Neutral Citation [2012] IEHC 412

THE HIGH COURT

[2010 No. 864 Sp.]

IN THE MATTER OF ROADSTONE GROUP SPORTS CLUB

BETWEEN/

JOHN DUNNE, ANTOINETTE AGNEW AND PHILOMENA MOODY

PLAINTIFFS

AND

OLIVER MAHON AND MAURICE O'CONNOR

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 10th day of October, 2012

1. This application arises from a dispute between the trustees of the Roadstone Group Sports Club ("the Club") concerning the question of whether the Club should be wound-up pursuant to the inherent jurisdiction of this Court. The first plaintiff is the Chairman of the Club (albeit not a trustee) and the second and third plaintiffs are trustees of the Club. The second and third plaintiffs were formerly full members of the Club but are now associate members, having subsequently retired from the employment of the Roadstone companies.

2. The defendants are full members of the Club and also constitute the remaining trustees. The defendants were elected trustees of the company in February 1997 having being nominated by Roadstone Dublin Ltd. and Roadstone Provinces Ltd. in accordance with Rule 4(c) of the Rules of the Club ("the Rules").

3. The Rules do not contain any provisions providing for their amendment and were originally silent as to what would become of the Club's assets were it to be dissolved. This is at the heart of the present dispute and, specifically, questions of whether certain resolutions and amendments to these Rules have been validly adopted are central to the present proceedings. I will return to this question towards the conclusion of this judgment once I have set out certain background facts and enumerated the governing principles.

4. The Roadstone Group Sports Club was established in 1957 for the benefit of the employees of the company of the same name. When originally established it was as a small social club. Over time the Club expanded, notably following the merger of Roadstone Ltd. with Irish Cement in 1970 and the formation of CRH Plc, a flourishing multinational which is now one of the mainstays of the Irish economy.

5. The Club moved to new premises in Belgard Road in Dublin in the 1970s. In 1991, after some negotiations and discussions between the Club and CRH, a site was purchased at Kingswood, Clondalkin, County Dublin from CRH. There is now a substantial clubhouse on the premises. The Club has a variety of soccer pitches (which are floodlit) and a pitch and putt course in a 6.73 hectacre site. It has a 200 square metre function hall, a bar and a restaurant area. The parking facilities are extensive and ample. The clubhouse caters for a wide variety of social events and it has rooms and facilities cater suitable for a wide range of activities such as darts, snooker, bridge and other similar activities. In recent years the premises have been rented out for major pitch and putt championships, martial arts competitions and even Irish dancing competitions. The Club also receives a rental of some €13,000 per year in respect of a mobile telephone mast.

6. Full membership is open to employees of CRH, but associate membership is also open to those who are not CRH employees and the evidence is that since about 1970s provision has been made for associate members who have significantly supplemented that full membership. As of the end of 2010 the Club had 349 associate members, 53 full members, one honorary member and two life members. As of June, 2012 the Club has a small number of part-time employees.

7. Although disputed by the plaintiffs, the Club's finances seem - superficially at least - to be in a healthy position. It has no debt and as of October, 2010 it had savings of some €478,820. By reason, however, of exceptional items (including redundancy payments) there was a total loss of just over €207,000 in 2011 and the cash at hand reduced to €312,008. Although the present financial position of the Club is open to various interpretations, the plaintiffs point to this loss as a harbinger of what may yet ultimately happen if the Club is permitted to continue into the future.

8. Judged from the photographs that have been supplied to me, the facilities seem most impressive and are such as might tempt the interest of any person eligible to join the Club. That, however, is not the view of the full members of the Club, or, at least, the majority of them as expressed by a vote at an extraordinary general meeting in July 2009. (It should be observed that the associate members were not permitted to vote).They take the view that the Club should be wound up on the basis that membership is in terminal decline and that it has no long term future. As we have noted, the Club's rules do not provide for such a winding up and, accordingly, the majority of the members petition the Court for an order to this effect pursuant to this Court's inherent jurisdiction. The net question, accordingly, is whether such a jurisdiction exists and, if so, in what circumstances should it be exercised.

9. The defendants suspect that issues in relation to the viability of the Club stem from the compulsory acquisition of two acres of the Club's grounds by South Dublin County Council for the sum of €1m. in 2004. During this period of intense economic activity in the State and a time when the price for building land reached elevated proportions the Club received many unsolicited approaches regarding a possible sale of the lands. At another point in April 2008 the Club received an offer of over €20m. for the lands, although realistically an offer of this kind will not again be forthcoming in the present economic climate. In view of the price paid for the acquisition of those lands, not unnaturally, perhaps, the minds of some members have turned to the question of whether the assets of the Club might not be realised on a dissolution.

10. It bears remarking that an unincorporated body such as the Club differs significantly from the position of a company incorporated under the Companies Act 1963. In the latter case the Oireachtas has enacted statutory mechanisms whereby such companies can be wound up, not merely on the (all too common) ground of insolvency, but also on the basis that it would be just and equitable to do so: sees. 213(f) of the Act of 1963. Specific protection is also available for the minority shareholders where the affairs of the company have been conducted in a manner oppressive to their interests: see s. 205 of the Act of 1963.

11. By contrast, a club such as the present one has no existence apart from its members as it is not a legal person in its own right. Johnston J. put the matter well in *Feeney v. McManus* [1937] I.R. 23, 31-32 when he observed:-

> "A club is the most anomalous group of human beings that is known to the law. It is union of persons for social intercourse or for the promotion of certain pursuits, which are closely allied to social intercourse, and the members usually regulate their conduct in accordance with bye-laws or regulations to which they subscribe. A club has no existence apart from its members. It differs from a corporation in that respect. It differs from those statutory bodies like Friendly Societies which have a sort of pseudo-corporate existence by virtue of the statute-law which regulates their activities, and even a trading partnership, regulated by the [Partnership Act 1890] has a position and an existence which is superior to those of a club."

Does the High Court enjoy an inherent jurisdiction to wind up an unincorporated association?

12. Like perhaps so much else touching on the law of incorporated associations, the law and practice in relation to the existence of a jurisdiction to wind-up such an association is in many respects obscure and not free from difficulty. The English law is admirably summarised and analysed in Green's superb article, "*Dissolution of Unincorporated Associations*" (1980) M.L.R. 626, an article from which I have derived the greatest assistance.

13. So far as the jurisdiction to wind-up is concerned, as Green observes, many of the authorities in this general area are what might be termed sub-stratum cases. As it happens, both of the leading Irish cases on this precise point arise from the tumultuous events of 1916 and 1921-1922 respectively. In the first of these, *Feeney v. McManus*, the General Post Office (Dublin) Dining Club had flourished until the General Post Office was destroyed by fire following the Easter Rebellion in April, 1916. This had the effect of breaking up the club as a going concern. Johnston J. held- or perhaps more accurately, assumed- that he had a jurisdiction to direct a wind-up of the club and he directed that the proceeds be distributed equally among the members of the club.

14. The second case, *Buckley v. Attorney General* (No.2) (1950) 84 I.L.T.R. 9, concerned the status of the original Sinn Fein political party following the signing of the Anglo-Irish Treaty in December 1921. That treaty was, of course, ratified by a small majority in Dáil Eireann in January 1922, but this simply was the prelude to the Civil War which broke out in June, 1922. The original Sinn Fein did not survive that conflict and as Kingsmill Moore J. noted ((1950) 84 I.L.T.R. 9, 31), it "melted away in the course of that year as the result of the political strife culminating in the civil war". It is true that a new organisation calling itself Sinn Fein was formed in 1923 in the aftermath of the Civil War. This, however, was a new organisation which Kingsmill Moore J. found was not the successor to its predecessor: the sub-stratum of the latter having vanished at some point between the flames which consumed the Four Courts in June, 1922 and a late August evening in Béal na Bláth a few weeks later. It followed, therefore, that what might be termed the "new" Sinn Fein was not entitled to the assets of the "old" Sinn Fein.

15. Both *Feeney* and *Buckley* illustrate how external events can bring about the collapse of the sub-stratum. This is also borne out by the English cases which not untypically concern the future status of unincorporated associations providing benefits for employees of particular companies following the cesser of business by the companies in question. Thus, for example, in *Re Lead Company's Workmen's Fund Society* [1 904] 2 Ch. 196, 203 Warrington J. observed that:-

> "The fact also that the company have given up business seems to me to go a long way to deprive the society of the substratum on which it was founded, namely, as a society for the benefit of those who were, or have been, workmen employed by the company."

16. Nor can the present case be compared with a case such as *Re GKN Bolts & Nuts* [1982] 1 W.L.R. 774, a case where the club had effectively ceased to functions for several years. Membership cards were no longer issued and it had been several years since annual general meeting had been held. The fact that the club's stock of drink was sold off was also regarded as indicative as of the fact that the club had more or more less collapsed. As Megarry V.C. observed ([1982] 1 W.L.R. 774, 779) a club's inactivity "may be so prolonged or so circumstanced that the only reasonable inference is that the club has become dissolved".

17. Yet the present case is, therefore, clearly not a substratum case. The Club is currently viable and it possesses the lands and facilities which are apt and suitable to enable the original aims and objects of the Club to be fulfilled. While it is true that the viability of the Club was hotly contested in the course of the hearing, I am not presently convinced that the future of the Club is necessarily as doubtful as the plaintiffs seem to think. As counsel for the defendants, Mr. McDonald SC put it in cross-examination of the first plaintiff, Mr. Dunne, little efforts have been made over the last few years to attract new members or to re-invigorate the Club by seeking to attract new types of custom and business. In fairness, it should be noted that although Mr. Dunne riposted by saying that they did so endeavour, but that this was in any event pointless. The evidence nonetheless establishes that the club has been effectively closed to new members since about 2004 and there has been no advertising for new members since that date.

Should the Club be wound up by reason of the fact that a majority so desire this?

18. If, therefore, the Club is to be would up, it is because a majority of its members so desire. The real question, therefore, is whether the Court has a jurisdiction to wind up on this ground. While the English authorities accept that the High Court enjoys a general jurisdiction to wind up on just and equitable grounds, not all of the authorities can be readily reconciled. Specifically, there appears to be a difference of opinion as to whether the rules of a club can be changed by a majority of the members, even if the rules of the club do not so provide

19. We may start with *Harington v. Sendall* [1903) 1 Ch. 921. Here Joyce J. granted the plaintiff an injunction restraining his expulsion as a member of a club who declined to pay an increase in the membership subscription for which the rules did not provide. It is true that one may justify decisions of this kind on the basis that membership of an incorporated association is based on contract and that even the single dissentient member is entitled to hold all other members to the precise terms of that contract. A similar view was taken by Harman J. in *Re Tobacco Trade Benevolent Association* [1958] 3 All E.R. 353 where he held ([1958] 3 All E.R. 353, 355) that an amendment designed to allow a benevolent association invest in a wider range of securities than heretofore was invalid in the absence of express authority in the pre-existing rules:-

> "This body started with no power to alter its own rules, and such a body cannot alter its rules by its own motion except

possibly with the concurrence of every member of the body. There was never any pretence that anything of that sort was obtained here."

20. Yet the difficulty with *Harington v. Sendall* and *Re Tobacco Trade Association* (and other decisions in similar vein) is that that approach quickly leads to deadlock, atrophies the development and evolution of unincorporated associations and perhaps most significantly often leads to the collapse of substratum in many cases. Is it to be said that a blocking minority is entitled permanently to stop the increase of subscriptions, even though this might have the effect of stultifying the development of the club and even bringing about its ultimate collapse?

21. Different views on this point have, of course, been expressed by English judges. In *M'Kenna v. Barnsley Corporation* (1894) 10 T.L.R. 533 the English Court of Appeal held that an implied power existed on the part of the majority to bind a dissentient minority. That Court would accordingly not interfere with a resolution passed by a majority to register their society under the Friendly Societies Act 1875, even though no provision was made for this in the society's rules. In *Abbatt v. Treasury Solicitor* [1969] 1 W.L.R. 1575. 1583 Lord Denning observed in this context:-

> "It is true that the old rules [of a particular unincorporated association] contained no express power to amend or later them. But I should have thought it was implied that the members could, on notice, by a simple majority in general meeting, amend or alter the rules."

22. It should be mentioned, however, that the other members of the Court did not agree or, at least, necessarily agree with these views. Winn L.J. concurred in the result, but gave no reasons. Cross L.J. agreed with the result, but he concluded that this was because the parties had acquiesced in the rule change. His judgment strongly suggested that there is no implied power to amend such rules.

23. But earlier generations of English judges had also taken the view that there was an implied power to amend. Thus, in *Re Lead Co. Workmen's Fund Society* Warrington J. had approved the dissolution in a case where the majority had been so in favour. In more recent times Megarry J. took a similar view in *Keys v. Boulter* (No.2) [1972] 1 W.L.R. 642 where, albeit without much discussion of the point, the judge concluded that he enjoyed an inherent jurisdiction to dissolve two trade unions who had unsuccessfully amalgamated, even though - as might be expected - not every member of the amalgamated union agreed with this.

24. For my part I take the view that, absent an express agreement to the contrary in a club's rules, it is unrealistic to expect or assume that an individual member can have the right to block each and every proposed change through the exercise of an individual power of veto. An implied power to amend through majority vote must generally be assumed, as otherwise the association would lack the necessary flexibility to enable it to adapt to the challenges of modem society. In that respect, I consider that the test articulated by Maguire C.J. *in Ward v. Sprivack Ltd.* [1957] I.R. 40, 47-48 (and which principles were applied by the Supreme Court in subsequent decisions such as Sweeney v. Duggan [1997] 2 I.L.R.M. 211 and *Carna Foods Ltd. v. Eagle Star Insurance Co. (Ireland) Ltd.* [1997] 2 I.LR.M. 499):-

> "It is settled law that a term may be implied in a contract to repair what Cheshire and Fifoot, *Contract Law* (3rd. ed., 1952 at 127) calls an 'an intrinsic failure of expression.' Where there has been such a failure the judge may supply the further terms which will implement [the parties'] presumed intention and in a hallowed phrase give 'business efficacy' to the contract."

25. The failure in the rules of the present Club to provide for this situation of amendment may be thought to represent a paradigm example of such an intrinsic failure of expression, as there is general agreement on all sides that the drafting quality of these rules is unsatisfactory. For these reasons, I believe that I can imply a term to the effect that the rules can in principle be amended by simple majority vote. Here, I believe that the argument advanced in "The Dissolution of Unincorporated Non-Profit Associations" (1928) 41 *Harv. Law Review* 898 is compelling:-

> "In the absence of express provisions to the contrary, unanimous consent is ordinarily considered a prerequisite to dissolution of unincorporated non-profit associations. This is apparently grounded on the principle that a contract cannot be rescinded without mutual consent. But its present application would require, as part of the articles of association, an understanding that the society be perpetual. More reasonably interpreted, the silence of the articles is evidence that the duration of the organisation and the method of dissolution were not considered. Since unanimity is rarely attainable and the will of the majority is the accepted mode of government, it is a fair inference that majority rule is tacitly agreed upon."

26. Of course, not every amendment effected by means of this implied power to alter the rules would be regarded as acceptable or as being within the scope of such an implied power. Different considerations might obtain where the character of the club was changed profoundly by amendment, since the majority cannot coerce the minority into being a member of a club which they did not join. In such cases, a court might well draw by analogy on principles informing the exercise of the jurisdiction conferred by s. 205 of the Act of 1963 to protect minority shareholders in order to block a change of this kind. In other cases, a court might hold that the resulting change to the character of the unincorporated association in question was so profound as to bring about a dissolution of the association by reason of the collapse of its substratum.

27. All of this is re-inforced by a further consideration which must, where necessary, re-mould the law in this area, namely, the guarantee of the right of free association in Article 40.6.1.iii of the Constitution. As the Supreme Court observed in *National Union of Railwaymen v. Sullivan* [1947] I.R. 77, 107: "[E]ach citizen is free to associate with others of his choice for any purpose agreed upon by him and them." In *Equality Authority v. Portmarnock Golf Club* [2009] IESC 73, [2010] 11.R. 671,741 Hardiman J. commented in respect of that decision that the Court had assumed "that voluntary association of persons had some purpose or activity, social, sporting, intellectual, economic or otherwise".

28. In the present a group of individuals had originally come together for social and sporting purposes, but a majority of them no longer wish to continue to maintain the Club and have elected to dissolve it. Just as their right to come together is protected by Article 40.6.1, so must the very corollary of that right- the right to dissociate- be protected and enforced. Kingsmill Moore 1. may be thought tacitly to have acknowledged this principle in *Buckley*, where speaking in the context of irreconcilable policy differences within an organisation, he observed that in that situation "the organisation would have to be dissolved, for neither a house nor an organisation divided against itself can stand."

29. In arriving at this conclusion I fully recognise that a hardship is thereby imposed on the minority who desire anxiously that the Club and its wonderful facilities be maintained. I entirely sympathise with them in their opposition to the closure of the Club, but the

Court cannot effectively compel an unwilling majority to associate with a minority. Dissolution is the fairest solution in these circumstances, since at least the property interests of all members are maintained and preserved on an equal basis.

Rule 37

30. It remains now to consider the various proposed amendments to the Rules. Rules 37 was introduced in 1992 and provides that:-

> "In the event of the Club being disbanded and the premises subsequently sold all monies left after all debts are paid will be donated to charity."

31. There is no doubt at all but that this rule change was motivated by the most noble and altruistic of motives. In his affidavit (and, indeed, evidence) Mr. Mahon made it clear that the object of the rule change was to negative the incentive for existing members to seek personal enrichment from the dissolution and thereby to dissuade those who might wish actively to bring about the Club's demise.

32. It is agreed that this amendment was effected by a majority vote. In these circumstances I nevertheless feel compelled to hold that this is an example of an impermissible rule change. Prior to the adoption of Rule 37, all existing members had a vested right to share in the distribution of the proceeds of the Club on its dissolution. As Sir Charles O'Connor M.R. put in *Tierney v. Tough* [1914] 1 I.R. 142, 155: "The society is only the aggregation of those [individual members] and the property of the former is not the property of the latter". Kingsmill Moore J. also expressed similar views in *Buckley* with regard to the "old" Sinn Fein ((1950) 84 I.L.T.R. 9, 28):

> "It was an unincorporated association governed by no special statutory provisions. Outside or apart from the members who composed it the association had no legal existence. It could hold property by means of trustees but on a dissolution such property would be divisible equally among the existing members."

33. This is fundamentally why the present motives of the plaintiffs (and the majority of the members) in seeking the dissolution of the Club are irrelevant. Even if it is thought that these members have sought to hasten the demise of the club or are deliberately fatalistic as to its prospects of survival so that they can share in any surplus realised by the dissolution of the club, this is irrelevant since as a matter of law in a case of this kind the club's property ultimately belongs to the members.

34. This also means that, absent a pre-existing rule to the contrary, it is an implied term of the contract of membership that the society's property should on dissolution be distributed in equal shares: see In *re Bucks Widows' Fund* (No.2) [1979] 1 W.L.R. 936, 952, per Walton J.

35. A change of the kind proposed would thereby deprive a member of a right personal to him or her and would significantly alter the nature of the Club to the prejudice of individual members. Nor can it truly be said that there has been acquiescence on the part of the members since the adoption of Rule 37 in 1992. While it is true that the Rule was not challenged at the time, it is only now that the potential operation and applicability of Rule 37 has come into view. Any member who sought to challenge the validity of Rule 37 prior to any actual dissolution would very probably have been met with the response that any such challenge was hypothetical and premature: of the decision of the Supreme Court in *Collooney Pharmacy Ltd. v. North Western Health Board* [2005] IESC 44, [2005] 4 I.R. 124.

The 2009 resolution

36. The question of whether the Club ought to be dissolved had been a matter of controversy and debate among the Club's Committee, the trustees and the members for several years. Legal advice had been sought on all sides and different views on the wisdom of the proposal and the motives of those seeking dissolution had been forthrightly expressed on all sides. Ultimately, a motion was passed at an Extraordinary General Meeting held on 161h July 2009 following a proposal to that effect from the Club's Committee dated 22nd April 2009 that the Club would apply to this Court for orders:-

> (a) Dissolving the Club.
>
> (b) Declaring Rule 37 to be invalid.
>
> (c) An order providing for the sale of the Club's assets, the payment of any liabilities and debts and providing that any surplus would be divided on the basis of 20% to Our Lady's Hospital, Harold's Cross, 40% to full members and 40% to associate members.

37. It seems to me that the vote in July 2009 must be regarded as expressing the view of a majority of the members that the Club should be dissolved. It is true that associate members were not permitted to vote (as this was not provided for in the Rules) and that the vote was confined to the two life members and the other full members. Provision was made for proxy votes and it may well be that some of those who voted did so by proxy. It is true that a resolution was passed at an Extraordinary General Meeting in 2007 allowing for proxy votes, but the validity of that vote was in turn a matter of dispute. Yet even allowing for possible imperfections in the voting procedure, I am driven to the conclusion that the July 2009 vote must be taken to represent a majority of the members of the Club. Certainly, it has never been suggested that this was not so, or that the vote was not representative of the views of the majority of members of the Club, be they life member members or, for that matter, associate members.

Conclusions

38. In line, therefore, with the principles I have expressed in my judgment, it seems to me that I have no option but to give effect to that expression of opinion as reflected in the outcome of the vote at the extraordinary general meeting held in July 2009.

39. Further orders were sought with regard to the manner in which full members, associate members and life members would be treated. In the light of the views I have expressed in this judgment, I will make orders in the terms sought, with the proviso that the question that the manner in which the proceeds are to be distributed remains to be fully argued. Accordingly, I propose to hear further argument on these questions, not least having regard to the principles set out in *Tierney v. Tough, Buckley and In re Bucks Widows' Fund* (No.2).