

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Benson v Ortho-Bionomy Australia Limited [2023] NSWSC 687

Supreme Court of New South Wales, Richmond J, 22 June 2023

A Company Limited by Guarantee member sought a declaration that her expulsion was invalid.

Key words: Company Limited by Guarantee, New South Wales, Member Expulsion, Natural Justice, Bias, Duomatic Principle, Damages

1. Ortho-Bionomy Australia Limited (OBA) is a public company limited by guarantee which aims to promote and establish an Ortho-Bionomy Community and to educate practitioners in the philosophies and principles of Ortho-Bionomy throughout Australia.
2. Ortho-bionomy is an alternative health practice involving a non-invasive method of therapeutic bodywork designed to address pain and stress patterns and promote structural balance and ease of movement.
3. Ortho-bionomy is a technique similar to osteopathy, but unlike osteopathy, it is not a health profession regulated by the Australian Health Practitioners Regulation Authority.
4. OBA requires its members to abide by a Code of Ethics and its instructors to abide by a Code of Conduct. However, it does not have any power to regulate or control who can practice ortho-bionomy in Australia, and a person can practice ortho-bionomy in Australia without being a member of OBA.
5. Ms Benson had been a member of OBA since its establishment in 2011, and the inaugural chairperson and a board member until 2012. In 2014, she became a member of the board of the Society of Ortho-Bionomy International (SOBI), a US entity and the peak international body for ortho-bionomy, and was its president from 2017 to 2019.
6. Ms Benson has derived income from being both a practitioner and teacher of ortho-bionomy.
7. A series of grievances arose involving Ms Benson's complaints about the behaviour of OBA members and her breaches of particular articles of the Code of Ethics and the Code of Conduct in doing so.
8. The OBA board indicated to Ms Benson that she might be expelled as an OBA member unless certain assurance about her future behaviour was given, and Ms Benson engaged legal representation.

9. The OBA board investigated the appointment of an independent mediator or arbitrator to help resolve this dispute. However, OBA's insurer, AON, indicated that the costs of mediation would not be covered by its insurance policy, and OBA did not have sufficient funds to pay for the mediation itself.
10. The OBA board resolved to terminate Ms Benson's membership, and after legal objections, a general meeting was held to review the board's decision.
11. Ms Benson's lawyer attended the meeting as Ms Benson's proxy and objected to new complaints being made without affording Ms Benson an opportunity to consider these and respond. Another meeting was convened, and a majority of members voted for the expulsion.
12. Ms Benson challenged the expulsion on four grounds being:
 - the required procedure for expulsion of a member under the Constitution was not followed;
 - the requirements of natural justice were not followed;
 - the OBA Board's decision was vitiated by apprehended bias; and
 - the OBA Board failed to give Ms Benson the benefit of the procedures contained in the Grievance Policy for resolving the grievance against her.

Constitutional Adherence

13. The Court noted that the expulsion of a member must strictly follow the procedure laid down in the Constitution.
14. It was argued that there was no resolution of the directors prior to the vote to expel her that the directors had formed the requisite opinion required by the Constitution, as there was no OBA board resolution to this effect recorded.
15. The Court found that the issue had been approved by the directors through their approving the minutes and by the doctrine of unanimous assent, sometimes referred to as the Duomatic principle (based on *Re Duomatic Ltd* [1969] 2 Ch 365). Under the Duomatic principle, anything the directors can do at a formal board meeting, they can do informally if they all agree to it.

Denial of Procedural Fairness

16. Ms Benson argued that none of the matters identified to her by the OBA Board as being matters to which it had regard in reaching its decision, either individually or cumulatively, amounted to an Expulsion Event for the purposes of the OBA Constitution. Further, the OBA Board did not provide reasons as to why the conduct of Ms Benson was unbecoming of a member, or was prejudicial to the interests or reputation of the Company.
17. The Court found that while there might have been technical breaches, the directors were not lawyers, and adequate notice of the claims and an adequate opportunity to meet it was given to Ms Benson.

Apprehended Bias

18. One director of OBA had been the subject of a complaint by Ms Benson about inappropriate advertising and was, in fact, the prosecutor or moving party in the expulsion, making an opening statement at the general meeting.
19. The Court found that there was no evidence that this was the case.

20. Further, the Court found that the statement was balanced and did no more than explain why the OBA Board had proceeded as it had, which was necessary background to the question required by the Constitution to be put to the meeting.

Failure to apply the Grievance Policy

21. Ms Benson argued that she was denied procedural fairness because the OBA Board did not follow the procedures in the Grievance Policy.

22. The Court noted that the Grievance Policy was not part of the Constitution, and there was nothing in the Constitution to require its consideration.

Damages

23. Although the Court did not find that the expulsion was invalid, it did briefly consider the issue of a damages claim.

24. Damages may be awarded for a breach of natural justice or excess of power by an incorporated club or association, on the basis of damages for breach of the contract between the members and the association, founded on its constitution.

25. Ms Benson claimed \$100,000 for loss of income because she was no longer a member of OBA but was unable to establish the quantum.

26. The Court dismissed the matter with costs.

COMMENT



This is a well-written judgment with concise statements of the law of several issues that arise in internal disputes of this type.

It is regrettable that the appointment of an independent mediator or arbitrator was not covered by the OBA's insurance policy, as this might have avoided the expensive and disruptive court proceedings, which presumably its insurance would have to some extent covered.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/687.html>

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