SUPREME COURT OF QUEENSLAND

CITATION:	*Gould v Isis Club Incorporated* [2015] QSC 253
PARTIES:	**LORRAINE BARBARA GOULD** (Applicant) **v** **ISIS CLUB INCORPORATED** (Respondent)
FILE NO/S:	S 6/2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Bundaberg
DELIVERED ON:	28 August 2015
DELIVERED AT:	Rockhampton
HEARING DATE:	26 August 2015
JUDGE:	McMeekin J
ORDERS:	**1. Declare that the decision made by the respondent on 30 April 2015 terminating the applicant's membership of the respondent is void.** **2. Order that the decision by the respondent to terminate the applicant's membership of the respondent be set aside.** **3. Order the respondent pay the applicant's costs fixed in the sum of $141.70.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – REVIEW OF PARTICULAR DECISIONS - where the applicant's membership of the respondent association was terminated following an alleged breach of the rules of the association – whether the respondent's rules had been complied with – whether there had been a breach of natural justice – whether the respondent's decision should be set aside *Associations Incorporation Act* 1981, s 71, s 72 *Australian Workers' Union v Bowen (No 2)* (1948) 77 CLR 601 *Cox v Caloundra Golf Club Inc*. [1995] QSC (27 September

1995)
Calvin v Carr [1979] 1 NSWLR 1
Ex Parte Angliss Group (1969) 122 CLR 546
Hall v The NSW Trotting Club Limited [1997] 1 NSWLR 378
Isbester v Knox City Council [2015] HCA 20
Kioa v West (1985) 159 CLR 550
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70
McClelland v Burning Palms Surf Life Saving Club [2002] NSWSC 470
Preston v Carmody (1993) 44 FCR 1
R v Marks; Ex parte Australian Building and Construction Employees and Builders Labourers Federation (1981) 147 CLR 471
Russell v Duke of Norfolk [1949] 1 All ER 109
South Australia v O'Shea (1987) 163 CLR 378
Twist v Randwick Municipal Council (1976) 136 CLR 106 12

COUNSEL: The applicant in person

Keegan S R (solr) for the respondent

SOLICITORS: Baker O'Brien and Toll for the respondent

[1] **McMeekin J:** I heard this matter on 26 August. I then declared that the decision of the committee terminating Ms Gould's membership was void and ordered that it be set aside. I made that declaration and order after the conclusion of the hearing in order to meet the convenience of the parties. I then advised the parties that I would deliver reasons in due course. These are those reasons.

[2] The applicant, Lorraine Barbara Gould, was a member of the Isis Club Incorporated ("the Club"), the respondent here. Her membership was terminated by decision of the Management Committee on 30 April 2015.

[3] Ms Gould contends that the Club, through its officers, failed to accord her natural justice in the processes that were followed leading to the termination of her membership.

[4] The Club is an incorporated association under the *Associations Incorporation Act* 1981 ("the Act"). It is essentially a social club, its objects being identified as follows:

1. To establish, maintain and conduct an association for the convenience and use of members of the association and to provide a Clubhouse and other amenities, and generally afford to members all of the usual privileges, advantages and convenience of an association;

2. To give social and sporting advantage to members and to provide and maintain facilities for those purposes;

3. To promotes and encourage participation in healthy and legitimate sport by its members;

4. To do promote and encourage social interaction between and entertainment of its members;

5. To do all such things as are incidental or conducive to the attainment of the above objects.

[5] Section 71(3) of the Act obliges an incorporated association to follow the rules of natural justice in adjudicating upon the rights of its members as conferred by its rules.

[6] The rules of the Club constitute the terms of the contract between the members and the Club: s 71(1) of the Act. Section 71(2) gives this court jurisdiction to adjudicate upon the validity of a decision of the club where a member is deprived by that decision of a right conferred by the rules. Ms Gould invokes that jurisdiction in this application.

The Relevant Rules

[7] Clause 11(3) of the Club Rules provides: "The management committee may terminate a member's membership if the member: … (d) conducts …herself in a way considered to be injurious or prejudicial to the character or interests of the association".

[8] Clause 11(4) of the Club Rules provides: "Before the management committee terminates a member's membership, the committee must give the member a full and fair opportunity to show why the membership should not be terminated."

The Issues

[9] The essential issue is whether Ms Gould was given that "full and fair opportunity to show why her membership should not be terminated". A secondary issue is whether the availability of a right of appeal from that decision under the rules is sufficient to

overcome any deficiencies that might be thought to exist in the processes that have, to date, been followed.

The Principles

[10] It is well established that the requirements of natural justice are not inflexible but depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth": *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 per Tucker LJ quoted in *Ex Parte Angliss Group* (1969) 122 CLR 546 at 552; 43 ALJR 150 at 151. And see *Kioa v West* (1985) 159 CLR 550 at 563 per Gibbs CJ, 594 per Wilson J, 612-615 per Brennan J.

[11] Where the tribunal is a social club as here the strict rules applicable to judicial tribunals are relaxed. The principle was explained by Dixon J (as he then was) in *Australian Workers' Union v Bowen (No 2)* (1948) 77 CLR 601 at 628:

> 'It is important to keep steadily in mind that we are dealing with a domestic forum acting under rules resting upon a consensual basis. It is a tribunal that has no rules of evidence and can inform itself in any way it chooses. Members may act upon their own knowledge and upon hearsay if they are satisfied of the truth of what they so learn and if they give the member with whom they are dealing a proper opportunity of answering the charge and defending himself.'

[12] Some things though are fundamental. Samuels JA in *Hall v The NSW Trotting Club Limited* [1997] 1 NSWLR 378, in speaking of the rules that applied to a stewards' enquiry, said at 388:

> "It is necessary first to establish what rules of natural justice the stewards were required to observe. In my view, they were these. The stewards were bound to inform the appellant of the nature of the accusations made against him, and to give him 'a fair opportunity of make any relevant statement which he may desire to bring forward and a fair opportunity to correct to controvert any relevant statement brought forward to his prejudice': *De Veteuil v Knaggs* [1918] 18 AC 557 at 560 applied in *University of Ceylon v Fernando* [1960] 1 WLR 223 at 232; [1960] 1 All ER 631 at 638.

> Moreover, I respectfully agree with what Adam J said in *R v Brewer; Ex parte Renzella* [1973] VR 375 at 381: 'As it is the duty of the stewards to give a fair hearing to the person charged, they must of course, until he has been heard in his defence, keep their minds open in the sense of being ready and willing to be persuaded by the party charged'".

[13] As will be seen the committee has gathered evidence, or at least information, against Ms Gould. The committee evidently accepts as accurate the information they have received. That the committee might properly do so on a provisional basis seems appropriate, otherwise why bother Ms Gould with the charges? However the source of the information that the committee acted upon is not revealed. If the source of information is a committee member who is to determine the charge then that is not necessarily fatal, as the earlier citation of the judgment of Dixon J shows, but there are limits. Mahoney JA in *Hall* put the principle this way (at 398 omitting references):

> "It is now firmly established that, where a member of the tribunal not merely provides information but acts in substance as (to use the words used in the cases) accuser, prosecutor or interested party, the tribunal proceedings will be vitiated. These terms are not definitions of the proscribed relationships. But whenever a tribunal members occupies such a position, then, irrespective of actual bias, his participation will vitiate the tribunal's deliberations."

[14] While there are differences between a stewards' enquiry into a race meeting and the termination of membership of a social club, both in respect of the statutory and contractual framework under which each operates and the impact on the subject of the enquiry, in my view these basic principles still apply here.

The Facts

[15] Ms Gould asserts, and I do not understand it to be disputed, that the Isis Club is the largest club in Childers and in the wider Isis district. It has over 1000 members. Many social functions are held there.

[16] Ms Gould was a member of the management committee of the Club from September 2011 until October 2014. She served as treasurer for some part of that period.

[17] In October 2014 a new management committee was elected. No members of the previous committee were re-elected.

[18] On 15 February the new management committee met and unanimously determined that Ms Gould's membership be terminated. The minutes record that one committee member had "listed various reasons for termination of Lorraine Gould's membership".

[19] On 20 February 2015 the new management committee wrote to Ms Gould in the following terms:

> "The new Management Committee of the Isis Club has been installed for just over three months. During this time there has been much debate and consternation over your behaviour prior to, during and after the recent Annual General Meeting. This has troubled many of the Club's members, employees, suppliers and service providers over a number of years.
>
> It is the unanimous opinion of the Management Committee that your behaviour and conduct, both as a member of the Management Committee and as an ordinary member of the Club, has been injurious and prejudicial to the character and interests of the Isis Club Inc.
>
> On these grounds, and in accordance with the clause 11(3) of the Club Rules, we hereby give notice that we intend to terminate your membership.
>
> Clause 11 of the Club Rules obliges the Management Committee to give you an opportunity to show why your membership should not be terminated. If you wish to present such a case to the Management Committee, you should do so by 31 March 2015.
>
> If no such presentation is made, your membership will be terminated at that date."

[20] Ms Gould responded by letter dated 20 March 2015 in these terms:

"I note the contents of your letter dated 20 February 2015 and refute your claims.

Your Management Committee is now required to provide all the evidence upon which it has based its allegations to terminate my membership. It is expected that sufficient time, (after receipt of), will be provided in order to have the material appraised. Thereafter, you will be advised of my intentions."

[21] The Management Committee responded to that letter on 25 March 2015 with a letter in the following terms:

"In October 2014 you made a unilateral decision, without formal Management Committee consideration, to terminate the membership of at least four longstanding members of the Club. These people were good Club members and well-respected members of the community. You gave these people no good reason for their termination and no opportunity for a hearing or to reply.

You now have the audacity to demand evidence supporting our allegations for terminating your membership. The Club Rules do not put any obligation on the Management Committee that requires us to 'provide all the evidence upon which we have based our allegations'.

The offensive and disturbing behaviour detailed above is conduct which the Management Committee considers was injurious or prejudicial to the character and interests of the Isis Club. This instance alone is more than sufficient grounds for the current Management Committee to terminate your membership.

However, the current Management Committee is comprised of fair and reasonable people. For your information we have detailed below other examples of your conduct which we consider was injurious or prejudicial to the character and interests of the Isis Club.

> The Management Committee considers that with so many instances of offensive behaviour we are compelled to terminate your membership to protect the reputation of the Isis Club.
>
> Our initial advice to you on this matter was on 20 February 2015. You took one (1) month to respond and only then demanded more information.
>
> As specified in our earlier letter, you have until 31 March 2015 to show cause why we should not terminate your membership. If no case is presented to the Management Committee by then, your termination will be effected on that date."

[22] Included in that letter were two additional pages, headed "Further examples of conduct considered injurious or prejudicial to the character and interests of the Isis Club". There were then set out 11 separate dot points in which allegations are made about Ms Gould's conduct, or alleged conduct.

[23] On 29 March 2015 Ms Gould wrote to the Management Committee. I will not detail the entirety of the letter but it included the following:

> "In response to your letter containing the allegations to support your intention to terminate my membership, I wish to advise that should you follow through with the termination, I will appeal your decision.
>
> …
>
> Once again, I refute all your allegations and suggest that, as a committee, you can reconsider the path your decision will take and the ramifications for the membership as a whole."

[24] On 30 April 2015 the secretary of the membership committee wrote to Ms Gould advising her that as she had chosen "not to make any representation to the management committee", the management committee has "now decided to terminate your membership. This letter is our formal notification to you under clause 11(5) of the Club Rules. The termination of your membership is effective from the date of this notice." The letter further advised Ms Gould that "under the

Club Rules, you may appeal the Management Committee's decision. … In accordance with clause 12 of the Club Rules, a notice of intention to appeal must be given to the Club Secretary within one month after the date of this notice."

[25] On 18 May 2015 Ms Gould wrote to the Management Committee in these terms:

> "As advised in my correspondence to you on 29 March 2015, I refute all allegations your committee has made against me. I also note that your letter did not regard my previous letter as 'making representation'. Your committee has also failed to provide acknowledgement of any letters in reply and has also failed to provide documentary evidence or validation of any of your allegations to support your decision.
>
> Therefore, pursuant to clause 12(2) of the Club's rules, you are hereby notified of my lodging an appeal against the termination of my membership."

[26] On 29 May the Management Committee acknowledged receipt of Ms Gould's letter of 18 May and advised her that she was not welcome to visit the Club as her membership had been terminated.

[27] On 5 June Ms Gould responded, acknowledging receipt of the committee's letter of 29 May, and inquiring, inter alia, as to the date of the general meeting that was to be held for the hearing of her appeal against the termination of her membership.

[28] On 11 June 2015 there appeared a notice in the "Town and Country", a local newspaper, which gave notice to members of a General Meeting of the Club and included as one of the items for discussion: "Consider an appeal against membership termination".

[29] Ms Gould says, and I do not think it to be contested, that she had not received any personal communication advising her of the general meeting. It is common ground, too, that the public notice was intended to be a public notice of a general meeting to consider her appeal against her termination, although she was not identified in the public notice.

[30] On 1 July, Ms Gould wrote to the secretary of the Club. The notice that appeared in the Town and Country had been brought to her attention. She advised the secretary

that she intended to file an application for review in the Supreme Court on the following day, seeking to set aside the original decision and, as well, set aside the hearing date of her appeal, and to defer the hearing of the appeal until the Supreme Court had determined her proceedings. A copy of the proposed application for review was included in her correspondence. That application was filed.

[31] The general meeting did not go ahead. A new date has now been set for the hearing of her appeal on 1 September – next Tuesday.

[32] The correspondence shows that the management committee have banned Ms Gould from entering the club premises. Ms Gould asserts that she is the only person in the Isis district who has been so banned or had their membership terminated. Ms Gould asserts that her reputation professionally and personally has been adversely affected with the potential for that to impact on her ability to find employment in the district.

The Submissions

[33] Ms Gould appeared on her own behalf. She is not a lawyer and is not versed in the principles applicable on an application of this type.

[34] Ms Gould has made a number of complaints that I do not act on. Her complaints and my responses are:

(a) **The committee's decision was vitiated because of the presence of one Mr Stephen Parcell on the committee that determined to terminate her membership**. The complaint was that Mr Parcell was an accountant whose business had been adversely affected by decisions made by the previous committee of which Ms Gould had been a member. There are two problems. The first is that no notice of the argument was given to the respondent. Ms Gould's affidavit listed several matters that she alleged demonstrated a failure to afford her natural justice (see paragraph 18 of the affidavit filed 3 July 2015). This was not one of those matters. It would be unfair to now act on it. Secondly, I cannot see that I have the necessary material to be satisfied of the factual basis of the claim;

(b) **The committee had based its decision on inaccurate and inadequate information**. It is not known what information the

committee acted on as the respondent has chosen not to reveal the evidence it had.

(c) **The committee has acted at the behest of the former general manager, a person who was the subject of legal proceedings brought by the previous committee of which Ms Gould was a member**. There is no evidence to show that the committee acted at anyone's behest. And it is for the committee members to advise themselves of the facts as they see fit.

(d) **The committee has singled out Ms Gould to blame for the decisions taken by the previous committee**. That allegation does seem accurate. Why one individual, and not all committee members, should bear the opprobrium of decisions taken by a committee, is not clear. However the wisdom of adopting that course is for the committee, and the justification for it must depend on information that the committee has and I do not. I know of no principle that would prevent the committee from doing so.

(e) **The committee failed to give genuine consideration to Ms Gould's submissions contained in her letter of 29 March**. It is not known what consideration the committee gave to that letter. And the letter did not in fact come to grips with any of the allegations made against Ms Gould.

(f) **The committee failed to advise Ms Gould of the date that her appeal was to be heard.** Why that happened is not apparent. Such a failure is not necessarily due to bias. An administrative oversight or an assumption as to what notice might be sufficient could explain what occurred.

(g) **A financial update distributed to members in early July contained information that was inaccurate, misleading and implicitly critical of Ms Gould**. The update post-dated the decision. The premise is not shown i.e. that the information was inaccurate and misleading. And in any case any inaccuracies do not necessarily bespoke bias or otherwise reflect on the affording of natural justice.

[35] There remains three fundamental and relevant matters advanced by Ms Gould:

(a) There was an apprehension of bias, based on the language and tone of the letters of 20 February and 25 March, suggestive that the committee had pre-judged the matter;

(b) That the letters of 20 February and 25 March "failed to identify the critical issues and to contain sufficient information to enable Ms Gould to properly respond to the allegations";

(c) That insufficient time was allowed to Ms Gould to properly and adequately prepare her defence to the charges mentioned in the letter of 25 March 2015.

[36] The Management committee submitted that they had complied in all respects with the club rules; that any deficiencies in the wording of their letters or notices of motion were due to inexperience and a poor choice of words, they at all times acting without legal advice; that Ms Gould had not sought further information about the charges following the letter of 25 March; that Ms Gould had responded as she saw fit to those charges and had exercised her right to an appeal. In all the circumstances the appeal set for next Tuesday should be allowed to proceed.

Adequate Notice

[37] In my view there are several difficulties with the processes adopted by the management committee.

[38] First, Ms Gould was not given any proper notice of the charge she faced. The initial letter advising her that she had until 31 March to show why her membership should not be terminated was completely lacking in detail. That letter of 20 February, while alerting Ms Gould in general terms of the ground of the complaint she had to meet – her behaviour had been "injurious and prejudicial" – and of the relevant rule (cl 11(3)), told her nothing of the actual conduct that was complained of. For some reason the list referred to in the minutes and that the committee acted on was not supplied. The description given - "much debate and consternation over your behaviour prior to, during and after the recent annual general meeting" – was completely opaque as to the behaviour that so concerned the committee.

[39] Ms Gould could not have mounted any defence of her conduct without knowing what the complaint was she had to meet. It is fundamental that to be given a "full

and fair opportunity" to show why her membership should not be terminated Ms Gould needed to know what that charge was. Lawyers would describe the missing detail as "particulars" of the charge made. Absent those particulars, Ms Gould was in the dark and could make no meaningful response.

[40] Unfortunately, the follow up letter of 25 March not only did not clarify what was the charge Ms Gould had to meet but confused matters.

[41] The opening paragraph seems to limit the complaint to Ms Gould's conduct in the termination of the membership of "at least four longstanding members". There are two difficulties with this. The four members are unnamed. And the "at least" suggests that the complaint extends beyond those four. The failure to identify who the four people were would make any response to the charge difficult to say the least.

[42] But the problems go further than that.

[43] The letter by its terms does not make clear whether Ms Gould is expected to meet the allegations made only in the first paragraph or whether she was also required to meet the allegations made in the accompanying document, matters that the letter implied were added because the committee members were "fair and reasonable people". The document included in the letter of 25 March "detailed … other examples of your conduct which we consider was injurious or prejudicial to the character or interests of the Isis Club".

[44] The tying of the additional allegations to the character of the committee members is puzzling. I suspect that the reference was made because of the committee's view earlier expressed that they were under no obligation under the club rules to provide the "evidence" supporting the allegations made and this added detail fell into that category and so was provided by way of an act of grace.

[45] If the committee members thought that they had no obligation to disclose their hand then the members misunderstood their obligations. It may or may not be right to say that the committee were under no obligation to provide the "evidence" by which they intended to prove the charges although I am of the view that would depend very much on the evidence itself – the obligation to provide a "full and fair opportunity" to respond might well require the revealing of the evidence e.g. to

prevent surprise, or to ensure that a fair opportunity was afforded of explaining why the evidence was or may be unreliable. A denial of natural justice might well be the result of a refusal to respond meaningfully to a request for evidence that was sufficiently precise.

[46] However, what is beyond doubt is that the Committee had to fully and fairly inform Ms Gould of the allegations that were made against her, both as to the conduct she was alleged to have engaged in and, if it wasn't obvious, why that conduct was seen to be relevantly prejudicial, in sufficient detail to enable her to mount her defence.

[47] I was informed by Ms Keegan who appeared for the Committee that the committee members did intend that Ms Gould meet not only the allegation in the first paragraph of the letter of 25 March but also those in the accompanying document. The issue of course is not what the committee intended but what they conveyed by their letter. I am inclined to think that the reference to "so many instances" in the fifth paragraph and the conclusion that then followed would at least suggest that all the allegations mentioned were intended to be the basis of the decision and that each required a response. I note that in the affidavits of Mr Walker, the President of the club, and Ms Ricciardi, the current secretary of the club, they assert that the two page accompanying document supplied the "reasons for the termination" (see paragraphs 10 and 7 of their respective affidavits). It would have been helpful if that had been said in the letter. Nonetheless, at the very least, the letter is confusing.

[48] The failure to make clear precisely what allegations were to be met is a fundamental problem.

Time to Respond

[49] That is not the end of the matter. Whether Ms Gould was expected to meet only the charge made in the first paragraph of the letter or the eleven matters raised in the accompanying document there is the difficulty of the very short period of time afforded her to prepare her defence.

[50] It can be seen that there are three matters mentioned in the opening paragraph each conveying a different complaint and potentially requiring quite a different defence:

(a) That Ms Gould acted unilaterally and without formal Management Committee consideration in terminating the memberships in question;

(b) That the members that she was alleged to have moved against were "good club members and well respected members of the community";

(c) That Ms Gould "gave these people no good reason for their termination and no opportunity for a hearing or to reply"?

[51] There were eleven discrete matters raised in the accompanying document, each dealing with a different allegation, one of which appears to be a repeat of the allegation in the first paragraph of the letter, but with a significant addition. Some allegations contained several discrete issues of fact each of which potentially requires a response.

[52] Presumably the committee thought that the time given initially was adequate – nearly six weeks from 20 February until 31 March. I would agree. But the time given to meet the detailed allegations was only six days. In my view six days – and that assumes the letter was received on the day it was sent – was far too short a period to enable any meaningful defence to be raised to the allegations.

[53] It is no answer to say that Ms Gould took a month to respond to the initial letter. That first letter ought to have provided the detail of the complaint. The obligation placed on the committee by cl 11(4) of the club rules – to allow Ms Gould a "full and fair opportunity" to respond – necessitated a sufficient degree of particularity. I refer to the authorities that I have cited above. Her delay in asking for that detail, assuming her demand for the evidence amounted to that, did not cure the defect.

[54] It is fundamental that a club member have an adequate time in which to prepare themselves to meet the charges brought. It is simply unfair to expect a member to meet a raft of allegations requiring examination of numerous issues and potentially obtaining evidence from many different people without affording an adequate time in which to do so. There is no golden rule but the matter is left to the good sense of the committee. I could not accept that six days were sufficient to meet the various allegations raised. There was no prospect of Ms Gould mounting a defence to all eleven allegations in that time.

[55] There are other problems. I have said that one of the eleven matters mentioned in the accompanying document appeared to be a repeat of the allegation in the first paragraph of the letter. It reads: "you terminated the membership of several long standing and respected members of the Club in a blatant and offensive attempt to prevent them from nominating for a board position at the AGM."

[56] I leave to one side the absence of any particulars as to what action it was of Ms Gould that caused, or purported to cause, these members to have their membership terminated. The present concern is the unfortunate confusion as to whether this is an additional and new allegation or a repeat of the one mentioned in the body of the letter. It highlights the need, if it requires any emphasis, of particularising who it is that the committee refer to.

[57] Whether a reference back or not there was a very significant and new allegation made and one not made, expressly at least, in the body of the letter. Effectively the charge against Ms Gould is not simply that she failed to comply with the rules of the club in the processes adopted in terminating the membership of these members, or that she failed to afford these members natural justice (which are the issues identified in [42](a) and (c) above), or that these were good people and good club members ([42](b) above), but that she was motivated by an improper purpose in moving against them. Is Ms Gould to assume that this is a material complaint made in relation to the primary allegation in the first paragraph of the letter? Or is it a separate allegation about different members? The confusion is unfortunate and unfair.

[58] The problems go further than that one allegation. Assuming that each of the allegations was intended to be the subject of the complaint, and hence requiring refutation, it is necessary that each be fully particularised to enable a defence. That degree of particularity is lacking. To take one example – it is said that Ms Gould "set about discrediting those that [she] opposed by making derogatory, false, misleading and misinformed statements about them or their involvement in the club" in annual reports "over which you presided". Yet no information is given as to what reports, what statements or what persons are intended to be referred to. No proper defence could be made to so broad a charge.

[59] To take another example the charges allege that Ms Gould made "derogatory statements" about "prospective board members" but does not particularise what are the statements alleged to have been made nor identify the prospective board members referred to. There are more examples that I could give.

Apparent Bias

[60] The minutes of the meeting of 15 February record that the committee determined then that Ms Gould's membership was terminated. Consistently with that determination in the letter of 25 March the committee on two occasions effectively stated that they had already decided the matter. Thus in the third paragraph the committee said in reference to the termination of membership issue mentioned in the first paragraph: "This instance alone is more than sufficient grounds for the current membership to terminate your membership". That statement assumes the fact of the conduct alleged and that it bears the necessary character justifying termination. Next, in the fifth paragraph, after referring to the "other examples of your conduct" which the committee considered was "injurious or prejudicial to the character and interests of the club", and which were set out in the accompanying document, the letter went on: "The Management Committee considers that with so many instances of offensive behaviour we are ***compelled*** to terminate your membership to protect the reputation of the club." (My emphasis)

[61] I have referred above to the necessity of keeping an open mind until the defence is heard. That general principle applies here. Clause 11(4) of the club rules makes quite plain what any fair minded person would think was fundamental – the decision to terminate should follow, not precede, the opportunity to present the case for the defence. Clause 11(4) reads: "***Before*** the management committee terminates a member's membership, the committee must give the member a full and fair opportunity to show why the membership should not be terminated" (My emphasis).

[62] I appreciate that the committee is in the difficult position of being both prosecutor and judge in their own cause. This the club rules allow and indeed require. That being so the more important it is then that the committee make very plain that the committee members collectively and individually retain an open mind on the question of the final decision whether to terminate membership.

[63] Here the process was reversed. The determination preceded hearing from the defence. The committee were honest in saying that they felt "compelled" to terminate Ms Gould's membership, but to do so before a word of the defence case was heard indicates pre-judgement that is the very antithesis of affording natural justice. The test is whether the circumstances "would lead an objective bystander reasonably to apprehend that [the committee] had predetermined the question" in issue (to adopt the phrase used by Mason CJ and Brennan J in *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 81). It is impossible to conclude otherwise.

[64] I am very conscious that the committee members cannot be expected to act and write as lawyers do. However I do not think it overly pedantic to insist on reasonably strict adherence to the rules that the club itself has laid down. As Thomas J observed in *Cox v Caloundra Golf Club Inc*. [1995] QSC (27 September 1995) at p 6:

> "… in the context of disciplinary proceedings involving expulsion or suspension, especially where the determination may be thought to involve some degree of personal disgrace, a Court must be very careful before it disregards a breach of the rules, especially a breach of the rules where the correct procedure could have produced a different result."

[65] Expelling Ms Gould from the club will certainly involve some personal disgrace in her community. Whether any defence she may have mounted could have brought about a different result is more problematic. The committee members appear to have assumed the truth of the allegations of fact made against her and also determined that the conduct so displayed had the necessary character justifying termination. Nonetheless the members in a general meeting may disagree. Ms Gould is entitled to her chance to persuade both the committee and the members in a general meeting and to do so with full knowledge of the case she must meet.

[66] There is one final matter.

[67] The effect of my decision will be to return the matter to the management committee. There may be a further hearing. How that committee will be constituted will require

some careful consideration. I would wish to ensure, if I can, that this matter does not return to this Court if that can be avoided so I mention the following.

[68] While the rules require that the committee be both prosecutor and judge there remains a limit on the extent to which a person can act as judge in their own cause. I refer to the judgment of Mahoney JA in *Hall* that I have cited at paragraph [13] above.

[69] To like effect is the discussion in the recent decision of the High Court in *Isbester v Knox City Council* [2015] HCA 20 at [34] – [38] per Kiefel, Bell, Keane and Nettle JJ. It is useful to set out that discussion as their Honours detail some examples of how committees have been held to have failed to afford natural justice by reason of their composition:

> "The interest which the appellant alleges existed in this case is akin to that which a person bringing charges, whether as a prosecutor or other accuser, might be expected to have in the outcome of the hearing of those charges. It is generally expected that a person in this position may have an interest which would conflict with the objectivity required of a person deciding the charges and any consequential matters, whether that person be a judge or a member of some other decision-making body. In *Dickason*, Isaacs J referred to cases of this kind as instances of "incompatibility".
>
> The plaintiff in *Dickason* was a member of a friendly society regulated by statute. He was accused of insulting the District Chief Ranger of the society. It was held that the District Chief Ranger could not sit as part of the committee to hear the charges brought against the plaintiff. Isaacs J said that, subject to a statute providing otherwise and the principle of necessity, "[i]f it is incompatible for the same man to be at once judge and occupy some other position which he really has in the case, then prima facie he must not act as a judge at all." O'Connor J thought that it would be impossible not to reasonably suspect a man who is a prosecutor in a charge concerning himself of bias.
>
> *Stollery* is a case not unlike *Dickason*. In *Stollery*, a greyhound owner was accused by the manager of an association which conducted dog racing of

attempting to bribe the manager. The manager reported the incident in question to the Greyhound Racing Control Board, which then held an inquiry. The manager himself was a member of the Board. Although he took no part in the deliberations, he remained present in the room whilst they were taking place. The decision of the Board was quashed by this Court.

In *Stollery*, Menzies J referred to a long line of authority which establishes that a tribunal decision will be invalidated if "there is present some person who, in fairness, ought not to be there". In the view of Barwick CJ the manager was personally involved as he was in the position of an accuser. Gibbs J took a similar view. It was contrary to the rules of natural justice, his Honour held, for an accuser to be present as a member of a tribunal hearing the charge he promoted. Their Honours held that the manager's mere presence was sufficient to invalidate the decision, either because he was an influential person or because his presence might inhibit and affect the deliberations of others.

The joint reasons in *Ebner* gave as an example of the prohibition on a judicial officer hearing a case the circumstance where that person is a member of a body which instituted the prosecution. In doing so, the reasons also referred to authority, including *Dickason*, which suggests that the application of the prohibition was not considered to be limited only to judicial officers."

[70] There is a reference in two of the allegations contained in the two page document accompanying the letter of 25 March to discrediting or making derogatory comments about "prospective board members". As no particulars are given of the identity of those prospective board members I do not know – and nor does Ms Gould – whether they have sat in judgment on her. While I have heard no argument on the subject such persons may have an interest that goes beyond mere impartial committee member such that any decision of a committee so constituted may be vitiated.

[71] Finally Ms Gould refers in her affidavit to two members who nominated for the committee – Mr Parcell and Ms Ricciardi – but were unfinancial at the relevant date

and so not eligible to nominate and were so advised by "the Board". I mention this matter as it may coincide with the complaints about her conduct in terminating memberships. If so the committee will need to give consideration as to whether persons so directly affected by Ms Gould's alleged actions should sit in judgement on her.

Does the Appeal Process Cure all?

[72] There is a line of authority supporting the view that an appeal can cure an earlier breach of the rules of natural justice: *Australian Workers Union v Bowen (No 2)* (1948) 77 CLR 601; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 116; 12 ALR 379 at 387–8 per Mason J; *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at 798-800 per Campbell J and the authorities his honour cites there: *Calvin v Carr* [1980] AC 574 ; [1979] 1 NSWLR 1; *R v Marks; Ex parte Australian Building and Construction Employees and Builders Labourers Federation* (1981) 147 CLR 471 at 485 ; 35 ALR 241; *Preston v Carmody* (1993) 44 FCR 1 at 14–18 per Wilcox J.

[73] In *Twist* Mason J pointed out the limitations on the principle (see (1976) 136 CLR 106 at 116):

> "Further, the earlier cases should not be regarded as deciding that the presence of an appeal to another administrative body is an absolute answer to a departure from natural justice or the standard of fairness. The existence of such an appeal does not demonstrate in itself that the inferior tribunal is at liberty to deny a hearing. But if the right of appeal is exercised and the appellate authority acts fairly and does not depart from natural justice the appeal may then be said to have "cured" a defect in natural justice or fairness at the first instance."

[74] After pointing out that there was a conflict of authority on the point Mason J indicated his reasons for preferring the view that the later hearing might "cure" the defects of the earlier one:

> "…first, because the party affected has elected to treat the administrative decision as a valid, though erroneous decision, by appealing from it, in preference to asserting his right to a proper performance by the authority of

> its duty at first instance; and secondly, because in some cases the court will be compelled to take account of the public interest in the efficiency of the administrative process and the necessity for reasonably prompt despatch of public business and balance that interest against the countervailing interest of the individual in securing a fair hearing — in appropriate cases that balance will be achieved if the individual secures a fair hearing on his appeal."

[75] Here the appeal is yet to take place. And while Ms Gould preserved her position by lodging a notice of appeal she at all times made plain that she did not accept that the appeal should be heard unless the errors that infected the original decision were corrected. Her application to this Court originally included an application for an injunction to prevent the appeal hearing going ahead. Finally, the defects attending the first hearing have not yet been corrected.

[76] The mere lodging of a notice of appeal did not cure these fundamental defects in the procedures followed. It is self-evident that the club rules provide to Ms Gould the opportunity of being heard twice – once by the committee and then by the membership. One of the advantages to Ms Gould in first confronting the committee before appealing to the members is that she does get to see what evidence is put against her. That is an advantage that the club rules intend that she have. Depriving her of the detail of the charges – which still remains the situation – and moving to the appeal stage without correcting that deficiency does not afford Ms Gould natural justice.

Conclusion

[77] I am conscious that it is well accepted that the requirements of natural justice will be satisfied if "…the decision making process, viewed in its entirety, entails procedural fairness" (see *South Australia v O'Shea* (1987) 163 CLR 378 at 389). When the decision-making process is viewed in its entirety in this case, I am not satisfied that the requirements of natural justice have been met.

[78] On 26 August I made the following orders:

> 1. Declare that the decision made by the respondent on 30 April 2015 terminating the applicant's membership of the respondent is void.

2. Order that the decision by the respondent to terminate the applicant's membership of the respondent be set aside.

3. The respondent pay the applicant's costs fixed in the sum of $141.70.

[79] It follows that the appeal hearing set for next Tuesday cannot proceed. The respondent by its solicitor gave an undertaking that in the light of my orders the respondent would not proceed with the meeting.