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Natural Justice in Tribunals – a Natural Winner?

HOLLY WHITCROFT

"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".

– Starke, J in *Cameron v Hogan* (1918) 25 CLR at pp 383 – 384.

Most sporting associations are voluntary associations, often incorporated and subject to set rules or a constitution. Where a dispute arises in an association's exercise of powers pursuant to its governing rules, when is it appropriate for a court to become involved in that dispute?

In the recent case of *South Melbourne Football Club Ltd v Football Federation Victoria Inc* (2010) VSC 355, the Supreme Court of Victoria ('the Court') considered whether to set aside a decision of the Football Federation's Appeals Board ('the Board') to deduct six points from the total championship points held by the South Melbourne Football Club ('the Club'). The Court determined that it could only review the Board's decision in the context of assessing whether the Board had acted within its contractual bounds and in accordance with the rules of its Constitution. Justice Pagone J found that the Board had properly complied with the applicable rules. However, the Board had failed to afford natural justice to the Club. This was because the Club was not presented with the opportunity to make submissions on the penalty or sanction that was to be imposed on it. Justice Pagone J commented that the Club was never told with sufficient particularity what the charges against it were, until the decision had been made. Accordingly, the Board's decision was set aside and the Board was reconstituted to hear and determine an appropriate penalty for the Club.

The issue of a breach of natural justice was also raised in the case of *James Kovacic v Australian Karting Association (Qld) Inc* (2008) QSC 344. The Supreme Court of Queensland was asked to consider the validity of a declaration made by the Australian Karting Association (Qld) Inc ('Qld AKA') to refuse to accept race entries from Mr Kovacic ('the Applicant'). One of the bases of the Applicant's claim was that the QLD AKA's decision was made without proper adherence to the principles of natural justice. The Court intimated that there perhaps had been a breach of natural justice. However the question of whether the Court could grant relief turned on whether there was a justiciable issue. In the end, the Court did not provide a considered view on the issue of natural justice because the evidence failed to establish that the Qld AKA's resolution created a detrimental impact on the Applicant, such that relief was warranted. The proceeding was dismissed.

There have been a number of cases that demonstrate that the principles of natural justice play an important role in the determination of disputes by sporting and other tribunals. Whilst the starting point for a court is one of reluctance to interfere with decisions made by such bodies, where there may have been a denial of natural justice or procedural fairness, this may be sufficient to warrant further investigation by a court. However, the Qld AKA case indicates that a denial of natural justice alone may not be sufficient. An applicant must demonstrate that the matter is justiciable and that the particular consequences of the decision are sufficient to warrant the court's intervention.

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Exploring the Unique Leasing Relationship Between **Sporting Bodies and Local Council**

FIONA SEARS

Often not for profit sporting bodies lease open spaces from local authorities for the purposes of conducting their chosen sport. At times, this can present challenges that are not regularly faced when dealing with traditional commercial landlords.

Unlike landlords who focus on commercial matters such as rental returns etc, councils often lease open spaces to not for profit sporting bodies at peppercorn or minimal rent. While you would tend to think that this would make negotiating the terms of your lease with councils easier, this is not always the case. What is unique when dealing with councils are their internal policies and procedures. This includes the often bureaucratic and inflexible stance they tend to take in relation to leasing terms.

Councils generally have their own 'standard lease' that they require parties to enter into, frequently with very little flexibility for change. Often included in these standard leases are terms that state the lease is being granted for the benefit of the community and at a reduced rent. The purpose of these clauses is to allow councils to introduce moral rights, not normally encountered in commercial leasing, into its leases.

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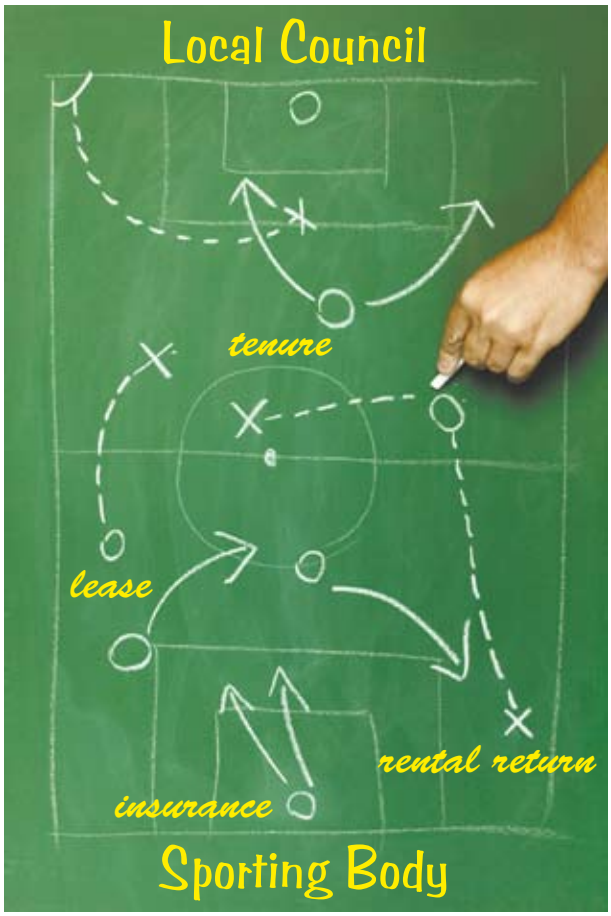
This includes imposing rights outside of the sporting body's constitution. For example, imposing an obligation on the sporting body not to refuse to admit to its membership or exclude from its membership a person seeking in good faith to participate in its activities. Also these clauses seek to regulate the fees the sporting body can charge in relation to the use of the premises.

Frequently, we also see clauses, which allow council to impose upon the sporting body a requirement to allow others to use the premises for appropriate activities when the sporting body is not in use of the premises. While this requirement is often then governed by a number of qualifying provisions (most importantly that the premises not be required by the sporting body at the time the third party wants to use it) it is something that is not part of ordinary commercial leasing.

When it comes to the permitted use of the open space, specifically defining that permitted use can create its own challenges. While it may seem appropriate to be quite specific when defining the permitted use, this will often affect the ability of the sporting body to sub lease or assign its lease to a third party in the future. For example, if the permitted use is broad, such as 'sporting fields', this will allow you to sub let or assign the lease to a third party who intends to use the space for any sporting purpose. However, if the permitted use is 'rugby union fields', strictly speaking you will only be permitted to sub let or assign the lease to a third party who intends to use the space for that specific purpose.

Difficulty is often experienced in the area of tenure or the right to secure uninterrupted use of the space for the term for your lease. While councils are generally happy to grant long-term leases, most council leases tend to have a 'catch all' clause that allows them at any time, for any reason to terminate the lease without any appeal right for the sporting body. This can be a particularly unpalatable clause when the sporting body is looking to expend significant money on infrastructure to support its use of the space.



Another issue that frequently arises is in the area of insurance. Common practice is for landlords to simply be noted on the tenant's policy of insurance as an interested party only. Councils regularly require that they be co-insured under the tenant's policies. This is an outdated practice and often creates significant difficulty for sporting bodies, as their insurers will not do this.

Finally, while it has been common practice for councils to insist upon these strict requirements and then relax the enforcement of the provisions of these various leases, we are starting to see a trend where council is taking a more active role in the management of these spaces. Where once it would be commonplace for requests for consents to be disregarded and reporting requirements not insisted upon or enforced, councils are now more closely monitoring and managing these spaces and insisting on compliance.

"No-Ball" on Betting

ZOHEB RAZVI

In the last couple of months there has been a surge in controversies surrounding players and their involvement in gambling. Last month, the International Cricket Council commenced an investigation on four members of the Pakistan cricket team who have been allegedly involved in spot-fixing. Closer to home, the NSW police force have been called in to investigate suspicious betting activity surrounding the NRL match between the Canterbury Bulldogs and North Queensland Cowboys in Townsville.

The relationship between sport and betting agencies has grown dramatically over the past decade. How often do we watch a footy game where sports commentators periodically mention the latest odds when calling games? Has this relationship gone too far?

Most players in most sporting codes in Australia are prohibited from betting. Notwithstanding that, players have in the past indulged in betting activities.

More recently, players have allegedly been involved in spot-fixing. This is an illegal activity within a sporting code where a specific part of a game is fixed. Cricket is an ideal vehicle for spot fixing, for example the timing of a 'no-ball' or 'making a duck'. You don't need to persuade all eleven players to throw a match to make a buck!

So what can be done to eradicate this type of corrupt behaviour? We think the spotlight should be placed back on the players.

Previous attempts to deal with this include the establishment of an anti-corruption and security unit (ACSU) in cricket. This was established in 2000 after former players (such as the late Hansie Cronje) were found to be connected with legal and illegal bookmaking agencies. The ACSU's purpose was to pursue the three objectives of investigation, education and prevention. But have these objectives worked for cricket?

We think it's about time the world of sport established an independent body that works in the same manner as the World Anti Doping Agency. In other words, having a body that can achieve those same objectives as the ACSU but remain independent from an individual sport.

Whatever the case, all those involved in sport need to become more vigilant in understanding the risks of being associated with betting agencies. Gambling and sport go hand in hand and that's not going to change.

Independent Contractors

NIGEL INGLIS

A common question we often assist our sports clients with is whether a coach or other person on staff has been engaged to perform services as an independent contractor or employee. The distinction is an important one and getting it wrong could cost.

The independent contractors legislation prohibits sham-contracting arrangements. This is where an employer attempts to misrepresent an employment relationship as an independent contracting relationship.

In many cases there is a real possibility that even though you think you are engaging a worker as a contractor in circumstances where, except for the worker's request to be engaged as a contractor for various tax and other reasons, they would otherwise be engaged as an employee. This may be a breach of the sham arrangements provisions of the independent contractors legislation, particularly where the individual worker is the party contracted, rather than the worker being employed by a corporation, which then contracts to the organisation.

The common law tests for whether a worker is an employee, rather than a contractor, are still relevant. These include how much control is exercised over the person and whether the person uses their own tools of trade or they are supplied. You should review each contracting arrangement to determine whether, against the accepted legal tests, an arrangement would be regarded as employment rather than an independent contracting arrangement.

You should then look at whether you have engaged the worker through a corporation, rather than as an individual. The sham arrangements provisions only apply to individuals engaged as contractors, rather than corporations. Therefore any liability under the independent contractor legislation is substantially lessened if the arrangement is between you and a corporation, rather than you and an individual worker.

However, even despite this, it is difficult to discount the possibility a court may hold that a breach of the independent contractor legislation has occurred. This may be where it is clear that a corporate entity has been used for the sole reason of avoiding the sham arrangements provisions. This would be the case in circumstances where a clear breach of those provisions has occurred.

There are various steps you can take to lessen the risk of liability for a breach of the sham arrangements provisions. We can assist you to put measures in place and provide legal advice about what steps you can take to lessen that risk.

Two Length Rule Brings Spring Time Pain to Defendant Jockeys

GRAHAM SCHROEDER

The decision handed down on 13 October 2010 from the Supreme Court of Queensland in the matter of Appo v Stanley & Anor (2010) QSC 383 contains a timely and useful analysis of the law of negligence as it applies to professional sports in the context of the thoroughbred racing industry.

The Plaintiff Jockey Brendan Appo had sought damages for personal injuries he sustained in a race fall when his mount was closed out and made contact with the horse immediately in front. The Plaintiff suffered multiple fractures including spinal injuries, which curtailed an 18-year career as a professional jockey.

The law acknowledges whilst Jockeys owe a duty of care to their counterparts, it is in the context of the inherent risks associated with the sport.

It is a long-standing principle that voluntary participation in a sporting activity does not imply an assumption of the risks associated with the activity, so as to exclude a duty of care by another participant.

The courts have regard to the competitive business nature of the thoroughbred racing industry, involving large animals ridden by small men at high speed in close proximity.

Courts are generally not delicate in assessing a defendant Jockey's conduct in the context of a breach of duty of care. The courts have regard to the competitive business nature of the thoroughbred racing industry, involving large animals ridden by small men at high speed in close proximity.

In Appo the Court identified the opportunity for injury was abundant whilst the choices available to jockeys to avoid or reduce risks was reasonably limited.

These principles go some way to explain why claims for damages relating to injured jockeys, sustained during the course of their vocation, are reasonably rare.

Generally claims will only succeed where a jockey is able to establish one of his counterparts has failed to take reasonable care that should have be taken.

In Appo the Court determined the only issue for consideration was whether there had been a breach of duty due to contravention of the 'two lengths' rule.

This rule requires jockeys to visually check and not cross the path of another horse unless there is at least two lengths clearance of that other horse.

The Court found there was no evidence supporting an exception to this rule in this instance.

The Appo decision highlights the general principle that without exceptional circumstances, participants engaging in a sport or a past time may be held to have accepted the risks that are inherent in the activity.

Whether there is a basis to support a finding of breach of duty resulting in negligence will depend upon the facts of each case and involve an assessment of the accepted risks and the scope of the duty of the alleged wrongdoer. These issues will vary depending upon the facts and circumstances of the alleged breach.

The decision in Appo has direct relevance for the racing industry, however the principles have broader application across the spectrum of sporting pursuits and recreational activities where there is the potential for injuries to be caused by others.

JOHN MULLINS
EDITORIAL

There is certainly an increasing focus by national, state, regional and club sporting organisations in relation to their constitution, policies and procedures. A significant amount of my time this year has been devoted to advising on and drafting constitutions. To a lesser extent there has also been a flow on effect of advising on policies and procedures, particularly disciplinary provisions.

There is certainly a trend for state and national sporting organisations to abandon the status of Incorporated Associations in favour of Companies Limited by Guarantee. The Australian Sports Commission is currently promoting this evolution. Any reasonable assessment of the respective pieces of legislation would inevitably lead a sporting organisation to conclude that a Companies Limited by Guarantee is a better structure for larger organisations. I believe there is still room for Incorporated Associations for smaller organisations.

One of the phenomena that we observe is that sporting, community, RSL and life saving clubs are in most cases Incorporated Associations, but as a function of poker machines many of these organisations are now multimillion-dollar businesses. When the Incorporation Associations Act started this legal structure it was not intended for large organisations with large numbers of members and large turnover.

What is becoming increasingly apparent to me is that despite the arguments of certain groups, such as the Australian Sports Commission, there is not one model of a constitution that suits all sporting organisations.

I have seen close to ten different constitution models which all work perfectly well and importantly suit the individual organisation. Unquestionably there are some old constitutions that are very effective.

However, organisations that spend the time, the effort and the cost associated with setting up new constitutions will be rewarded with a sound document. Whether it complies with the Australian Sports Commission Governance Model is not the test, the test is whether they serve the individual organisation well.

If you haven't yet started reviewing your constitution, I urge you to. Although the investment is great, the process and outcome will service the organisation well for the future.

There is no avoiding taking governance seriously. Increasingly where sporting organisations are perceived to have governance problems, this affects their relationship with Government and potentially Government funding. This is for most sporting organisations a good enough reason to get a constitutional review on the agenda.

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