

**THE HIGH COURT****2004 16720 P****BETWEEN****JIM FITZHARRIS****PLAINTIFF****AND**

**MICHAEL O'KEEFFE, JIMMY DUNNE, RICHIE McLOUGHLIN, SIMON DEVEREUX, CHRISOPHER A. G. GAVICAN, TURLOUGH COFFEY, MICHAEL CUNNINGHAM, EDDIE KELLY, SEAN DORIS, MARGARET NEILE, GERARD BURNS, RAY DEVINE, PADDY MCCARTHY, MICHAEL GILMARTIN AND JIM O'CONNOR**

**DEFENDANTS****Judgment of Miss Justice Laffoy delivered on the 18th day of December, 2008****Preliminary issue**

1. In order to put the preliminary issue which is the subject of this judgment in context it is necessary to consider the pleadings in the substantive action to some extent.

2. In the statement of claim delivered on 30th November, 2004, the plaintiff is described as a "keen game hunter". The following matters are pleaded to illustrate the plaintiff's relationship to the defendants:-

- (a) that the plaintiff has been a member of Ballitore Game Club (the Club) since 1971 and its secretary since 1974;
- (b) that the club is affiliated to Kildare Regional and Game Wildlife Council (the Council) and the plaintiff was at all material times a serving officer of the Council since the early 1980s;
- (c) that at all material times the plaintiff was a member of the National Association of Regional Game Councils of Ireland (the National Association);
- (d) that the National Association operates a self insurance scheme entitled "The National Association of Regional Game Councils Game Hunting Compensation Fund" (the Compensation Fund); and
- (e) that the defendants are members of the National Executive of the National Association and that they are being sued in these proceedings in their representative capacity.

3. In the pleas in the statement of claim which are at the core of the preliminary issue it is contended as follows:-

- (i) By contract or collateral contract effective from 1st August, 2003 (and similarly for previous years) made between the plaintiff and the National Association, the plaintiff and the National Association agreed to be bound by the Constitution and Rules of the National Association as adopted on 11th February, 1995, as amended;
- (ii) The plaintiff's application for renewal together with the Constitution and Rules of the National Association and the correspondence that had been exchanged between the parties represented the terms of a contract and/or collateral contract between the plaintiff and the National Association;
- (iii) Pursuant to the terms of the contract the National Executive of the National Association was under a duty to consider the plaintiff's application for membership in accordance with the Constitution and Rules, in particular, Rule 19, and in accordance with the requirements of natural and constitutional justice, and properly, fairly and reasonably;
- (iv) In preventing the renewal of the plaintiff's membership, the defendants acted ultra vires their powers and in breach of the plaintiff's contractual rights; and
- (v) The National Association is under a duty to admit the plaintiff to membership when he complies with its rules in all material respects.

4. The kernel of the plaintiff's complaint against the National Association as pleaded, which is not factually disputed, is that on the 8th September, 2003, a motion was passed by the National Executive of the National Association that the membership of the plaintiff be declined at the next renewal unless certain conditions were met. On 20th May, 2004, the plaintiff duly completed a proposal for renewal of his membership number 6210 of the Compensation Fund, which was declined, thus excluding him from membership of the Compensation Fund and effectively from membership of the National Association or its constituent parts and the benefits therefrom.

5. In their defence delivered on 5th April, 2005, the defendants denied, in multifarious formulations, that any contract existed between the plaintiff and the National Association and asserted that in the circumstances no breach could occur and that no cause of action had been revealed in the statement of claim.

6. The defendants brought a motion seeking an order of the court in pursuance of Order 25 of the Rules of the Superior Courts 1986 directing that "the preliminary objections/points" as raised by the defendants in their defence be disposed of as a preliminary issue in the proceedings. By an order made on 7th November, 2005, which was made by consent, Clarke J. ordered that a preliminary issue be tried on the following question:-

"Whether having regard to the Constitution and Rules of the National Association of Regional Game Councils there can be said to be any contract and/or collateral contract between the Plaintiff and the Defendants/Association as might arguably give rise to the various contentions as pleaded by the Plaintiff".

7. The scope of the question is very narrow. On my interpretation of it, in essence, what the court is required to do is to determine whether, as a matter of law, the plaintiff can found his case against the defendants in contract.

**Pleadings/evidence**

8. Directions were given in the order of 7th November, 2005, as to the service of points of claim and the reply and the setting down of the issue for trial. The defendants were to be the moving party on the preliminary issue and the plaintiff was to be the respondent.

9. The points of claim delivered by the defendants merely rehearsed what had happened up to that point. However, the defendants' position in relation to the plea as to the existence of a contract or collateral contract between the plaintiff and the National Association was summarised. It was alleged that the plaintiff was not a member of the National Association at any material time, that the National Association is made up of Regional Game Councils, not private individuals, and that private individuals have no right of membership. The defendants asserted that under the Constitution and Rules of the National Association neither the plaintiff nor any private individual has a right to individual membership.

10. In relation to the factual matrix within which the preliminary issue is to be determined, in responding to the defendants' motion in an affidavit sworn on 26th July, 2005, the plaintiff's solicitor had pointed to the fact that the preliminary issues sought to be tried required to be tried in the context of agreed facts. That assertion was correct. It is well settled that a preliminary issue of law cannot be tried *in vacuo*, but must be tried in the context of agreed or established facts (*McCabe v. Ireland* [1991] 4 I.R. 151). While the point was not specifically addressed in the parties written submissions or in the oral submissions made by their counsel, I am assuming, for the purposes of dealing with the preliminary issue, that the relevant facts which are to form the basis of the court's decision on the preliminary issue are those outlined earlier from the statement of claim, in conjunction with the contents of the following documents which have been put in evidence by agreement:-

- (1) the National Association Constitution and Rules 2002/2005,
- (2) the Compensation Fund Contract and Personal Accident Insurance Summary 2002/2005,
- (3) the Council's Rules and Constitution and
- (4) the Club's Rules and Regulations.

11. Two further documents were put before the court, namely:-

- (a) the National Association Constitution and Rules 2005/2007,
- (b) the Compensation Fund Contract and Personal Accident Summary 2002/2007.

12. The question posed for the determination of the court, as I construe it, relates to the Constitution and Rules of the National Association in force when these proceedings were instituted in July, 2004. Counsel for the plaintiff referred to amendments of the Constitution and Rules, which were introduced at an Extraordinary General Meeting of the National Association held on 2nd July, 2005, which are reflected in the document referred to at (a) above, and it was suggested that the amendments were introduced so as to score a personal attack on the plaintiff. I agree with the submission of counsel for the defendants that those amendments are not relevant to the issue to be determined. Therefore, I have had no regard to the documents at (a) and (b).

13. For the same reason, irrelevancy, I have had no regard for matters put before the court by counsel for the defendants as to how the relationship of the National Association, the Council and the Club has changed since these proceedings were instituted. The contention that the plaintiff's application for renewal of his membership of the Compensation Fund and the National Association has become moot is not before the court on the preliminary issue. Indeed, mootness is not pleaded in the defendants' defence.

### **The Constitution and Rules of the various bodies**

#### **The National Association**

14. The plaintiff's case for the existence of a contract or a collateral contract between him and the National Association is founded primarily on the provisions of the Constitution and Rules of the National Association, the relevant version, as I have stated, being that in force when these proceedings were instituted and when the dispute between him and the National Association arose, that is to say, the Rules which are described as being pertinent to 2002 to 2005.

15. The provisions of the Constitution and Rules to which attention was drawn by counsel for the plaintiff were the following:-

- (1) The definition of "Associate Member" in the definition section, which defines that expression as meaning "a member of the Compensation Fund",
- (2) Article III of the Articles of the Association, which deals with affiliation and membership and provides for two categories of members as follows:-

"a. Each [Regional Game Council] shall be entitled to affiliate as a member of the Association. In the cases of Counties Leitrim and Tipperary there shall be separate bodies in the North and in the South.

b. Every person whose Compensation Fund Contract is validated by the Association shall be a non-voting Associate Member, whose membership (which may be renewed) ceases to exist at the end of each Compensation Fund year."

(3) The provisions of the Rules of the Association which deal with the Compensation Fund, namely, Rules 13 and 14. Rule 14 deals with the Fund Contract and provides that the Fund Board, as constituted by Rule 13, shall administer the Compensation Fund to provide protection for Associate Members and other specified persons and bodies through the issue of a Fund Contract.

(4) Rule 19, which deals with disciplinary procedures, non-compliance with which forms the basis of the plaintiff's allegation of breach of contract on the part of the National Association.

#### **The Compensation Fund**

16. The Fund Contract is the contract of insurance between a person who is accepted as a member of the Compensation Fund and the Fund Board. Counsel for the plaintiff drew attention to the membership proposal form, in which the applicant for membership of the Compensation Fund was required to declare as follows:-

"I am a fully paid up current Member of the Club named in this proposal".

17. Part 3 of the Fund Contract sets out the basis of protection and provides that the proposal shall be the basis of the contract and be regarded as incorporated in the Fund Contract. It also provides for the payment of a membership fee as consideration for the benefits of membership. The risks protected against are set out in Part 4 and the conditions of protection are set out in Part 5. Counsel for the plaintiff specifically referred to Part 6 as demonstrating a contractual nexus between the various organs of the National Association. It deals with extensions of protection and provides in clause (10) that the protection afforded by the contract is extended to protect all officers and trustees during their terms of office in all organs of the National Association while in the course of discharging their official duties of office, but contains a proviso that, where the protection applies to officers of gun clubs or local clubs, such protection will only be given where "each and every" member of the club is a member of the Compensation Fund.

18. Counsel for the plaintiff also pointed to Part 9, which deals with renewal procedure, which provides that, upon payment by the member of the membership fee for a subsequent period of membership and acceptance of that renewal fee by the Compensation Fund, the member's membership shall be renewed, without the necessity for the completion of a further proposal form, subject to such alterations to the contract as may be imposed by the Fund Board as are notified to the member.

#### **The Council**

19. The Rules and Constitution of the Council as passed in September, 1996 provided in Rule 14 that all Game/Gun Clubs affiliated to the Council must be members of the Compensation Fund.

#### **The Club**

20. The rules and regulations of the Club as of October, 2000 provided that all members must be insured through the Club with the National Association.

#### **The Law**

21. Of the authorities to which the court was referred, the one which seems most relevant to the question raised in the preliminary issue is the decision of Morris J., as he then was, in *Walsh v. Butler* [1997] 2 I.L.R.M. 81. In his judgment, Morris J. considered the relationship between an unincorporated association, in that case a rugby football club, and its members. As the head note records, Morris J. held that the relationship between an unincorporated association and its members is a contractual one, which is based upon the rules of the club. Morris J. put it slightly differently at p. 84 when, having said that he was satisfied that the rugby football club in question was correctly described as "an unincorporated association", he went on to say:-

"... I am satisfied that as such the relationship as between the members must be regarded as a contractual relationship based upon the rules of the club".

22. In that case, the issue as to whether the plaintiff was a member of the rugby football club in question arose in the context of a personal injuries action. On the facts it was held that he was not a member of the club at the time of the alleged accident. The practical implications of the contractual nature of the relationship between a club and its members is exemplified by the judgment of Morris J. in two respects: the failure to comply with rules regarding the election of members prevents a person becoming a member of the club; and, even where a person is properly elected a member of a club, if the club rules provide that a failure to pay an annual subscription in respect of a year causes membership to lapse, membership will lapse if the annual subscription is not paid.

23. The significance of the decision of Morris J. is illustrated in the decision of the Court of Appeal in *Robertson v. Ridley* [1989] 1 W.L.R. 872, which was relied on by counsel for the defendants. That was also a claim for personal injuries by the plaintiff, a member of an unincorporated members' club, whose injury arose when he fell off his motorcycle while he was riding in the club's premises, having struck a pothole. In essence, what the Court of Appeal held was that an unincorporated members' club has no liability in tort, for example, in negligence, to individual members. There may be liability in contract but that depends on the construction of the rules. The rule relied on by the plaintiff as imposing liability was a rule that provided that the chairman and secretary of the club were "responsible in law for the conduct of the club a corporate body". In a passage relied on by counsel for the defendants (at p. 876) May L.J. stated that "very clear words in the rules of a members' club" would be needed to displace the general rule that an ordinary contract of membership of a members' club does not impose liability on the club to an individual member in respect of the condition of the club premises. May L. J. continued:-

"Certainly in the instant case, merely to say that the secretary and the chairman shall be responsible in law for the conduct of the club, cannot lay any duty of care to the plaintiff on either the chairman or the secretary in respect of the state of this road. In my opinion, therefore, the claim must fail both in contract and in tort ...".

24. No dispute arose in that case as to whether there was a contractual relationship between the member and the club. What was at issue was what the terms of the contract were, which was a matter of construction of the rules of the club.

25. In my view, none of the other authorities referred to by counsel for the defendants is relevant to the issue the court has to determine.

#### **Application of the law**

26. Whether there was a contractual relationship between the plaintiff and the National Association turns on whether, by reference to its Constitution and Rules and as a matter of fact, the plaintiff was a member of the National Association. The nature of the contractual liability is a matter of the construction of the Constitution and Rules.

27. Counsel for the plaintiff characterised the game hunting organisation, (and I have chosen the word "organisation" as a neutral term) as a tree with four branches: the individual members, the local gun clubs (for example, the Club), the regional councils (for example, the Council) and the National Association, which was described as the umbrella organisation in charge of all the tiers. The Compensation Fund, which is controlled and administered by the National Association, binds the organisation together through the contractual linkage created by the Compensation Fund Contract and the constitutions and rules of the various branches, it was submitted.

28. That is broadly speaking correct. Looking at the position of the plaintiff as of 1st August, 2003, his status in relation to the three unincorporated bodies, by reference to their constitutions and rules, and in relation to the Compensation Fund, by virtue of the Compensation Fund Contract, was as follows:-

(1) He was a member of the Club, which was affiliated to the Council.

(2) He was a member of the Compensation Fund and there was a contractual relationship between him and the Compensation Fund, which was regulated by the Compensation Fund Contract.

(3) As a member of the Compensation Fund, and, as counsel for the plaintiff submitted, this is the nub of the matter, he was a non-voting associate member of the National Association. The fundamental flaw in the position which the defendants have adopted is that they have ignored what is stated in "black and white" in Article III of the Constitution and Rules of the National Association, which I have quoted earlier, from which it is clear that, as a member of the Compensation Fund, he was a person whose Compensation Fund Contract was validated by the National Association, and, as such, he was a non-voting associate member of the National Association.

(4) Accordingly, there was a contractual relationship between the plaintiff and the other members of the unincorporated body which constituted the National Association and, thus, between the plaintiff and the National Association, which was regulated by its Constitution and Rules.

#### **The Answer to the Question**

29. Having regard to the foregoing, the answer to the question posed is as follows:-

"Having regard to the Constitution and Rules of the National Association, there can be said to be a contract between the plaintiff and the National Association such as might arguably give rise to the various contentions as pleaded by the plaintiff."

30. However, that answer does not address the terms of the contractual relationship relevant to the substantive action, nor whether any of those terms was breached, nor whether the plaintiff is entitled to any of the reliefs which he has claimed on the basis of such contractual relationship. All of those issues fall to be determined by reference to, and on the proper construction of, the terms of the contract as contained in the Constitution and Rules of the National Association in the substantive action.