

ACPNS LEGAL CASE REPORTS SERIES

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KABBARA & ORS V AUSTRALIAN NATIONAL SPORTS CLUB INCORPORATED [2020] NSWSC 497

Supreme Court of New South Wales, Rein J, 1 May 2020

Whether terms can be implied into the constitution of an incorporated association for disciplinary fairness.

Key words: Incorporated Association, New South Wales, Procedural Fairness, Sporting Club, Expulsion, Implied Terms in Constitution, COVID Hearing

1. The Australian National Sports Club Incorporated (the Club) is registered under the provisions of the *Associations Incorporation Act 2009* (NSW). The Club had purportedly dismissed the members of the Club's Management Committee and replaced the Management Committee with an 'Interim Caretaker Committee of three Life Members'. There were 19 members of the Club (the plaintiffs) who were expelled by the Club and claimed that their expulsion had no proper basis.
2. The hearing was due during the COVID-19 virus restrictions, and it was agreed that the matter would be dealt with by three 'test' members and by the court making a determination on agreed questions, with other matters to be determined at a later date.
3. The two agreed questions were:
 1. Was there an implied term of the Constitution that no General Member would be expelled from the Club without first being afforded procedural fairness?
 2. Was there an implied term of the Constitution that no General Member would be expelled from the Club unless they had:
 - (a) persistently and wilfully acted in a manner prejudicial to the interests of the Club; or
 - (b) persistently refused or neglected to comply with a provision of the Constitution?
4. The only reference in the Constitution was:

22.0 Disciplining of General Members

22.1 A complaint may be made by any General Member or Life Member of the Club that a General Member of the Club:

(a) has persistently refused or neglected to comply with a provision or provisions of these rules;
or

(b) has persistently and wilfully acted in a manner prejudicial to the interests of the Club.

22.2 On receiving such a complaint, the Management Committee shall deal with the complaint in accordance with the current Policy and Procedures Manual.

5. There was no evidence that a Policy and Procedures Manual was ever created by the Club.

Expulsion Term

6. The plaintiffs contended that an expulsion term was to be implied on one of three alternative bases:

- a) From the express words of the Constitution;
- b) From the nature of the contract i.e. as a legal incident of the class of contract to which the Constitution belonged;
- c) To give the Constitution effective operation.

7. The Club argued that:

- a) The Constitution was entirely effective in its operation without the expulsion term;
- b) The expulsion term was not so obvious that it went without saying;
- c) The expulsion term was not capable of clear expression and the plaintiffs were seeking to 'add conditions to the exercise of that (otherwise) clearly stated power', and in effect were 'redrafting the Constitution';
- d) If an exclusion clause was read as imposing a restriction or precondition on the power to expel there was no power in the Club to expel a General Member at all and the Courts should be astute to adopt a construction which would preserve the validity of a contract;
- e) Nothing in the authorities on incorporated associations supported the proposition that terms in the nature of the expulsion term are implied as a matter of law into the constitutions of incorporated associations.

8. The court found that the term was implied from the express words of the Constitution, saying (at [31]):

[I]t is the Plaintiffs' proposed construction of the Constitution that prevents the Constitution from having no real content for grounds of expulsion, and I agree that it is most unlikely that it was intended that the Club could expel a member on any basis whatsoever without members being informed of what the basis might be.

Fairness Term

9. The plaintiffs raised the same three contentions for an implied fairness term. The court applied the second contention that it was an implication in law from the nature of the contract. It noted that there was nothing in the constitution which contradicted or ousted the requirement for fairness.

10. The court noted that *Hornby v Narrandera Ex-Servicemen's Club Ltd* [2001] NSWSC 235; *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470; (2002) 191 ALR 759; and *Samuel v St George Leagues Club Ltd* (NSWSC, 20 October 1992, Powell J, unreported) all made clear that expulsion (or suspension) must be exercised in accordance with the rules of natural justice (unless the rules are excluded expressly or by necessary implication) and that those rules were capable of ascertainment.

11. Thus, the court found that both the expulsion and fairness term were implied into the constitution. The rest of the proceedings are to be considered at a later date.

IMPLICATIONS



The importance of the constitution, which in incorporated associations is a contract, and of following its terms is borne out in this case. Terms can under certain conditions be implied into written contracts, and this is what occurred in this case. Part of the root cause of this situation was the Club not having a Policy and Procedures Manual (PPM) dealing with such matters. The court noted that (at [37]):

The Club's failure to produce a PPM without evidence from it that there is no such document creates an anomaly. If there is no such PPM then, strictly, it might be said that no one can be disciplined under cl 22 because the terms of the Constitution must be followed precisely...and if no one can be disciplined then perhaps there is no power to expel – but this issue does not form part of the Separate Questions.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2020/497.html>

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