IN THE SUPREME COURT OF NEW ZEALAND
HAMILTON REGISTRY

BETWEEN ANASTASIOS ECONOMOU of Wellington, Night Club Proprietor

Plaintiff

AND ROBERT FINLAY MacDONALD of Hamilton, Accountant and PERCY GEORGE VERCOE of Hamilton, Retired (as trustees of the Waikato Racing Club's Jackpot Committee)

First Defendants

AND DAVID CHARLES BRATTON of Auckland, Crane Driver, GEORGE WILLIAM ZANE of Auckland, Clerk, TANGIMETUA CRUMMER of Auckland, Married Woman, KEVIN ARTHUR STEVENS of Auckland, Leather Worker, WILLIAM BRYNT BAKER of Papakura, Freezing Worker, BRIAN JAMES SHANNON of Hamilton, Insurance Clerk, EDWIN MORRIS ROBINSON of Tauranga, Waterside Worker and VAKAI KOTEKA of Auckland Cargo Worker

Second Defendants

Hearing: 6, 7, 8, 9 August 1973

Judgment: 13 August 1973

Counsel: G.P. Barton and J.C.D. Corry for Plaintiff
L.W. Brown Q.C. and J. Campion for First Defendants
J.S. Henry, S.C. Ennor, G.A. Little, G.N. Jenkins and R.A. McGechan for various Second Defendants

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JUDGMENT OF COOKE J.

The plaintiff claims judgment against the first defendants for $831,564.70, being the amount of a pool or jackpot in what was described in the entry forms as an accumulator sweepstake, organised by Waikato Racing Clubs. I shall call the competition the Jackpot. It is common ground that under the Jackpot rules and conditions the pool fell to be distributed to the bearer of the ticket containing 'the winning number of all six Jackpot races' run at the Te Awamutu race course on 29 July 1972 at a race meeting conducted by the Taumarunui Racing Club; or,

failing any such entry, to the bearers of the tickets containing the greatest number of winning selections. The pool comprised, so I was informed from the Bar, the amount invested by entrants on the day, augmented by $139,509 carried forward from an earlier meeting. The first defendants are sued as trustees for the Jackpot committee, a committee appointed by the participating clubs to manage the Jackpot. The plaintiff is a member of and was the ticket-bearer for a syndicate known as the Paramount syndicate. If the horse Nelsonian bore the winning number of the sixth Jackpot race within the meaning of the rules and conditions, it is common ground that the Paramount syndicate, as the only entrant to have selected all six winners, would be entitled to the whole pool. Nelsonian was first past the post, but, as a result of an objection by one of the owners of Fox View and an inquiry by the Judicial Committee of the Racing Club, Nelsonian was later in the day relegated to third, Polaris being promoted to first and Fox View to second. It is common ground that if Polaris had the winning number within the meaning of the rules and conditions, the pool falls to be divided among the plaintiff and the bearers of eight other tickets, who are the second defendants.

Having considered the evidence and the submissions of counsel, I am satisfied that the plaintiff's claim must fail. I will now give my reasons, which fall under two broad headings.

The Jackpot Rules and Conditions

For some unexplained reason two forms of Jackpot entry tickets were available at the course on the day of the meeting, a pink form and a yellow form. There are

some differences between them, but these differences are not material on the view I take. The plaintiff used a pink form for his syndicate. The form is perforated down the middle so that a copy of the entry may be stamped, detached and returned to the entrant. It is a multiple entry form, allowing the selection of all or any runners (up to 24) in the first Jackpot race to be combined with any or all the runners in any other Jackpot race. For each combination of six numbers the entrant must invest 50 cents. The selection is made by marking crosses in squares corresponding to the numbers of the horses selected in each race. The plaintiff selected 11 horses in the first race, 15 in the second, 11 in the third, four in the fourth, and one each in the fifth and sixth Jackpot races : a total investment of $3630. The rules and conditions are printed on the back of the investor's copy and read as follows :

JACKPOT RULES AND CONDITIONS

1. In the event of a dead heat for first place all horses participating in the dead heat will be regarded as winners.
If a horse(s) is scratched subsequent to the Official Scratching Time and such horse(s) is not bracketed with another horse which starts, any selection on such horse(s) shall automatically be placed on the favourite for such race as determined by the on-course investments on the totalisator Win Pool. In the event of two or more horses being equally determined as favourites the equal favourite first appearing in the list of runners in the on-course totalisator records for that race shall be the favourite for the purpose of this regulation. The investor must NOT alter his copy.

2. If the investor wishes to select a horse included in a bracket he shall select the totalisator number of the bracket.

3. Race day placings will be final for the purpose of the Jackpot and later reversals of placings will not be recognised.

4. Entries may be made only on this form. The original of the Jackpot ticket will be stamped and retained by the Club and will be the sole evidence of the combination on which the investment was made. The duplicate will be stamped and detached by the seller and must be retained by the investor, who, if it is a winning ticket must produce it for payment by 8a.m. on the day following the race day, or such later time as the club may in its discretion decide.

5. All betting units on the Jackpot shall not exceed 50 cents. No bets will be accepted from or dividends paid to minors or their agents.

6. Any error in the completion of a Jackpot ticket is the responsibility of the investor. Claims in respect of tickets which in the opinion of the Stewards or Committee of the Club are incomplete, illegible, defaced or altered will not be recognised.

7. The investor must complete the Jackpot ticket and take it to the selling window before it is stamped. Once the ticket has been validated no changes will be made to it in any circumstances.

8. Two Jackpot pools shall be operated. The first pool shall consist of 80% of the amount invested on the day together with such amount as may already have accumulated and in the event that it is not won this pool shall accumulate and will continue to accumulate at successive race meetings of the participating clubs until the meeting at which the total of this pool reaches $100,000. After that event there shall be no further accumulations in the first pool at succeeding race meetings and all investments made at succeeding meetings during the continuance of a particular Jackpot shall form part of the second pool and shall be distributed accordingly. The second pool shall until the race meeting after the date on which the first pool is frozen consist of 20% of all investments on the day. At all succeeding race meetings after that date during the continuance of a Jackpot the second pool shall consist of all investments made on the day. In neither case shall the second pool accumulate.

9. To win the Jackpot pools one entry must contain the winning number of all six Jackpot races which must be listed on each portion of the Jackpot entry. In the event of both pools not being won outright the second pool shall be awarded to the person or persons with the greatest number of winning selections on their entry on that day.

10. In the event of there being more than one winning entry in both pools or in the second pool the pool or pools will be divided equally amongst all winning entries.

11. No claim for a winning dividend will be recognised unless the stamped ticket is presented to the Club Secretary by 8a.m. on the day following the race day provided however that if the Club, at the expiration of the prescribed time has reason to believe that there is a winning ticket which has not been presented it may, in its sole discretion, extend the time for presentation of claims for such period as it thinks fit.

12. The proceeds of a winning ticket accepted as valid, shall be payable to the bearer on the racecourse or at such other place as the Club may decide. Claims of multiple ownership of or participation in a ticket, will not be recognised and the proceeds of a winning ticket will be paid only to the bearer at the time of presentation. When a winning ticket is presented the bearer must identify himself to the Club's satisfaction as the person whose name and address appear on the winning ticket.

13. The validity of any ticket in respect of which a dispute may arise shall be decided by the committee and their decision shall be final and subject to no appeal. The same shall apply to any question or dispute arising out of the interpretation of these rules or which is not covered by these rules and the committee may in its discretion waive any of the formal requirements of these rules.

14. No Committeeman, Steward, or other official of the Club (including the Secretary and his office staff) and no person employed in the totalisator today is permitted to take part in the Jackpot today. Any successful ticket found by the Club to have been purchased by any such person (or on his behalf) will be declared invalid.

15. No deductions of any sort will be made from the pool.

16. Any dividend announced on race day shall be tentative only and subject to final confirmation.

17. The first Jackpot pool may be terminated if, in the opinion of the Waikato Dist. Committee it is considered necessary or advisable to do so. The Committee shall if it decides to terminate the first pool nominate the Race meeting and the date on which the first pool shall terminate and on the day specified the first pool shall if not won outright be awarded to the person or

> persons with the greatest number of winning selections. Notice of the Race meeting and the date on which the pool is to terminate shall be given either in the race-card for the day or by notice displayed in some prominent place on the race course at which such race meeting is being held.
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> 18. The Jackpot accumulator sweep-stake is conducted by a committee representing the participating Clubs referred to hereunder under Section 45 of the Gaming Act 1908. All decisions to be made in connection with these rules shall be made by such committee or such person or persons as it shall from time to time nominate.

The yellow form is smaller, set out differently and so as to allow only ten selections per form in each race, and in some respects differently worded. Among the differences it may be mentioned that clause 13 of the rules and conditions on the yellow ticket refers to the Waikato District Committee instead of simply the committee, and clause 18 on the yellow ticket provides simply : 'The Jackpot Accumulator Sweepstake is conducted under section 45 of the Gaming Act 1908, and its subsequent amendments'. But the crucial clauses 3 and 9 are identical on the two forms.

The plaintiff went to trial on a second amended statement of claim. It sets out more than twenty alternative grounds or contentions, most of them alleging that any decision of the Judicial Committee following the inquiry conducted as a result of the objection or protest was ineffective against the plaintiff's claim for one reason or another. But there is no specific mention either there or in any of the correspondence produced to the Court of what was presented at the trial as the plaintiff's main contention. This was, in summary, that for the purposes of the Jackpot rules the winner of a race is the first horse to pass the post; that the identity of this horse

is an objectively ascertainable fact, a time and motion assessment calling for the application of the human senses of observation with or without the aid of mechanical devices such as binoculars or cameras; but that if any doubt had arisen in any entrant's mind on race day the question could have been referred to the Jackpot committee, in which event that committee would have had to conduct an inquiry complying substantially with the rules of natural justice and at which all the interested entrants in the Jackpot (but none of the connections of the horses) would have had a right to be heard. In developing his argument about that kind of inquiry, counsel for the plaintiff found the analogy of an Athenian parliament irresistible. Mr Barton stressed in opening that the plaintiff was not relying on any decision made by any committee or other persons - not even the judge appointed for the meeting under the Rules of Racing. The role of the judge, he said, was outside the Jackpot rules; no doubt the Jackpot committee would consider the judge's views if there were a dispute, but in theory that committee would be free to differ from the judge. Further, that committee would act on their own general knowledge of racing and would not be bound by the Rules of Racing, though entitled to have regard thereto if they saw fit. An entrant in the Jackpot seeking a ruling from that committee would have to do so within a reasonable time, which would vary with his particular circumstances but would be confined to race day. At one stage it was said that the Jackpot committee should meet immediately after the last Jackpot race to give a decision as to the winner of each Jackpot race on the day, at which meeting it would probably 'rubber stamp' some of the placings that had been determined under the Rules of Racing; but it

may be that this was not an essential part of the argument. The whole argument was said to follow from the Jackpot rules and conditions, particularly clauses 13 and 18.

Mr Henry, who presented the final submissions for the defendants on this part of the case, described the argument for the plaintiff as untenable. I regard that as an understatement. The unreality and impracticability of the argumen need no stressing. The essential question is the meaning of 'race day placings' in clause 3. It is a question of interpretation. In answering it regard must be had, not onl to the context of the rest of the ticket, but also to the general nature of the transaction and the surrounding circumstances. The following are important considerations.

The competition concerned the results of races conducted under the New Zealand Racing Conference's Rules of Racing by a club registered under those Rules and entitled to use the totalisator, as appears from the first schedule to the Rules and the licence to use the totalisator at the meeting on 29 July 1972, granted to the club by the Minister of Internal Affairs under s.50 of the Gaming Act 1908 on 15 May 1972. The Rules and the licence were both proved in evidence. The Jackpot committee comprised representatives of a number of registered clubs, likewise shown by the first schedule to the Rules as entitled to use the totalisator and likewise holding licences, as Mr Roberts testified.

The Rules of Racing are expressed (by Rule 2) to apply to wide categories of persons, including all clubs and owners and all persons applying for admission to or attending at any racecourse on which any race meeting is held. I find it established by the evidence that entries in the Jackpot could only be made on the course and that the plaintiff filled in an submitted his syndicate's entry there after ascertaining the

numbers of the selected horses from the official card or race book issued by the club. The numbers were vital; indeed clause 9 of the Jackpot rules even refers to the winning number, not the winning horse. The first page of the race book listed the club's officials for the meeting, including the Stewards, the Judicial Committee and the Judge; it has not been disputed that these necessary officials were properly appointed. Obviously horse races, like most other competitions, cannot be conducted without rules. The Jackpot rules do not deal with the conduct of the races. If the only rule was that the horse first past the post was the winner, the meeting and any competition concerned with the results would be chaotic. The Rules of Racing contain many provisions laying down the necessary details. Handicaps, barrier positions, the start, the course to be covered, interference, weighing in, permissible racing and riding gear - these are only a few elementary examples of the kind of matters that have to be covered. No less manifest is the need for official adjudication, especially when close finishes may be witnessed, from various positions and with various degrees of calmness and objectivity, by thousands of racegoers. I do not believe that anyone with any familiarity with racing would entertain more than fleetingly the suggestion that in referring to race day placings the Jackpot rules meant anything other than the placings as determined that day under and in accordance with the Rules of Racing.

The express exclusion of later reversals of placings was necessary because otherwise it might have been implied that a subsequent reversal on appeal under the Rules of Racing to a District Committee (rule 347) or the Appeal Judges (rule 35 could affect the Jackpot result. In this express exclusion clause 3 of the Jackpot rules is somewhat analogous to rule

309 (4) of the Rules of Racing. The latter rule provides that after the Stewards have duly authorised the payment of dividends, no alteration in the order of placings and no disqualification of any horse placed by the Judge shall have any effect with respect to the totalisator. The Jackpot money did not go through the totalisator and clause 3 allows reversals to be effective for Jackpot purposes until the end of race day. Rule 202 (2) of the Rules of Racing provides that a race meeting shall be deemed to commence at ten o'clock in the morning of the day on which the first race of the meeting is advertised to be run and to conclude at ten o'clock in the evening of the last day of the racing - a provision which may supply a definition of race day for the purposes of the Jackpot rules, especially in the case of a one-day meeting such as this; although it is not here necessary to decide as between 10 p.m. and the alternative of midnight, since the revised places were announced between 5 and 6 p.m.

As I see it, the immediate question in the case is not strictly one of implied terms: it is as to the natural meaning in the Jackpot rules of the express term 'race day placings'. Assuming, however, that it is right to treat the case as turning on whether a term should be implied or a document incorporated by implication, I have no hesitation in finding it necessary to give business efficacy to the Jackpot rules to imply the term that the Rules of Racing are incorporated except so far as specifically excluded or modified (as by the exclusion of reversals after race day). In the words of Lord Pearson in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board 1973 2 All E.R. 260, 268, I find that the parties to the Jackpot must have intended that term to form part of their contract: it went without saying.

The other provisions of the Jackpot rules contain

indications of the essential dependence of the Jackpot on the Rules of Racing. For example, there are references to official scratching times, brackets, Stewards of the Club. As for the powers conferred by clauses 13 and 18 of the pink form on the Jackpot Committee and by clause 13 of the yellow form on the Waikato District Committee, such clauses are of a well-known type and are not, I think, intended or apt to cover questions whose determination is otherwise provided for These clauses empower the committee mentioned to decide questions or disputes arising out of the interpretation of th Jackpot rules or to make decisions in connection with those rules, though it was accepted on all sides in argument in the present case that they cannot oust the jurisdiction of the Court to interpret the rules: Walton v Holland 1963 N.Z.L.R. 927, 745-6; Enderby Town Football Club Ltd v Football Association Ltd 1971 Ch. 591, 604-5. Consistently with that principle, the plaintiff here is not asking the Jackpot committee to interpret the meaning of 'race day placings' in the Jackpot rules or to decide any questions in connection with those rules. He is asking the Court to interpret the expression and to adopt the involved interpretation already outlined, starting with the point about objectively ascertainable fact. Clause 13 also empowers the committee mentioned to decide any question or dispute not covered by these rules. It was on this part of the clause that reliance was chiefly placed for the plaintiff. But, for the reasons already given, I think that a question or dispute as to which horse won the race is covered by the Jackpot rules, because the natural meaning of those rules is that race day placings are to be determined in the manner provided by the Rules of Racing. Clauses 13 and 18 are designed to provide machinery for the administration of the Jackpot, not for the determination of questions relating to the conduct of races. I can see no justification for trying to stretch them to

cover racing questions; and the extraordinary consequences, illustrated by the contentions for the plaintiff as to the kind of inquiries that would be entailed, are a strong reason for not doing so.

I have been led to the conclusions already stated independently of the line of authorities in which leading cases are Brown v Overbury (1856) 11 Ex. 715, 156 E.R. 1018; Dines v Wolfe (1869) L.R. 2 P.C.280; and Cipriani v Burnett 1933 A.C. 83. Quite understandably those cases were not cited in argument, for in each there was an express reference in the agreement to the decision of stewards or the rules of a jockey club. But it seems not irrelevant to quote the words of Baron Alderson in the first of those cases, words which were approved by the Privy Council in the last:

> Every contract must be determined according to the circumstances belonging to it. This is one of racing, and the universal practice has been, that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, viz. the judge or the stewards.

Under the Rules of Racing (rules 207 and 208) the Judicial Committee exercise the powers of the Stewards in respect inter alia of objections and protests. In my view, wording much stronger than anything to be found in the Jackpot rules would be needed to show that the entrants in such a competition did not intend the results of the races to be determined in the traditional way.

Lest it should be held, contrary to his main argument, that the Rules of Racing were incorporated and that a Judicial Committee decision could constitute a race day placing for Jackpot purposes, Mr Barton made some submissions attacking the validity of the Judicial Committee

decision to relegate. That there was such a decision by the Judicial Committee was accepted, a submission that it had not been proved being abandoned; but on various grounds it was contended that the Committee were not proved to have acted within the jurisdiction conferred on them by the Rules of Racing or that their decision was so unsatisfactory as to justify the Court in treating it as completely ineffective for Jackpot purposes. All parties were economical indeed in the evidence they put before the Court relating to the Judicial Committee's inquiry and decision. The plaintiff called a legal executive employed by his solicitors, who deposed to certain conversations he had conducted with three of the four members of the Committee, and made some mention of having spoken to persons involved in the inquiry. The plaintiff also served subpoenas on the same three members of the Judicial Committee and during the trial obtained receipts from them for the conduct money previously paid and produced those receipts as exhibits. But the receipts were evidently obtained for the purpose of getting a sample of the handwriting of the Chairman of the Committee (Mr Wallace). The plaintiff elected not to call these witnesses. Nor did the defendants call any members of the Judicial Committee. The first defendant called the secretary of the Waipa Racing Club, Mr Roberts, who was acting as race day secretary for the Taumarunui Club at this meeting, and also a Stipendiary Steward to the New Zealand Racing Conference, Mr Bird. Mr Roberts had taken no part in the inquiry, though during it he had occasion to go into the judicial room from time to time. In accordance with rules 55 and 57 of the Rules of Racing, Mr Bird organised the procedure at the inquiry and was present throughout the taking of the evidence

by the Committee and when their decision was given, but he was not present during the Committee's deliberations. In his opening Mr Brown indicated that Mr Bird would produce a record of the Judicial Committee hearing signed by the Chairman but later he explained that this was not being done because Mr Barton had raised an objection that Mr Bird was not an appropriate witness to produce the record. The second defendants not surprisingly called no evidence.

There was some other evidence called for the plaintiff, but it had little or no bearing on the inquiry or the incident occasioning it. This evidence included testimony by the plaintiff himself and another member of the syndicate, Mr Tsimbourlas, both of whom said that they thought from their observations that Nelsonian had won. Mr Tsimbourlas had recorded the race commentary on a tape recorder. He had left it on for a period of nearly half an hour after the race. By consent the tape covering that period was played in open Court. Mr Neal (the legal executive) produced a transcript of such of the announcements and remarks recorded as he could make out, and gave evidence of the times at which some of them were apparently spoken. From the tape and the transcript it appears that almost immediately after the finish it was announced that a photograph for first place between numbers 2 and 23 (Nelsonian and Polaris) had been called for. Soon after that there were several announcements within quick succession noted by Mr Neal as giving the order 2, 23, 24 (Tracey Lee), but he accepted that there might have been a

reference to 8 (Fox View). The third announcement was immediately followed by the advice 'Hold all tickets'. An answer by the plaintiff in his evidence-in-chief showed that he regarded this as an indication that there was going to be an inquiry. Mr Neal said that this intimation would have been 'at least three or four minutes from the end of the race'. That is consistent with the evidence about the time of the protest itself to which I am about to refer. Nothing else on the tape calls for specific comment, and the fact that members of the syndicate did not contribute any evidence of importance about the running of the race perhaps suggests that there would have been little direct value in giving them and other Jackpot entrants a right to be heard at an inquiry - to say nothing of the logistics involved.

I find the basic facts to be as follows. For the Te Kuiti Hack Handicap, which was the seventh race of the meeting and the sixth Jackpot race, the Judge duly signed, in accordance with rule 277 of the Rules of Racing, a report showing that the horses had reached the winning post and been officially placed by him in the order: Nelsonian, Polaris, Fox View, Captain Peri, Tracey Lee. He recorded the winning margin as a head, with three lengths between second and third, a neck between third and fourth, and a nose between fourth and fifth. After the race the weighing in of the horses placed by the Judge was completed at 3.50 p.m., as duly recorded by the clerk of scales on the weighing card. At the same time, 3.50 p.m., a written protest or objection by Mr B.A. Hamilton, a part owner of Fox View, against the

winning horse and the second placing, was received by Mr Roberts as Race Meeting Secretary, together with the required deposit of $20. By rule 319 (2) of the Rules of Racing objections on certain grounds, including '(a) A cross or jostle or other act on the part of its rider during the race', must be made within two minutes after the last to be weighed in of the riders of the horses placed by the Judge has been so weighed in, unless the Stewards are satisfied that such objection could not have been made within that time. The written objection did not specify the grounds but I find on Mr Bird's evidence-in-chief that it was treated as an objection to be considered in terms of rule 278 (1) which provides:

> 278 (1) If, in the opinion of the Stewards, a horse placed by the Judge or its rider has interfered with the chances of any other horse or horses placed by the Judge they may place such first-mentioned horse immediately after the horse or horses so interfered with.

On Mr Bird's evidence in cross-examination I find that the protest related to an incident which began in the finishing straight about three-quarters of a furlong from the winning post. It is a reasonable inference that the time limit in rule 319 (2) applied to this objection. No doubt the recorded times are not necessarily accurate to the second, but on the evidence I find that the objection was made within the prescribed two minutes. As for the inquiry itself, I have no doubt that Mr Bird correctly read out to the Committee the words of 278 (1) and in particular - and notwithstanding the hearsay evidence of Mr Neal about the words said to have

been used by Mr Bird - that he did not substitute 'must' for 'may'. Mr Bird was a clear, careful and satisfactory witness, and on the balance of probabilities I also find that in accordance with his normal practice he specifically explained to the Committee that there was a discretion. I take into account the whole of Mr Neal's evidence in reaching that conclusion. The inquiry lasted about one hour and three-quarters or two hours, but was interrupted by the running of the last two races. The Judicial Committee watched those races. The regathering of witnesses, some of whom had commitments for those races, also took time. Connections of the three horses were present during the inquiry and all those concerned were given the opportunity to make statements and tender evidence. A film of the concluding stage of the race, taken from a head on position looking down the finishing straight, was shown a number of times during the inquiry. After deliberating the Committee altered the placings to Polaris, Fox View, Nelsonian, and this result was announced on the course loudspeaker. Mr Roberts obtained written authority for payment out by the totalisator of the win dividend for Polaris, two of the three signatories being Mr Wallace and Mr Pratt (both of them Stewards and members of the Judicial Committee). That authority was then taken to the totalisator. Payment of place dividends for the three horses had been authorised at about 3.50 p.m. but no payment of a win dividend had been authorised before the end of the inquiry. I infer and find from the evidence which I have summarised that the Judicial Committee relegated Nelsonian because they were of opinion that, in terms of rule 278 (1), the horse or its rider had interfered with the chances of the horses placed second and third by the Judge and because, having heard much evidence and studied the film, they considered that the nature of the interference made this change of the placings appropriat

The finding just stated is based on inference from the evidence as a whole. A tribunal such as a judicial committee of a racing club is not required to have drawn up a formal record of its procedural steps and its findings, as if it were a court of summary jurisdiction before Jervis's Acts. If, as was argued for the plaintiff, there is an onus on the defendants to prove affirmatively that the Judicial Committee were of the opinion referred to in the rule, I find the onus discharged. But it seems to me very doubtful whether that onus exists. Counsel relied on the principle stated in Mayor of London v Cox (1867) L.R. 2 H.L. 239, 263, that in inferior courts the maxim omnia praesumuntur rite esse acta does not apply to give jurisdiction. Reference was also made to the statement in Professor de Smith's book on the Judicial Review of Administrative Action, 2nd ed. 105, that if the jurisdiction of an 'inferior' tribunal is attacked or relied on in collateral proceedings, the burden of proving that the tribunal had jurisdiction to make the decision is cast upon the party seeking to support the decision. I am disposed to think that in collateral proceedings the onus is normally discharged by proving that the tribunal was properly seized of the proceedings and at a time when it retained jurisdiction over the case made an order of the kind it was authorised to make in such a case. The onus would then shift to the party impugning the decision to show, for instance, that the order was based on inadmissible grounds or that no grounds whatever existed for the making of the order. That approach is at least suggested by the judgment of the Court of Appeal delivered by North J. in Bognuda v Hawkes Bay Newspapers Ltd 1963 N.Z.L.R. 501, which was cited for the plaintiff. If necessary I would be prepared to rest this part of the present judgment on that view, and I would be still more disposed to do so having regard to the fact that the plaintiff attacks

the Judicial Committee's decision solely because of his syndicate's interest in a gambling competition.

The final ground of attack on the decision was alleged general unsatisfactoriness. It was said that, bearing in mind that the plaintiff had no standing to appear before the Judicial Committee under the Rules of Racing and the extraordinarily large sum at stake in the Jackpot, the Court should treat the decision as not constituting a race day placing for the purposes of the Jackpot, because of the collective effect of three matters considered together; reliance on the individual effect of each being disclaimed. Shortly stated it was claimed that the evidence established (i) that two of the Judicial Committee members had taken tickets in the Jackpot in breach of clause 14 of the Jackpot rules and conditions; (ii) that the Committee had fallen into an error of law regarding the power to relegate, in that two members were under the misapprehension that, in the event of interference with a horse's chances, relegation was mandatory under rule 278; (iii) that the Committee knew before they completed their deliberations that only one ticke would take the pool if the protest was dismissed, whereas if Nelsonian were relegated the pool would be shared among a number of entrants.

With regard to this ground the first general comment mus be that the Court is not hearing an appeal from the Judicial Committee's decision. The Court has no jurisdiction to do so Nor is the present even a proceeding by way of direct review of the decision, such as an action for a declaration. The ground appears to be a novel basis for collateral attack. No authority was cited for it. Even if such a ground is known

to the law or could be evolved by developing the law, which is at least doubtful, I would certainly not be prepared to accede to it without being satisfied that the Committee's decision was seriously unsatisfactory. And of that I am very far from satisfied. It is quite consistent with the very limited evidence about the race incident put before the Court by the plaintiff and the other parties that there was gross interference and that the Committee reached the only possible decision. To prevent misunderstanding let it be added that I am not saying that such is the case. The Court simply does not know the facts. For reasons which no doubt seemed good to them, each of the parties refrained, as they were entitled to refrain, from any particularity in the evidence about what happened during either the race or the inquiry. The plaintiff, whose representative had apparently interviewed a number of persons directly involved in the inquiry, called none of them as witnesses in the Court. Not even the owner or jockey of Nelsonian was called; and there is reference in the correspondence that was produced to an appeal by the connections of the horse against the relegation being withdrawn. In view of that dearth of evidence I can see no merit in the argument. Further, the plaintiff is asking the Court to help his syndicate recover alleged winnings at gambling. That is his sole 'interest' in the Committee's decision. I doubt whether it should be treated as giving him locus standi to attack the decision in the Court on this ground for Jackpot purposes, even if such a ground were available to the owner of the horse in proceedings not relating to the Jackpot. This is apart altogether from the questions arising under the Gaming Act, which require separate consideration.

The fact that it is by no means established that the Committee's decision was generally unsatisfactory seems to me

to dispose of this ground of the plaintiff's argument. But, so that it will be clear that they have not been overlooked, I will deal separately with each of the three points said to support the ground collectively. As to the first, on Mr West's evidence I find that Mr Wallace did write out three Jackpot tickets in his wife's name. Mr Psathis's evidence, which I thought he gave very fairly, was not definite enough in my view to warrant a finding that Mr Thomas, another member of the Judicial Committee, participated in the Jackpot. Possibly the three tickets already mentioned could have been declared invalid under clause 14. But it is not necessary to decide that question. All three tickets were 'dead' well before the sixth Jackpot race. There is no evidence - indeed it was not even suggested in argument - that Mr Wallace had any personal interest in the outcome of the Judicial Committee inquiry. Even if there were a small pecuniary interest it might not necessarily be a disqualification in the case of a racing club steward: O'Brien v Boyle (1893) 13 N.Z.L.R. (S.C. 69; but again there is no need to go into that question. Especially in the light of what has been said about the position of racing club stewards in such cases as O'Brien v Boyle, I can see no justification for reading into clause 14 an implication that a member of the Judicial Committee who has transgressed that clause is automatically debarred from performing his functions as a member, even though the breach can have no influence on the Committee's deliberations.

As to the second point, Mr Neal, a former member of the police force, gave evidence to the effect that in the course of his investigations in the interest of the plaintiff, Mr Wallace and Mr Thomas indicated to him in conversations that they had considered relegation mandatory under the Rules of

Racing. From Mr Neal's answers in cross-examination and his answer to the Court that he could not remember Mr Wallace's words 'clearly as a quotation', I do not find this proved so far as Mr Wallace is concerned. The position regarding Mr Thomas is somewhat different, as counsel for the first defendants did not cross-examine specifically on this part of Mr Neal's evidence and Mr Neal had testified that, as well as appearing to be taken aback when he read the rule and found the word 'may', Mr Thomas previously in the conversation 'informed me that he was of the opinion that the Rules of Racing made it mandatory for the Committee to relegate once interference had been established'. Although only the civil standard of proof applies, I do not think it would be safe to accept this evidence without corroboration. I am sure that Mr Neal was not in any way seeking to deceive the Court, but he told me that before he first left Wellington on one of his missions, his employers, the plaintiff's solicitors, 'had a very close look at the particular rule'; and I think he was probably in the state of mind sometimes experienced by cross-examiners in which one is apt unconsciously to adopt an interpretation of an ambiguous answer favourable to one's client. However that may be, even if Mr Neal's evidence about Mr Thomas were accepted to the full, it would not materially advance the plaintiff's case. Mr Barton accepted that the second point alone would not be enough to justify an overriding of the decision. Moreoever, as he put it in answer to a question, if only one of the four members of a tribunal is shown to have been under a misapprehension as to the meaning of a rule, that only takes the plaintiff a quarter of the way to showing that the tribunal was under a misapprehension. (Cf. Ellis v Hopper (1858) 3 H. & N. 766; 157 E.R. 677.) On the relevant evidence as a whole, including that of both Mr Bird and Mr Neal, I am certainly not prepared to find that the

decision of the Judicial Committee was influenced by any misinterpretation of the rule. I reach that conclusion as a matter of the weight of all the evidence, not upon any consideration of inadmissibility. It should be added, however, that no case was cited in which a statement made by a single member of a tribunal some months after a decision (Mr Thomas was not interviewed by Mr Neal until 30 October 1972) has been admitted as evidence of the view of the rules on which the tribunal acted.

As to the third point, it may well be that the Judicial Committee knew that their decision could have the effect of determining whether the Jackpot would go to one syndicate or be shared among a range of entrants. But it was conceded that there was no evidence that this had influenced their decision in any way. The suggestion seems wholly unfounded.

For these reasons I think that, on the true interpretatic of the Jackpot rules and conditions, race day placings meant the official placings determined under the Rules of Racing by the end of the day, and that in the circumstances the decision of the Judicial Committee conclusively settles the placings.

The Gaming Act

I have thought it probably more satisfactory for the parties, and perhaps more in the public interest, to deal with this case by considering it on the merits first. But there is a second broad reason why it seems to me that the plaintiff's claim must fail: namely that the action is not maintainable because of the Gaming Act.

This aspect of the case has a strange history. On 2 August 1972 Beattie J. granted the plaintiff ex parte an interi injunction restraining the first defendants (at that time the only defendants) from paying out the Jackpot money. They then commenced interpleader proceedings, naming the present plaintiff as first defendant and the present second defendants as second defendants, to have determined by the Court to whom they should pay 'the prize or proceeds'. In the present action they filed a notice of motion, signed by senior counsel, for orders setting aside the injunction and dismissing the action, on the grounds that the plaintiff's action could not be maintained by virtue of the provisions of s.71 of the Gaming Act 1908 and that the interpleader proceedings would determine the proper distribution. On 14 December 1972 orders were made by Henry J. by consent of all parties, adding the second defendants as parties to the present action, dismissing the motion to strike out this action, and dismissing a motion by the present plaintiff to stike out the interpleader proceedings The plaintiff in this action subsequently filed two amended statements of claim. None of the defendants pleaded the Gaming Act as a defence in any of their statements of defence. At the hearing of the action leading counsel for the first defendants mentioned at the beginning of his opening that he would refer to some matters of law at the end of it. When he appeared to be about to call his first witness, I asked whether he had finished his opening and he said that he had forgotten to mention the matters of law. He then said that the first defendants suggested that the Court should have regard to s.71 of the Gaming Act and that thereby the action was not maintainable.

Understandably there was an objection on behalf of the plaintiff to the first defendants raising the point in this way. In the discussions that ensued it emerged that all the defendants wished to rely on the Gaming Act. Mr Barton agreed that it was a pure point of law, which the plaintiff was ready to meet by argument. He did not want the opportunity of calling any further evidence affecting the point; and he said that, apart from the mere fact that it would be an additional point to be faced, the plaintiff would not be prejudiced if it were allowed to be raised at this late stage, except possibly insofar as the question of costs might arise. On that he said that if the Act had been pleaded, the plaintiff would have wished to consider the position responsibly before bringing the case on for hearing. I think it was obviously foreseeable, however, that the Court might well feel bound to raise the point, whether the Act was pleaded or not. There are authorities indicating that the Court has such a duty: see for instance Luckett v Wood (1908) 24 T.L.R. 617; Patterson v Wolland (1915) 34 N.Z.L.R. 746; O'Brien v Stead (1894) 13 N.Z.L.R. (C.A.) 81, 93. Mr Brown said that the failure of the first defendants to plead the Act was an oversight. Having regard to all these considerations I granted leave to the defendants to amend thei defences. They all did so by pleading that the action cannot be maintained because of the provisions of either s.69 or s.70 or s.71 of the Gaming Act 1908. There was full argument on the point, particularly by Mr Corry, Mr Little and Mr Barton (whom I granted an opportunity of final reply); but the views that I have formed can be expressed quite shortly.

Notwithstanding some judicial statements, as by Russell L.J. in Earl of Ellesmere v Wallace 1929 2 Ch.1, 52, that

there cannot be more than two parties or two sides to a bet, I think that the weight of authority now clearly favours the view that in the ordinary totalisator situation or in 'picks' competitions or others of the kind sometimes known as pool betting, all the participants are betting among themselves. The leading New Zealand case is Official Assignee v Totalisator Agency Board 1960 N.Z.L.R. 1064 where judgments to that general effect were delivered in the Court of Appeal by Gresson P. and Cleary J. Most of the earlier New Zealand reported cases are collected there. More recent decisions to the same effect are Police v Pools (New Zealand) Ltd 1962 N.Z.L.R. 854, McGregor J.; Police v Steele 1964 N.Z.L.R. 492, Tompkins J.; and Racing Enter-Prizes Ltd v Police 1970 N.Z.L.R. 307, Haslam J. I refer also to Automatic Totalisators Ltd v Federal Commission of Taxation (1920) 27 C.L.R. 513; Esler v Skill Ball Pty Ltd 1940 V.L.R. 429; Totalisator Agency Board v Wagner 1963 W.A.R. 180; and Davison Faulkner Pty Ltd v Totalisator Agency Board 1971 V.R. 274. Perhaps the most helpful English case is still Attorney-General v Luncheon and Sports Club Ltd 1929 A.C. 400, where at p.405 Lord Buckmaster spoke of a bet simply as 'something staked to be lost or won on the result of a doubtful issue'. The French term pari mutuel might be said to sum up the effect of the authorities. The Jackpot does not seem to be distinguishable in any material respect, and it cannot be doubted that in ordinary usage the entrants would be regarded as betting. Section 50 (8) of the Gaming Act 1908, repealed as from 1 August 1972 by the Racing Act 1971 but in force at the relevant time, gave a clear indication of the view of the New Zealand legislature as to the meaning of betting, in defining 'totalisator' as 'the instrument for wagering or betting known by that name'; see now s.2 of the Racing Act. I respectfully think that the concept of mutual

betting must now be regarded as authoritatively settled in New Zealand.

Accordingly I think that the plaintiff's action is prima facie barred by the concluding words of s.70 of the Gaming Act, which provide that 'no action shall be brought or maintained to recover ..... any sum of money won, lost, or staked in any betting transaction whatever'. It is not necessary to decide whether the action would also be barred by s.69, though I am inclined to think that it would. Nor is a decision on s.71 called for. There is quite a strong argument that s.71 is concerned only with stakes or prizes for the competitors in the races, games, sports and exercises there mentioned, and not with mere bettors; some support for it can be obtained from considering the effect of the proviso which appeared in the forerunner of the section, s.7 of the Gaming Act 1894, and from the judgments in Patterson v Wolland, already cited, and Mitchell v Beck (1913) 32 N.Z.L.R. 1279.

On the foregoing view about s.70, the action cannot be brought unless saved by s.45, which was likewise in force at the date of the Jackpot and repealed by the Racing Act as from two days later. Sections 44 and 45 read:

> 44. - Every transaction wherein any money or valuable thing is received as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter to or among any person or persons, by lottery or chance, whether by the throwing or casting of any dice, or the drawing of any tickets, cards, lots, numbers, or figures, or by means of any wheel or otherwise howsoever, any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid, and every scheme of the nature commonly known as a sweepstake, shall be deemed to be a lottery within the meaning of this Act, and the provisions of this Act shall apply in respect thereto accordingly.

> 45. - Nothing in this Act shall apply to any sweepstake got up on a racecourse, provided ... that the several contributions thereto do not exceed five shillings each, and that the whole sum contributed goes to the winner without any deduction on any account: /Provided that, where the sweepstake is conducted in respect of any horse race by a racing club (being a racing club registered as such in accordance with the rules of the New Zealand Racing Conference or the New Zealand Trotting Conference) that is not authorised to use the totalisator, the racing club may deduct, by way of commission, from such whole sum as aforesaid an amount not exceeding ten per cent thereof./

In McComish v Alty 1955 N.Z.L.R. 172 Gresson J. held that a licensee of a hotel in which a 'picks' competition was conducted should not be convicted under s.41 (c) of the Gaming Act of assisting in conducting a lottery. In interpreting s.44 the Judge drew a distinction between 'what might loosely be termed a sweepstake' and 'what is commonly known as a sweepstake'. He held that the competition did not fall within the latter expression in s.44, principally because the result was not determined by pure chance. The competitors picked their winners, and 'in forecasting the result of a horse race, skill, experience and study can, and normally do, play a not inconsiderable part...' In Bhana v Barriball (Christchurch, 24 November 1972), a case concerning a 'jackpot sweepstake' conducted by a trotting club, the plaintiff claimed to be a member of the winning syndicate, to whose representative the money had been paid over. The claim failed on the facts, it being found that the plaintiff was not a member, but the Judge went on to hear separate argument and gave a separate judgment on whether, if he had been a member, the plaintiff's claim would have been barred by the Gaming Act. He held not, essentially on the ground that the Act does not preclude an action by a principal to recover from his agent betting winnings received by the agent on behalf of the principal. As to a submission that the jackpot competition was illegal as a lottery within s.44, Wilson J. said:

> The validity of this submission depends upon

> the meaning of the words 'every scheme of the nature commonly known as a sweepstake.' The section does not say 'every sweepstake' or even 'every scheme of the nature of a sweepstake'. It refers to what is 'commonly known as a sweepstake.' The dictionary meaning of 'sweepstake' is a 'gambling arrangement by which all the sums staked may be won by one or by a few of the bettors, as in a horse-race,' but what is commonly known as a sweepstake is within a rather narrower compass: it is a sweepstake as defined, but in which the horses are allocated to the respective bettors by lot and not by individual selection. It used to be common amongst parties of friends attending a race meeting and, where the individual contributions did not exceed 50 cents, was legitimised by s.45 of the Act. It took the form of contributions by the participants of the same number of agreed monetary units as there were horses running in a selected race which was to be run at the meeting. Each participant then drew the name of one of such horses for every unit contributed by him. The whole of the pool comprising the sum of the contributions was paid to the participant who drew the name of the horse that won the race. As no participant could select the horse of his choice the destination of the pool was decided purely by chance - by the luck of the draw. It was, indeed, a form of lottery in the wider sense in which that term is described in s.44.

Later in the judgment he said that he was following McComish v Alty in holding that the jackpot competition was not such a sweepstake as is contemplated by s.44, as more than a mere scintilla of skill was involved.

It is quite clear that skill was involved here. The point may be underlined by mentioning the plaintiff's evidence that he selected only one horse in each of the last two races because, having watched them running at a previous meeting, he thought they were going to win. The reference in Wilson J.'s judgment to s.45 suggests that he did not regard a competition entailing such elements of skill as covered by that section. The suggestion is confirmed by the tenor of the rest of the judgment, which assumes throughout that ss.69, 70 and 71 would have applied but for the agency point. I notice, too, that at one point in his judgment in Official Assignee v Totalisator Agency Board at p.1080 Cleary J. said that the winner of a sweepstake is determined solely by the chances of the draw.

I find the concept that there is a distinction between the dictionary meaning of a sweepstake and what is commonly known as a sweepstake not without difficulty. Normally a dictionary should reflect common usage. There is also the problem of the date as at which common knowledge would have to be ascertained: 1881, when the original of the present s.44 appeared, 1908, or 1972? As the principles are stated in 36 Halsbury's Laws of England, 3rd ed. 392, para. 587:

> Words are primarily to be construed in their ordinary meaning or common or popular sense, and as they would have been generally understood the day after the statute was passed, unless such a construction would lead to manifest and gross absurdity, or unless the context requires some special or particular meaning to be given to the words.

With the utmost respect for the opinions and experience of Gresson and Wilson JJ., I am not sure that I am entitled to assume that when the Gaming Act provisions were enacted what was commonly known as a sweepstake was confined to sweepstakes involving no substantial skill. It must be recognised that the lottery context of s.44 affords a special reason for adopting such an interpretation there. There is no need to question the decisions that s.44 applies to pure chance sweepstakes only, but I am not convinced that the word 'sweepstake' should be confined to the same limited interpretation in s.45. The latter section originated at a different time (1885). Nor does it include the words 'of the nature commonly known as'. Moreover s.45 provides that nothing in the Act is to apply to sweepstakes covered by the section; so it is not concerned merely with freeing some sweepstakes from illegality as lotteries by reason of s.44. In recent times jackpot competitions have undoubtedly been known as sweepstakes, as the tickets here proclaim. The word is fairly capable of covering them. Taking all these factors into account, I am prepared to assume in favour of the plaintiff, thoug

with much hesitation in view of the opinions quoted, that s.45 is not necessarily excluded because winning the Jackpot called for skill.

I am also prepared to assume it to be immaterial that the contributions on 29 July 1972 were augmented by a sum carried over from an earlier sweepstake. And clearly clause 15 of the Jackpot rules required the whole sum contributed on that day to be distributed, nor is there any evidence of any deduction. It is also plain that only entrants on 29 July 1972 could participate in the sweepstake held on that day.

The crucial difficulty in the plaintiff's way so far as s.45 is concerned appears to me to be the requirement of the section 'that the several contributions thereto do not exceed five shillings each'. Entrants were invited to and did contribute, with one entry form, sums much in excess of that. As in the case of the Paramount syndicate, thousands of dollars might be invested. It is true that the minimum contribution, covering only one selection in each race, was 50 cents. Rosenbaum v Burgoyne 1965 A.C. 430, a case about gambling or fruit machines, was cited. The statute there interpreted laid down a condition 'that the stake required to be hazarded in order to play the game once does not exceed sixpence'. Although a player could put in more than one sixpence before pulling the lever, he did not have to do so to play the game. The condition was therefore complied with. In that case the statute was fairly clearly referring to the minimum contribution needed to play. The question is whether a similar intention can be extracted from the different words of s.45.

When the section originated, as part of s.7 of the Gaming and Lotteries Act 1881 Amendment Act 1885, it contained an additional restriction. The total amount subscribed was not to exceed five pounds. That was brought forward into the

1908 Act, in which the section has the apt descriptive marginal note 'Small sweepstakes on racecourse allowed' (which is not, however, admissible as part of the Act as an aid to interpretation). The five pounds restriction was omitted by s.20 of the Gaming Amendment Act 1949, at the same time as the proviso was introduced allowing the deduction of commission by registered clubs not authorised to use the totalisator. Incidentally, that proviso suggests, I think, that Parliament did not regard s.45 as limited to sweepstakes dependent solely on chance. But eliminating the five pounds restriction could not, it seems to me, alter the meaning of the five shillings restriction.

I find it very difficult to see why the legislation in 1885 and 1908 imposed both restrictions unless it was intended that no contributor should put in more than five shillings. It would seem virtually pointless to stipulate that the total amount subscribed was not to exceed five pounds and that no entry should cost more than five shillings but to leave any contributor free to make more than one entry. And even without the legislative history there is no manifest reason why Parliament should be concerned in such a context with limiting the cost of tickets but not the number that could be taken. Counsel for the plaintiff was contrained to describe it as a legislative mystery. On the other hand it is intelligible that the legislature, concerned to limit gambling, should intend that no one should contribute more than five shillings to such a sweepstake. A further reason might have been an intention to ensure that bigger bets went through the totalisator. We know from such cases as Dark v Island Bay Racing Co. (1886) 4 N.Z.L.R. (S.C.) 301 that totalisators were in use in New Zealand in the eighteen-eighties. There might be some difficulty in policing a provision prescribing a maximum contribution for any individual, but that does not seem to me to have any

cogent bearing on interpretation. Nor can I regard the interests of non-totalisator clubs in 1949 as shedding any light on the meaning of the five shilling restriction. On the other hand a little help is furnished, I think, from the words 'got up on a racecourse'. There is a suggestion of something impromptu, a passing round of the hat, though I do not put great weight on this. The elaborate pre-meeting arrangements necessary for the present Jackpot seem a far cry from the spirit of the section.

All in all, I think the more natural interpretation of s.45 is that sweepstakes can be got up on a racecourse provided that no one puts in more than five shillings and that (subject to the 1949 proviso) the whole pool goes to the winner, so that such sweepstakes cannot be organised for gain. Despite the various assumptions I am prepared to make in favour of the plaintiff, and despite the references to s.45 on the entry forms, I must hold therefore that the Jackpot was not covered by s.45; with the result that the plaintiff's claim is precluded by s.70.

This decision will be a disappointment to the plaintiff and the other members of the Paramount syndicate. One can only hope that it will be some consolation to them to reflect that they are joining, albeit in a rather spectacular way, the ranks of countless followers of the Turf who must have been deprived of winnings over the centuries by the results of protests. Philosophy may be made easier by the sum, no trivial one after all, which the syndicate will doubtless receive on the footing that they share the pool with each of the second defendants.

For both the broad reasons I have given there will be judgment for the defendants. In the normal course an order

for substantial costs would follow the event, subject to some allowance to the plaintiff on the abandoned counterclaims for interest. But, arising out of the pleading and presentation of the defendants' cases, there are matters, which need not now be further particularised, giving room for argument about whether the normal course should be followed. I am prepared to receive memoranda from counsel on costs if necessary. If the defendants or any of them wish to apply for costs they should lodge a memorandum by 24 August 1973; otherwise there will be no order.

Nothing was said at the hearing about the course to be taken with the interim injunction. Accordingly I order that it be dissolved as from 24 August 1973, subject to a reservation of leave to any party to make any application regarding it before that date.

R B Cooke J.

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