OUTER HOUSE, COURT OF SESSION

[2022] CSOH 6

A281/17

OPINION OF LORD CLARK

In the cause

(FIRST) CLUB LOS CLAVELES, (SECOND) ALBERT FLETCHER, (THIRD) ROGER LINDSAY, AND (FOURTH) NORMA ANN BURSTON

Pursuers

against

FIRST NATIONAL TRUSTEE COMPANY LIMITED

Defender

Pursuer: Barne QC; BTO LLP
Defender: O'Brien QC; Turcan Connell LLP

20 January 2022

Introduction

[1] The first pursuer is an unincorporated association named Club Los Claveles ("the club"). In terms of its constitution, the business of the club is managed by a committee. The three other pursuers are individuals who say that they are on the club's committee. Members of the club hold timeshares in properties in a resort known as Los Claveles, in Tenerife. The properties are owned by five companies, set up for that purpose. The constitution of the club provides that the shares in the five companies require to be held by an independent trustee. The defender was appointed as the independent trustee. A dispute

arose as to whether the defender's position as trustee had come to an end. The pursuers seek a declarator to that effect along with decree of specific implement and certain other orders. The defender contends that the individuals named in the instance are not members of the committee and hence that the pursuers do not have title to sue. It is accepted by the defender that if the pursuers do have title to sue the orders sought should be granted, but subject to certain qualifications. The matter called before me for a proof before answer.

Background

Factual background

[2] The Los Claveles timeshare resort in Tenerife was established in 1990 and comprises of villas and studio apartments. The club members hold timeshare weeks in 85% of the properties in the resort. From around 2011, the costs and role of the defender as trustee began to be discussed at various meetings. A change of trustee came to be considered. The club's constitution empowers the club's committee to delegate certain roles to a management company. In 2012, Wimpen Leisure Management SA (Wimpen) acted as the management company. The managing director of Wimpen wrote to the defender on the club's behalf on 23 May 2012 giving notice of the termination of the defender's appointment as trustee. On that date, Hutchinson & Co Trust Company Limited (HCTCL) signed a trustee appointment document as the replacement trustee. On 22 June 2012, the defender expressed its disappointment but said that it would appoint solicitors to deal with a deed of retirement. The defender requested a payment of £9,500 in relation to the anticipated expenses of termination and transferral. Payment was made. At a combined annual general meeting (AGM) held by the club and other organisations involved in the resort in June 2014, it was recorded that the contract with the defender had been terminated and a new trustee

had been appointed at a lower cost. Delays then occurred in relation to the retirement of the defender and the appointment of the new trustee. The pursuers aver that the club wished to appoint Hutchinson Trustees Limited (HTL) as the new trustee, that company having bought the business of HCTCL in February 2016.

[3] The second pursuer, Mr Fletcher, was elected to the committee at the AGM in June 2014. The third pursuer, Mr Lindsay, was elected at the special general meeting (SGM) in January 2016 and re-elected at the AGM in September 2016. The fourth pursuer, Mrs Burston, was elected at the SGM in January 2016. Disputes between the club and certain others involved in the resort's affairs (in particular, Wimpen) have been going on for some time. The shares in Wimpen were bought by another Spanish company in 2015 and this was not well-received by some club members. An attempt was made to terminate Wimpen's position as the management company. The disputes included whether Wimpen was "the Company" under article 1 of the club's constitution, and hence a founder member of the club. That issue and certain other matters went to an arbitration, which I shall call the first arbitration. On 1 August 2017 the arbitrator's part award was issued. Among other things the arbitrator concluded that Mr Fletcher, Mr Lindsay and Mrs Burston were the duly elected committee members as at August 2017. The arbitrator also found that Wimpen was "the Company" for the purposes of the constitution. This means that as a founder member it was entitled, under the constitution, to appoint two of the five members of the club's committee, with the other three members elected by the club's members.

[4] In August 2017, the defender's solicitors advised that they had been instructed to expedite the transfer of the trusteeship and requested updated details in order for a deed to be finalised. A draft deed of retirement was emailed by them to the solicitors acting for the new trustee. Also in August 2017, at a club committee meeting, litigation against the

defender was approved. Later that month, there was an appeal to this court against findings in the part award in the first arbitration. That appeal was refused.

[5] There was an SGM in April 2017, an AGM in September 2017 and an AGM in April 2018. At these meetings, resolutions were passed to suspend or expel certain individuals and companies from membership of the club. There were also amendments to the constitution relating to elections and the membership of the committee, stopping Wimpen from appointing two of the members of the committee. Committee members were elected or re-elected. Matters were referred to a second arbitration, initiated by Wimpen and an associated company. The issues included whether these meetings and the resolutions passed at them were valid. In her part award issued in March 2020, the arbitrator in this second arbitration concluded that the meetings were invalidly constituted and the resolutions passed were null and void. An appeal to this court against that award was refused.

[6] Certain issues were raised at an earlier debate in this case and subsequently dealt with in a reclaiming motion, prior to the outcome of the second arbitration. The Inner House concluded *inter alia* that it was most unfortunate that the current dispute has proved incapable of simple resolution by the resignation of the defender and the appointment of a new trustee (*Club Los Claveles & Ors* v *First National Trustee Company Ltd* [2020] CSIH 33, at [32]) and that after a proof before answer, a declarator in not too dissimilar terms to that sought, which stated that the defender is obliged to resign and assume a nominated trustee once the latter has been identified, may be justified (at [38]).

[7] When the present action was first raised and the debate and reclaiming motion were dealt with, the named pursuers were the club and four individuals. The meetings that were later declared to be invalid had involved the election of two of those four individuals and

the re-election of the other two (Albert Fletcher and Roger Lindsay). As a result of the arbitrator's findings on invalidity of the meetings and the resolutions passed, the summons was amended, in essence based upon the last set of validly appointed committee members being named as the individual pursuers. In light of the findings in the second arbitration, Wimpen's right to appoint two members of the committee remained in place.

[8] No AGM took place in 2020. On 23 March 2021, a meeting took place, with Albert Fletcher, Roger Lindsay, Norma Burston and the two people appointed by Wimpen in attendance. A resolution confirming the constitution of the committee as comprising those five individuals was passed unanimously. A resolution authorising the solicitors to continue with these proceedings was also passed, by a majority of three to two. In May 2021, Wimpen and Mr Fletcher each sent lengthy and detailed letters to the persons known to be club members, setting out their conflicting respective positions on a number of matters. The letter from Mr Fletcher explained the reason why the persons now said to be committee members were in that position and that the present litigation would continue. No members have, by arbitration or legal proceedings, sought to challenge that position.

[9] The background details set out above are perhaps somewhat complex but require to be narrated as they are relevant for the purposes of understanding the submissions made on behalf of the parties and my decision and reasons. However, it may assist simply to highlight what might be described as the headline point: that Albert Fletcher, Roger Lindsay and Norma Burston, named as committee members and as pursuers in this action, were the elected club committee members prior to the passing of the resolutions that were later declared invalid. The pursuers' position is that the declaration of invalidity in the second arbitration resulted in the previous elected committee members being treated as the

currently elected committee members. The defender's position is that this contention is wrong and that there are no validly elected committee members, and hence no title to sue.

The constitution of the club

[10] Clause 11 provides:

> "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…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 … At the second Annual General Meeting of the Club and at each subsequent 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 together with any new nominees 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 or vacancies thereby created.
>
> 11.3 Save as herein provided election 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…"

[11] Clause 11.4 deals with the general powers of the committee, and the committee's power to delegate to the management company. It then continues:

> "11.4 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…"

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 for approval of the club

accounts and club budget: clause 11.4. That includes making contracts (clause 11.5.5), appointing professional advisers (clause 11.5.6), and conducting litigation (clause 11.5.8).

Deed of Trust

[12] Clause 1.3(a) of the Deed of Trust states:

> "Where reference is made herein 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."

Evidence

[13] The pursuers lodged an affidavit by Veranne Wilkinson, who is the managing director of HTL. Her evidence was not challenged by the defender and she was not led as a witness. Under reference to the Opinion of the Inner House in the reclaiming motion, she explained that HCTCL had not refused to accept office. It had sold its business to HTL which had always been willing and remained willing to assume office as the club's trustee in place of the defender. HTL has signed a contract to that effect dated 21 September 2020. HTL was also willing to sign the proposed deed of retirement, appointment, and conveyance, which contains the discharge of the defender referred to at para [38] of the Inner House's decision.

[14] The pursuers then led evidence from Mr Fletcher, including on the factual background, already noted above. He had been a member of the club for over 25 years. Wimpen had been employed by the committee to help run the resort, collect fees, manage staff and the like. It kept the register of members. The club committee asked for the register

of members to be returned from Wimpen after they ceased to be the management company. The arbitrator in the first arbitration ordered that it be returned. That had still not been done and litigation enforcing the award of the first arbitrator was continuing in the Spanish courts. There were membership certificates said by Wimpen to exist but disputed by the committee and which had not been ratified at a general meeting of the club members. Wimpen also appeared to hold, or pass on, the rights to timeshare weeks that had been cancelled, which it was not entitled to do. If Wimpen was able to use the votes allocated to the cancelled weeks that would give Wimpen a significant number of votes. The cancelled weeks belonged to the club as represented by the committee. Wimpen no longer had any position but continued to operate as if still in post and was still collecting money on behalf of the club.

[15] Mr Fletcher said that the present defender had a copy of the register of members but had refused to pass it to the club committee. Nor had the club committee been allowed to inspect it. In relation to the disputes between Wimpen and the club, the defender had continued to support Wimpen and refused to give information to the club committee. The driver behind changing the trustee was purely the costs charged by the defender. He explained the discussions and decisions reached about the transfer of the trusteeship. He was satisfied that it was clearly the settled will of the club to transfer to a new trustee and that had been the case for many years.

[16] In light of the second arbitration and the dismissal of the appeal, the logical conclusion was to revert back to the elected members of the last validly authorised committee, and the two Wimpen nominees. No one on the committee and no member of the club had indicated that the committee as now constituted could not function or operate. No meetings had been challenged. He referred to a letter from Wimpen to him, as chairman

of the committee, dated 22 April 2021 requesting a special general meeting. Wimpen had indicated that some seven companies, which Mr Fletcher and his colleagues had never heard of, had the right to vote. It was necessary to see the register of members to allow the committee to decide who was entitled to vote. Mr Fletcher's position was that the defender did not act independently but rather had been working together with Wimpen and supplied information to Wimpen. An AGM would be called if there was confidence about who are the true members of the club. If the membership records were handed to the new trustee that would certainly help in determining who were truly members. The Covid-19 pandemic was a reason for not holding general meetings of the club in 2020 and 2021. Meetings could not have been held by remote video link, as the majority of members are in their seventies or eighties and do not use emails or digital platforms. The request for an SGM, noted earlier, was said to be based on at least 10% of the members requesting it, but that could not be verified as neither Wimpen nor the defender was prepared to give the committee their register of members. The committee would need to call a general meeting to allow election of club committee members and that would be done after these proceedings. The decision of the second arbitrator had been published on the website and was accessible by 75% of the members known to the club committee as being members. Those members had been told in May 2021 about the committee as now constituted and that this litigation was proceeding.

[17] Evidence was then led on behalf of the defender from Declan Kenny, the CEO of the defender. The trustee was given information from the founder member, in this case Wimpen, as to who are the members. The defender could identify club members from the records in its possession. Wimpen, as founder member, had updated the defender as regards any changes to membership. Most general meetings involving members of other clubs during the pandemic had been dealt with in virtual meetings and Mr Kenny had

attended quite a few of them. It had always been the defender's position to follow the notice that it had to resign as a trustee and that was why a draft deed of retirement had been sent out. Nothing had happened for a long period. They had waited to hear back from HTL on various matters.

[18] In 2015 the defender became aware of the disputes between Wimpen and the committee. The defender had concerns about this breakdown in relations. Once the award of the first arbitration came out the defender decided to move on and get the transfer of the trusteeship completed. It did that within a week of the word coming out. The defender sought an appropriate indemnity from the club committee and Wimpen and did not want to be caught as "a piggy in the middle". The defender would progress matters as requested if satisfied that the committee was properly constituted. The defender was happy to resign as long as it got indemnities. As far as Mr Kenny was aware, this committee had been operating since March 2021 and no one in the club had sought to prevent these individuals from holding themselves out and acting as the committee. However, the defender would like to see things clarified by an AGM as that would close the matter. The defender's concern was that if the committee did not contain valid members that created issues regarding the validity of any agreement in the deed of retirement.

[19] Mr Kenny accepted that the beneficiaries under the trust are the club members. He also accepted that the register of members was part of the club's property, as the Inner House had determined. The only reason for not passing the register to the committee was whether the committee membership was valid, but it would be passed to the replacement trustee. The defender had not made its register available to Wimpen, although information on the register came from Wimpen. It was always the founder member of the club who gave

the defender that information. The issue whether Wimpen was the management company remained in dispute. The defender had taken no sides. The disputes were killing the club.

Submissions

Submissions for the pursuers

[20] The manner in which the club chooses to give effect to its constitution is a matter for the club. Any alleged irregularities are to be dealt with by the club, if necessary by arbitration. In the present case, the named pursuers had convened three committee meetings since disposal of the appeal in the second arbitration. Those meetings were attended by the appointed committee members. Furthermore, Mr Fletcher, expressly in his capacity as chairman, had written to the known members of the club confirming that, as a result of the second arbitration, the elected members of the committee revert to the situation that applied before the appointments made at the impugned general meetings. It has not been alleged and no proceedings have been raised suggesting that the committee is not properly constituted. An argument about irregularities, advanced by a third party who is being sued by an unincorporated association, should not be given effect: *Edinburgh Veterinary Medical School* v *Dick's Trs* 1874 1 R 1072, Lord Neaves at 1078, Lord Ormidale at 1079. The committee has confirmed that it wishes these proceedings to be brought. In the circumstances, it was not open to the defender to contest the pursuers' standing. Furthermore, the Deed of Trust, at clause 1.3(a) protects the trustee in these circumstances.

[21] If the pursuers' primary position was not accepted then in terms of the club's constitution, properly construed, the named pursuers remained the elected members of the committee. It was wrong for the defender to seek to equiparate unincorporated associations with companies. Companies usually have detailed articles or memoranda of association,

which are themselves supplemented by a detailed and comprehensive statutory code. Matters for unincorporated associations are far less prescribed. It is the constitution, and how the members choose to apply it in practice, that matters. As such, a more flexible approach to giving effect to a club's constitution is usually appropriate: *Re GKN Nuts & Bolts Sports and Social Club* [1982] 1 WLR 774, Megarry V-C at 776; *Jacques* v *Amalgamated Union of Engineering Works (Engineering Section)* [1986] ICR 683, Warner J at 692. Reading clauses 11.2 and 11.3, and having regard to the "play in the joints", as mentioned by Megarry V-C, the constitution should be understood as defining the length of committee members' tenure under reference to the holding of general meetings. This general approach was adopted by the arbitrator in the first arbitration. In the circumstances, the elected membership of the committee reverts to what it was in 2016. The alternative is to leave the club without a functioning committee.

[22] If the pursuers' construction of the club's constitution was not accepted, then there are no elected committee members and no functioning committee. A term must be implied into the constitution to allow members, in the absence of a functioning committee, to vindicate club interests and take reasonable steps to give effect to the settled will of the club, as expressed by members at a general meeting. Without such a term, where there was no functioning committee for whatever reason, the club would be entirely powerless to take executive action in protection of its rights and assets. Such a term therefore goes without saying and is, in any event, necessary to give efficacy to the constitution in circumstances where the executive body is not functioning (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Company (Jersey) Ltd and another* [2015] UKSC 72, paras [14] to [32], especially at para [21]; *Attorney General of Belize* v *Belize Telecom Ltd* [2009] 1 WLR 1988). In the present case, the club has decided that the defender should no longer act as trustee and paid over a

large sum of money to the defender to give effect to that decision. The trustee delayed in giving effect to the club's decision for reasons that have now been rejected by the Inner House. The trustee has also refused to return the register of members to the club or allow the committee to inspect the register. In these circumstances, members of the club can take steps to vindicate the club's interests in terms of the orders sought.

[23] If the above submissions were not accepted, the pursuers have title to sue *qua* individuals. Such a right will arise when the cause of action relates to a vindication of the individual members' rights: see *Abbott* v *Forest Hills Trossachs Club* 2001 SLT (Sh Ct) 155. In the absence of a functioning committee, the pursuers as individuals were entitled to vindicate their interest in having the transfer completed. Similarly, in relation to the club register, this had been determined by the Inner House to be club's "property" for the purposes of the Deed of Trust. The individual members were therefore entitled to take steps to vindicate their interest in the club.

Submissions for the defender

[24] The pursuers had no title to sue because the individuals are not members of the committee and have no title to bring this claim as individual members of the club. The normal principles of contractual interpretation, as stated in *Wood* v *Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10], should be applied. The procedure in clause 11.2 had not been followed. The pursuers were all elected more than 3 years ago and not validly re-elected subsequently. Mr Fletcher had been in office since 2014, which would exceed the 6 year term limit. Clause 11.2 has clear parallels to the provisions for retirement of directors by rotation that are commonly found in the articles of association of companies. In such cases, if the company fails to hold a general meeting, a director who ought to have retired

at that meeting vacates office on the last day when a meeting could have been held: see *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883 at 888-889; *Alexander Ward & Co Ltd* v *Samyang Navigation Co Ltd* 1973 SLT (Notes) 80; and *Harman* v *BML Group Ltd* [1994] 1 WLR 893, Dillon LJ at 896.

[25] Insofar as the first arbitration award reached a contrary view, it was wrongly decided and is not *res judicata*. Nobody else was to blame for the failure to hold valid meetings in 2017 or 2018. The pandemic did not prevent later meetings from being held by video. The suggestion that a dispute over the accuracy of the register of members prevented the committee from convening a meeting could not explain the whole period of failure. Even if Mr Fletcher alone was excluded from the committee, because of the 6 year period having been reached, the resolution authorising the continued pursuit of this claim would not be validly passed. Clause 1.3(a) of the Deed of Trust, properly construed, did not bar the defender from advancing the above argument. It related to directions of the committee. Its purpose, broadly put, was to allow the trustee to rely on apparently valid directions without incurring liability should those directions prove defective. But this case was not simply about directions. The defender has an interest in ensuring that its discharge is granted by parties who actually have authority to grant it.

[26] It would be inconsistent with the scheme of the constitution if individual members of this large society could bring actions of their own in relation to such collective rights, independently of the committee. Co-holders of rights are generally required to act unanimously in enforcing them: *Derrick and Webster* v *Laing's Patent Overhead Handstitch Sewing Machine Co Ltd* (1885) 12 R 416. Here, the members would do so through the committee as their common agent. There was no basis for implying the term relied upon by the pursuers. The traditional tests for implication of terms were not met: *Marks and Spencer*

plc v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [21]. In particular, the constitution already provided a means by which the club can operate without its committee until the committee can be reconstituted. Clause 11.4 covered the matter. If (contrary to the above submission) clause 11.4 is to be read narrowly as applying only to the period before the committee is first constituted, then the natural implied term to plug the gap would be for the same arrangements to apply *mutatis mutandis* in the event of the committee ceasing to be constituted.

Decision and reasons

[27] Mr Fletcher and Mr Kenny each gave their evidence in a candid and straightforward manner. Mr Fletcher is plainly committed to looking after the interests of the members of the club, with honesty and integrity. Mr Kenny properly explained that the defender was in the unfortunate position of being caught in the middle, having received a number of letters from solicitors for the club and for Wimpen, those entities being embroiled in a bitter dispute. This dispute was described by Mr Kenny as "killing the club". From the information put before me, I can see real force in that view and it would be a deeply regrettable outcome for all participants. The present case, however, deals only with the somewhat peripheral issue of the position of the defender as trustee.

Issue 1 - Is the defender entitled to challenge the validity of the appointment of committee members?

[28] The pursuers contend that someone in the position of the trustee in this case, in effect a third party, cannot take issue with the internal matters of the club. Senior counsel for the pursuers accepted that an unincorporated body sues in its own name, with authorised

persons entitled to have the body bring such proceedings also named: *Renton Football Club and Others* v *John K McDowall and Others* (1891) 18 R 670. In that case there was also a dispute about whether the members were duly authorised. That was held to be an issue that the defenders were entitled to take and a proof on it was allowed. The case cited and relied upon by senior counsel for the pursuers (*Edinburgh Veterinary Medical School* v *Dick's Trs* 1874 1 R 1072) did not in fact focus on the question of the basis upon which the pursuers were entitled to represent the society and hence whether there was title to sue. The pursuers' reliance on clause 1.3(a) of the Deed of Trust does not assist them. That clause provides comfort to the trustee, but only applies "Where reference is made herein to directions of the Committee of the Club…". I was given no basis for concluding that a decision to terminate the appointment of the trustee fell within that category and indeed I see no reference in the Deed of Trust to that being a direction of the committee. As to the basis for any valid interest on the part of the defender, it is in my view entitled to have the court determine whether those who purport to act as the committee do indeed have authority to grant the discharge of the defender's liabilities. Acceptance by the defender of a purported discharge by non-authorised persons could leave the defender in difficulty. In these circumstances, the defender has standing and interest to take the issue of title to sue.

Issue 2 - Interpretation of the terms of the constitution

[29] It was accepted that the constitution formed part of a contract. I shall apply the relevant principles, summarised as construing the wording objectively, contextually, purposively, and in a manner which accords with commercial common sense: *Park's of Hamilton (Holdings) Limited* v *The Scottish Football Association Limited* [2021] CSIH 61,

Lord President (Carloway) at para [17], under reference to *Ardmair Bay Holdings* v *Craig* 2020 SLT 549, Lord Drummond Young at para [47] *et seq*.

[30] It is quite clear from the constitution that the committee has the responsibility of running the affairs of the club. Without a committee, the club cannot effectively function. The committee is to comprise the elected members and the two members nominated by Wimpen. The two nominated members are not subject to the retirement provisions but Wimpen can replace them with new nominees. As the quorum for the committee is three, it cannot function with only the two nominated members. If there are no elected members, there is no quorate committee.

[31] In *Re Consolidated Nickel Mines Ltd*, a director who was in office was entitled to remuneration. Under the articles (and as also laid down by statute) there required to be an AGM each year. The directors failed to convene AGMs over a 2 year period. This appears to have been a deliberate act by them. They were taken to have retired at the end of the first of those years and hence were not entitled to remuneration thereafter. Sargant J said (at 887) that "the directors failed to perform their statutory duty" to call a general meeting. The present case involves different facts. The club is an unincorporated association rather than a company. The committee members did convene AGMs, which they considered to be valid, although they were later declared to be invalid. It was not suggested that the committee members were under a statutory duty to call an AGM, although the constitution does of course require that to be done. The individual pursuers are enforcing the club's rights rather than seeking to obtain remuneration. Unlike the position as regards companies, when members can convene a general meeting or request the court to call one (now dealt with in sections 303 to 306, Companies Act 2006) there is no such statutory right for members of an unincorporated association. Under the club's constitution,

it is only the committee which can call a general meeting; members cannot do so. Moreover, the wording of the constitution in relation to general meetings (especially what is said in clause 11.3) differs from the articles of association (so far as these are stated) in the cases cited on behalf of the defender. It is those rules, properly construed in accordance with the principles noted above, that matter. *Re Consolidated Nickel Mines Ltd* and the other cases relied upon by the defender can therefore be distinguished.

[32] One can readily understand that if the existence of a committee is absolutely essential at all times, the constitution would seek to achieve that end. Clause 11.2, quoted above, makes clear that retirement and re-election are to take place at an AGM. While it also states that the maximum period of service on the committee shall be 6 years, after which the retiring member shall stand down, nonetheless that is also to occur at an AGM. The decision of the arbitrator in the second arbitration was that the AGMs held on 10 September 2017 and 28 April 2018 were improperly convened and conducted. This invalidated the business at those meetings, with all resolutions voted on and passed at those AGMs being null and void. There were therefore no AGMs at which the committee members could, or were required to, retire and at which others could be re-elected. It was actions of the committee members at the time that gave rise to these meetings being improperly convened, but there was no suggestion of that being deliberate. Clause 11.3 also makes clear that it is only at an AGM that a director can be elected or removed. The reference in clause 11.3 to "Save as herein provided" is, in my opinion, a reference to the ability of the committee to fill casual vacancies other than at an AGM (see clause 11.5.1) and to the nomination and cessation of committee members by Wimpen. The use of "removal" in clause 11.3, occurring at a general meeting, must in my view relate to retirement of elected members, there being no other reference in any provision in the constitution to the removal of committee

members. When that is read along with clause 11.2, viewed objectively and in context, it is clear that a committee member does not retire until a valid AGM is held. This results in the highly sensible and pragmatic solution that if there have been invalid AGMs, rather than having no committee and thus no functioning club, the last properly elected members and the Wimpen nominees will form the committee. No real hardship is caused as there is an obligation on the committee to call an AGM within the stated timeframe, a matter commented further upon below.

[33] This interpretation fits with the purposive approach. The members of the club could hardly have intended that it would not be able to function and protect its rights, when the members cannot themselves convene a general meeting to elect committee members. It also makes very little commercial sense for the constitution to mean that such a situation would occur. Rather, the purpose must have been to have a committee in place at all times. As to the defender's reliance on clause 11.4 as meaning that the founder members would manage the club in the circumstances that occurred, that is of no assistance. The clause clearly applies only until such time as the committee shall have been constituted, and hence at the outset of the club's existence.

[34] For those reasons, I reject the defender's position and find that the individual pursuers in this action are committee members with authority to bring these proceedings and to discharge the defender. They have title to sue and as the defender accepts, that having been established, the defender must demit office on the terms set out in the relevant deed.

[35] While of no relevance to construction, it is worth noting that Wimpen and all of the persons known to the pursuers as being members of the club were told about who were the present committee members and why that was so. No arbitration or legal proceedings to

challenge the decision as to who should be on the committee have been raised by either Wimpen or any club member. Indeed, when the agents for Wimpen wrote to Mr Fletcher on 22 April 2021, the letter expressly referred several times to the present individual pursuers as the "elected committee members" and asked them to carry out a function that can only be carried out by the committee, namely the calling of a general meeting. In addition, the persons nominated by Wimpen as committee members voted at the meeting on 23 March 2021 in favour of the present five individuals constituting the committee.

[36] As noted earlier, the committee must convene an AGM. It may also be required to convene an SGM, if a valid request for that has been made. Notice must be given to members, but the constitution states that accidental omission or non-receipt of a notice does not invalidate the proceedings of the meeting, even if deliberate, if it arose out of or was connected with an honest but mistaken view of law or fact (clause 19.4). This reinforces the obvious point that the committee requires to reach a view as to who are the current members of the club, albeit that an honest mistake will not cause the meeting to be invalid. The evidence in the case showed that the committee has not been given, or been allowed to inspect, the register of members held by Wimpen and by the defender. The elected members of the committee have a concern about certain persons and companies that Wimpen lists as members, now also recorded in the defender's list. There are said to be questions of whether that has resulted from improper allocation of certificates by Wimpen, for example for cancelled weeks that are said to truly belong to the club. The committee must be given a reasonable period of time after having seen the register of members held by the defender to consider and reach a view upon which of these persons can properly be regarded as members. That will limit the chance of a mistake in convening an AGM. To ask the committee to convene an AGM when it doesn't have the register is asking for trouble

and could well result in yet further arbitration or litigation about wrongly convened meetings. Thus, the current committee members do need to call an AGM and perhaps may also need to convene an SGM, but they can only properly do so after having sight of the register of members and being given a reasonable time to reach a view as to the correctness of the entries.

Issue 3 - Implied term

[37] The pursuers rely upon the implied term only if their construction of the club's constitution is incorrect, so that issue no longer arises. It is, however, appropriate that I give my views on the matter. The implied term was to allow members, in the absence of a functioning committee, to vindicate club interests and take reasonable steps to give effect to the settled will of the club, as expressed by members at general meetings. In my opinion, the term should be implied, subject to adding wording to the effect that the members can do so if they have notified all persons whom they know to be members of the club of their intention to act on behalf of the club and that has not been the subject of any challenge in arbitration or legal proceedings. I am satisfied on the evidence that removing the defender as trustee was and remains the settled will of the club. In the circumstances, the principles for implication of terms as set out in *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [21] are met. The officious bystander element of the test, and the need for business efficacy, support such an implied term and it does not contradict any of the express terms. When one considers what the members would have intended to happen when the club has inadvertently found itself in a position where there is no functioning committee, there are two main possibilities. The first is that an action raised to vindicate the settled will of the club should be given up, with the issue of expenses

arising. The second is that members who make known their intention to vindicate the settled will of the club and who are not challenged about doing so are to be viewed as having authority to continue with the action. The latter approach is in my opinion "so obvious that it goes without saying", to use the expression of MacKinnon LJ in *Shirlaw* v *Southern Foundries (1926) Ltd* [1939] 2 KB 206, at 227. If I had not accepted the pursuers' position on construction of the express terms, I would therefore have upheld their position on this implied term. It does not involve individual club members vindicating personal rights, but enforcing rights on behalf of the club. To the extent that the orders sought refer to the committee, the members who are pursuers in the action would be so viewed for that purpose.

Issue 4 - Personal rights

[38] The proposition is that the pursuers (other than the club) have title to sue as individuals in the event that the pursuers' argument on all of the earlier grounds should fail. I have already held that the pursuers' case succeeds, but it is appropriate that I also express my views on this point, albeit in brief terms. I would have rejected the pursuers' contentions. Firstly, the constitution makes clear that the business and affairs of the club are managed by the committee. There is nothing which supports the view that individual members could bring actions of their own, as individuals rather than as representing the club, in relation to such collective rights. Secondly, the individuals, not acting on behalf of the club, are not the persons in favour of whom the conclusions in the summons should be granted.

Disposal

[39] For the reasons given, the defender falls to be replaced as trustee. Parties were agreed that if the pursuers succeed the court should be addressed on the precise terms of the orders sought. I shall fix a by-order hearing for that purpose, reserving in the meantime all questions of expenses.