



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 35
A281/17

Lord President
Lord Woolman
Lord Doherty

OPINION OF LORD CARLOWAY, THE LORD PRESIDENT

in the cause

CLUB LOS CLAVELES and ALBERT FLETCHER, ROGER LINDSAY, and NORMA ANN
BURSTON, three members of the Committee thereof as representing the Club and as
individuals

Pursuers and Respondents

against

FIRST NATIONAL TRUSTEE COMPANY LTD

Defenders and Reclaimers

Defenders and Reclaimers: O'Brien QC; Turcan Connell LLP
Pursuers and Respondents: Barne QC; BTOLLP

18 August 2022

Introduction

[1] This is a long-running dispute concerning a trust which was set up to facilitate the ownership and management of timeshare properties in the Los Claveles resort in Tenerife. The quarrel centres on the defenders' status as trustee. It is, to say the least, unfortunate that the parties have been unable to resolve their differences in light of the court's previous opinion (2020 SC 504 at para [32]). The court attempted to make it clear that this litigation should be concluded with the resignation of the defenders and the appointment of a new trustee. The register of members should be handed over to the pursuers or the new trustees

(para [39]). The court explained that, although it had not been asked to pronounce decree *de plano*, the pursuers “may well be entitled to a decree for implement” (para [38]). The import of that must have been lost on the defenders.

[2] The pursuers wish the defenders to demit office in order to make way for the appointment of a new trustee. The defenders say that they are content to do so, but assert that, in terms of the constitution of the Club, there is no validly constituted committee with the authority to enter into the requisite deed of retirement. They say that the pursuers have no title to sue. The Lord Ordinary held that there was a validly constituted club committee in terms of the Club’s constitution. Accordingly, the defenders must demit office on the terms set out in a draft deed of retirement which has been lodged in process.

[3] The primary question for the court is whether the Lord Ordinary’s interpretation of the Club’s constitution is correct. The pursuers cross-appeal the Lord Ordinary’s decision that the defenders were entitled to challenge the validity of the appointment of the committee members by pleading “no title to sue”. They contend that the interpretation and application of the constitution is a matter for the Club and is of no concern to the defenders.

The Constitution of the Club and the Trust Deed

[4] The Club is an unincorporated association whose members are the proprietors of timeshares in the properties at the resort. The properties are owned by five companies which were set up for that purpose. It is a requirement of the Club’s constitution that the shares in those companies be held by an independent trustee. The relevant deed of trust was entered into by the Club’s Founder Members, who were originally Wimpey Homes Holdings Ltd, Time Ownership Los Claveles (Management) Ltd and the Royal Bank of Scotland plc.

[5] Clause 11 of the constitution sets out how the Club is managed by a committee as follows:

“11.1 The business and affairs of the Club shall (save insofar as the same may have been delegated to a management company or the Annual General Meeting as hereinafter provided) be managed by a Committee of not more than five persons, three of whom shall be ordinary Members of the Club and two of whom shall be nominated by the Company [*ie* WimPen Leisure Management SA] ... Decisions of the Committee shall be on the basis of a majority of those present and in the event of an equality of votes, the Chairman shall have the casting vote. Three members of the Committee shall form a quorum...

11.2 ... [A]t each ... Annual General Meeting one elected member of the Committee shall retire and a new member thereof shall be elected. Retiring members, may offer themselves for re-election for one further term of office ... with the outcome decided by majority vote. The maximum period of service on the Committee shall be six years after which the retiring member shall stand down for a period of no less than four years. ... [R]etirement of elected Committee members shall be by rotation each member retiring at the third Annual General meeting to be held after their respective elections. The two Committee members nominated by the Company shall cease to be such on written notice being given to them by the Company and the Company shall then nominate a successor or successors to fill any vacancy ... thereby created.

11.3 ... [E]lection or removal of members to an[d] from the Committee shall be dealt with only at Annual General Meetings or Special General Meetings of the Club...”.

[6] The committee is given power to do “all things ... that may be necessary for the carrying out of the objects of the Club for its general management”, except the approval of the Club accounts and budget (cl 11.4). That power includes making contracts (cl 11.5.5), appointing professional advisers (cl 11.5.6), and conducting litigation (cl 11.5.8). The committee had delegated some of its management functions to WimPen Leisure

Management SA. Clause 11.4 also provided that:

“... Until such time as the Committee shall have been constituted the management of the Club and all the powers of the Committee shall be vested in the Founder Members who will ... enter into an Agreement with Time Ownership Los Claveles (Management) Limited ...”.

On 21 May 1991, the defenders were appointed as the trustee for the purpose of holding the shares in the companies which own the properties.

[7] Clause 1.3(a) of the Deed of Trust, in terms of which the defenders were appointed, reads as follows:

“Where reference is made ... to directions of the Committee of the Club the Trustee shall be entitled to rely on and accept decisions of the Committee which shall be stated by the Chairman of the Committee Meeting at which the relevant decision was reached to have been so reached in accordance with the relevant rules of the Constitution and without prejudice to the generality of the foregoing the Trustee shall not be concerned to enquire or satisfy itself in any way as to the election of Committee Meeting [*sic*] or calling of Committee Meetings or the procedure adopted or the reaching of decisions thereat.”

Background

[8] The pursuers have been attempting to terminate the defenders' appointment as trustee for many years. On 23 May 2012, the committee wrote to the defenders purporting to terminate that appointment. The following month the defenders responded that they would appoint solicitors to draft the necessary deed of retirement, appointment and conveyance. A sum of £9,500 was requested by, and paid to, the defenders. Various communings occurred between then and August 2017, when the defenders' solicitors wrote to the pursuers stating that they would expedite the transfer of the trusteeship and requesting details in order that the deed could be finalised. The deed had not been finalised and the defenders continue to be in receipt of substantial sums every year. On 27 August 2017 the committee passed a resolution authorising litigation against the defenders.

[9] The individuals named in the instance aver that they are three members of the committee; the other two being WimPen's nominees. It is agreed by joint minute that Mr Fletcher was elected at an AGM held in June 2014. Mr Lindsay was elected at an SGM in January 2016 and re-elected at the AGM in September 2016. Mrs Burston was elected at the

2016 SGM. At an SGM in April 2017 and AGMs in September 2017 and April 2018, other Club members, namely Terry Smith and Walter Farquhar were elected in place of Mrs Burston, with the others being re-elected. An arbitral award of March 2020 determined that the 2017 and 2018 general meetings had been invalidly convened. Thus the elections and re-elections at these meetings were deemed null and void. An appeal against the arbitrator's decision to this court was refused. Since it was held that retirements were not effective until replacements were found, Messrs Smith and Farquhar were deemed not to have been elected and Mrs Burston's resignation was not effective.

[10] At a committee meeting on 23 March 2021, chaired by Mr Fletcher, he and Messrs Lindsay and Burston were confirmed as duly elected members of the committee, alongside WimPen's two nominees. The make-up of the committee was thus the same before and after the invalid resolutions. A resolution to continue with the litigation was passed by three votes to two.

[11] The pursuers believe that there has been an improper allocation of timeshare certificates by WimPen. This has led to a dispute on who is a member of the Club. The pursuers aver that both WimPen and the defenders hold a copy of the register of members, but the committee do not. Notwithstanding the previous Opinion of the Court (at para [39]), the defenders' CEO gave evidence at the hearing before the Lord Ordinary that the register had not been provided to the pursuers owing to the defenders' concern that the committee is not a valid one.

The Lord Ordinary

[12] The Lord Ordinary rejected the pursuers' contention that the defenders had no standing to challenge the validity of the committee. If the defenders were to accept a

purported discharge of their trusteeship by persons who were not duly authorised to act for the Club, that could leave the defenders in difficulty. Clause 1.3(a) of the Deed of Trust did not support the pursuers' argument. That clause only applied to a trustee who was complying with a direction of the committee. There was no basis for concluding that a decision to terminate the appointment of the trustee fell into the category of a direction.

[13] The Lord Ordinary rejected the defenders' challenge to the validity of the committee. The individual pursuers (Messrs Fletcher, Lindsay and Burston) were committee members with authority to bring the proceedings on behalf of the Club. Read together, clauses 11.2 and 11.3 of the constitution provided that retirement and re-election of committee members did not take place until a valid AGM was held. A committee member must stand down after a maximum period of 6 years, but this too must take place at an AGM. The arbitral decision invalidated the 2017 and 2018 general meetings. In those circumstances, the last properly elected members remained as committee members. This view, which formed part of the contract between the Club members which required to be construed in accordance with established principles of interpretation, accorded with the purpose of the constitution. Club members could not themselves convene an AGM. That power rested with the committee. The members must have intended there to be a committee in place at all times. It would make no commercial sense if the constitution resulted in the Club not being able to function or to protect its rights. A valid committee being in post, the defenders must demit office on the terms in the draft deed of resignation.

[14] For an AGM to be convened, the committee had to give notice to the members of the Club. To require the committee to convene another AGM, when it did not have the register of members, could well lead to further litigation. The current committee members needed to call an AGM. They may need to convene an SGM, but they can only do so after having sight

of the register of members and been given a reasonable time to reach a view on the correctness of the entries.

[15] The Lord Ordinary would have accepted the pursuers' alternative argument that, if there were no validly constituted committee, it was an implied term of the constitution that the members could vindicate the Club's interests and take reasonable steps to give effect to the settled will of the Club as expressed by the members at general meetings. Such a term should be implied, subject to notification having been given to all known members of their intention to act on the Club's behalf. It was the settled will of the Club that the defenders be removed as trustee. The test for the implication of terms was met (*Marks and Spencer v BNP Paribas Securities Services* [2016] AC 742 at [21]).

[16] The pursuers' additional proposition, that if the individual pursuers did not have title to sue as committee members, they had title to sue as Club members, would have failed. The constitution made it clear that the business and affairs of the Club were managed by the committee. There was nothing to support the view that individual members could bring actions of their own in relation to collective rights.

Title to Sue – Cross Appeal

Submissions

Pursuers

[17] The Lord Ordinary erred in holding that the defenders had standing to challenge the committee's validity. The interpretation and application of the Club's constitution was a matter for the Club's membership. It was, in relation to the defenders, *res inter alios acta* (*Edinburgh Veterinary Medical Society v Dick's Trustees* (1874) 1 R 1072 at 1079; *Ward & Co v Samyang Nav. Co* 1975 SC (HL) 26 at 36 and 51). The word "direction" in clause 1.3(a) should

be taken to mean simply a decision of the committee. It was clear from the words “without prejudice” that the trustee should not be concerned with matters that were internal to the Club. The defenders were arguing for a construction, which they had no standing to pursue and in circumstances where there was no evidence to suggest that any member of the Club supported that construction.

Defenders

[18] It was for a pursuer to establish their title to sue. Any defender could plead no title to sue when members of an unincorporated association were the pursuers (*Renton Football Club v McDowall* (1891) 18 R 670 at 675). None of the individual pursuers had a *prima facie* valid appointment to the committee. They should be taken to have retired at the expiry of their terms as set out in the rotation provisions (cl 11.2). The main purpose of the action was to obtain a deed of retirement, which must contain a discharge in the defenders’ favour. An invalid committee cannot grant such a discharge. The natural meaning of clause 1.3(a) is that the trustee is not obliged to enquire as to the committee’s validity; not that the trustee may not enquire.

Decision

[19] The pursuers are an unincorporated association, namely Club Los Claveles. The names of the three committee members are included in the instance primarily as “representing the Club”, albeit that by amendment on 10 September 2021 they also sue as individuals. Their names are added as representing the Club because that is this Court’s practice (but not that of the sheriff court; see Sheriff Courts (Scotland) Act 1907 s 3(e)). The principal reason for the practice, in the case of pursuers, is to facilitate the recovery of

expenses by the defenders in the event of an award being made against the association (*Renton Football Club v McDowall* (1891) 18 R 670, Lord McLaren at 674).

[20] It is correct to assert as a generality that any action brought by an association ought to be properly instructed by the members or, as here, by a body such as a committee with delegated powers to sue. The defenders maintain that the three individuals have not been properly elected as members of the committee. That is not a challenge to the pursuers' (ie Club Los Claveles') title to sue. The Club have a title as an unincorporated association to vindicate their rights in relation to the defenders (*Edinburgh Veterinary Medical Society v Dick's Trustees* (1874) 1 R 1072, Lord Ormidale at 1079). Further, it is not a matter which need normally concern a defender unless, as in *Renton FC*, there is some real basis for an averment that the action is not properly authorised by the membership.

[21] Any defect in the election of a committee member is *res inter alios acta* so far as third parties are concerned, (*ibid*; *Ward & Co v Samyang Nav. Co* 1975 SC (HL) 26, Lord Fraser at 36, Lord Kilbrandon at 51; see also the process of disclamation; McLaren: *Court of Session Practice* 440). The court is not in the habit of insisting that non-natural pursuers demonstrate that an action has been properly authorised. In this case the defenders have no basis upon which to assert that the membership have not authorised the litigation. The constitution authorises the committee to institute legal proceedings (cl. 11.5.8). The only functioning committee of the Club authorised litigation on 27 August 2017 and again on 23 March 2021.

[22] In addition, the purpose of Clause 1.3(a) of the Deed of Trust is to avoid disputes of this very nature. The word "directions" refers to statements by the committee chairman (Mr Fletcher) that a particular decision has been reached by the committee. The minutes of the committee make clear what has been decided. The defenders are entitled to rely on that

to the effect that both a transfer of the trusteeship and this litigation have been duly authorised.

[23] For these reasons, the court should allow the cross-appeal and repel the defenders' first plea-in-law in so far as applying to the Club and the three individuals named as representing it. For the reasons given later, the situation may be different in relation to those persons "as individuals".

Validity of the Committee

Submissions

Defenders

[24] The second to fourth pursuers were no longer members of the committee. It was either the import of clause 11.4 of the constitution, which failing an implied term of the constitution, that the powers of the committee vested in the Founder Members of the Club, namely WimPen, and Time Ownership Los Claveles (Management) Ltd, in any scenario in which the committee became inquorate. The pursuers accepted that no valid AGM had been held since 2016.

[25] The provisions within the constitution for the retirement of committee members by rotation had parallels with the retirement of directors under the Articles of Association of limited companies (Companies (Model Articles) Regulations 2008, Sch 3, art 21). A director was deemed to have vacated office on the last day on which the meeting at which he ought to have retired could validly have been held (*In re Consolidated Nickel Mines* [1914] 1 Ch 883 followed in *Harman v BML Group* [1994] 1 WLR 893). The members of a Club were only bound by the actions of a committee when it acted in accordance with the constitution (*Crocket v Tantallon Golf Club* 2005 SLT 663 at paras [29] – 30]). Those principles applied

where the directors believed that the AGMs were valid at the time (*Re New Cedos Engineering Co* [1994] 1 BCLC 797). The fact that the Club was an unincorporated association did not affect the reasoning in the authorities on the management of companies. The court had no statutory power to convene a general meeting of a club, as it did in relation to companies (Companies Act 2006, s 303 to 306). This was not a sufficient reason to give the rotation provisions a different meaning from that which they would otherwise bear.

[26] Even if clause 11.4 did not have the effect of giving the Founder Members the committee's powers in the event of a meeting being inquorate, and there was no such implied term, the Lord Ordinary was not correct to say that that would leave the Club *in limbo*. There would be a *casus improvisus* justifying an application to the *nobile officium*.

[27] Mr Fletcher was ineligible to hold office as he was first appointed to the committee over six years ago. Six years was the maximum period of service (cl. 11.2). If he had not been a valid committee member at the meeting of 21 May 2021, the committee would have been deadlocked on the resolution authorising the litigation. The other individual pursuers would not have had the authority to pursue the action without Mr Fletcher.

[28] The Lord Ordinary erred in holding that, if there was no validly constituted committee, it was an implied term of the constitution that Club members could vindicate the Club's interests and take reasonable steps to give effect to the settled will of the Club. The test for implication was not met (*Marks and Spencer v BNP Paribas Securities Services* [2016] AC 742). First, since the constitution permitted the Founder Members to take over in the event of an inquorate committee, there was no *lacuna* requiring to be filled. Secondly, co-holders of rights generally had to act unanimously (*Detrick and Webster v Laing's Patent Overhead Handstitch Sewing Machine Co* (1885) 12 R 416). Where they had appointed agents to act in the form of a committee, and that mechanism had failed, there was no basis for

implying a further term. Thirdly, the implied term would be unworkable. Different members might make competing claims to be acting under any implied provision. An implied term could not provide a basis for the orders sought here, as both required a functioning committee.

Pursuers

[29] As a result of the arbitrator's award declaring the 2017 and 2018 AGMs invalid, the membership of the committee reverted to its previous state. That was confirmed in the first arbitration with WimPen. The Lord Ordinary interpreted the Club's constitution correctly. It was appropriate for a much more flexible approach to be taken to the interpretation of an unincorporated association's constitution than to that of a limited company's articles of association. When applying clauses 11.2 and 11.3, the usual canons of contractual interpretation were to be used. "Play in the joints" was required (*In re GKN Bolts & Nuts Sports and Social Club* [1982] 1 WLR 774 at 776). The membership of the committee had reverted to its pre-2016 formation. The alternative would leave the Club without a functioning committee. For those same reasons, Mr Fletcher was eligible for membership notwithstanding the expiry of six years.

[30] Clause 11.4 only applied at the inception of the Club and did not give the Founder Members the committee's powers beyond that. The defenders were incorrect to argue that a Founder Member could exercise the committee's powers if the committee became inquorate. The Founder Members had not asserted such a right. WimPen had appointed two members to the committee, both of whom voted at the meeting in March 2021 to confirm that the committee had been validly constituted.

Decision

[31] The proceedings of an unincorporated association can be wide and varied. They should not be compared too closely with those of a limited company, which is governed by a detailed statutory regime. In the case of a club, the court agrees with *In re GKN Bolts & Nuts Sports and Social Club* (Megarry V-C at 776) that when tackling problems which arise with rules and resolutions:

“[G]eneral concepts of reasonableness, fairness and common sense [should] be given more than their usual weight ... In other words, allowances should be made for some play in the joints.”

[32] The Club’s rules provide for the periodic election and retirement of the three non WimPen members on its management committee (cl 11.2). The structure, in broad terms, is that at each AGM a member retires and another is, at the same meeting, elected. This structure, including the six year maximum, has to be viewed in the context of the other rules. They presume that there will always be a functioning committee of the Club which can pursue any necessary litigation.

[33] The AGMs of 2017 and 2018 have been declared invalid. There have been no AGMs since then. The effect of this is not only that the election of committee members did not take place but also that any scheduled retirements did not occur. The only pragmatic solution to this problem is the one determined both in the arbitration and by the Lord Ordinary. The committee members who were in place before the invalid AGMs remain in office until they retire at a future AGM. That being so, the court agrees with the Lord Ordinary (at para [32]). The three individual pursuers are the committee members who not only have the authority to direct the litigation but also have the power to grant a valid discharge to the defenders. On this basis, the reclaiming motion should be refused.

[34] Had it required to determine the matter, the court may have been less enthusiastic about the implication of a term which permitted a group of only three members to litigate on behalf of the Club as a whole. The test for implying a new term into the constitution does not appear to be met. For the reasons already given, there is no apparent *lacuna*. Any attempt to pursue a derivative action, based upon the three individual pursuers' Club membership, would, as the Lord Ordinary indicated, require intimation on the other members and proof of the "settled will" of the Club, which would not be easily achieved. There is force in the defenders' submission that an implied term would be difficult to operate. As these matters do not now arise, the court should not express a concluded view.



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OPINION OF LORD WOOLMAN

in the cause

CLUB LOS CLAVELES and ALBERT FLETCHER, ROGER LINDSAY, and NORMA ANN
BURSTON, three members of the Committee thereof as representing the Club and as
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Defenders and Reclaimers: O'Brien QC; Turcan Connell LLP
Pursuers and Respondents: Barne QC; BTOLLP

18 August 2022

[35] I agree with the reasoning and conclusions of your Lordship in the chair. In particular, I agree that the defenders were not entitled to advance a plea of no title to sue and that the cross-appeal should be allowed.



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OPINION OF LORD DOHERTY

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**Defenders and Reclaimers: O'Brien QC; Turcan Connell LLP
Pursuers and Respondents: Barne QC; BTOLLP**

18 August 2022

[36] I agree with your Lordships that the reclaiming motion should be refused, for the reasons which your Lordship in the chair has set out in paragraphs [31] to [33] of his opinion.

[37] However, I would not have allowed the pursuers' cross-appeal. In my opinion the Lord Ordinary was correct to hold that the defenders were entitled to advance their plea of no title to sue.

[38] Questions of title to sue are not mere matters of practice. They are questions of substantive law (Maxwell, *Court of Session Practice*, p 147; Macphail, *Sheriff Court Practice*

(4th ed), paragraph 4.35). Club Los Claveles is an unincorporated association. In Scots law it has no separate legal personality distinct from that of its members. It is well established at common law that an unincorporated association cannot sue or be sued alone. Generally at least some of the members must also be pursuers or defenders (*Pagan & Osborne v Haig* 1910 SC 341, Lord Dundas at p 350; Stair Memorial Encyclopaedia, *Associations and Clubs Reissue*, paragraph 20; Scottish Law Commission Report no. 217, *Unincorporated Associations* (2009), paragraph 2.14). The common law position has been innovated upon to some extent by statute in relation to certain actions brought in the sheriff court (Sheriff Courts (Scotland) Act 1907, First Schedule (as substituted by Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993), OCR 5.7(1), and section 3(e), (n), and (o); see *Greengairs Rovers FC v Blades* (1910) 26 Sh Ct Rep 280 and Macphail, *supra*, paragraph 4.122); but there has been no statutory innovation in respect of actions in the Court of Session.

[39] Where, as here, the constitution of an unincorporated association empowers a committee to litigate on behalf of the members, the law recognises that the committee has title to sue on their behalf (cf. *Whitecraigs Golf Club v Ker* 1923 SLT (Sh Ct) 23). The defenders maintain that Mr Fletcher, Mr Lindsay and Mrs Burston are no longer committee members. If that contention had been correct then they would have ceased to have title to sue on behalf of the members (*Donaghy v Rollo* 1964 SC 278). It would have been a point which the defenders were entitled to take. Whether or not they continue to be committee members, and therefore whether they continue to have title to sue, is not a matter which is of no interest to the defenders, not least because they wish to know whether an indemnity granted by Mr Fletcher, Mr Lindsay and Mrs Burston would bind all of the members of the club. In my opinion it is not a matter which is *res inter alios acta* the defenders. Nor am I persuaded that Clause 1.3(a) of the Deed of Trust precludes the defenders from taking the title to sue

point. In my opinion on a proper construction of that provision it confers rights on the Trustee. It does not restrict or remove rights which the Trustee would otherwise have.

[40] Accordingly, in my view the defenders were entitled to advance their title to sue argument. However, in the result, that argument fails because its premise has not been established - Mr Fletcher, Mr Lindsay and Mrs Burston have not ceased to be committee members.