

NEW SOUTH WALES SUPREME COURT

CITATION: Goodwin v VVMC Club Australia (NSW Chapter) [2008] NSWSC 154

JURISDICTION:

Equity

FILE NUMBER(S): 1277/07

HEARING DATE(S): 15/02/08

JUDGMENT DATE: 15 February 2008

EX TEMPORE DATE:

15 February 2008

PARTIES:

John Arthur Goodwin v Vietnam Veterans Motor Cycle Club Australia NSW Chapter Incorporated

JUDGMENT OF: White J

LOWER COURT JURISDICTION:

Not Applicable

LOWER COURT FILE NUMBER(S):

Not Applicable

LOWER COURT JUDICIAL OFFICER:

Not Applicable

COUNSEL:

Plaintiff: R Potter

Defendant: G Smith

SOLICITORS:

Plaintiff: Turnbull Hill Lawyers

Defendant: Armstrongs Solicitors

CATCHWORDS: ASSOCIATIONS AND CLUBS – incorporated associations – expulsion, suspension and disqualification – power to expel, suspend and disqualify – whether relations between members are justiciable – rules of association have effect of covenants under seal between members – disregard of rules – denial of natural justice - assessment of damages.



*“As you have not taken up the offer of retired status within the previously stated time you are hereby dismissed from the VVMC, NSW Chapter as from 3 March 2006.*

*You are required to make arrangements with the Secretary for the return of your colours before the next committee meeting on 20 May 2006.”*

2 The defendant is an association registered under the *Associations Incorporation Act* 1984 (NSW) (“the Act”). Its rules are contained in its constitution adopted in 1998 and registered with the New South Wales Department of Fair Trading on 11 May 1999. Its constitution describes its “Chapter Mission” as being *“To provide a suitable environment, both real and psychological, where Veterans of all wars and conflicts and those who have participated in peacemaking, peace enforcement and peacekeeping missions; plus ... [various other designated persons], can share experiences and assist each other in assimilating into the community, therefore enabling them to lead a more healthy, rewarding and productive lifestyle.”* Its objectives include providing an environment in the form of a veterans’ rehabilitation and lifestyle centre where veterans, serving and ex-defence personnel, and their families, can relax in a rural and peaceful setting; providing a psychological environment where members assist and watch over each other; maintaining close links with, and utilising the services provided by, the Vietnam Veterans Counselling Service and other like projects or organisations; providing an environment where members can associate with the general community; and supporting individual and community charities, community projects, community organisations and associations.

3 The following questions arise in this proceeding. The first is whether the plaintiff’s expulsion from membership is justiciable. The defendant submits that the plaintiff’s relationship with it is consensual, but not contractual, and that his expulsion involves no diminution of, or damage to rights of, property, livelihood, trade or reputation. Hence it is submitted that his expulsion from membership, whether in accordance with the rules or not, and whether in accordance with the dictates of natural justice or not, gives rise to no legally enforceable right.

4 The second question is whether by-laws said to justify a resolution at a general meeting of the defendant that the plaintiff be dismissed from membership if he did not resign are themselves valid.

5 The third question is whether the rules or the by-laws, assuming them to be valid, providing for dismissal from membership were complied with and whether the plaintiff was afforded procedural fairness.

6 The fourth question arises if the relations between the parties are contractual and if the plaintiff’s expulsion was in breach of the rules or by-laws. In that event, there is no real dispute that he would be entitled to damages in respect of distress arising from his expulsion for the last two years and the deprivation of benefits which membership of the defendant provides, but there is a question of the quantum of such damages.

## **Defendant’s Rules and By-Laws**

7 I deal first with the defendant's rules and by-laws. Rule 4 provides that a person ceases to be a member of the association if the person dies, resigns membership, or is expelled from the association. Rule 6 deals with resignation. A person who has paid all amounts due to the association may resign by giving notice in writing of his intention to do so. Rules 11 and 12 deal with expulsion and discipline. Those rules provide:

***“DISCIPLINING OF MEMBERS***

11. (1) *A complaint may be made by any member of the association that some other member of the association:*
  - (a) *has persistently refused or neglected to comply with a provision or provisions of these rules; or*
  - (b) *has persistently and wilfully acted in a manner prejudicial to the interests of the association.*
- (2) *On receiving such a complaint, the committee:*
  - (a) *must cause notice of the complaint to be served on the member concerned; and*
  - (b) *must give the member at least 14 days from the time the notice is served within which to make submissions to the committee in connection with the complaint; and*
  - (c) *must take into consideration any submissions made by the member in connection with the complaint.*
- (3) *The committee may, by resolution, expel the member from the association or suspend the member from membership of the association if, after considering the complaint and any submissions made in connection with the complaint, it is satisfied that the facts alleged in the complaint have been proved.*
- (4) *If the committee expels or suspends a member, the secretary must, within 7 days after the action is taken, cause written notice to be given to the member of the action taken, of the reasons given by the committee for having taken that action and of the member's right of appeal under rule 12.*
- (5) *The expulsion or suspension does not take effect:*
  - (a) *until the expiration of the period within which the member is entitled to appeal against the resolution concerned; or*
  - (b) *if within that period the member exercises the right of appeal, unless and until the association confirms the resolution under rule 12(4), whichever is the later.*

***RIGHT OF APPEAL OF DISCIPLINED MEMBER***

12. (1) *A member may appeal to the association in general meeting against a resolution of the committee under rule 11, within 7 days after notice of the resolution is served on the member, by lodging with the secretary a notice to that effect.*
- (2) *The notice may, but need not, be accompanied by a statement of the grounds on which the member intends to rely for the purposes of the appeal.*
- (3) *On receipt of a notice from a member under clause (1), the secretary must notify the committee which is to convene a general meeting of the*

*association to be held within 28 days after the date on which the secretary received the notice.*

- (4) *At a general meeting of the association convened under clause (3):*
  - (a) *no business other than the question of the appeal is to be transacted; and*
  - (b) *the committee and the member must be given the opportunity to state their respective cases orally or in writing, or both; and*
  - (c) *the members present are to vote by secret ballot on the question of whether the resolution should be confirmed or revoked.*
- (5) *If at the general meeting the association passes a special resolution in favour of the confirmation of the resolution, the resolution is confirmed.”*

8 Section 20 of the Act deals with alterations of the rules of an incorporated association. Any alteration to the objects or rules of an incorporated association must be made by special resolution (s 20(1)). A special resolution requires at least 21 days' written notice to members, specifying the intention to propose the specified resolution as a special resolution and the passing of the resolution by a majority of not less than three-quarters of members of the association as being entitled under the rules to vote in person or, where proxies are allowed, by proxy. That may be relaxed in certain circumstances which are not material.

9 An alteration to the rules, once approved by a special resolution, takes effect when the prescribed notice of the resolution has been lodged with the Director-General as provided for in s 20(2) and s 20(3). On 13 November 2004, members of the defendant, at a general meeting, voted to accept by-laws. It does not appear that these were passed pursuant to a special resolution of members. In any event, the by-laws have not been registered. They do not alter or replace the defendant's rules. In the event of inconsistency between the rules and the by-laws, the rules prevail.

10 The by-law of most significance for present purposes is by-law 1023 headed “*Dismissal process - all members including life members*”. It provides:

*“[1023] The process to dismiss a Member from the Chapter may be instigated from the Committee or indeed from the Membership. Disciplinary proceedings are to be heard in the presence of the Chapter Membership. The Member is to be informed of the allegation/s made against him and is to be given sufficient time to prepare his defence. The Member may call on another Member to assist him in presenting his case. The membership is to decide on the outcome by a majority vote. If the vote is for dismissal then it is to take place immediately. There is to be no review. If the case is not proven all documentation concerning the matter is to be destroyed.”*

11 There are also by-laws dealing with resignation and retirement. According to the by-laws, resignations and retirements take effect by the Committee giving approval to a written application by the member to resign or to retire (see by-laws 1010, 1011, 1015, 1016). Colours are to be returned upon a person ceasing to be a member. It appears, however, from by-law 806 that holding colours is not synonymous with membership. Whilst a person who ceases to be a member is required to hand in his colours, a member can be disciplined by

being stripped of his colours until he completes eight chapter rides whilst retaining membership (see by-laws 516 to 518 and 806).

### **Circumstances Leading to Plaintiff's Expulsion**

12 I deal next with the circumstances leading to the plaintiff's purported expulsion. At the annual general meeting of the defendant held on 23 July 2005, the plaintiff read out a prepared statement which was very critical of the President, Mr Thorpe, and the present Secretary, Mr Reid. He accused Mr Thorpe of defaming him and of labelling him as an informant to another club, which had led to the plaintiff being bashed, I infer, by members of another motorcycle club. He concluded the reading of his prepared statement, by saying:

*"... if you deem me to be a traitor for turning on my president then so be it. I will obey any judgement you the members make. My judgement is that the president is the traitor for abusing his privileged position within the club.*

*The ball is in your court. Thank you for your patience and attention."*

13 He then left the club house (which was where the meeting was being held), for the other members to discuss the matter. On leaving, the plaintiff said words to the effect, "*I am going outside. My colours are in the bunkhouse. I will leave it up to the members to decide what happens next.*" He was not wearing the club colours at the meeting of the members and there are strict rules about the wearing of such colours (see by-laws 507 to 512).

14 On 10 August 2005, the Secretary, writing on behalf of the Management Committee, wrote to the plaintiff as follows:

*"It has become evident that you have a grievance against the duly elected President, and or, the Committee, therefore as you have stated, you do not recognise the legally elected President. The offer of your colours by you is hereby accepted.*

*Please state your intentions towards the VVMC NSW Chapter, in writing, to the Secretary within **14 days** of receipt of this letter."*

15 The evidence before me does not support the contention in this letter that the plaintiff had offered his colours. Rather, the evidence was that he said he would get them. Ultimately, no claim was put that the plaintiff offered to resign at the 2005 Annual General Meeting. The Management Committee did not treat his statement at the Annual General Meeting as a resignation, nor would any such resignation have complied with the rules had that been what was intended.

16 The plaintiff's reply to this correspondence left no room for doubt that he was not resigning. The defendant's letter of 10 August 2005 did not formulate any charge of misconduct against the plaintiff or require him to justify his conduct. The plaintiff replied on 22 August 2005. He called on the Management Committee to take disciplinary action against the President.

17 On 1 September 2005, the Secretary, on behalf of the Management Committee, wrote three letters to the plaintiff. Of present relevance is the third, which stated:

*“As you have failed to address the questions asked of you in the recent letter received by you on the 16th August 2005, you should be informed that disgruntled individual members with personal dislikes of decisions and personal dislikes and or hatred of other members are not the protectors for the future of this club. This task lies with the duly elected Committee of Management.*

*We, now one more time, request and require you to state your intention towards the VVMC and your perception of your future within the chapter.*

*This will assist us in determining your suitability as an ongoing and productive member of the VVMC (NSW Chapter).*

*The verbal offer of your colours and the non-recognition of the President can, and has been verified by members who were listening to you at the time. Complaints of your behaviour will be dealt with in appropriate [sic] manner at the appropriate time. Please provide the information requested within 14 days of the receipt of this letter.”*

18 The plaintiff made a long reply on 17 September. He concluded by saying:

*“... if you intend to eliminate me at all cost then stop stuffing around, put your charges in writing with all the appropriate signatures and lets [sic] get on with it and we will see who is right or wrong.”*

19 There was no response to that from the defendant. No charges, in writing or otherwise, were then put to the plaintiff. Instead, on 9 January 2006 the Secretary wrote to the plaintiff in the following terms:

*“As a valuable member to the VVMC we wish to acknowledge your input to the club over the years and the generosity of your time.*

*The Management Committee offers retirement, as you have informed us of your medical condition and inability to attend social functions and incapability of working at shows.*

*The retirement package enables you to keep your colours in an enclosed case for viewing and a retired members biscuit patch would be presented to you.*

*Retirement enables you to still make use of the club facilities and maintain contact and friendship with other club members.*

*On behalf of the Committee we wish you Season’s greetings and is looking forward to hearing from you in the near future.”*

20 A general meeting was to be held on 3 February 2006. The plaintiff advised that he would not be attending due to ill-health. He added:

*“This does not mean I refuse to attend all functions or am unable or unwilling to contribute in some form at all club functions as you have falsely stated in your offer to retire which I am still pondering.”*

21 A notice of annual general meeting was circulated. The business notified concerned a proposal to amend the by-laws relating to re-admission of former members who had resigned, and changes to the clubhouse.

22 On 3 February 2006, the defendant held what was called a special general meeting followed by a general meeting. The special general meeting dealt with the business set out in the agenda. There followed another meeting, though perhaps it was a continuation of the same. The minutes under the item “General Business” record that a resolution was carried that:

*“That due to his lack of attendance and statements of ill health preventing from [sic] fully participating in Chapter activities, that J Goodwin be made a final offer of retirement. Failure to accept retirement is to result in his dismissal from the Club.”*

23 There were 29 members present. A resolution was passed, 28 to zero, with one member abstaining.

24 The members had no power either under the rules or the by-laws, assuming the by-laws have effect, to dismiss the plaintiff in such circumstances. Unanimity in the resolution makes no difference to that conclusion. Even under by-law 1023, assuming it to be valid, a member is entitled to be informed of the allegations against him and to be given sufficient time to prepare his defence before the membership is to vote on the consequences of such an allegation. That was not done.

25 On 12 February 2006, the Secretary wrote to the plaintiff advising him that the main issues raised at the general meeting on 3 February 2006 were “*non attendance, non availability and retirement*”, all of which affected him. The letter stated that no reply had been received concerning the retirement offer. It was said that each time the Secretary had received an apology it had been for medical reasons and that these issues were raised at the meeting and brought forward for the members to consider. The plaintiff was advised that “*The members understanding your medical position, voted to allow you one last chance at retirement. If not accepted in the time frame as indicated below, you will be dismissed.*”

26 Reference was then made to by-law 617 which states that members failing regularly to attend runs and/or organised events may have their membership reviewed by the Membership Committee. The letter concluded by saying that the defendant’s attendance record showed three functions that the plaintiff had failed to attend since December 2004 and they were expecting an answer from the plaintiff within 14 days.



27 The plaintiff responded on 27 February 2006 asking how this matter could have been raised when it was not on the agenda. He asked for a copy of the minutes and said he would give his final decision on the matter of retirement after he had received the minutes.

28 On 1 March the Secretary wrote as follows:

*“It is the view of the Management Committee that you accept the retirement package offered to you previously.*

*The decision to take action was made unanimously from the floor with 28 members voting and with 1 member abstaining due to late arrival. This was from the floor at the General meeting following the Special General meeting.*

*This decision by the Members was a last chance offer of retirement, except this by Friday 3 March 2006, if no reply by this date, dismissal is the Management’s only alternative [sic] ...”*

29 The plaintiff rejected this decision and on 2 May 2006, the Secretary wrote to the plaintiff, advising him of his dismissal from the Vietnam Veterans Motorcycle Club New South Wales Chapter as quoted at the outset of these reasons. It is not in dispute that the defendant did not comply with its rules, that is r 11, in connection with the plaintiff’s dismissal from membership.

### **Justiciability of the Plaintiff’s Claim**

30 I turn to the first issue raised, namely, the justiciability of the plaintiff’s claim. In *Cameron v Hogan* (1934) 51 CLR 358, Rich, Dixon, Evatt and McTiernan JJ said at 370:

*“Judicial statements of authority are to be found to the effect that, except to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of its rules has been committed, cannot maintain any action directly founded upon that complaint. For example, in Forbes v Eden, (1867) LR 1 Sc. & D. 568 at p 581, Lord Cranworth said:*

*‘Save for the due disposal and administration of property, there is no authority in the Courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs. ...’*

*... There are ... reasons which justify the statement that, at common law as well as in equity, no actionable breach of contract was committed by an unauthorised resolution expelling a member of a voluntary association, or by the failure on the part of its officers to observe the rules regulating its affairs, unless the members enjoyed under them some civil right of a proprietary nature.”*

To like effect Starke J said at 384:

*“As a general rule the Courts do not interfere in the contentions or quarrels of political parties, or indeed, in the internal affairs of any voluntary association, society or club. ‘Agreements to associate for purposes of recreation, or an agreement to associate for scientific or philanthropical or social or religious purposes, are not agreements which Courts of law can enforce. They are entirely personal. Therefore, in order to establish a civil wrong from the refusal to carry out such an agreement, if it can be inferred that any such agreement was made, it is necessary to see that the pursuer has suffered some practical injury, either in his reputation or in his property’ (Murdison v Scottish Football Union, (1896) 23 R (Ct. of Sess.) 449 at pp 466–67).”*

31 The position was summarised by the Court of Appeal in Western Australia in *Rush v WA Amateur Football League (Inc)* [2007] WASCA 190 as follows:

*“[30] In Skelton's case, [Skelton v Australian Rugby Union Ltd [2002] QSC 193], Chesterman J noted that there were many cases in which courts have intervened where exclusion or suspension from membership of a club or association had occurred in breach of the organisation's rules or of natural justice. However, as his Honour noted, all of those cases were predicated upon the person involved suffering some diminution of rights of property, livelihood or trade. To that category of case may be added cases where a person's reputation is damaged*

...

*[37] In the particular circumstances of this case, in the absence of any property, income or reputational interests, this Court has no jurisdiction to decide issues arising out of the consensual but non-contractual relationship between the parties. ...”*

32 If there is a contractual relationship between the plaintiff and the defendant or its members, the present dispute is justiciable. Section 11(2) of the Act provides:

*“Subject to this Act, the rules of an incorporated association bind the association and the members of the association to the same extent as if the rules had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the rules.”*

33 Counsel for the defendant submitted that although there are deemed to be mutual covenants for the provisions of the rules to be observed, it should be inferred from the nature of the defendant association, that is, from its being essentially a social and recreational body, that such mutual covenants, whilst consensual, were not intended to give rise to legal relations.

34 I do not agree with this submission. Section 11(2) not only provides for the rules to be binding, but for them to be binding to the same extent as if all members had given covenants under seal to observe the provisions of the rules. A covenant under seal, that is by deed, is the most solemn act a person can perform with respect to a piece of property or other right (*Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 at 369).

35 In *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470; (2002) 191 ALR 759, Campbell J (as his Honour then was) described the effect of s 11(2) as follows:

“[109] As well, s 11(2) has an effect which cuts two ways concerning an expulsion from the club. So far as a member is concerned, he or she has the benefit of a deemed covenant with each other member to observe all the provisions of the rules, which has as a consequence a contractual obligation on each member not to expel any other member save in accordance with the rules. As well, though, that covenant has the consequence that someone in the position of Mr McClelland covenants with the other members that, if the procedures of the rules are followed for an expulsion, he will be bound to treat that expulsion as an effective one. These mutual contractual obligations are ones which would be cut down or varied only to the extent to which there was some contrary public policy (meaning thereby a public policy of the type which can override contractual obligations), or if there was some equity which precluded the parties to the contract from relying on their strict contractual rights. As I have earlier held, the rules of natural justice are not, in their application to domestic tribunals, rules which operate as a matter of public policy of a kind incapable of being varied by contract. No equity to prevent the provisions of the deemed contract between the members being relied upon has been asserted in the present proceedings.”

36 It will be observed that his Honour treated s 11(2) as creating contractual obligations on each member. In *Rose v Boxing NSW Inc* [2007] NSWSC 20, Brereton J (at [57]) also referred to there being a deemed contract on the terms of the constitution between an incorporated association and its members. In my view that is the clear effect of s 11(2). Irrespective of the actual intentions of the members, or of the nature of the incorporated association, the subsection deems that a contract comes into existence between, *inter alia*, the members of the association.

37 Counsel for the defendant referred to *Ermogeneous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95. The question in that case was whether it should be inferred that the parties intended to enter into contractual relations in respect of the plaintiff's employment by the defendant, that is to say, the issue was whether there was an intention to enter into a contract of employment. No issue arose, and there is no discussion on the question of whether, the contract between a member and the incorporated association would arise on the terms of its constitution. In *Rush v WA Amateur Football League (Inc)*, the plaintiff was not a member of the association and the question did not arise in that case.

38 For the reasons I have given, I conclude that there is a contract between the plaintiff and the defendant, and between all of the members of the defendant, which makes the dispute

justiciable. It is therefore unnecessary to consider whether in any event the dispute would be justiciable because it would involve some diminution of rights of property, livelihood, trade or reputation.

### **Validity of By-Law 1023**

39 The second issue concerned the validity of by-law 1023. It is strictly not necessary to deal with this question because, as I have previously indicated, the procedures in by-law 1023 were not followed in any event. Even had those procedures been followed it would not have availed the defendant because the question of dismissal of the plaintiff from membership was governed by rr 11 and 12. By-law 1023 is inconsistent with those rules. Amongst other things it substitutes for the two-stage process provided for in rr 11 and 12 (that is, a process involving determination of a complaint by the Committee in the first instance with the right of appeal to the association in general meeting), a single determination by the association in general meeting.

40 Secondly, by-law 1023 does not limit the type of allegations which can be the subject of a process under that by-law leading possibly to a member's dismissal. By contrast, at relevant times sub-rule 1 of r 11 limited the types of complaints which could lead ultimately to dismissal to complaints that a member had persistently refused or neglected to comply with the rules or had persistently and wilfully acted in a manner prejudicial to the interests of the association. That sub-rule was subsequently amended to provide a wider class of complaints which could lead ultimately to dismissal, but that neither affects the present case nor would lead to any different conclusion as to inconsistency.

41 A third area of inconsistency is that procedural safeguards as to the service of a written notice of complaint and provision of a minimum 14 days for a response are not provided for with any particularity in by-law 1023.

42 Fourthly, under by-law 1023 a member could be dismissed by an ordinary resolution, whereas on an appeal from a resolution of the committee under r 11 the committee's resolution is to be confirmed only if the association passes a special resolution in favour of confirmation.

43 Accordingly, even had by-law 1023 been complied with, in the absence of compliance with r 11, the required procedures for dismissal of the plaintiff from membership would not have been complied with. Strict compliance with such rules is essential. (See *Hornby v Narrandera Ex Servicemen's Club Ltd* [2001] NSWSC 235 at [8], [9] and [10] and cases there cited; and *McClelland v Burning Palms Surf Life Saving Club* at [74].)

### **Non-Compliance with Rules of Natural Justice**

44 Nor were the rules of natural justice complied with in this case. The plaintiff was not given notice of any charge of improper conduct or any proper opportunity to respond to either the Committee or to members in general meeting before the decision to dismiss the plaintiff was made. Even if there was no requirement that the rules be applied strictly, the process adopted was not fair.

45 It follows that the plaintiff is entitled to the declaration sought in the summons that he remains an ordinary member of the defendant and that his purported expulsion from membership is invalid.

### **Damages**

46 The next question is that of contractual damages. In *Rose v Boxing NSW Inc & Anor*, Brereton J held that damages may be awarded for a breach of natural justice or for purported actions in excess of power by an incorporated club or association on the basis of damages for breach of the contract between the members and the club founded on the constitution (at [106]). His Honour also held that where the purpose of such a contract is to provide pleasure, enjoyment, personal protection, relaxation or to avoid vexation, damages are recoverable for inconvenience, vexation and distress. His Honour said (at [112]) that:

*“As the purpose of membership of a club is to provide opportunities to participate in social, sporting, cultural, political or other activities, breaches of contracts founded on their rules constituted by improper exclusion from membership will commonly attract such damages, because such a breach defeats the purpose of the contract.”*

47 Those observations apply to the present case. The plaintiff has given evidence that since termination of his membership he has kept in telephone contact with a number of members, but effectively lost a great deal of his social life and ties. He gave evidence that he has missed the comradeship of fellow members and often felt depressed as a result.

48 Such distress is compensable. The difficulty is in measuring a monetary remedy to compensate for a loss which is essentially not measurable in money terms. However, the difficulty of quantification does not mean that damages should be nominal. Nonetheless, the damages must reflect compensation and only compensation.

49 It was submitted to the plaintiff that *Rose v Boxing NSW Inc* provided an appropriate guide as to the measure of compensation. That is undoubtedly true, but the facts of the cases are quite different. Brereton J would have allowed \$5,000 damages for compensation and disappointment arising from Mr Rose's exclusion from refereeing boxing matches in New South Wales for a period of about two and a half years. His Honour reduced that amount of damages by 20% to allow for a possibility that the plaintiff in that case would have been validly expelled in any event. His Honour noted that the onus of establishing such matters as would reduce the *prima facie* damages fell on the defendant.

50 In the present case, I do not consider that any such discount is warranted. It is impossible to speculate what charge might validly have been laid against the plaintiff, or what the outcome of any such charge might have been had the procedures of rr 11 and 12 been followed. Nonetheless, the position of the plaintiff in *Rose v Boxing NSW Inc* is, I think, significantly different from the position of the present plaintiff. As counsel for the defendant submitted, Mr Rose was Australia's pre-eminent amateur boxing referee and judge. He had refereed at the Sydney Olympic Games. He has been nominated to referee at the Beijing Olympic Games. He had been involved in amateur boxing in various capacities, both

nationally and internationally, and refereeing of boxing appears to have been his life. I do not think that the evidence establishes that the distress and loss suffered by the plaintiff in the present case from his exclusion is of the same degree. I consider that a sum of \$1,000 will properly compensate the plaintiff for the loss of the benefits of membership of the defendant which he has suffered from his purported exclusion in May 2006.

## **Orders**

51 For these reasons, I make declarations in accordance with paras 1 and 2 of the amended summons. I direct entry of judgment for the plaintiff against the defendant in the sum of \$1,000 and I order the defendant to pay the plaintiff's costs.

52 Exhibit 1 may be returned forthwith but should be preserved for at least 28 days. The other exhibits may be returned after 28 days.

[COUNSEL ADDRESSED ON COSTS]

## **Costs**

53 The letter from the plaintiff's solicitors of 1 November 2006 plainly spelt out the grounds on which the plaintiff contended that his purported dismissal was invalid. Essentially those grounds have been upheld. In my view, the defendant, properly advised, ought to have perceived it did not have reasonable prospects of defending the claim. That position is reinforced by the correspondence of 1 November 2006. The plaintiff has bettered the offer in the sense that he has obtained an award of a small amount of damages.

54 However, my decision on costs does not depend on his having bettered that position; having regard to the fact that that better position only arose as a result of an amendment to the summons made this morning. My decision on the question of costs rather reflects my view as to what the defendant ought to have appreciated as to its prospects of success. I do not consider that the Committee could properly have considered that its rules had been complied with.

55 I order that the defendant pay the plaintiff's costs, and that costs from 14 November 2006 be assessed on the indemnity basis.

56 The remaining exhibits may be returned after 28 days.

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LAST UPDATED:  
28 February 2008