# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Carberry v Drice as Rep of Brisbane Junior Rugby Union (An unincorporated Body)* [2011] QSC 016 |
| PARTIES: | **CHRISTOPHER MICHAEL CARBERRY**<br>(applicant)<br>**v**<br>**DESMOND DRICE as representative of BRISBANE JUNIOR RUGBY UNION (AN UNINCORPORATED BODY)**<br>(first respondent)<br>**BRISBANE JUNIOR RUGBY UNION INC**<br>(second respondent)<br>**QUEENSLAND JUNIOR RUGBY UNION INC**<br>(third respondent)<br>**QUEENSLAND RUGBY UNION LIMITED (ACN 055 120 217)**<br>(fourth respondent)<br>**JOHN WALKER and ALAN WILSON and GRAHAM HYND**<br>(fifth respondent) |
| FILE NO/S: | 5724/09 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 11 January 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 August 2010 |
| JUDGE: | Margaret Wilson J |
| ORDER: | **The Court orders:**<br>**1. that the claim against the fourth respondent be dismissed;**<br>**2. that the applicant pay the fourth respondent's costs of and incidental to the proceeding to be assessed on the standard basis; and**<br>**3. that the applicant and the first, second, third and fifth respondents make written submissions about the form of the orders and costs by 4pm on 31 January 2011 and insofar as the proceeding concerns those parties, the applications be adjourned to a date to be fixed.** |
| CATCHWORDS: | ASSOCIATIONS AND CLUBS – JURISDICTION OF THE COURTS – INTERFERENCE IN INTERNAL MANAGEMENT – GENERALLY – where first to fourth |

respondents regulated and controlled rugby in Brisbane and throughout Queensland – where applicant held two paid positions and two unpaid positions as rugby coach – where applicant attended junior rugby game and punched volunteer first aid officer – where applicant suspended from being a rugby coach and excluded from rugby grounds – where applicant seeks declarations and injunctions against respondents – where first to third respondents voluntary associations – whether Court should interfere in conduct of first to third defendants – whether applicant's livelihood or reputation at stake – whether Court should grant declaratory relief – whether applicant has real interest to establish

DAMAGES – GENERAL PRINCIPLES – where applicant seeks damages from the first, second, third and fourth respondents – where applicant does not claim to be member of or in contractual relationship with them – whether applicant can recover damages

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where respondents submitted that applicant's statement of claim does not disclose any action – whether statement of claim embarrassing

BANKRUPTCY – ADMINISTRATION OF PROPERTY – PROPERTY AVAILABLE FOR PAYMENT OF DEBTS – PROPERTY DIVISIBLE AMONGST CREDITORS – PROPERTY BELONGING TO OR VESTED IN BANKRUPT AT COMMENCEMENT OF BANKRUPTCY – where applicant undischarged bankrupt at all material times – whether applicant's claims against first, second and third respondents for declaratory and injunctive relief and his claim against fifth respondent for declaratory relief vest in trustee in bankruptcy – whether claims divisible amongst creditors

*Associations Incorporation Act* 1981 (Qld)
*Bankruptcy Act* 1966 (Cth), ss 58, 116
*Supreme Court Act* 1995 (Qld), s 128

*Baldwin v Everingham* [1993] 1 QdR 10, cited
*Cameron v Hogan* (1934) 51 CLR 358, applied
*Cox v Journeaux (No 2)* (1935) 52 CLR 713, cited
*Edgar and Walker v Meade* (1916) 23 CLR 29, cited
*Faulkner v Bluett* (1981) 52 FLR 115, cited
*Forster v Jododex* (1972) 127 CLR 421, cited
*Griffiths v Civil Aviation Authority* (1996) 67 FCR 301
*Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660, applied
*Kovacic v Australian Karting Association (Qld) Inc* [2008] QSC 344, cited

*London Assn for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, cited
*Metsikas v Quirk* [2010] NSWSC 756, cited
*Mutasa v AG* [1980] QB 114, cited
*Randall v Deputy Commissioner of Taxation* (2008) 174 FCR 441, cited
*Rose v Boxing New South Wales* [2007] NSWSC 20, applied
*Rowland v Dawbarn* [1925] St R Qd 52, cited
*University of Technology Sydney v Gerrard* [2001] NSWSC 368, cited

COUNSEL: R Perry SC for the applicant
MD Martin for the first, second, third and fifth respondents
D O'Brien for the fourth respondent

SOLICITORS: Lynch Morgan Lawyers for the applicant
ClarkeKann for the first, second, third and fifth respondents
Mullins Lawyers for the fourth respondent

[1] **Margaret Wilson J:** On 1 June 2003 the applicant the attended an Under 13 rugby game played at Tarragindi. Upset by what he regarded as a refusal to treat his injured son, he punched a volunteer first aid officer in the face. The next day he was suspended from being a Brisbane Junior Rugby Union coach, and on 13 February 2004 he was excluded from rugby grounds for life pursuant to the Brisbane Junior Rugby Union Competition Rules.

[2] In this proceeding he seeks various forms of relief arising out of the imposition of the ban.

[3] These are interlocutory applications in which –

(a) the first, second, third and fifth respondents seek to strike out the claim or alternatively to strike out the statement of claim or certain paragraphs of it;
(b) the fourth respondent seeks to strike out those paragraphs of the statement of claim which relate to it, or alternatively summary judgment, or alternatively a stay of the claim against it; and
(c) the applicant seeks, *inter alia*, a declaration of deemed admissions.

[4] In considering the applications in so far as they relate to the pleadings, I shall assume that the facts alleged in the statement of claim could be established at trial.

**The parties**

[5] The applicant was a bankrupt at the time of the incident, and he remained so until his discharge from bankruptcy on 20 November 2010. At the time of the incident, he held two paid positions as a rugby coach (one of them as a junior rugby coach), and two unpaid positions as a junior rugby coach.

[6] Brisbane Junior Rugby Union was an unincorporated association. The first respondent Drice has been sued as its representative. Although a person cannot be

appointed to represent a voluntary association as such,[1] no point was taken about the capacity in which the first respondent was joined.

[7] On 4 February 2004 the second respondent Brisbane Junior Rugby Union Inc was incorporated under the *Associations Incorporation Act* 1981 (Qld). On 21 February 2004 it ratified the Brisbane Competition Rules previously made by the unincorporated association.

[8] The third respondent was an association incorporated under the *Associations Incorporation Act* 1981 (Qld). Under its constitution it had power to regulate junior rugby union matches played in competitions in Queensland. It was affiliated with the fourth respondent.

[9] The fourth respondent was a company duly incorporated. Under its constitution it was empowered to control rugby throughout Queensland.

[10] On 21 November 2004 the third respondent appointed the fifth respondents as members of its Appeals Committee.

**This proceeding**

[11] This proceeding was commenced by an originating application filed on 29 May 2009.

[12] On 16 June 2010 P Lyons J ordered that it continue as if commenced by claim, and that the applicant file a statement of claim. The applicant did so on 16 July 2010, and subsequently defences were filed by the first, second, third and fifth respondents on 27 July 2010 and by the fourth respondent on 6 August 2010. The applicant filed a reply to the first, second, third and fifth respondents' defence on 12 August 2010.

[13] It is necessary to recount some of the factual saga in order to gain any appreciation of what is claimed.

**The disciplinary proceedings**

[14] On 2 June 2003 the following notice was issued to the applicant –

> **"QUEENSLAND JUNIOR RUGBY UNION INC.**
> **BRISBANE JUNIOR RUGBY UNION COMPETITION**
> **COMMITTEE (BCC)**
> **NOTICE OF SUSPENSION PENDING THE HEARING AND RESOLUTION OF THE MATTER Rule 35.4**
>
> Mr Chris Carberry
> Coach
> Souths Under 15 and South Region Under 15 2003 Teams
>
> The BCC has received information concerning an incident during an Under 13s game at Souths Juniors, Shaftesbury Street, Tarragindi on Sunday 1st June 2003 in which it is alleged you punched a First Aid Officer, Shay Smith, in the face.

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[1] *London Assn for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, 21; *Rowland v Dawbarn* [1925] St R Qd 52.

The BCC through a motion has started Show cause proceedings against you Pursuant to Rule 35.6 and due to the seriousness of this matter, has directed that you be Suspended from any involvement in Brisbane Junior Rugby Union, including your involvement as a Coach for the Souths Under 15 and South Region Under 15 2003 Teams, pending the hearing and resolution of the matter.

A Show Cause Notice will be issued to you within the near future.

Elliot Hutchinson
Secretary/Competition Registrar
Brisbane Competition Committee
2nd June 2003"

[15] On 11 June 2003 a show cause notice was issued to him in the following terms –

**"QUEENSLAND JUNIOR RUGBY UNION INC. BRISBANE JUNIOR RUGBY UNION COMPETITION COMMITTEE (BCC) NOTICE TO SHOW CAUSE PURSUANT TO RULE 35.6 OF THE BRISBANE COMPETITION RULES**

Mr Chris Carberry
Southern Districts Junior Rugby Union Club

The BCC is concerned that the your actions on 1st June 2003 when attending the Under 13 game Souths (White) versus Norths (Gold) at Souths Juniors, Shaftesbury St, Tarragindi, have brought the game into disrepute.

The BCC hereby requires you to show cause (pursuant to the provisions of Rule 35.6 of the Brisbane Competition Rules) why a penalty should not be imposed on you with relation to an alleged breach of those Rules and associated Codes of Conduct.

A hearing will be held by the BCC at Queensland Rugby Union Mallon Street, Bowen Hills, commencing at 6:00pm on the 12th day of June, 2003.

**Particulars of Allegations**

For the purposes of the show cause hearing, the BCC notifies you that it is concerned that your actions in striking a First Aid Officer appointed by a Club may have the effect of bringing the game into disrepute. At the hearing, we will require you to provide an explanation concerning the following matters:-

1. Breach of Competition Rule 4 CODE OF CONDUCT, specifically:
   - 4.1 A member, coach or official shall not at anytime act in a manner detrimental towards the game or spirit of Rugby Union

   and
   - 4.6 All players, officials and supporters have an obligation to comply with the Junior Rugby Code of Conduct in or about any junior match in which they are involved.

2. Breach of Junior Rugby Code of Conduct, specifically:
   - a. Coach's Code point 18.
     Set a good example by personal behaviour.

   and
   - b. Parents Code point 8.

Support all efforts to remove verbal and physical abuse from Junior Rugby.

3. Breach of ARU Code of Conduct for Players, Coaches, Referees and Administrators, specifically paragraphs:

3.(a) not to abuse, threaten or intimidate a referee, touch judge or other match official, whether on or off the field, or a selector, coach, manager or other team official;

(b) not to use crude or abusive language or gestures towards referees, touch judges or other match officials or spectators;

(c) not to conduct themselves in any manner, or engage in any activity, whether on or off the field, that would impair public confidence in the honest and orderly conduct of matches and competitions or in the integrity and good character of participants; and

(d) not to do anything which adversely affects or reflects on or discredits the Game of Rugby Football, the ARU, any Member Union or Affiliated Union of the ARU, or any squad, team, competition, tournament, sponsor, official supplier or licensee, including, but not limited to, any illegal act or any act of dishonesty or fraud.

Supporting Documentation

The following attachments support the Allegations:

1. Statement by Ken Hunter President of Southern Districts Junior Rugby Union.
2. Statement by First Aid Officer Chez Smith [sic].
3. Statement by Rebecca Hyde

Elliot Hutchinson
Secretary/Competition Registrar
Brisbane Competition Committee
Disciplinary Committee

Dated: 11th June 2003"

[16] The hearing was adjourned to 16 September 2003. The applicant retained Mr Gundelach of counsel to represent him. The hearing was adjourned again, pending the outcome of a proceeding in the Holland Park Magistrates Court on 2 October 2003.

[17] By letter to the applicant dated 10 December 2003 on the letterhead of the unincorporated association, Mr Hutchinson wrote to Mr Gundelach inquiring as to the outcome of the Magistrates Court proceeding, and advising that in the absence of a response by 18 December 2003 the disciplinary hearing would be reconvened.

[18] The second respondent was incorporated on 4 February 2004.

[19] On 9 February 2004 the following notice was issued to the applicant –

**"QUEENSLAND JUNIOR RUGBY UNION INC.**
**BRISBANE JUNIOR RUGBY UNION COMPETITION COMMITTEE (BCC)**

**NOTICE TO SHOW CAUSE PURSUANT TO RULE 35.6 OF THE BRISBANE COMPETITION RULES**

Mr Chris Carberry
Southern Districts Junior Rugby Union Club
7 Eric Road
HOLLAND PARK QLD 4121

By Mail:

CC: Adrian Gundelach
Bennett Chambers
Level 6
Inns of Court
107 North Quay
BRISBANE QLD 4000

By facsimilie: 32363578

The attached Notice to Show Cause, was set out to be heard on 12th June 2003 and was adjourned at the request of your Barrister Adrain P Gundelach [sic], re-convened for 16th September 2003 and again adjourned at the request of Adrian Gundelach. As there seems to be no further outstanding action to cause further delay, the hearing has been reconvened and will be held by the BCC at Queensland Rugby Union, Mallon Street, Bowen Hills, commencing at 7:00pm on the 12th day of February, 2004.

If you have misplaced any of the documentation accompanying the original Show Cause please inform me and I will send it out again.

Attachment:

1. Notice of Show Cause issued on 11th June 2003 to Mr Chris Carberry.

Elliot Hutchinson
Secretary/Competition Registrar
Brisbane Competition Committee
For Disciplinary Committee

Dated: 9th February 2004"

[20] On the morning of 12 February 2004 the applicant emailed a letter to the chair of the BJRU Disciplinary Committee in these terms –

"I am unable to establish the significance of a 're-issue' of a show cause. I will take it that the old process has for some reason under Rules with which I am not familiar, gone 'stale'.

Tonight would therefore be the first return date.

Ignore for a moment that I was served by e-mail (specifically prohibited I understand). Mr. Gundelach received his copies by ordinary mail on 10 Feb.

Mr. Gundelach was able to spare me a few minutes today. He is in Trials all week. He is unavailable tonight.

He has seen my e-mail to the Secretary proposing you proceed in my absence. He agrees, and asks that your published reasons be set out to deal with each of the Particulars of allegations in the Notice. Should you find I have brought the game into disrepute, he will be available to appear on an adjourned date to make submissions on penalty.

You may care to verify this with him direct after Court today. I understand you are on the same floor.

> The Secretary has assured me you are now in possession of all relevant correspondence. He will know what supporting documents accompanied Minute 17 2002/3 which caused the six (6) members of the B.C.C. to suspend me and elect the Show cause process, as distinct from the other options, and again on 12 June when the original show cause issued. He says he didn't have my letter 4 June 2003, but you now have it I am told.
>
> I do not want this process delayed any further. Registrations for 2004 are due next week. There are presently 35 families in my Under 16 Squad awaiting an outcome.
>
> So lets [sic] not quibble about technicalities. Just proceed with the evidence to date (I have been given three statements - Hunter, Smith and Hyde). If there is any other last minute material, please feel free to judge it on its merits in my absence.
>
> But Mr. Gundelach is quite specific – please set out your findings to follow the form of the Particulars, so that his submissions on penalty, if required, can follow."

[21] The applicant did not appear at the disciplinary hearing. The Disciplinary Committee found –

> "… that on 1 June 2003 at Southern Districts JRU, Tarragindi [Chris Carberry] was in breach of the BJRUCR in that [he], as a parent, supporter and team official, breached rule 4.1 and 4.6 of the BJRUCR, and the Junior Rugby Code of Conduct specifically:-
>
> (a) Coach's Code, Points 18;
> (b) Parent's Code, Point 8.
>
> **CHRIS CARBERRY**
>
> is hereby excluded from rugby grounds for life, pursuant to Rule 36.2(vi) of the BJRU Competition Rules.
>
> The rights of appeal are pursuant to Rule 37 of the BJRUCR."

[22] The applicant appealed to the fourth respondent's Judiciary Appeals Committee. On 13 May 2004 he appeared before that committee, and submitted that it did not have jurisdiction to hear the appeal. The committee upheld his objection to its jurisdiction, and remitted the matter to "the BJRU".

[23] The fifth respondents were appointed members of the third respondent's Appeals Committee on 21 November 2004.

[24] The applicant alleges that on 22 November 2004 the fifth respondent fixed 8 December 2004 as the date upon which it would hear and determine his appeal; that on 4 June 2005 the fifth respondent delivered a written decision finding, *inter alia*, that it had jurisdiction to hear and determine the appeal; and that on 9 August 2005 the fifth respondent terminated its hearing of the appeal on the ground the applicant had not brought any appeal before it.

[25] The applicant alleges that on 26 June 2004 the then chairman of the fourth respondent's Judiciary Appeals Committee contended at a general meeting of the fourth respondent that the decision on 12 February 2004 was valid and had the effect of excluding the applicant from entry to all grounds on which rugby is played

worldwide. He alleges that the fourth defendant has evinced an intention not to be bound by an order of the Court in favour of the applicant against the first, second and third respondents. Further, he relies on provisions of its memorandum of association by which it is empowered to control rugby throughout Queensland, and to enforce rules governing the conduct of officials of rugby clubs, bodies and associations within its jurisdiction. He contends that it controls the right of the public, including the applicant, to enter the Ballymore Sports Ground and Suncorp Stadium, when rugby matches controlled by it are played there.

**Statement of claim**

[26] The statement of claim is prolix.

[27] In essence the applicant alleges that the first respondent (the unincorporated association) had no power to issue the initial suspension notice and that he was denied procedural fairness in relation to its determination to ban him for life from attending any rugby grounds. He also challenges the validity of later decisions of the other respondents.

[28] He claims to have suffered various losses in consequence of their conduct:

(a) in consequence of the conduct of the first respondent – suspension from involvement in Brisbane Junior Rugby Union including performance as a coach for two teams; loss of reputation; inconvenience, vexation and distress;

(b) in consequence of the conduct of the second, third and fourth respondents – exclusion from grounds on which rugby is played worldwide; inability to enter rugby grounds on which junior rugby matches in which his son and grandson were participants were being played; inability to attend any social function on a rugby ground worldwide; inability to work as a rugby coach in Brisbane or elsewhere, or to renew his accreditation as a rugby coach; loss of reputation; inconvenience, vexation and distress; loss of income.

[29] The applicant seeks various declarations and injunctions against the first, second and third respondents. As against the fourth respondent he claims an order that it give effect to the various declarations and injunctions claimed against the first, second and third respondents. He claims damages against the first, second, third and fourth respondents for pecuniary loss and for inconvenience, vexation, distress, loss of reputation and disappointment. As against the fifth respondent, he seeks a declaration that its decision that it had jurisdiction to hear and determine an appeal against the decision banning him for life from attending any rugby grounds is void.

[30] Counsel for the respondents submitted that the applicant's pleading does not disclose any cause of action. Of course the function of a statement of claim is to state the facts on which the claimant relies, not the law. But it must contain sufficient facts to give rise to one or more causes of action. A remedy is available only where there is a cause of action.

**Claims against first, second and third respondents**

[31] In his claims against the first, second and third respondents, the applicant is asking the Court to intervene in the affairs of voluntary associations – which it is reluctant to do. In *Cameron v Hogan*[2] Rich, Dixon, Evatt and McTiernan JJ said –

> "The policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment."

And Starke J said –

> "Has Hogan, however, any redress in a Court of law for such unauthorized act? It may be unlawful in the sense that it is void (*Graham v Sinclair.*[3]) But to give him a right of relief at law or equity, Hogan must establish some breach of contract with him, or some interference with his proprietary rights or interests. As a general rule, the Courts do not interfere in the contentions or quarrels of political parties, or, indeed, in the internal affairs of any voluntary association, society or club."

[32] What happened in that case was described by Dr Forbes in *Justice in Tribunals* –

> "[3.50] Australia's most celebrated 'club case' belongs not to our own litigious era but to the time of the Great Depression. In July 1930 Sir Otto Niemeyer, an agent of the Bank of England, prescribed bitter fiscal medicine for deeply indebted Australian governments. A 'Premiers' Plan' proposed to slice 20 per cent[4] off public service salaries and pensions. The leader of Victoria's Labour government was Edmond John Hogan (1884 – 1964). His party ordered him to repudiate the Premier's Plan as a 'capitalist betrayal' of ordinary Australians. When Hogan ignored that direction the party expelled him, effectively ending his premiership.
>
> Hogan responded by suing the unincorporated party for damages and a declaration that his expulsion was void for want of natural justice. We shall never know whether that claim was justified, because the High Court did not examine it. Hogan fell, so to speak, at the door of the court. His grievance was dismissed as non-justiciable, although he prudently relied on both of the then recognised ways of taking a 'club case' to court – property and contract. On the first count it was held that the party's assets were not for the enjoyment of members, but for the advancement of a political agenda.[5] The fact that candidates for election to parliament received party funds for electoral purposes did not establish a personal benefit.
>
> Hogan's action in contract also failed, because the court found no intention to create legal relations".[6]

[33] The scope of the decision in *Cameron v Hogan* has been explored in many cases over the last 77 years. It is now tolerably clear that the Courts will intervene in the affairs of voluntary associations in some circumstances, including –

(a) where there has been a breach of contract;

(b) where a proprietary right has been infringed;

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2 (1934) 51 CLR 358.
3 (1918) 25 CLR 102, 107.
4 The reduction was compromised at 10 per cent in 1931.
5 *Cameron v Hogan* (1934) 51 CLR 358, 375, 385.
6 JRS Forbes, *Justice In Tribunals* (The Federation Press, 3rd ed, 2010), pp 42 - 43.

(c) where someone's livelihood or reputation is at stake.[7]

[34] In *Edgar and Walker v Meade*,[8] a case involving the affairs of a trade union, and in *Baldwin v Everingham*,[9] a case involving a political party, Courts intervened because legislative recognition of trade unions and political parties had taken them beyond the ambit of mere voluntary associations. The mere fact that the second and third respondents were separate legal entities is not enough to make the validity of their conduct justiciable.[10]

[35] The applicant does not claim to have been a member of the unincorporated Brisbane Junior Rugby Union, or the second respondent, or the third respondent. This is not a case of breach of contract or infringement of a proprietary right.

[36] It may nevertheless be one affecting the applicant's livelihood or reputation in a relevant sense. In *Hughes v Western Australian Cricket Association (Inc)*[11] Toohey J said –

> "It is now well established that the doctrine of restraint of trade may operate in the case of sports persons who derive income from the sport they play: *Eastham v Newcastle United Football Club Ltd*;[12] *Buckley v Tutty;*[13] *Greig v Insole;*[14] *Blacker v New Zealand Rugby Football League Inc.*[15] As the High Court pointed out in *Buckley v Tutty*,[16] it is unnecessary to consider whether a professional sports person, who habitually plays the game for reward, practises a trade within the ordinary meaning of that expression: 'The doctrine regarding restraint of trade is not limited to any category of skilled occupations but applies to employment generally'.
>
> It is not essential that the sports person derive his or her entire income from practising the sport. …
>
> In *Buckley v Tutty*,[17] the High Court said that since the respondent was a member of both the New South Wales Rugby Football League and the Balmain District Rugby League Football Club, *McEllistrim v Barrymaceligott Co-operative Agricultural and Diary Society Ltd*[18] and *Dickson v Pharmaceutical Society of Great Britain*[19] were sufficient authority for the view that the Supreme Court had power to make a declaration and grant an injunction. The court continued: 'However, since we have said that we regard the question, what persons are members of the League, as not altogether clear, we would add that even if the respondent had been a stranger to those organisations he would have had a right to relief'.

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7 *Field v N.S.W. Greyhound Breeders, Owners & Trainers Association Ltd* [1972] 2 NSWLR 948; *Plenty v Seventh-Day Adventist Church of Port Pirie* (1986) 43 SASR 121; *Carter v NSW Netball Association* [2004] NSWSC 737; *Rose v Boxing New South Wales Inc* [2007] NSWSC 20, [59].
8 (1916) 23 CLR 29, 43 - 44.
9 *Baldwin v Everingham* [1993] 1 Qd R 10, 20.
10 *Kovacic v Australian Karting Association (Qld) Inc* [2008] QSC 344, [28].
11 (1986) 69 ALR 660, 700, 701 -702.
12 [1964] Ch 413.
13 (1971) 125 CLR 353.
14 [1978] 1 WLR 302.
15 [1968] NZLR 547.
16 (1971) 125 CLR 353 at 371.
17 (1971) 125 CLR 353 at 381.
18 [1919] AC 548.
19 [1970] AC 403.

> Counsel for the respondents invited me to decline to follow this dictum of the High Court and the dictum of Wilberforce J in *Eastham v Newcastle United Football Club Ltd*,[20] on which it was based. This would indeed be a bold course. Even if what the High Court said was *obiter*, it was *obiter* in a joint judgment of the five members constituting the court. In any event, the dictum is in my respectful view entirely in accord with the principle that, where the rules of an association place an unjustifiable restraint on the income earning activities of a person, a court is not precluded from granting appropriate relief merely because that person is not a member of the association."

[37] The applicant held two paid positions as a rugby coach, and two unpaid positions as a junior rugby coach. It may well be that as a coach his conduct was so regulated by the constitutions and rules of the first, second and third respondents that he has a sufficient interest to satisfy the standing test,[21] and that the issues would satisfy the test of justiciability.[22]

[38] In paragraphs 8 – 12 of his statement of claim the applicant makes a number of allegations about the first respondent's decision to suspend him. Some of these relate to the proper construction of the Brisbane Junior Rugby Union Competition Rules and some relate to his being denied natural justice.

[39] Regrettably, because of the prolixity of the pleading and the scattergun approach adopted in submissions, the construction of the rules was not adequately explored on the hearing of the applications. Similarly, questions as to the applicant's right to procedural fairness in relation to the suspension were not explored. In the circumstances I cannot be satisfied of the absence of questions which ought to be tried.

[40] Paragraphs 13 – 23 of the statement of claim concern the validity of the show cause notices. These questions were not sufficiently explored for me to be satisfied of the absence of questions which ought to be tried.

[41] Paragraphs 25 – 28 attack the validity of the decision made on 12 February 2004. In paragraph 25 the applicant alleges it was void and unenforceable if made by the first respondent; in paragraph 26 he alleges it was void and unenforceable if made by the second respondent, and in paragraph 27 he alleges it was void and unenforceable if made by the third respondent. In paragraph 28 he alleges that if made by the second or third respondent, it was void and unenforceable because he was denied natural justice in a variety of respects. Again, I cannot be satisfied of the absence of matters which ought to be tried.

[42] It is pertinent to make a few observations on the allegation that the applicant was denied natural justice. Needless to say, his right to natural justice included a right to adequate notice of the hearing, and a refusal to grant an adjournment may, in some circumstances, be tantamount to a denial of the right to be heard.[23] Rights to procedural fairness may be waived. The applicant's prospects of persuading the

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20 [1964] Ch 413, 446.

21 See *University of Technology Sydney v Gerrard* [2001] NSWSC 368, [9] and *Kovacic v Australian Karting Association (Qld) Inc* [2008] QSC 344, [25].

22 See, generally, the discussion in Forbes above n 6, chapter 4 "Private Tribunals and Restraint of Trade," and Owen-Conway, S & L "Sport and Restraint of Trade" (1989) 5 *Australian Bar Review* 208.

23 *R v Thames Magistrates' Court, ex parte Polemis* [1974] 1 WLR 1371.

Court that he was denied natural justice do not appear good, in light of his letter of 12 February 2004. While he was given fairly short notice that the hearing was to be resumed, he made a conscious decision not to appear, and it is doubtful that he had the right to insist upon adjournment of the consideration of penalty. But these are not questions which can be determined on this interlocutory hearing.

[43] The Court has a very wide jurisdiction to grant declaratory relief at the suit of a person with a real interest to establish. Section 128 of the *Supreme Court Act* 1995 (Qld) provides –

> **"128 Suit may be for declaratory order only**
> No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

See also *Forster v Jododex*;[24] *Baldwin v Everingham*;[25] *University of Technology Sydney v Gerrard*;[26] and *Rose v Boxing New South Wales Inc*.[27] It may refuse to grant declaratory relief in respect of a non-justiciable issue.[28]

[44] His claim for declaratory relief against the first, second and third respondents should in principle proceed to trial. So, too, should his claims for injunctive relief to prevent those respondents from giving effect to decisions alleged to be invalid.

[45] At common law, damages are not awarded for restraint of trade.[29]

[46] As I understood the submissions of the applicant's counsel, the claims for damages are based on contract. He referred to the decision of Brereton J in *Rose v Boxing New South Wales*:[30]

> "[105] .... The juristic basis upon which the principles of natural justice apply to the proceedings of a domestic tribunal which has no statutory basis is to be found in contract; in the absence of express provision to the contrary, it is implied in disciplinary provisions of the rules of such associations that they will be exercised in accordance with the rules of natural justice.[31] Thus, natural justice comes to operate in private clubs and associations by the interpretation of their rules on the basis that fair procedures are intended, while recognising the possibility that express words or necessary implication in the rules could exclude natural justice in whole or part.[32] Accordingly, their source is contractual, even where the relevant constitution makes no express provision, and their contravention in such a case is a breach of contract.

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24 (1972) 127 CLR 421, 435.
25 [1993] 1 QdR 10, 15.
26 [2001] NSWSC 368, [10]
27 [2007] NSWSC 20, [55].
28 *Rose v Boxing New South Wales Inc* [2007] NSWSC 20, [56]; *Mutasa v AG* [1980] QB 114; RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) [19] – [25]; Forbes above n. 6, 16.40 – 16.49.
29 *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, 440; *Buckley v Tutty* (1971) 125 CLR 353, 380.
30 [2007] NSWSC 20
31 *Trivett v Nivison* [1976] 1 NSWLR 312, 317-319.
32 *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243, 250, 255; *Australian Workers' Union v Bowen (No 2)* [1948] HCA 35; (1948) 77 CLR 601, 617, 631; *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470; (2002) 191 ALR 759.

> [106] Accordingly, in my opinion, 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 club founded on the constitution. *Abbott v Sullivan*,[33] *King v Foxton Racing Club*,[34] *Fagan v National Coursing Association of SA Incorporated*[35] or *Byrne v Auckland Irish Society Inc*,[36] all allow that damages may be awarded in respect of a wrongful expulsion, on the basis of breach of contract, in the case of an incorporated club. In substance, the breach is constituted by the deprivation of the benefits of membership without compliance with the constitutional conditions precedent – which may be express, or may be implied as in the absence of express contrary intention the rules of natural justice will apply. The circumstance that the same deprivation could have been effected in compliance with the constitution is relevant to the assessment of damages, but does not deny causation. Moreover, I would not exclude the possibility that damages may be available on the same basis in the case of an *unincorporated* club, if the constitution is intended to give rise to legal consequences, since the members of an unincorporated association agree by accepting membership to conduct its affairs in accordance with the constitution – although in such a case, it would be those members who acted in breach of the constitution, and not the association (which is not a separate legal entity) which might be liable.
>
> …
>
> [112] Accordingly, in my opinion, where the purpose of a contract is to provide pleasure, enjoyment, personal protection or relaxation or to avoid vexation, damages are recoverable for inconvenience, vexation and distress. As the purpose of membership of a club is to provide opportunities to participate in social, sporting, cultural, political or other activities, breaches of contracts founded on their rules constituted by improper exclusion from membership will commonly attract such damages, because such a breach defeats the purpose of the contract. Those damages may include damages for financial loss in respect of damage to reputation caused by breach of contract."

[47] However, the applicant was not a member of any of the first, second or third respondents; he was not in a contractual relationship with any of them. Accordingly, there is no basis on which he can claim damages for denial of natural justice against any of them.

**Claim against the fifth respondent**

[48] The fifth respondent consists of individuals who were members of the fourth respondent's Judiciary Appeals Committee.

[49] The only relief sought against the fifth respondent is a declaration that its decision delivered on or about 2 June 2005 that it had jurisdiction to hear and determine the appeal against the decision of 12 February 2004 is void.[37] This is odd, in light of the allegations in the pleading that the fifth respondent's subsequent decision to

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33 [1952] 1 All ER 226.
34 [1953] NZLR 852.
35 (1974) 8 SASR 546.
36 [1979] 1 NZLR 351.
37 See paragraph 16 of the prayer for relief in the statement of claim filed 16 July 2010 (court document no 12).

terminate the hearing because it lacked jurisdiction was void and unenforceable. The applicant alleges (*inter alia*) that he was denied natural justice in relation to the making of both decisions in that the fifth respondent displayed actual bias against him.

[50] This is yet another example of the embarrassing character of the applicant's pleading. At the very least, the prayer for relief cries out for amendment. I cannot be satisfied that there are not matters which ought to be tried.

**Claim against the fourth respondent**

[51] The case pleaded against the fourth respondent is that –

(a) the applicant appealed to its Judiciary Appeals Committee, but it refused to hear the appeal as it found it had no jurisdiction;
(b) the chairman of the Judiciary Appeals Committee stated at a general meeting of the fourth respondent that the decision made on 12 February 2004 was valid and had the effect of excluding the applicant from all grounds on which rugby is played worldwide;
(c) it has evinced an intention not to be bound by orders of this Court against the first, second and third respondents;
(d) it is empowered by its constitution to control rugby in Queensland (including rugby played at Ballymore and Suncorp Stadium) and to enforce its rules, regulations and bylaws against its members; and
(e) by virtue of (a) to ((d), the applicant has been excluded from rugby fields worldwide and has suffered loss of reputation, inconvenience, vexation, distress and loss of income as a rugby coach.

[52] I accept the submission of counsel for the fourth respondent that no cause of action has been disclosed.

[53] The claim against the fourth respondent cannot succeed, and should be summarily dismissed.

**Effect of bankruptcy**

[54] Counsel for the respondents submitted that the applicant's claims are vested in his trustee in bankruptcy, and that he may not sue in respect of them.

[55] The applicant was an undischarged bankrupt at all material times. Section 58 of the *Bankruptcy Act* 1966 (Cth) provides –

> "**58 Vesting of property upon bankruptcy—general rule**
> (1) Subject to this Act, where a debtor becomes a bankrupt:
> …
> (b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.
> …
> (6) In this section, *after-acquired property*, in relation to a bankrupt, means property that is acquired by, or devolves on, the bankrupt on or after the date of the bankruptcy, being property that is divisible amongst the creditors of the bankrupt."

[56] The property divisible among a bankrupt's creditors is defined in s 116, which provides –

> "**116 Property divisible among creditors**
> (1) Subject to this Act:
> (a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge; and
> (b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge; and …
> is property divisible amongst the creditors of the bankrupt.
>
> (2) Subsection (1) does not extend to the following property:
> …
> (g) any right of the bankrupt to recover damages or compensation:
> (i) for personal injury or wrong done to the bankrupt, the spouse or de facto partner of the bankrupt or a member of the family of the bankrupt; or
> (ii) …
> and any damages or compensation recovered by the bankrupt (whether before or after he or she became a bankrupt) in respect of such an injury or wrong..."

[57] Property divisible among a bankrupt's creditors remains vested in his trustee after his discharge from bankruptcy.[38]

[58] Rights of property which the trustee can turn to advantage for the benefit of creditors vest in the trustee. They include rights of action relating to the bankrupt's property or estate. But rights to recover damages or compensation for personal injury or personal wrong such as defamation do not vest in the trustee.[39]

[59] In *Randall v Deputy Commissioner of Taxation*[40] the applicant was at all material times an undischarged bankrupt. He secured employment as a public servant, but that employment was terminated. He sought judicial review, certiorari and consequential relief in relation to the termination decision. The respondent submitted that the applicant's rights of action had vested in his trustee, and that he lacked standing to bring the proceeding. Lander J concluded that the rights of action had not vested in the trustee. His Honour said –

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38 *Daemar v Industrial Commission (NSW) (No 2)* (1990) 99 ALR 789, 795; *Freeman v National Australia Bank Limited* [2006] QCA 260, [10] – [13].

39 *Cox v Journeaux (No 2)* (1935) 52 CLR 713, 721; *Faulkner v Bluett* (1981) 52 FLR 115; *Griffiths v Civil Aviation Authority* (1996) 67 FCR 301, 325-326; *Metsikas v Quirk* [2010] NSWSC 756, [9]–[11].

40 (2008) 174 FCR 441.

> "76 The right to seek a review of the respondent's decision to terminate the applicant's employment remains with the applicant. The trustee has no interest in seeking a review of that decision. The trustee, for example, could not ensure that if the decision were reversed that the applicant would resume employment. If the trustee was interested in the proceeding and brought the proceeding and the decision was quashed as the applicant seeks in this proceeding, there would be no property in the result which would be divisible among the applicant's creditors. The right to seek an order quashing the decision of the respondent to terminate the applicant's employment is not a right which can be exercised beneficially for the creditors, even in circumstances where the applicant seeks the further orders which may result in a sum of money being paid to him by way of compensation. Whether if the bankrupt received compensation that money would become after-acquired property for which he would have to account to his trustee does not need to be determined on this application: see *Chippendall v Tomlinson.*[41]"

[60] The applicant's claims against the first, second and third respondents for declaratory and injunctive relief and his claim against the fifth respondent for declaratory relief are not property divisible among his creditors, and are not vested in his trustee in bankruptcy.

[61] As the various claims for damages cannot succeed, it is not necessary to determine whether they would be property divisible among the applicant's creditors.

**Orders**

[62] The applicant's claim against the fourth respondent cannot succeed, and should be summarily dismissed.

[63] As I have said, I cannot be satisfied that his claims for declaratory and injunctive relief against the first, second and third respondents and for declaratory relief against the fifth respondent ought not be tried. But his claims for damages against the first, second and third respondents cannot succeed.

[64] The applicant should have an opportunity to make an application to regularise the capacity in which the first respondent has been joined.

[65] His statement of claim is embarrassing, and should be struck out. He should have leave to replead his claims for declaratory and injunctive relief against the first, second and third respondents, and for declaratory relief against the fifth respondent.

[66] The applicant's application for a declaration of deemed admissions should be adjourned pending the repleading of the statement of claim.

[67] I will hear counsel on the form of the orders and on costs.

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41 (1785) L Co Bank L 428; 99 ER 900.