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C1/2002/2722,
Neutral Citation No: [2003] EWCA Civ 1056

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
(Mr Justice Field)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 21st July, 2003

B e f o r e:

LORD JUSTICE DYSON,

LORD JUSTICE LONGMORE

AND

SIR MARTIN NOURSE

– – – – – – –

HAMPSHIRE COUNTY COUNCIL

Appellant

– v –

GRAHAM BEER T/A HAMMER TROUT FARM

Respondent

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: GRO ), Fax No: GRO
Official Shorthand Writers to the Court)

Ms Gillian Carrington (instructed by Hampshire County Council) for the Appellant
Mr James Maurici (instructed by Messrs Thring Townsend Solicitors) for the Respondent

J U D G M E N T
As Approved by the Court

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Lord Justice Dyson :

1. This appeal raises the question of whether the decision of a private company limited by guarantee, Hampshire Farmers Markets Limited ("HFML"), is susceptible to judicial review, and whether this company is a "public authority" within the meaning of section 6 of the Human Rights Act 1998 ("the 1998 Act"). The decision was made on the 14 November 2001 to reject an application by Mr Beer to be allowed to participate in the 2002 Farmers' Markets Programme organised by HFML. In addition to seeking to have this decision quashed, Mr Beer claims damages under the 1998 Act. By a decision dated 25 November 2002, Field J held that the decision was susceptible to judicial review and quashed it. He also held that HFML was acting as a public authority within the meaning of section 6 of the 1998 Act when it excluded Mr Beer from its markets. He adjourned Mr Beer's claim for damages. He gave permission to appeal to this court on the grounds that the questions raise issues of general importance to local authorities who transfer functions to companies. Hampshire County Council ("HCC") have been joined in these proceedings as an interested party. The appeal has been brought by HCC. HFML decided not to appeal since it is a company of limited resources, and was unwilling to expose itself to the uncertainties of litigation.

2. Mr Beer is a producer of trout at Liphook in Hampshire and trades under the name "Hammer Trout Farm". In 1999, HCC began to organise farmers' markets using the name Hampshire Farmers' Markets. This was at a time when the farming economy was suffering a severe downturn. HCC ran three pilot markets in Winchester. These were established pursuant to section 33 of the Local Government Housing Act 1989 (subsequently repealed). Section 33(1) empowered a local authority to take such steps "as they may from time to time consider appropriate for promoting the economic development of their area". Section 33(2) provided that the steps taken could include "participation in and the encouragement of, and provision of financial and other assistance for (a) the setting up or expansion of any commercial, industrial or public undertaking — (i) which is to be or is situated in the authority's area; or (ii) the setting up or expansion of which appears likely to increase the opportunities for employment of persons living in that area". Corresponding provisions are now to be found in section 2 of the Local Government Act 2002.

3. Following the success of these pilot schemes, in 2000 HCC organised a programme of thirty two farmers' markets. These were run for part of the year only and were held at weekends and on bank holidays. In September 2000, HCC announced a programme of sixty farmers' markets for 2001, again to be held at weekends and on bank holidays. Those who wished to participate in the programme were invited to apply to the Farmers' Market manager, Ms Tessa Driscoll, who was an employee of HCC. Participants had to satisfy three criteria: (a) all produce to be sold had to be grown, raised, baked or caught in Hampshire or within ten miles of the border; (b) the stall–holders had to grow and produce the produce themselves; and (c) no brought–in produce was allowed to be sold.

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4. Mr Beer was accepted by HCC into the Farmers' Market Programme from the outset. About sixty stall–holders (including Mr Beer) wanted to have farmers' markets not only at weekends and on bank holidays as organised by HCC, but also on weekdays. In September 2000, these stall–holders set up the Southern Farmers' Market Association ("SFMA") to organise weekday markets to run alongside the HCC markets. Mr Beer was elected chairman of SFMA.

5. Having established Hampshire Farmers' Markets, HCC decided to hand over the running of the markets to the stall–holders themselves. The farmers and producers were told that HCC would cease to run the markets in December 2001, but that HCC would help them to set up a limited company to take over the markets. HFML was incorporated on the 29 December 2000. Its registered office was at HCC's offices at the Castle in Winchester. The company was set up with the assistance of HCC which included the provision of advice and help with the documentation by its legal department. In October 2001, the company's registered address was changed to that of its accountants. The company started operating in January 2002. The company secretary at the time of incorporation was Mrs Frances Stokes, an HCC employee, who became the company's Business Development Manager and one of its seven directors. The remaining directors were stall–holders. Ms Tessa Driscoll was seconded from HCC to the new company until April 2002. Since then she has been employed directly by HFML. HCC provided further support to the company by allowing it to use a desk and computer in one of the rooms in HCC's main building in Winchester.

6. In 2001, HCC issued application forms to be completed by stall–holders who wanted to participate in the 2002 programme of farmers' markets. The criteria and market regulations were in identical terms to those that had previously been issued by HCC. Mr Beer applied for a licence to participate in the markets. By its letter dated 14 November 2001, the company refused his application. The judge held that this decision was taken in breach of the rules of natural justice. Since there is no appeal from that part of his decision, I do not propose to explore the reasons for the rejection of Mr Beer's application.

Amenability of HFML to Judicial Review

7. The judge reviewed a number of the leading authorities at paras 14 to 26 of his judgment. The reasons he gave for concluding that the decision by HFML to exclude Mr Beer from its markets was amenable to judicial review were as follows:

> "27. In my judgment, the decision to exclude Mr Beer from the 2002 Farmers Markets programme by HFML involved a public element which renders the decision amenable to judicial review. The facts before me are quite different from those in Servite Houses and Leonard Cheshire Foundation. It is true that HFML is a private body, and that there is no statutory underpinning to its role and functions; nor are its functions woven into a system of governmental control. However, it is a not–for–profit organisation engaged in promoting the public interest by facilitating access to trading outlets much

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needed by Hampshire's farmers and producers. In substance it acquired from HCC the assets and goodwill of the Hampshire Farmers Markets business, and it did so free of charge. It did not and does not own the sites on which the markets are conducted. These are public sites owned by local councils whose permission for the use of the sites for the markets had been granted free of charge to HCC, a situation which in November 2001 was highly likely to continue as, in fact, it has done in 2002. The goodwill acquired by HFML included both the reputation established by Hampshire Farmer Markets with the public who attended the various markets, and a ready–made body of stall–holders. The company plainly had in November 2001 and has today, a privileged position over potential rival organisers of weekend and bank holiday Farmers Markets held at the sites operated by HCC. It follows that to this extent Hampshire farmers and producers were and are dependent on HFML for access to the markets it organises. Thus, the exclusion of a producer from those markets was bound potentially to be damaging, particularly if, like Mr Beer, he had been a stall–holder when HCC ran the markets and had thereby come to depend on those markets for a significant part of his livelihood.

28. In my opinion HFML were and are engaged in running what in substance are public markets to which the public, both buyers and sellers (especially sellers who have been stall–holders from the outset) have a common law right of access. This right to access is not unqualified. It is subject to a power in HFML to regulate and organise, but the exercise of that power is a public function, and it is reviewable by the courts.

29. I asked Ms Carrington whether she accepted that decisions by HCC when it ran the markets to grant or terminate licences had been amenable to judicial review. With respect to her, she had difficulty in avoiding an affirmative answer to this question. In my view, on the basis of the market cases to which I have referred, such decisions by HCC were plainly reviewable, and not only because HCC was a public authority exercising a statutory power. Does the fact that the organisation of the markets has been transferred to HFML in the manner I have described change the situation? In my opinion not. The company has stepped straight into the shoes of HCC. The rights of the public to attend the markets, including in particular the right of an applicant stall–holder who has been a stall–holder from the outset, and who satisfies the prescribed criteria and is willing to pay the prescribed fees, were not extinguished when the undertaking was transferred to HFML. Accordingly, I hold that the decision of the HFML Board of 14th November 2001 to exclude Mr Beer from its markets is amenable to judicial review."

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Summary of the parties' submissions

8. On behalf of HCC, Ms Carrington submits that there are two principal factors which militate against the decision being amenable to judicial review. The first is the absence of any public function being performed by HFML: its function is no more public than that performed by the owner of a shopping mall, or the organiser of a car boot sale or a supermarket. It is true that a sector of the public, namely market traders, will be affected by the decisions of the company. But impact on a section of the public is not sufficient to render those decisions amenable to judicial review. The relationship between Mr Beer and HFML was entirely consensual in character.

9. The second is the judge's finding that HFML is a private body with no statutory underpinning of its role and functions, and that its functions are not woven into a system of governmental control. It is true that HCC was exercising statutory functions when it established HFML. But the function of promoting economic development in an area is not delegable and was not delegated to HFML. There was no statutory underpinning of the role and functions of HFML, which simply operates markets as does any other market operator. No control is exercised by HCC over the company. At the material time, Mrs Stokes was but one of seven directors (there are now nine), and she has never had a controlling vote on the board. The low level assistance given by HCC to the company is not enough to lead to the conclusion that the functions of the company are woven into a system of governmental control.

10. On behalf of Mr Beer, Mr Maurici advances two main arguments. First, he submits that the fact that HFML were operating a market to which the public had access on public land was, of itself, sufficient to render the decision amenable to judicial review. He relies on a number of cases in support of the proposition that bodies which take decisions in relation to market licences are exercising a public function. I shall refer to these as "the market cases". They are: *R v Barnsley Metropolitan Borough Council , ex p Hook* [1976] 1 WLR 1052, *R v Basildon District Council, ex p Brown* (1981) 79 LGR 655, *R v Wear Valley District Council, ex p Binks* [1985] 2 All ER 699, *R v Durham County Council, ex p Robinson* , The Times 31 January 1992, and *R v Birmingham City Council, ex p Dredger* (1994) 6 Admin L R 553. Mr Maurici submits that these authorities show that disputes that arise on the termination or non−renewal of a licence to trade at a market to which the public has access are not purely private or contractual matters: they have a public element.

11. His second principal argument is there were in any event a number of features of the relationship between HFML and HCC which demonstrate that, in making the impugned decision, HFML was exercising a public function. I shall refer to some of these features later.

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12. I shall deal with the market cases separately. It is clear from the authorities that there is no simple litmus test of amenability to judicial review. The relevant principles tend to be stated in rather elusive terms. There was a time when courts placed much emphasis on the *source* , rather than the *nature,* of the power being exercised by the body making the impugned decision. If the power derived from statute or the prerogative, then it was a public body and the decision was amenable to public law challenges. If the source was contractual, then public law had no part to play. The importance of the seminal decision in *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] 1 QB 815 was its recognition of the fact that the issue of amenability to judicial review often requires an examination of the nature of the power as well as its source. Lloyd LJ said at page 847C that, where the source of the power did not clearly provide the answer, then the nature of the power fell to be examined:

> "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 were 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".

13. Lloyd LJ did not explain what he meant by "public law functions". But at page 838E, Sir John Donaldson MR said:

> "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 forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction".

14. This test of a "public element which can take many forms" is expressed in very general terms, and of itself provides no real guidance. A similar formulation of the general test has been propounded in two recent decisions of this court as to the meaning of "public authority" in section 6 of the 1998 Act to which I shall refer in more detail shortly. In *Poplar Housing Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, Lord Woolf CJ said that what could make an act "which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act". In *R (Heather) v Leonard Cheshire Foundation and another* [2002] EWCA Civ 366, [2002] 2 All ER 936, Lord Woolf referred to the lack of "evidence of there being a public flavour to the functions [of the body]". The issue in *Donoghue* and *Heather* was whether the bodies whose decisions were the subject of challenge were public authorities within the meaning of section 6 of the 1998 Act. As Lord Woolf pointed out at para 65(i) of the judgment of the court in *Donoghue* , section 6 "is clearly inspired by the approach

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developed by the courts in identifying the bodies and activities subject to judicial review". No doubt for this reason, it was common ground in oral argument before us that (i) the tests for a functional public authority within the meaning of section 6(3)(b) and for amenability to judicial review are, for practical purposes, the same, and (ii) the observations in both *Donoghue* and *Heather* are equally relevant to the application of both tests.

15. Since the completion of the oral argument, however, the House of Lords has decided the appeal in *Parochial Church Council of the Parish of Aston Cantlow v Wallbank* [2003] UKHL 37. We have had the benefit of further written submissions from counsel as to the effect of this decision on the appeal in the present case. The issue in *Aston Cantlow* was whether the decision of the church council to enforce a lay rector's obligation to meet the cost of chancel repairs was a private act or the discharge of a function of a public nature within the meaning of section 6(3)(b). Certain observations were made as to the relationship between the public functions test in section 6(3)(b) and the test for amenability to judicial review, and I shall come to these later when I consider whether HFML acted as a public authority when it decided to exclude Mr Beer from the Farmers' Market Programme. In my judgment, there is nothing in the speeches in *Aston Cantlow* which suggests that what was said in *Donoghue* and *Heather* is not a useful guide to amenability to judicial review. Moreover, and unsurprisingly, their lordships said nothing about the important market cases to which I refer at paras 20–22 below.

16. It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question–begging. But it provides the framework for the investigation that has to be conducted. There is a growing body of case–law in which the question of amenability to judicial review has been considered. From these cases, it is possible to identify a number of features which point towards the presence or absence of the requisite public law element. I do not propose to examine many of these authorities. Leaving aside the market cases, it seems to me that it is sufficient to refer to the two recent decisions which I have already mentioned.

17. The first is *Donoghue*. The issue in that case was whether a housing association was a public authority performing public functions for the purposes of section 6 of the 1998 Act. The housing association had obtained a possession order evicting the claimant from her home. She contended that the association was a public authority exercising a public function, and that her eviction violated her rights under Article 8 of the European Convention on Human Rights. At para 65 of the judgment of the court, Lord Woolf CJ said:

> "In coming to our conclusion as to whether Poplar is a public authority within the Human Rights Act 1998 meaning of that term, we regard it of particular importance in this case that:
>
> (i) While section 6 of the Human Rights Act 1998 requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities

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subject to judicial review. The emphasis on public functions reflects the approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal (the judgment of Lloyd LJ) in *R v Panel on Take−overs and Mergers, Ex p Datafin plc* [1987] QB 815.

(ii) Tower Hamlets, in transferring its housing stock to Poplar, does not transfer its primary public duties to Poplar. Poplar is no more than the means by which it seeks to perform those duties.

(iii) The act of providing accommodation to rent is not, without more, a public function for the purposes of section 6 of the Human Rights Act 1998. Furthermore, that is true irrespective of the section of society for whom the accommodation is provided.

(iv) The fact that a body is a charity or is conducted not for profit means that it is likely to be motivated in performing its activities by what it perceives to be the public interest. However, this does not point to the body being a public authority. In addition, even if such a body performs functions, that would be considered to be of a public nature if performed by a public body, nevertheless such acts may remain of a private nature for the purposes of sections 6(3)(b) and 6(5).

(v) What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private.

(vi) The closeness of the relationship which exists between Tower Hamlets and Poplar. Poplar was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant.

(vii) The defendant, at the time of the transfer, was a sitting tenant of Poplar and it was intended that she would be treated no better and no worse than if she remained a tenant of Tower Hamlets. While she remained a tenant, Poplar therefore stood in relation to her in very much the position previously occupied by Tower Hamlets."

18. At para 66, he said that there is no clear demarcation line between public and private bodies and functions. "In a borderline case such as this, the decision is very much one of fact and degree". It is necessary to take account of all the circumstances. The conclusion of the court was that "the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions".

19. The second recent decision is *Heather*. In that case, the claimants were persons to whom the local authority owed a statutory duty to provide accommodation. It made arrangements for that accommodation to be provided at public expense by LCF, a charitable foundation.

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LCF decided to close the home where the claimants had been living for many years. They applied for judicial review of the decision. The first issue was whether, in deciding to close the home, LCF was acting as a public authority exercising functions of a "public nature" within the meaning of section 6(3)(b) of the 1998 Act. Giving the judgment of the court, Lord Woolf said at para 35:

> "35. The matters already referred to, can however, be put aside. In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public. (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions. In this case it is contended that this was what has been happening in regard to those residents who are privately funded and those residents who are publicly funded. But in this case except for the resources needed to fund the residents of the different occupants of Le Court, there is no material distinction between the nature of the services LCF has provided for residents funded by a local authority and those provided to residents funded privately. While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private. Here we found the case of *R (on the application of the University of Cambridge ) v HM Treasury* Case C−380/98 [2000] All ER (EC) 920 at 930, 940−942, sub nom *R v HM Treasury, ex p University of Cambridge* [2000] 1 WLR 2514 at 2523, 2534−2535, relied on by Mr Henderson, an interesting illustration in relation to European Union legislation in different terms to s.6. (ii) There is no other evidence of there being a public flavour to the functions of LCF or LCF itself. LCF is not standing in the shoes of the local authorities. Section 26 of the 1948 Act provides statutory authority for the actions of the local authorities but it provides LCF with no powers. LCF is not exercising statutory powers in performing functions for the appellants. (iii) In truth, all that Mr Gordon can rely upon is the fact that if LCF is not performing a public function the appellants would not be able to rely upon art 8 as against LCF. However, this is a circular argument. If LCF was performing a public function, that would mean that the appellants could rely in relation to that function on art 8, but, if the situation is otherwise, art 8 cannot change the appropriate classification of the function. On the approach adopted in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All ER 604, [2002] QB 48, it can be said that LCF is clearly not performing any public function. Stanley Burnton J's conclusion as to this was correct."

The market cases

20. It is sufficient to refer to two of the market cases relied on by Mr Maurici. The first is the well−known case of *Hook*. The applicant applied to have quashed the decision of the council to exclude him from trading in the market and to revoke his right to have a stall.

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His application succeeded on the grounds that the decision had been taken in breach of the rules of natural justice. Ms Carrington submits that this case (and indeed all the market cases relied on by Mr Maurici: see para 10 above) is distinguishable on the grounds that the decision was made by a local authority. Moreover, she points out that the market in *Hook* had been the subject of grant by royal charter and later a private Act. But I agree with Mr Maurici that neither of these factors was relied upon by the Court of Appeal as the reason for quashing the decision on the grounds of breach of natural justice. Lord Denning MR said that the right of a stallholder to have access to the market was conferred by common law, and could only be taken away for just cause and then only in accordance with the principles of natural justice. He said at page 456E: "I do not mind whether the market–holder is exercising a judicial or administrative function". It is clear that it was irrelevant that the market–holder was a local authority and that the market was authorised by royal charter and statute. What was relevant was that the stallholder had the right at common law to come to a place to which the public had the right of access to sell his goods. The judgment of Scarman LJ was to similar effect. He emphasised the common law right in the public to go to market to buy and sell, subject to the statutory regulation of the exercise of that right by the local authority. At page 1060A, he said:

> "Although, therefore, there is a contractual element in this case, there is also an element of public law: the enjoyment of rights conferred on the subject by the common law. I think, therefore, on analysis, it is clear that the corporation in its conduct of this market is a body having legal authority to determined questions affecting the rights of subjects".

There is no suggestion here that Scarman LJ attributed any relevance to the identity of the market–holder (the local authority) or the nature of the market (other than the fact that it was one to which the public had a right of access at common law).

21. The second decision is *Binks* . Here too the market–holder was the local authority. The applicant was a street trader who operated a hot food takeaway caravan from a market place. She had no written licence, and operated under what was described as an informal arrangement with the local authority. Her right to station the caravan in the market place was terminated without notice. Her application to quash the decision on the grounds that it had been made in breach of the rules of natural justice succeeded before Taylor J. He rejected the submission that decisions such as *Hook* were to be distinguished because the principles enunciated in them were only to be applied where there is a statutory market or something akin to a statutory market. In so doing, he relied on a passage in the judgment of Templeman LJ in *Brown* (page 667) to the effect that the status of the market was not relevant to the crucial question whether the stallholder's licence had been validly terminated. The exercise of the powers (in that case by the local authority) must be governed by the same principles whether in relation to a statutory market or an unofficial market managed by the local authority in the interests of the local community.

22. Having rejected this submission, Taylor J continued as follows at page 703H:

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> "Moreover, in the present case the Market Place at Crook is conceded to be a place to which the public has right of resort at all times. It is not a highway, but it is nevertheless a place to which the public has a right of access and on which the council have a discretion whether to allow street traders or not. During the day, the Market Place is in fact used for a market. When it is not being so used between prescribed hours it is used as a public car park for which no charge is made. It therefore seems to me that the local authority in granting or revoking licences to street traders to operate in the Market Place are in exactly the same situation as that envisaged in the Basildon case by all three members of the Court of Appeal. It seems to me that there is a public law element in the decisions of the council with regard to whom they license and whom they do not license to trade in the Market Place."

Public Authority

Summary of the parties' submissions

23. It is common ground that HFML is not a "core" public authority. It is a "hybrid" authority. It follows that the relevant question is whether the decision to exclude Mr Beer was a private act or the exercise of a public function. Both counsel rely on substantially the same factors in relation to this question as form the basis of their submissions on the amenability issue. In short, Ms Carrington submits that the act of HFML that Mr Beer seeks to challenge was not "governmental" in nature, but was of a private character. The assistance given by HCC to HFML and the current use of public land are minor indicia which are insufficient to imbue what would otherwise be a private decision with a public stamp. Mr Maurici submits that the guidance given by their lordships in *Aston Cantlow* in relation to hybrid authorities is not significantly different from that given in *Donoghue* and *Heather* , and that for all the reasons given in relation to the amenability issue, the impugned decision was made in the exercise of a public function.

The Aston Cantlow decision

24. Much of the discussion in the speeches in *Aston Cantlow* is on the question whether the parish council was a "core" public authority. The only general guidance on hybrid authorities and what is a public function for the purposes of section 6(3) is to found in the speech of Lord Nicholls who said:

> "11. Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non–public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private

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> nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b). Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.
>
> 12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

25. Lord Hope considered that the question of public function was fact−sensitive and did not admit of an answer in the abstract (paras 41 and 63), an approach with which Lord Scott agreed (para 130). It is perhaps somewhat surprising that there is no reference to *Donoghue* or *Heather* in *Aston Cantlow*. Ms Carrington submits that these decisions have been "superseded" by *Aston Cantlow* . If by "superseded" she means that the two earlier decisions are to be taken as having been overruled, then I do not agree. As I have said, apart from what Lord Nicholls said at paras 11 and 12, *Aston Cantlow* contains no guidance as to what amounts to the exercise by a hybrid public authority of functions of a public nature. Provided that it is borne in mind that regard should be had to any relevant Strasbourg jurisprudence, then the passages which I have quoted from the judgments in the two earlier cases will continue to be a source of valuable guidance. Indeed, para 12 of Lord Nicholls' speech is redolent of the flavour of that guidance.

Conclusion

26. I can now state my reasons for concluding that Field J was right to decide that the decision of HFML which is challenged in these proceedings is amenable to judicial review, and that, in making that decision, HFML was acting as a public authority.

27. I should start by explaining why, in my judgment, if the decision is amenable to judicial review, it was by the same token made by HFML acting as a public authority. I accept that it is possible to conclude that a decision by a public authority is not amenable to judicial review and vice versa. This point was made very clearly by Lord Hope in *Aston Cantlow* at para 52:

> "× 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

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> 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 natures" 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."

28. Thus, the domestic case law on amenability to judicial review can be "very helpful". But reliance on domestic cases must be tempered by, and sometimes yield to, relevant Strasbourg jurisprudence. This jurisprudence is especially likely to be helpful in determining whether a body is a core public authority. It is likely to be less helpful in relation to the fact–sensitive question of whether in an individual case a hybrid body is exercising a public function.

29. In the present case, Ms Carrington has shown us no Strasbourg authority which points the way. Nor has she advanced any reasons peculiar to the public authority issue in support of the submission that, even if HFML's decision is amenable to judicial review, nevertheless it was not made by HFML in the exercise of a public function. In my judgment, she was right not to do so. On the facts of this case, and I would suggest on the facts of most cases, the two issues march hand in hand: the answer to one provides the answer to the other.

30. It is important to record the concession by Ms Carrington (in my view rightly made) that, if the decision to refuse Mr Beer's application had been made by HCC before the incorporation of HFML, it would have been amenable to judicial review. The reason given by Ms Carrington for her concession was not that the decision would have denied a person access to a public market; rather it was that the decision would have been made by a public body, namely a local authority. In my judgment, the correct reason for the concession is more than the mere fact that the decision would have been made by a public body. Not all decisions by local authorities are amenable to judicial review or involve the exercise of public functions. The reason why I consider that the concession was correctly made is that the power being exercised by HCC would have had that public element or flavour to which I have earlier referred. In this regard, the fact that the power was being exercised in order to control the right of access to a public market is a most important feature.

31. I return to the decision that was actually made by HFML. It is clear from the market cases that decisions affecting the right of access to certain types of market may have a sufficient public element to be amenable to judicial review. There is a distinction between (a) an unofficial market in respect of which there are no public rights of access and (b) a statutory market in respect of which public rights do exist. A good example of the former is a car boot sale held on a person's private land. The paradigm example of the latter is a statutory or charter market held on land dedicated to public use and to which the public has a right of access. Where do the markets held by HFML come within the spectrum of markets? It is true that HFML did not start to operate the markets until January 2002, a few weeks after

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the decision of 14 November 2001. But neither party has suggested that the situation that obtained at the time of the decision was not likely to continue once HFML took over the running of the markets, or that it has not done so. The rather exiguous evidence as to the nature of these markets is not directed specifically at the time of the decision. But the brief summary that follows of the present position is the best evidence of the situation that existed at that time.

32. The markets are held on town centre sites. None of the sites is owned by HCC, but they are all owned by other local authorities. Ms Stokes says that the markets operated "on town centre sites in close association with the relevant local authorities". She does not explain exactly what she means by "close association with the relevant authorities". But she must mean that HFML and the local authorities who own the sites co–operate in the organising of the markets. The evidence also discloses that at Winchester, the market stalls occupy a pedestrianised area and most of the adjacent public car park. The pedestrianised area is used during the week by a conventional market.

33. In my view, it is clear from this evidence that these markets cannot be assimilated to the category of unofficial markets to which the public have no right of access. They are much closer to the second category to which I have referred, even though they are neither statutory nor charter markets. Their essential feature is that they are markets held on publicly owned land to which the public have access.

34. What flows from this? There is much to be said for accepting the submission of Mr Maurici that, for this reason alone, the decision of 14 November 2001 is amenable to judicial review and that in making that decision HFML was exercising public functions and acting as a public authority. The decisions in *Hook* and *Binks* show that the identity of the market holder is not decisive, nor is the source of the power to hold the market. What is critical is whether the market is one to which the public has the right of access. It is this feature which led Scarman LJ in *Hook* to speak of the existence of "an element of public law" which opened the door to the remedy of certiorari for breach of natural justice. It was the same feature which led Taylor J in *Binks* to speak of a "public law element". It is significant that "public element" was the phrase used by Sir John Donaldson MR in *Datafin* to describe one of the essential elements of amenability to judicial review.

35. But I do not base my conclusion that there was a sufficient public element in HFML's decision of 14 November 2001 solely on the fact that it involved the denial to Mr Beer of access to a public market. I have already referred to Miss Carrington's concession that, if the decision had been taken by HCC before HFML had been incorporated, it would have been amenable to judicial review. This concession brings into sharp focus the need to examine the relationship between HCC and HFML. I accept the submission of Mr Maurici that there are several features of that relationship which strengthen Mr Beer's case that the decision is amenable to judicial review.

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36. First, HFML owes its existence to HCC. The company was set up by HCC using its statutory powers. It was HCC's Economic Development Office which employed and paid for the services of Charles Morrison of Business Link Wessex to assist in the setting up of the company (it was bought "off the shelf"). HCC's in–house Legal Practice undertook the necessary legal work. In *Donoghue* , it was a relevant feature which pointed towards there being a sufficient public element that the housing association was *created* by the local authority. By contrast, in *R v Servite Homes and the London Borough of Wandsworth, ex p Goldsmith and Chating* [2001] LGR 55, Moses J regarded the fact that Servite was a "private body which does not owe its existence to Wandsworth" as a factor militating against its function being within the scope of public law.

37. Secondly, HFML stepped into the shoes of HCC. The phrase "standing in the shoes" of a public body derives from *Heather* (para 35(ii)). There is also a reflection of it at para 12 of Lord Nicholls' speech in *Aston Cantlow* ("or so taking the place of central government or local authorities"). The phrase is not a term of art. But it is clear what it means. It connotes the idea of A performing the same functions as had previously been performed by B, to the same end and in substantially the same way. It was an important feature of the decision in *Heather* that LCF was not performing the statutory functions previously performed by the local authority under section 21 of the National Assistance Act 1948. It was merely providing accommodation to the claimants. In the present case, HCC announced the 2002 programme of farmers' markets in 2001 before HFML started operating. They asked that applications for the 2002 programme be sent to themselves. After 2002, HFML took over the running of the markets, and ran them (as was always envisaged) in the same way as HCC had previously run them. It is relevant that the three criteria for admission of farmers to the markets were the same as those promulgated by HCC when the scheme was first established. These criteria were devised in what was perceived to be the public interest of promoting the interests of the local farming community. Ms Carrington drew attention to the fact that the main objects clause of HFML's memorandum of association was drafted in wide terms, so that it would be open to the company lawfully to change the criteria for admission to the markets, and operate them differently from the way they were previously operated, and indeed not operate markets at all. In theory, this is true. Anything might happen in the future. But these proceedings are concerned with the lawfulness of the decision of 14 November 2001. At that time, in so far as HFML was doing anything at all, it had stepped into the shoes of HCC in relation to these markets.

38. Thirdly, from the date of incorporation of HFML until the time when the company started operating the markets, and to some extent thereafter, HCC assisted the company in a number of respects. For several months after incorporation, the company's registered office was in HCC's offices. The company has at all times been provided with a desk and computer in one room in HCC's main building in Winchester. It has not yet operated from anywhere else. HCC agreed to make a discretionary grant to HFML to assist in the development of the markets. Two HCC personnel have provided important assistance to HFML, and continue to do so. Mrs Stokes is employed by the company as Business Development Manager and is one of its directors. She played an influential role in setting up the company. She chaired the steering group that was established for that purpose. Ms Driscoll, the company's Market Manager, was employed by HCC until April 2002, when her employment was transferred to HFML. In November 2001, she was seconded to the company.

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39. In my view, the combined effect of these three features (or groups of features) is sufficient to justify the conclusion that the decision of 14 November is amenable to judicial review. I regard the first two features as being of particular significance. To these must be added the fact that the decision was one which affected a person's right of access to a public market.

40. What is Ms Carrington able to put into the scales as a counterweight to these points? She relies strongly on the fact that this is not a case involving the privatisation of the business of government, or the assimilation of HFML's role into a system of statutory control or regulation. It is true that HFML is not performing a function of statutory control or regulation on behalf of HCC. The judge agreed that there is no statutory underpinning of the company's role and its functions, and that those functions are not woven into a system of governmental control. In some cases, the absence of such features may point decisively against amenability to judicial review. But it is necessary to have regard to all the relevant factors. In this case, I do not consider that the absence of statutory underpinning and the lack of interweaving into a system of governmental control is a matter of great weight. HFML was not simply another private company that was established to run markets for profit. It was established by a local authority to take over on a non–profit basis the running of the markets that the authority had previously been running in the exercise of its statutory powers in what it considered to be the public interest.

41. Ms Carrington also relies on the fact that the relationship between Mr Beer and HFML is consensual in character. The answer to this point was provided by Scarman LJ as long ago as 1976 in *Hook* . There is a consensual element in the case. But for the reasons that he gave, and for the additional reasons that I have sought to give in this judgment, there was also a public element too. This is a far cry from the paradigm case discussed in *Datafin* where, as in the case, for example, of a private arbitration, the sole source of power is a consensual submission to jurisdiction.

42. There are some cases which may properly be described as close to the borderline. Lord Woolf said that *Donoghue* was such a case. But in my view, that is not so here. It seems to me that the factors to which I have referred clearly compel the conclusion that the decision of 14 November 2001 is amenable to judicial review, and that in making that decision, HFML was acting as a public authority within the meaning of section 6 of the 1998 Act. For these reasons, I would dismiss this appeal.

Lord Justice Longmore:

43. I agree with the judgment of Dyson LJ. For myself, I consider that the decision of the judge was correct for each of the two reasons identified by Dyson LJ, each reason being sufficient in itself to justify his decision.

44. First, the market cases show that if a trader is denied the right to sell his goods in a place to which the public normally has access, that decision is a decision of public law and is

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amenable to judicial review. I do not think we could decide otherwise without overruling *R v Wear Valley District Council, ex p Binks* [1985] 2 All ER 699. So far from overruling it, we should approve that decision and declare that it is good law.

45. Secondly, the relationship between HCC and HFML is such that, for that reason also, the decision of HFML to exclude Mr Beer is amenable to judicial review. I agree with the considerations set out in paragraphs 28 - 30 of Dyson LJ's judgment and regard them as also justifying Field J's decision.

46. Naturally, the combination of the two reasons makes the judge's decision that much more secure but, in my view, either reason alone would have been sufficient.

47. I would also like to record my agreement with paragraph 25 of Dyson LJ's judgment in which he says that the decision of the House of Lords in *Parochial Church Council of the Parish of Aston Cantlow v Wallbank* [2003] UK HL 37 has not overruled *Poplar Housing Association Ltd v Donoghue* [2002] QB 48 or *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; these cases continue to give authoritative guidance on amenability to judicial review

Sir Martin Nourse:

48. I agree that this appeal should be dismissed for the reasons given by Dyson LJ.