SUPREME COURT OF QUEENSLAND

CITATION:	*Skelton v Australian Rugby Union Limited & Anor* [2002] QSC 193
PARTIES:	**ERNEST SKELTON** (applicant) **v** **AUSTRALIAN RUGBY UNION LIMITED** **(ACN 002 898 544)** (first respondent) AND **QUEENSLAND RUGBY UNION LIMITED** **(ACN 055 120 217)** (second respondent)
FILE NO:	4606 of 2002
DIVISION:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	11 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2002
JUDGE:	Chesterman J
ORDER:	**1. That the application is dismissed.** **2. That the costs of and incidental to the application will be the first respondent's costs in the cause.** **3. Upon the undertaking of the second respondent to abide any order of the court binding on the first respondent, to the extent that such order relates to the ability of the applicant to play in the Brisbane Club Competition, then the application against the second respondent be struck out and there be no order as to costs as between the applicant and the second respondent.**
CATCHWORDS:	INJUNCTIONS – INTERLOCUTORY – MANDATORY – Where applicant prevented from playing amateur rugby union because of suspension – Whether ban was a restraint of trade – Whether ban was in denial of natural justice INJUNCTIONS – INTERLOCUTORY – MANDATORY – Where there was no serious question to be tried – Where balance of convenience favoured respondent *Buckley & Ors v Tutty* (1971) 125 CLR 353, distinguished

Cameron v Hogan (1934) 51 CLR 358, applied
Dugul McDougall Noticeboard Pty Ltd v Touring Car Entrances Group Australia Pty Ltd, Butterworths unreported judgments, BC 200201751, cited
Gamilaroi Boomerangs v Members of New England Group 19 (1999) NSWSC 495, applied
Hall v Victorian Football League [1982] VR 64, distinguished
Network Ten Ltd v Fulwood, Butterworths unreported judgments, BC 9501085, applied
Smith v South Australian Hockey Association Inc [1988] 48 SASR 263, considered

COUNSEL: Mr J. Griffin QC with Mr N. Ferrett for the applicant
Mr D. Andrews SC with Mr D. A. Kelly for the first respondent
Mr A. Musgrave for the second respondent

SOLICITORS: Tutt & Quinlan for the applicant
Freehills for the first respondent
Corrs Chambers Westgarth for the second respondent

[1] **CHESTERMAN J:** Upon his undertaking to "abide by the rules of the game of rugby union, refrain from involvement in foul play or any other conduct which might bring the game of rugby union into disrepute" the applicant seeks an injunction until trial restraining each of the respondents from enforcing or giving effect to the first respondent's determination that no person should play in any game of rugby football in any competition controlled or authorised by either of the respondents during any period for which the person had been suspended from playing any other code of football for "foul play, code of conduct violation, doping offence or other disciplinary matters".

[2] On 4 September 1999 the applicant was playing a game of rugby league football for his club, Deception Bay, against an opposing team, Brothers Juniors, at Bray Park in Brisbane. The teams were members of Brisbane 2nd Division of the Queensland Rugby League Incorporated ("QRL") and were participating in a competition organised by and conducted under the auspices of the QRL.

[3] Just before half-time one of the officiating touch judges observed the applicant twice kick an opposing player who was lying on the ground. He immediately went onto the field and reported the incident to the referee who thereupon dismissed the applicant from the field for the rest of the match. The applicant became enraged, and, as he left the field he deviated towards the touch judge on the sideline. His intent must have been obvious because a number of his team-mates called out to him to go to the dressing rooms and not to make things worse. He ignored the advice and, approaching the touch judge, punched him in the face causing him to fall to the ground striking his head on an advertising sign.

Play was suspended. The police were called and the applicant was removed from the ground. He subsequently pleaded guilty to a charge of simple assault.

[4] On 8 September 1999 the QRL's South East Division Judiciary Committee met to consider two charges brought against the applicant: kicking another player and behaving in a way contrary to the true spirit of the game.

It is not clear whether the applicant appeared before the committee but he was represented by an official from his club. He pleaded guilty to the second charge which arose out of his assault on the linesman. He was found guilty of both charges and suspended from playing rugby league for 12 months with respect to the first charge and 10 years with respect to the second. He was advised of his right of appeal but did not exercise it.

[5] In December 1999 the applicant joined the Northern Suburbs District Rugby Union Club (now Norths-QUT Rugby Union Football Club Inc) ("Norths") and commenced training. In or about January 2000 he completed and signed a "registration and insurance form" which was a prerequisite to his becoming entitled to play rugby union. The form contains a lengthy clause in small, close spaced type which contains the words:

> "I warrant that I have fully disclosed any suspension I may be serving imposed on me by any sporting body".

The applicant at no time disclosed to his club or either of the respondents the fact of his suspension by the QRL. He claims, and I would accept, that he did not read the warranty. He played for Norths for the whole of the 2000 season.

[6] Rugby Union players are obliged to register annually. In January of February of 2001 the applicant completed another registration form. He played again for Norths in the 2001 season but on Saturday 16 June 2001 he was informed by his club's president, Mr Egan, that he could no longer play because of his suspension by the QRL. He has not since played any game of rugby union though he has remained involved in his club's affairs and has assisted with the administration of some teams. He did not attempt to register for the 2002 seasons because of the information that he could not play during the period of his suspension.

[7] On 28 March 2000 (i.e. after the applicant had first registered to play with Norths but before his second registration) the general manager of the first respondent sent by facsimile transmission to the second respondent a directive which read:

> "Please be advised that players suspended by other sporting codes by way of foul play, code of conduct violations, doping offences or other disciplinary matters <u>are not permitted to participate in rugby</u> for the duration of their suspension."

On 16 June 2001 the chief executive officer of the second respondent telephoned Mr Egan to tell him of the applicant's suspension and of the first respondent's determination of 28 May 2000. He insisted that the applicant not be permitted to play any further games for Norths.

[8] The Brisbane inter-club rugby union competition is broken up into two 9 game competitions for the premier grade in which the applicant played. The first competition ended last weekend, 1, 2, June. The second competition will end on the weekend 1, 2, September 2002.

[9] The application for the injunction was very earnestly argued on behalf of the applicant. It is clear that he is a talented player who deeply regrets his misbehaviour

in September 1999. His conduct while playing rugby union was exemplary. He has shown no tendency towards aggression or violence of any sort. He is well regarded by his club which has supported him whole heartedly in the litigation and in earlier attempts to overturn the QRL's suspension. Mr Egan urged the QRL to review the severity of its suspension, provided QRL officials with the opinion of a member of the second respondent experienced in judiciary committees to the effect that the suspension was excessive, as well as a statutory declaration from the touch judge involved in the initial incident which substantially retracted his earlier complaint.

Having reinvestigated the incident the QRL reaffirmed its decision. It concluded that the version of events on which it made its decision was correct and that there was no basis for reconsidering the period of suspension even if it had power to do so. Its decision was communicated to Mr Egan by a letter dated 3 May 2002. The applicant commenced proceedings on 23 May 2002.

[10] Some further facts should be mentioned briefly. Although it is notorious that rugby union players at representative level can, and do, earn substantial incomes from the game the formal agreement between the second respondent and its affiliates, including Norths, has as its foundation principle that:

> "The QRU and its affiliates agree that at club level the game of Rugby Union should remain amateur. By signing this agreement, the affiliate and the QRU are committing themselves to not only this as a principle but as a guide to how they treat their players, coaches and administrators. . . ."

The applicant played rugby union football at club level. He was once selected to play in a state representative side and his coach, who is also a state selector for the second respondent, rates his prospects of further representative honours quite highly. Nevertheless the fact is that he has not now played for a year and his chances of becoming a professional player are conjectural.

[11] The applicant advances three reasons to support his submission that the prohibition on his playing rugby is invalid. They are:

(a) the directive is an unreasonable restraint of trade
(b) the application of the directive to him occurred in circumstances which denied him natural justice
(c) the directive is invalid.

It is perhaps easier to deal with the last point first. The first respondent's power to make such a directive binding on the second respondent was not the subject of argument and it is not possible to form even a tentative opinion on the point.

[12] The applicant relies upon the principle to be found in *Buckley & Ors v Tutty* (1971) 125 CLR 353 and *Hall v Victorian Football League* [1982] VR 64. Those cases are different from this in two significant respects. The first is that Tutty was a professional footballer who was restrained by the rules of the New South Wales Rugby League from leaving the club where he played for another one where he might improve his position. Hall was a young man who wished to embark upon a career of professional football but was limited by the rules of the Victorian Football League from playing for a club other than one in the district where he lived. The rights of both to pursue their chosen occupation was restricted. By contrast the applicant complains that he is prevented from playing as an amateur, without

remuneration. It is true that he hopes that he may be selected to play at a level where he would be remunerated but the reality is that for the seasons he played with Norths he did so for pleasure, not money. The injunction is to allow him to play as an amateur not to overcome a restraint which limits his ability to follow his chosen occupation. There is no restraint of "trade".

[13] The second distinction is that the other cases involve restrictions which were of general application to all footballers in their respective leagues. They were rules for the general regulation of the sport and, in particular, for the allocation of players to and between clubs. The applicant is prohibited from playing rugby because of a personal disqualification. He, personally, is precluded by reason of his own particular past misconduct. The object of the directive is not to restrict the movement of players between clubs or to limit the number of perspective employers for footballers but to deter violence or other misbehaviour by players on the football field, to protect referees and linesmen and to protect the reputation of the sport of rugby union. Its restriction on the applicant's freedom to play football is merely incidental.

[14] These two considerations bring the applicant within the ambit of the remarks of the High Court in *Cameron v Hogan* (1934) 51 CLR 358 at 370-1:

> ". . . except to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of its rules has been committed, cannot maintain any action directly founded upon that complaint . . . At common law as well as in equity, no actionable breach of contract was committed by an unauthorised resolution expelling a member of a voluntary association, or by the failure on the part of its officers to observe the rules regulating its affairs, unless the members enjoyed under them some civil right of a proprietary nature . . . One reason which must contribute in a great degree to produce the result is the general character of the voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature. They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and a material advantage. . . . unless there was some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract."

[15] The applicant's complaint, in essence, is that the respondents will not let him join in a game they control and organise for the enjoyment of players and spectators. The injunction sought is to compel the second respondent to accept the applicant despite the fact that he does not conform to the standards adopted for participation in their voluntary organisation. The court is asked to override the respondents' determination of eligibility based on personal fitness to take part in their sport. The cases since *Cameron v Hogan* have shown a marked reluctance in the courts to do so, at least where the exclusion does not impact upon the livelihood or property of the person excluded. The remarks of Bryson J in *Gamilaroi Boomerangs v*

Members of New England Group 19 (1999) NSWSC 495 are apposite. His Honour said:

> "Unless litigation relates to protection of the important subjects of . . . livelihood interests and property rights, the policy against intervention stated in 1934 is just as pressing . . . now as . . . then. If a voluntary association relates only to sporting or social purposes I see nothing of substance to be achieved by the . . . judiciary making themselves responsible for resolution of internal disputes about who should be members or who should be officers. It is not practical to hope that persons can be compelled to remain in voluntary association together or that their association will flourish under legal compulsion; if people were compelled to continue in an association on a basis which they no longer wished for, they readily could and readily would desist from associating together. Liberty of association is a deeply held value and includes liberty to choose with whom one will associate, and it cannot effectually be controlled. A policy in which the courts intervene where economic interests are affected, but do not otherwise involve themselves in sporting or social clubs, appears to me to set the appropriate outer boundary for Law's Empire."

[16] The absence of any economic benefit in the applicant's being allowed to play club rugby is the obstacle on which his second basis also founders. There are many cases in which the courts have intervened where exclusion or suspension from membership of a club or association has occurred in breach of the organisation's rules, or of natural justice. All the cases are, however, predicated upon the person involved suffering some diminution of rights of property, livelihood or trade. As Cox J said in *Smith v South Australian Hockey Association Inc* [1988] 48 SASR 263 at 264-5:

> "The civil courts do not sit to hear appeals from the disciplinary tribunals of voluntary sporting associations. The starting point for any discussion of the legal principles involved is *Cameron v Hogan* . . . A member of a sporting body . . . who complains that he has been prejudiced by some failure to observe the club's rules must show that the rules were intended to confer upon him a contractual right for the performance of the particular duty upon which he insists or that he has in some other respect been deprived of a proprietary or pecuniary right or interest. . . . It is in keeping with the recent trend of authority to see an impediment upon a member's right to earn his living as an adequate justification for the courts' interference in the affairs of a voluntary association . . . However, the general policy of the courts with respect to such bodies is not to be undermined by extravagant or specious claims of pecuniary or other injury. An alleged impairment of the right to earn a living must be more than merely coverable or conjectural or insubstantial if it is to provide a jurisdiction basis for . . . intervention . . ."

[17] There is no relevant contract from the applicant and the first respondent. There were contracts made annually for the years 2000 and 2001 but there has been no contractual relationship between them since, at the latest, 1 January 2002. There is no pecuniary stake in the dispute. The contracts did not mention money. Their

terms were that in consideration of the first respondent registering the applicant as a player he promised not to make a claim against them if he were injured.

[18] For the reasons I have expressed I doubt whether there is a serious question to be tried but the points were not argued at length and the applicant may have an arguable case for relief which he may establish at trial. Even if there were a serious question to be tried the balance of convenience is against the grant of an interlocutory injunction.

[19] Although negative in form the injunction sought by the applicant is mandatory in form. It does not seek to preserve the *status quo* but to bring about a new state of affairs. The applicant is not registered to play rugby for the 2002 season. The injunction seeks to compel the first respondent to register him as a player and to compel the second respondent to allow him to participate in its competition, not for money but for enjoyment. To allow him to do so will contravene the first respondent's policy designed to enhance sportsmanlike, non violent, conduct amongst players.

[20] The applicant does not complain that he was dealt with unfairly by the QRL. Obviously he regards the length of the suspension as severe but does not criticise the QRL from not affording him natural justice or not dealing with him according to its rules. His complaint is that the respondents, and the first respondent in particular, should not adopt a policy of enforcing disciplinary suspensions imposed by other football codes without examining the merits of each particular case. It is said on his behalf that a rugby union judiciary committee would not have dealt so harshly with an assault upon a match official.

[21] In my opinion this is a debate in which the court should not participate, especially on an interlocutory hearing. I apprehend that the courts ought to be particularly reluctant to interfere with the standards set by sporting bodies for the conduct of their sport or with their determination of the personal qualifications required of a person who wishes to take part in their sport.

[22] The respondents take the point that the applicant waited a considerable time before making his application and that a delay disentitles him to relief. The application is made almost a year after he was first prohibited from playing rugby. There is no explanation for the delay apart from Mr Egan's affidavit which shows that the applicant was advised to attempt to persuade the QRL and/or the first respondent to reconsider the suspension before resorting to litigation. Mr Eagan also recounts events since 23 April 2002 when the QRL agreed to re-examine the disciplinary action taken against the applicant. However nothing is advanced to show what happened between 16 June 2001 and 23 April 2002 by way of any justification for delaying the application. In the absence of some compelling reason it is unsatisfactory for the applicant to wait a year and then move the court on the basis the applicant must immediately be allowed to play football for the balance of the season. As Young J noted in *Network Ten Ltd v Fulwood*, Butterworths unreported judgments, BC 9501085:

> ". . . the court expects in cases of interlocutory injunction that people will act promptly."

The same point was made in *Dugul McDougall Noticeboard Pty Ltd v Touring Car Entrances Group Australia Pty Ltd*, Butterworths unreported cases BC 200201751.

[23] The reality is that the applicant has served only one year of a ten year suspension for striking a match official in a fit of temper. He can scarcely say that it is urgent that he be allowed to play in advance of trial which will determine whether he has a justified complaint.

[24] I dismiss the application but will make directions for a speedy hearing of his actions. The costs of and incidental to the application will be the first respondent's costs in the cause. I order further that upon the undertaking of the second respondent to abide any order of the court binding on the first respondent, to the extent that such order relates to the ability of the applicant to play in the Brisbane club competition, then the application against the second respondent be struck out and there be no order as to costs as between the applicant and the second respondent.