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Public Functions and Amenability: Recent Trends

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Introduction

1. The vexed question of which functions are public and amenable to judicial review has generated considerable volumes of case-law and academic discussion over the years. In this piece I consider the general principles in this area before examining their application in three recent cases from 2016. These are *R (Holmcroft Properties) v KPMG LLP* [2016] EWHC 323 (Admin), *R (Macleod) v Governors of Peabody Trust* [2016] EWHC 737 (Admin) and *T.H. v Chapter of Worcester Cathedral* [2016] EWHC 1117 (Admin). Space precludes an analysis of the related but distinct issue of amenability to ECHR challenge under s 6 of the Human Rights Act 1998, which I leave to one side.
2. There has been little attempt by the courts or academic authors to reduce the case-law on the meaning of a public function to a single, defensible test. The only author to have attempted both to *explain* and *justify* the courts' approach in this way is Colin D. Campbell, who argues that a public function is, and should be, a monopoly power: 'Monopoly Power as Public Power for the Purposes of Judicial Review' (2009) 125 LQR 491. The argument contains a number of serious flaws that are explored in detail in Alexander Williams, 'Judicial Review and Monopoly Power: Some Sceptical Thoughts' (2017/18) LQR (forthcoming).

General Principles

3. The amenability case-law reveals the following fundamentals.
4. *First*, the courts' focus is on the nature of the *function*, not the institutional nature of the *defendant* itself. Private bodies may perform public functions, e.g. when a private psychiatric hospital uses its statutory powers to detain and treat inpatients against their will: *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin). Conversely, public bodies may perform private functions that are not therefore amenable to judicial review, notably when exercising contractual disciplinary powers (see below).
5. *Second*, nor is the courts' focus simply on the *source* of the power, source and nature being distinct. In *R v Panel of Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815, at 847, Lloyd LJ stated that he did 'not agree that the source of the power is the sole test whether a body is subject to judicial review', and that it could be 'helpful to look not just at the source of the power but at the nature of the power,' in the context of the *de facto* regulatory power exercised by the Takeover Panel. In *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225, at 246, Simon Brown J observed that *Datafin* gave 'clear emphasis to the "functions" test as opposed to the "source of power" test'.

6. *Third*, there is ‘no universal test’ for a public function, as Woolf J stated in *R v Derbyshire County Council, ex p Noble* [1990] ICR 808, at 819. Instead, the courts perform what has been called a ‘multi-factorial assessment’ involving the balancing of a number of competing considerations: *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA 587, at [119] (Rix LJ). The issue is said to be ‘one of overall impression, and one of degree’: *R v Legal Aid Board, ex p Donn* [1996] 3 All ER 1, at 11 (Ognall J). Scott Baker LJ has remarked that it is ‘often as much a matter of feel, as deciding whether any particular criteria are met’: *R (Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57, at [13].
7. *Fourth*, functions with a public element ‘may take many different forms’: *Datafin*, at 838 (Donaldson MR). The statutory functions of central and local government bodies will in many cases be amenable to review. The courts’ jurisdiction also extends to prerogative functions, as well as to certain forms of *de facto* power exercised by non-state bodies, as in *Datafin*, ‘without visible means of legal support’: *Datafin*, at 824 (Donaldson MR).
8. *Fifth*, the exercise of contractual discretion tends to be routinely excluded from the scope of judicial review, even discretion exercised by obviously public bodies such as local authorities. One of many examples is *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152, which involved the exercise by a health authority of its contractual discretion to dismiss a senior nursing officer for misconduct.¹ The courts have long been hostile to the idea of subjecting the exercise of contractual power by monopoly regulators like the Jockey Club to judicial review: see e.g. *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909; *R v Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207.
9. Although the hostility to reviewing contractual discretion tends to undermine the idea that nature and source of power are different concepts, the strength of judicial conviction on the matter is palpable. Brooke LJ has described the logic of the position against reviewing the exercise of contractual discretion as ‘unassailable’: *R (West) v Lloyd’s of London* [2004] EWCA Civ 506, at [30]. In *Datafin* (at 838) Donaldson MR described it as an ‘essential element’ of the law in this area that ‘bodies whose sole source of power is a consensual submission to its [*sic.*] jurisdiction’ are excluded from the scope of judicial review.²
10. Nevertheless, it is in keeping with the multi-factorial approach that the courts have refrained from establishing a bright-line rule that the exercise of contractual discretion can *never* be reviewable, as explained in *R (McIntyre) v Gentoo Ltd* [2010] EWHC 5 (Admin): ‘The fact that a right may have been exercised in accordance with the terms of a contract that confers it does not necessarily mean that the decision to exercise that right is one that may not be

¹ cf *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554 (disciplinary powers not contractual).

² In appropriate circumstances *private* law may of course be used to apply substantive principles of fairness similar to those available in judicial review: see e.g. *Nagle v Feilden* [1966] 2 QB 633; *Bradley v Jockey Club* [2005] EWCA Civ 1056.

invalid as a matter of public law’: at [29] (John Howell QC). For these reasons the mere presence of a contract between claimant and defendant will also not preclude review, as illustrated in cases like *Weaver* and *Macleod* (above), discussed below.

11. By far the thorniest issue in this area is the meaning of a public function as applied to non-state defendants exercising *de facto* power, which is the subject of the remainder of this piece. *Datafin* was a landmark ruling for recognising that judicial review could extend to *de facto* as well as statutory and prerogative power, but the courts have struggled to apply the ruling clearly and consistently. In *Holmcroft* (above), Elias LJ and Mitting J observed (at [23]) that the amenability question ‘is not always easily answered’.
12. The issue is bound to give rise to subjectivity and uncertainty. One conceptual difficulty is that the meaning of a ‘public’ function will depend heavily on one’s political impressions as to the proper role of the state. On this issue there is considerable room for reasonable disagreement between Left and Right, as noted by e.g. Gillian Morris and Sandra Fredman, ‘The costs of exclusivity: public and private re-examined’ [1994] PL 69, at 72.
13. It should also be remembered that judicial review is a regulatory regime with the overarching aim of ensuring that public power is exercised fairly towards those who are subject to it. The idea that the state should act fairly towards its subjects is uncontroversial, but the circumstances in which *non*-state defendants should be made to do so is once again a matter of largely political debate. There is no obviously correct answer to the general question of what fairness demands in private relationships. Narrower private-law questions as to whether liability should lie in discrete contexts like negligence, nuisance, contract, and so on, are likely to yield more straightforward answers.
14. A potentially infinite number of considerations can come into play in determining the meaning of a public function. This is inherent in the courts’ multi-factorial approach as well as the nature of the issue itself. Space precludes an exhaustive analysis of the factors to have been considered in decided cases, but some of the more notable ones are as follows.
15. *First*, it is relevant that the function is enmeshed in or underpinned by statute,³ or that the defendant is woven into the fabric of government. These can be loosely termed ‘institutional’ factors since they examine the nature and extent of the defendant’s institutional relationship with the state.
16. In *Datafin*, the Court of Appeal ruled that the Takeover Panel was amenable to judicial review notwithstanding that it exercised only *de facto* rather than statutory or prerogative power. Among the justifications given was the Panel’s relationship with organisations like the Department of Trade and Industry, Bank of England and Stock Exchange. The Panel had no legal power to enforce its City Code, but its source of power was ‘only partly based upon

³ For a recent affirmation of the principle see *R (Baker Tilly UK Audit LLP) v Financial Reporting Council* [2015] EWHC 1398 (Admin), although the parties agreed rather than argued the amenability point.

moral persuasion and the assent of institutions and their members’: *Datafin*, at 838 (Donaldson MR). The ‘unspoken assumption’ or ‘bottom line’ was that these other organisations would use their own statutory and contractual powers to penalise transgressors of the Code: at 826, 838 (Donaldson MR). Despite the courts’ focus being on the *function* performed, the Panel’s *institutional* relationship with the state – its links with government and enmeshment in the wider regulatory scheme – was therefore an important factor in classifying that function. Bingham MR explained in *Aga Khan* (above) that the effect was ‘to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation’: at 921-923.

17. Institutional considerations played an apparently decisive role in *R (Beer) v Hampshire Farmer’s Markets Ltd* [2003] EWCA Civ 1056, when the Court of Appeal ruled that a private company created by a local authority to take over the running a series of farmers’ markets was amenable to judicial review when rejecting the claimant’s application for permission to participate in the scheme. It was relevant to the decision that the company owed its existence to the local council, had stepped into the shoes of the council by running the markets, and that the council had assisted it in various ways such as providing office space, funding and staff. Their Lordships were clear that these factors were enough in themselves to render the function public.
18. In *Weaver* (above) the Court of Appeal ruled that the defendant, a registered social landlord that had sought to evict the claimant tenant for rent arrears, was performing a public function when managing and allocating housing stock. Only a small minority (10%) of that stock was transferred from local authority ownership. It was relevant that the defendant ‘operated in very close harmony’ with local authorities, assisting them to achieve their statutory duties and objectives in the social housing field, and that it was subject to ‘intrusive [legislative] regulation on various aspects of allocation and management’ that was designed to ‘ensure proper standards of performance in the public interest’: see [69]-[71] (Elias LJ).⁴ Dissenting, Rix LJ drew attention to the contractual relationship between claimant and defendant and argued (at [153]) that ‘a contract like a tenancy contract, for all that it is hedged around by statutory provisions, is made for the specific purpose of determining the rights between the parties.’
19. *Beer* and *Weaver* may be contrasted with *R v Servite Houses, ex p Goldsmith* (2001) 33 HLR 35, where no such institutional links existed. Moses J ruled that a private care home provider was performing only a private function when delivering residential care services pursuant to a contract with a local authority that was required by s 21 of the National Assistance Act 1948 to arrange that care. The ‘fatal impediment’ to the claim was said (at [89]) to be that the ‘source of [Servite’s] powers is purely contractual, and the absence of any statutory underpinning.’

⁴ See also [101] (Collins MR).

20. *Second*, it is relevant that the state would perform the function if the defendant did not. A further justification given by the Court of Appeal for its decision in *Datafin* was the ‘expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centrepiece of his regulation of that market’: at 838 (Donaldson MR). The suggestion was therefore that the Panel performed a function that the state would have stepped in to perform *but for* the Panel’s existence.
21. Various cases have considered the ‘but for’ criterion. It was accepted on both sides in *Baker Tilly*⁵ that the defendant was amenable to judicial review, in part because ‘the government would have to intervene to regulate these matters’ if the defendant did not: at [32] (Singh J).
22. The test was applied but went unsatisfied in *R v Football Association, ex p Football League Ltd* [1993] 2 All ER 833. Rose J found (at 848) that there was no evidence ‘that if the FA did not exist the state would intervene to create a public body to perform its functions.’⁶ It also went unsatisfied in *R v Chief Rabbi, ex p Wachmann* [1992] 1 WLR 1036. Simon Brown J stated (at 1041-1042) that the Chief Rabbi’s disciplinary function over a junior rabbi was merely private. It was not a public function ‘in the sense that he is regulating a field of public life and but for his office the government would impose a statutory regime’, because ‘his functions are essentially intimate, spiritual and religious.’
23. *Third*, the extent to which the defendant wields monopoly or other potentially harmful power may be relevant, but judicial views on the matter are mixed. Concern was expressed in *Datafin* that the Panel, which wielded ‘enormous power’ and had a ‘giant’s strength’, should be accountable to the courts in the event that it went ‘off the rails’ and used its powers ‘in a way which was manifestly unfair’: (Donaldson MR, at 845; 827). *Massingberd-Mundy* (above) contains *obiter* remarks by Roch J (at 222) that the Jockey Club should be regarded as amenable to judicial review, partly on the basis that it ‘holds a position of major national importance... [and] has near monopolistic powers in an area in which the public generally have an interest and in which many persons earn their livelihoods.’
24. More recently, Elias LJ held in *R (Lewisham London Borough Council) v Assessment and Qualifications Alliance* [2013] EWHC 211 (Admin) that judicial review could lie against assessment decisions made by GCSE awarding organisations notwithstanding the contractual basis of the relationship between the organisations and the schools who received their services. The function was said (at [139]) to be clearly public: ‘The determination of GCSE grades, taken by students across the country, is a matter of very significant public importance potentially affecting the life chances of those who are candidates for the examination’.

⁵ *Baker Tilly* (fn 2).

⁶ The application of the test has been criticised: Michael Beloff QC and Tim Kerr, ‘Why *Aga Khan* is Wrong’ [1996] JR 30, 31.

25. Views like these enjoy some support from academic writers. A number have suggested that the existence of monopoly or other potentially harmful power should be an important touchstone because of the scope for those wielding such power to act arbitrarily or otherwise unfairly. One writer once welcomed what he saw as the ‘growing acceptance of a philosophy that *all* those who wield power should be accountable and... subject to general principles of good administration’: Gordon Borrie, ‘The regulation of public and private power’ [1989] PL 552, at 558. Campbell (above) argues that monopoly power should be *the* touchstone when classifying the defendant’s function.
26. Learned judges have criticised the idea, however. For instance, in *Aga Khan* (above), Hoffmann LJ opined (at 932) that ‘the mere fact of power, even over a substantial area of economic activity, is not enough... [to] subject [a defendant] to the rules of public law’. In the same case, and underscoring the courts’ orthodox approach towards contractual power and consensual submission to the defendant’s jurisdiction, Farquharson LJ acknowledged (at 928) that newcomers to the horseracing industry were in practice consigned to accepting the Jockey Club’s jurisdiction but stated that ‘nobody is obliged to race his horses in this country’. As Simon Brown J stated in *Wachmann* (above, at 1041), amenability ‘means something more than that... [the defendant’s] decisions are decisions which may be of great interest or concern to the public or, indeed, which may have consequences for the public.’
27. *Fourth*, there is some authority to the effect that the absence of an alternative remedy may be relevant. This factor is closely linked to the previous one: the lack of an alternative remedy for the claimant will leave the defendant greater room to abuse its power. In *R v Insurance Ombudsman Bureau, ex p Aegon Life Assurance Ltd* [1994] CLC 88, Rose LJ appeared to gloss the usual approach to consensually-assumed jurisdiction by stating (at 93) that ‘Judicial review should not be extended to a body whose powers derive from agreement of the parties *and when effective private law remedies are available against the body*’ (emphasis added). In *Datafin* (above), Donaldson MR considered that Parliament might intervene to correct manifest unfairness on the part of the Takeover Panel but asked (at 827) ‘how long would that take and who in the meantime could or would come to the assistance of those who were being oppressed by such conduct?’.
28. Again, however, criticisms have been expressed. Hoffmann LJ has stated that it improper to ‘try to patch up the remedies available against domestic bodies by pretending that they are organs of government’: *Aga Khan* (at 933). In *R v Eurotunnel Developments, ex p Stephens* (1997) 73 P & CR 1, Collins J stated (at 7) that ‘the absence of any obvious remedy does not translate what... is a clear private law matter to a public law matter.’ Along similar lines, Lord Oliver stated (at 580) in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 that the *presence* of an alternative remedy would be relevant to the court’s decision to permit judicial review but not to the prior question ‘of the existence of the jurisdiction’. The questions of amenability and alternative remedy were described as ‘separate issues’ in *R (Shoemith) v Ofsted* [2011] EWCA Civ 642, at [87] (Maurice Kay LJ) and considered separately in *Baker Tilly* (above).

29. I turn now to the three recent cases from 2016 mentioned above: *R (Holmcroft Properties) v KPMG LLP* [2016] EWHC 323 (Admin), *R (Macleod) v Governors of Peabody Trust* [2016] EWHC 737 (Admin) and *T.H. v Chapter of Worcester Cathedral* [2016] EWHC 1117 (Admin). I explain the facts and findings before briefly considering their significance for the law in this area.

Holmcroft Properties

30. The case followed the mis-selling of interest rate hedging products by Barclays Bank to some of its customers. Barclays agreed with the Financial Conduct Authority (FCA) that it would establish a scheme to provide redress to certain customers who had been mis-sold. Under the agreement, KPMG was to oversee the implementation and application of the scheme as an independent party. Barclays was to make no offers of compensation to customers without KPMG's approval. KPMG could only approve offers that it considered appropriate, fair and reasonable.
31. Holmcroft Properties, the claimant, received an offer from Barclays that did not include compensation for consequential loss caused by the mis-sale. Holmcroft sought judicial review, arguing that KPMG's decision to approve the offer was unfair because Barclays' offer was calculated on the basis of undisclosed material. Holmcroft could not therefore advance its case on an informed basis.
32. In a joint judgment, Elias LJ and Mitting J found against Holmcroft on both issues calling for resolution: (i) whether KPMG was amenable to judicial review and (ii) whether its decision to approve the offer breached any of the substantive grounds of review.
33. As to the amenability issue, their Lordships began by explaining (at [23]) that:
- ‘The principles are tolerably clear, albeit stated at a high level of abstraction, and they are not in dispute in this case. But their application in any particular case can be problematic and it is the application of the principles to the circumstances of this case which divides the parties.’
34. Citing *Datafin* and *Beer*, they then reiterated (at [24]) that source of power is not the sole test for amenability and (at [26]) that the matter ‘therefore requires a careful analysis of the function in issue’, before setting out the parties’ arguments and concluding (at [38]), albeit ‘not without some hesitation’ (at [41]), that KPMG's duties did ‘not have sufficient public law flavour to render it amenable to judicial review’.
35. Some factors were said (at [39]) by their Lordships to point towards publicness:
- (a) The Barclays-KPMG arrangement was ‘more than a mere private arrangement and the bank would never have conferred the veto power upon KPMG [to decline to approve offers] unless required to do so by the FCA as part of its regulatory functions’.

- (b) The FCA was required to approve Barclays' initial appointment of KPMG as independent regulator of the compensation scheme.
 - (c) The arrangement required KPMG to report to the FCA regularly through Barclays. KPMG was not simply assisting Barclays to comply with its own regulatory obligations but was 'undertaking its duties both for Barclays and for the FCA so as to assist the latter in the effective performance of its regulatory functions.'
36. KPMG was therefore 'woven into the regulatory function' of the FCA. There was also a 'clear public connection between its function and the regulatory duties carried out by the FCA' (at [40]).
37. The factors pointing against publicness nevertheless prevailed:
- (a) The FCA could have exercised more draconian powers but instead chose to 'adopt an essentially voluntary scheme of redress' that left Barclays free to 'remedy their own errors' and identify 'unsophisticated customers who had been sold these products improperly' (at [42]).
 - (b) The fact that KPMG's powers were conferred by contract with Barclays was 'important' albeit 'not determinative', and it was relevant that KPMG lacked any direct relationship with Barclays' customers. Moreover, although the FCA approved KPMG's appointment to the role, the appointment was made by Barclays itself (at [43]).
 - (c) The mere fact that it could be said that KPMG was carrying out functions 'at the behest of a public body which, if performed by that public body, would be subject to public law principles', was said (at [44]) to be insufficient to render it amenable to judicial review.
 - (d) The FCA had no regulatory obligation to carry out the role played by KPMG had there been no willing skilled advisor like KPMG to do so. This was said (at [45]) to reinforce the first point, 'that the arrangements were voluntary albeit under the cloud of more drastic statutory sanctions'.
 - (e) The Barclays-KPMG arrangement did not exclude the FCA 'from taking a more active role in particular cases': at [46]. The FCA would have needed to investigate whether the arrangement was working in the event of a customer complaint that both Barclays and KPMG had acted unfairly, and would potentially be subject to judicial review itself when doing so.
38. The fact that there was no effective redress to ensure that fair and reasonable offers were made was mentioned (at [48]) but evidently not significant. Any public law remedy would be a limited one given that only a civil action could generate damages. The purpose of the arrangement was not to 'guarantee a fair outcome in each and every case' but to 'remedy a pattern of improper selling' with a broad remedial scheme to be implemented 'in good faith [and] with close supervision from an objective and independent party.' Civil actions and

possibly Ombudsman complaints could be taken up if the scheme as a whole failed to work as it should.

39. Their Lordships briefly considered and discounted the possibility that there could be a contractual remedy in the event of an unfair and/or unreasonable offer being made, but cited *Leech* (above) and observed (at [50]) that the existence of any such remedy would be irrelevant to the question of whether KPMG was amenable to judicial review.

Macleod

40. The claimant was a tenant of the Peabody Trust at a London property that had been transferred from the Crown Estate Commissioners (CEC). Peabody refused his request to exchange his tenancy with a tenant in Edinburgh. He sought judicial review of the decision. The allegations were that Peabody had unlawfully fettered its discretion and acted irrationally: by failing to follow its own policy in relation to mutual exchange, and failing to take account of its public sector equality duty (PSED) under s 149 of the Equality Act 2010. William Davis J found against the claimant on the amenability issue and on all substantive issues apart from s 149, but would in any event have declined judicial review on that issue because consideration of the PSED would have made no difference to the decision on the facts.

41. As to the amenability point, his Lordship began (at [15]) by identifying *Weaver* (above) as the leading authority in relation to social housing providers and their public-law status. It was said (at [18]) to be unnecessary to look beyond that decision ‘for any issues of principle’. *Weaver* did not hold that *all* registered social landlords are amenable to judicial review, and so fell to be applied to the facts (at [20]). Ruling that Peabody was not amenable to review, his Lordship took the following factors into account (at [20]):

- (a) Peabody had purchased CEC properties using ‘funds raised on the open market, not via any public subsidy or grant.’
- (b) It was not clear that these properties were ‘pure social housing’, even though they were ‘not let at a full market rent’.
- (c) Peabody was distinct from the landlord in *Weaver* because it ‘was not acting in close harmony with a local authority to assist the local authority to fulfil its statutory duty.’
- (d) Rents for CEC-transferred properties ‘are not subject to the same level of statutory regulation as social housing in general’.

Worcester Cathedral

42. The claimant bell-ringer was a member of the Guild of Bell Ringers of Worcester Cathedral. The first defendant, the Chapter of Worcester Cathedral, revoked the claimant’s membership of the Guild following allegations of inappropriate conduct by the claimant towards children and younger bell-

ringers. The second defendant, the Bishop of Worcester, consequently invited the claimant to sign an agreement placing conditions on him bell-ringing in all other churches in the Diocese of Worcester.

43. The claimant sought judicial review of both acts. The claim was principally brought on ECHR grounds under the HRA, but he also alleged that the decisions were irrational and unlawful for want of natural justice according to ordinary principles of domestic judicial review. As to the non-HRA claims, Coulson J ruled that neither defendant was amenable to judicial review. In any event, the substantive claims were either time-barred or unpersuasive.
44. As to the non-HRA amenability issue, Coulson J began by observing (at [75]) that it is ‘important to look at the nature of the power being exercised as opposed to simply the source of that power’, and that it ‘is also important to consider the nature of the body in question’. By this was meant that it was necessary to consider a range of factors such as whether the defendants had stepped into the shoes of central local government, were subsidised by public funds or were democratically accountable – as well as (from *Aga Khan*, above) the ‘further issue about the voluntary submission to the jurisdiction of the body in question.’ It was also said to be important to consider the ‘type of action taken’.
45. Coulson J made two further notable points (at [76]). First, citing *Wachmann*, his Lordship explained that it was ‘irrelevant’ to the amenability question that ‘the decisions in question... have had a significant impact on the claimant’. Second, the argument that the claimant would be left without a remedy was ‘also immaterial, because the administrative court [*sic.*] is not there simply to fill in the gaps left by statute or the common law.’ In this regard Coulson J cited the *dicta* of Hoffmann LJ in *Aga Khan* (above), about using judicial review to ‘patch up’ remedies against non-state defendants.
46. The functions of both defendants in safeguarding others were merely private (see [77]). Neither defendant exercised any statutory powers, which Coulson J believed to ‘point to the conclusion that the decisions are not amenable to judicial review’. The defendants were also not part of any system of public regulation and did not receive any public funding. The defendants’ acts of controlling bell-ringers’ access to church towers was ‘analogous to the control of sporting associations’, such as the Jockey Club, to their premises and events. The defendants’ decisions were merely private, with ‘no public element to them’.

Analysis

47. It was unlikely that any of these first-instance cases would break new ground. The main principles are already well established in this area, and it is in the nature of the multi-factorial approach that a considerable range of factors are potentially relevant to the courts’ analysis to a greater or lesser degree anyway. Nevertheless, some broad observations about the decisions may be made from the *dicta* cited above.

48. *First*, their Lordships in *Holmcroft* and *Worcester Cathedral* affirm the longstanding view that the courts' overriding concern in the amenability context is the nature of the power. Nevertheless, in both judgments source appears to remain a weighty factor. In *Worcester Cathedral* the lack of any statutory powers on the defendants' part pointed against amenability. Moreover, both *Worcester Cathedral* and *Holmcroft* emphasise the consensual element to the powers in question: controlling bell-ringers' access to churches was likened to the activities of sporting regulators, and it was 'important' that KPMG's powers were conferred by contract with Barclays in order to create a 'voluntary' remedial scheme.
49. *Second*, all three judgments show that institutional factors nevertheless continue to play an important role. In *Worcester Cathedral* Coulson J expressly mentioned that it was necessary to consider the nature of the *body* in question, and identified as relevant the fact that neither defendant was part of a system of public regulation. In *Macleod*, Peabody was distinguished from the landlord in *Weaver* because it lacked the same close relationship with local authorities and enmeshment in a statutory regulatory regime. In *Holmcroft* it was said to tell in favour of review that KPMG had been woven into the FCA's regulatory function, albeit that countervailing factors telling against review eventually prevailed.
50. *Third*, both *Holmcroft* and *Worcester Cathedral* affirm the views expressed in cases like *Aga Khan*, *Stephens* and *Leech* that the lack of an alternative remedy for the claimant is irrelevant to the amenability question. In *Worcester Cathedral* Coulson J is clear that the exercise of mere power or the 'impact' of a function on the claimant are irrelevant factors. Along similar lines, William Davis J emphasised in *Macleod* (at [21]) that the performance of a function affecting the public is also not enough: 'True it is that some public function was fulfilled [by the defendant] by the provision of homes for key workers in London. However, in my judgment the cumulative effect of the various factors... does not have the sufficiency of public flavour... found in *Weaver*.' Publicness is therefore about more than mere power, or than the injustice of a function being exercised without regulation in judicial review.
51. *Fourth*, *Holmcroft* appears to make thinly-veiled reference to the 'but for' test. It was said to be relevant that the FCA had no regulatory obligation to perform KPMG's role had no skilled advisor performed it. The case therefore represents another example of the test being applied but unsatisfied. Leaving aside *Baker Tilly* (above), in which the amenability point was agreed rather than argued by the parties, it seems doubtful that any defendant could satisfy the 'but for' test in the absence of very close institutional links of the sort present in *Datafin* (above), where the Government had made it clear that the Takeover Panel was being deliberately absorbed into its regulatory strategy, such that the lack of a statutory basis was a 'complete anomaly': at 835 (Donaldson MR).⁷

⁷ Indeed, the Panel's functions do now have a direct statutory basis under the Companies Act 2006.

Conclusion

52. It is not surprising that in *Holmcroft* their Lordships recognised that the amenability principles are not always easily applied. The courts continue to assert the formal position that the overriding concern is the nature of the function, while the analyses themselves – in all three cases – continue to accord significant weight to institutional and/or source-based considerations.
53. The precise weight to accord the various considerations in play is, moreover, a matter of some uncertainty. Since the multi-factorial approach involves balancing factors together rather than attempting to fashion bright-line rules about when review will and will not lie, even clear trends that are firmly rooted in the case-law are capable of being outweighed in a given case if the circumstances are thought to demand it. One has sympathy with William Davis J in *Macleod* for deciding the amenability point on the basis of *Weaver* alone, thereby avoiding a foray into the morass of amenability case-law that has steadily accrued since *Datafin*. There is no guarantee that such an exercise would have provided any clearer guidance as to how to resolve the issue.
54. *Holmcroft*, *Macleod* and *Worcester Cathedral* are largely orthodox judgments that amply illustrate the challenge facing judges in this area of law. Especially given the theoretical difficulty inherent in determining the meaning of a public function, a sense of ‘feel’ or ‘instinct’, as well as close reference to the facts of the individual case, will inevitably – and perhaps frustratingly – remain a staple part of the courts’ approach.