02/70

SUPREME COURT OF VICTORIA

ACADEMY OF HEALTH & FITNESS PTY LTD v READING

Adam J

18 February 1970

CIVIL PROCEEDINGS – CLUB MEMBERSHIP – MEMBER AGREED TO PAY PART OF THE FEES UPFRONT AND THE REMAINDER BY INSTALMENTS – MEMBERS REQUIRED TO ABIDE BY THE RULES AND REGULATIONS AS LAID DOWN BY THE SELECTION COMMITTEE – SOME PROBLEMS ENCOUNTERED DURING MEMBER'S FIRST MONTH IN THE CLUB – PROBLEMS CAUSED BY A FIRE AND A BROKEN-DOWN FILTRATION SYSTEM – MEMBER FAILED TO PAY THE MEMBERSHIP FEES DUE – CLAIM MADE ON MEMBER – CLAIM DISMISSED BY MAGISTRATE – MAGISTRATE HELD THAT THE AGREEMENT WAS VOID FOR UNCERTAINTY AND THERE HAD BEEN A FAILURE OF CONSIDERATION – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute. Magistrate's order set aside.

1. In relation to the question of the contract being void for uncertainty the reference to members abiding by the rules and regulations as laid down by the Selection Committee did not permit or authorise the complainant club or any Committee established by it to alter the terms of the agreement under which a member became a member of the club.

2. Members of a club such as this must be subject to some regulation in exercising their rights as conferred by membership of the club; matters which were appropriate to be dealt with by rules and regulations binding the members as, for example, the right of a member under this form was to have the use of the swimming pool at the club free. If it was available at some stage for mixed swimming, a regulation providing that the ladies or the gentlemen should wear swimming togs would appear to be quite a reasonable regulation for the Club to make, and one which if it be desirable could be enforced against members. And so with other facilities which were provided free, and the manner in which a member was to enjoy these privileges may well have to be a subject of certain regulations in the interest of all the members; that did not involve any altering of the obligations of the club to the members under this agreement, but merely controlling of the exercise of their rights.

3. Accordingly, the ground why the complainant failed could not substantiated. Even if there was substance in the view that the agreement was alterable by the club itself at any time, that there would be strong reason for saying that was quite severable from the agreement, and would not bring it down.

4. In relation to the question whether there had been a failure of consideration, the Magistrate was in error in treating alleged breaches, assuming they were established, to provide a defence to this claim. There was no defence taken, nor did the evidence support the view that the defendant had repudiated or rescinded this agreement for breaches by the complainant club. That would have raised different issues, depending on the seriousness of the breaches and the inferences that could have been drawn from the breaches as amounting to a repudiation of the agreement by the club. The case was not presented that way, and that was not the defence taken.

5. This was not a case where there had been some complete and total failure of consideration, which was the basis for the promise by the defendant to pay a subscription; it fell far short of that. Such breaches as were alleged by the defendant in his evidence and the Magistrate relied upon, did not warrant the conclusion that there was a good defence to this claim, but at most would have given rise if proved to some counterclaim.

6. Accordingly, there was no defence to the claim for the amount outstanding.

ADAM J: In this order it is the complainant, Academy of Health and Fitness Pty Ltd is seeking the review of an order made in the Court of Petty Sessions on 8 August 1969 at Malvern, by Mr O'Connor, SM.

The company (and I will refer to Academy of Health and Fitness Pty Ltd as 'the company')

had sued Basil John Reading for $200 claimed to be due under an agreement made on or about 29 August 1968.

The agreement sued upon was constituted by a document called 'Club Members Agreement' and the acceptance of the offer contained that agreement by the company. The Club Members Agreement contained an offer by Mr Reading, if accepted for club membership, to agree to all the terms and conditions appearing in that document; among the terms and conditions were that he should, for a membership of the club for a period of two years, be liable to pay $220; $200 representing the nomination fee to his health club, which would enable him to have renewals of his membership up to a period of about 10 years, and $20, the annual subscription. The $220 would cover the nomination fee of $200, which was also to cover the first year's subscription, and $20 which would cover the second year's subscription.

Mr Reading, the defendant, offered in effect to make these payments if admitted as a club member of the health club. In the offer there were expressed the privileges and services which were to accrue to him upon his becoming a member. They included, for instance, provision for a personally prepared, scientifically-designed weight training and conditioning program under the supervision of the Academy Chief inspector. They provided for medical examinations to be carried out by one of the club's medical officers and a report to be made to the member. And it provided a personal and specific dietary program to be prepared for the member by a qualified dietician. It provided for free use at any time of Sauna bath at the premises of the club, and certain other facilities free, such as the use of the club swimming pool, bowling alley, sun room, trampoline, and in regard to the squash not only for free use of the squash courts at the club premises, but during specified hours from 9 to 4:30 each day and from 10 pm to midnight each day.

The application for membership also provided for payment of the amount due, the $220 by certain instalments; $20 to be paid immediately and the balance to be paid every monthly periods at $10 per month. There are certain obvious errors in the statement the amounts payable – sometimes stated correctly in parts of this document, other parts incorrectly. I think it is quite clear where the errors are, and reading the document as a whole it is clear enough that what had to be paid under the agreement was for the 2 year membership, $220, to be paid $20 down, and as to the balance of $200, to be paid by monthly instalments of $10.

The document provided as follows:

> "All members are directly responsible to abide by the rules and regulations as laid down by the Club Members Selection Committee."

The Stipendiary Magistrate dismissed the claim of the club substantially on two grounds:

> (1) he held that the agreement constituted by the document I have referred to, and its acceptance by the club was void for uncertainty:
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> (2) furthermore he held on evidence that in certain respects the club had not granted the facilities and amenities for which the applicant was applying for membership and for that reason the applicant had a good defence in that there had been a failure of the consideration for his promise to pay the $220.

I may say the applicant had in fact only paid the first $20, and the club's claim was for the balance of the $200, the whole of which had remained unpaid.

I have had the case fully and helpfully argued both by Mr Dwyer and Mr Keenan, and the conclusion I have reached is that the Magistrate's decision certainly cannot be upheld for the reasons that he has given. The main ground on which he appears to have relied was that the agreement was void for uncertainty by reason of the reference in it to the provision that members are responsible to abide by the rules and regulations as laid down the Club Members Selection Committee. He construed that, as I understand him, as leaving it to one party to the contract, namely, the complainant club, to vary at will any terms or conditions of the original agreement, and on the principle presumably, that there is no concluded or binding contract if one of the parties to the contract is at liberty to vary its terms at will. On that general principle I would think he held that this was not an agreement of such certainty as the courts could enforce.

The conclusion that I have reached is that the reference to members abiding by the

rules and regulations as laid down by the Selection Committee do not permit or authorise the complainant club or any Committee established by it to alter the terms of the agreement under which a member becomes a member of the club. I think one would need much clearer words to give it that meaning, which would of course make the agreement one of a capricious character, alterable at the will of the club.

It is sufficient, I think, to read these references to rules and regulations as dealing with matters of detail in the carrying out of the agreed terms. And it is quite obvious that members of a club such as this must be subject to some regulation in exercising their rights as conferred by membership of the club; matters which are appropriate to be dealt with by rules and regulations binding the members as, for example, the right of a member under this form is to have the use of the swimming pool at the club free. If it is available at some stage for mixed swimming, a regulation providing that the ladies or the gentlemen should wear swimming togs would appear to be quite a reasonable regulation for the Club to make, and one which if it be desirable could be enforced against members. And so with other facilities which are provided free, and the manner in which a member is to enjoy these privileges may well have to be a subject of certain regulations in the interest of all the members; that does not involve any altering of the obligations of the club to the members under this agreement, but merely controlling of the exercise of their rights. So that I think that ground why the complainant failed cannot substantiated. And I would have thought that even if there was substance in the view that the agreement was alterable by the club itself at any time, that there would be strong reason for saying that was quite severable from the agreement, and would not bring it down.

It would be, I should have thought, of a subordinate character, and within the principle enunciated in *Fitzgerald v Masters* [1956] HCA 53; (1956) 95 CLR 420 at p427, there would be ground for assuming that this was a severable part of this agreement.

The further ground taken by the Magistrate was that there had been a failure of consideration and that that provided a defence. The failures of consideration on which he relied were based on evidence that the sauna bath had not been available at all times when the defendant had required it. The defendant only tried out the privileges of the club I think for a period of one month after the original membership, and according to him at least he appears to have been unfortunate in his efforts to have the use of the bath for a short period. It does appear, on that sauna bath matter that whereas normally there was one sauna bath for male members and another sauna bath for female members, there had been some fire at the club premises at about the time the defendant became a member, and that this fire had rendered one of the gymnasiums unusable for the time being, the result being there was only one sauna bath for both male and female members, and the club (complainant) had regulated the use of this; one day the male members and the alternate day for the female members. For that period the club did not provide free use at any time, in the sense of "at all times" of sauna baths for the members.

The other breach on which the Magistrate founded was related to the swimming pool. It appears that on the occasions in the four visits to the club of the defendant when he wished to use the swimming pool it was closed. The Magistrate construed the contract as one requiring the club to provide the swimming pool at all times for members, and also for them to have the free use of it. I think the Magistrate was in error in construing the agreement as obliging the club to make the swimming pool available to members at all times. That is certainly not in the application for membership of the club. The only privilege given by that application, which is, the base of the contract, was that the swimming pool should be free. It does not say it should be open at all times.

The Magistrate appears to have based the conclusion that there was a breach in that it was not open at all times because of a certificate of membership given some days later by the club to the defendant, which certificate stated "full use at all times of the heated indoor swimming pool".

I agree with the submission that this certificate given later, does contain – generally in somewhat vague terms – the privileges of club members, does not form part of the contract between the club and the defendant in this case. The terms of the contract are to be found in the application form and the acceptance of it, all of which occurred before this purple document called the club members certificate was issued to the defendant.

If it is so that the club was not bound to keep the swimming pool available at all times for members, then there has been no breach of the complainant's obligations as a club to the defendant and that ground on which the Magistrate found there was a failure of consideration is untenable. But even if it was part of the contract that the swimming pool should be available at all times, in considering there was a breach giving rise to a defence here it is to be noted that the only explanation why the swimming pool was closed was that there had been trouble with the filtration, and for the time being it is conceded the swimming pool was closed to enable repairs to be effected to that.

Now the Magistrate relied on these breaches as providing a defence; in my opinion he was in error in treating either of these breaches, assuming they were established, to provide a defence to this claim. There was no defence taken, nor did the evidence support the view that the defendant had repudiated or rescinded this agreement for breaches by the complainant club. That would, of course, raise different issues, depending on the seriousness of the breaches and the inferences that should be drawn from the breaches as amounting to a repudiation of the agreement by the club. The case was not presented that way, and that is not the defence taken.

I am unable to see, even if the Magistrate were correct in concluding that there was a substantial failure of consideration, how it provides a defence to a claim of this character. The relief, if the club has failed in these respects to comply with its obligations, would be some counterclaim against the club by the defendant, for damages, and not an excuse from paying the subscription as a member. This is not a case where there has been some complete and total failure of consideration, which was the basis for the promise by the defendant to pay a subscription; it falls far short of that. What the effect of that would be I need not consider in this case, but I am quite satisfied that such breaches as were alleged by the defendant in his evidence and the Magistrate relied upon, but on which the Magistrate has made no finding, do not warrant the conclusion that there is a good defence to this claim, but at most would give rise if proved to some counterclaim. As I say, I am not called upon to consider whether the defendant might have rescinded the contract for breach; the fact is that he did not purport to do so, and that being so I find no defence to the claim for the amount outstanding.

It remains merely to say that not only am I unable, with all respect, to uphold the Magistrate's reasons for dismissing the complainant's claim, but I am unable, despite the submissions by Mr Keenan, to find any other grounds which might support the decision below.

I think on the evidence that it was clear that the complainant company was entitled to the order that it sought. True it is under the application for membership, as accepted, it may be taken that the complainant club agreed to accept the $220 by instalments of $10 a month and at the time that these proceedings commenced, under the instalment plan the whole of the $200 was not due and payable. But I accept Mr Dwyer's submission that in this case the whole of the amount of $220 was immediately due and payable upon the acceptance of the defendant's application to become a member of this club; that being so, the agreement by the complainant club to accept the nomination fee and subscription fee by instalments was a concession which the defendant could only insist upon so long as it observed the provisions for payment by instalment. The defendant did not: he paid no instalments for a year; I see no reason why the complainant club should both sue for the whole amount which was due and payable, without regard to the concession made to take payment by instalments. In other, words, it was an implied term, that if default was made in payment of instalments under this concession made, then the whole of the debt would be recoverable as being due and payable from the beginning.

The result of what I have said is that I consider that the order should be made absolute and the order below set aside. In lieu thereof there should be an order for the payment of the amount of $200, and I think, subject to what is said, with costs at the same amount as was allowed to the successful defendant below, $71.50. The defendant must pay the costs of this order nisi, but if he applies to me for a certificate he may find this to his advantage. The formal order will be:

> Order nisi made absolute, order below set aside. In lieu, order for complainant for $200 with $71.50 costs. Defendant to pay costs of order to review. I grant the certificate under the *Appeal Costs Fund Act*.

APPEARANCES: For the complainant/applicant Academy of Health & Fitness Pty Ltd: Mr J Dwyer, counsel. David Waxman, solicitor. For the defendant/respondent Reading: Mr J Keenan, counsel. Michael Duffy & Co, solicitors.