



Précis Paper

Kabbara & Ors v Australian National Sports Club Incorporated [2021] NSWSC 738 – Expulsions Under Club Constitutions

A discussion about the case *Kabbara & Ors v Australian National Sports Club Incorporated* [2021] NSWSC 738, including a discussion about expulsions terms, procedural fairness and apprehended or actual bias.

Discussion Includes

- Key Facts
- Procedural History
- Expulsion Under the Club Constitution
- Procedural Fairness
- Other Issues
- The Power to Expel
- Bias and Reasoning
- Orders
- Key Learnings

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Kabbara & Ors v Australian National Sports Club Incorporated [2021] NSWSC 738 – Expulsions Under Club Constitutions

In this edition of BenchTV, Nick Furlan (Barrister, PG Hely Chambers, Sydney) and Jeffrey Lees (Principal Solicitor, Babingtons Lawyers, Sydney) discuss the case *Kabbara & Ors v Australian National Sports Club Incorporated* [2021] NSWSC 738. The case concerns an incorporated association and expulsion terms, procedural fairness and apprehended or actual bias.

Key Facts

1. The case involved Australian National Sports Club Incorporated (ANSCI), an incorporated association based in Lakemba. The dispute that gave rise to the proceedings was the expulsion of nineteen general members from the club in March and April 2018 by three individuals who had styled themselves the interim care-taker committee (ICC).
2. The plaintiffs sought declarations from the Court that the expulsions were in breach of ANSCI's constitution and were invalid and of no effect.
3. In early 2017, the elected members of the management committee of ANSCI resolved that certain questions needed to be put to the general body of members to consider whether all those persons were active members. There were also questions concerning actions and conduct of certain life members. The management committee convened a special general meeting of members to consider the issues.
4. The life members took great offence to the notice of the general meeting issued. One life member decided to dissolve the entire management committee.

Procedural History

5. The ICC was delegated by the board of life members to commence proceedings in the Supreme Court of NSW initially seeking a declaration to prevent any holding of an extraordinary general meeting, to confirm whether the dissolution of the management committee was valid and to confirm whether the Court could determine the composition of ANSCI or confirm the composition of the membership of ANSCI.
6. After seven to nine months, ANSCI attempted to defend itself by alleging breaches of the constitution by a number of members of the management committee. After a period of 12 months ANSCI decided it would discontinue the proceedings in June 2018. The hearing for the discontinuance occurred in October 2018.

7. However, in March-April 2018, the same three individuals who formed the ICC had commenced the process of issuing notices to nineteen members of the club and ultimately expelling them.
8. Although the earlier proceedings were discontinued, it became relevant whether the persons of ANSCI who were deciding whether the nineteen members of the club should be expelled, were allowing bias in their decisions.
9. There was also a dispute as to what cost orders should be made in the earlier proceedings. This was determined in October 2018. The Judge dealt with the cost scenarios in a way that had implications for the expulsion proceedings. The Judge linked the costs outcome in the first proceedings to the outcome of the case that subsequently ran. The essence of the order made in the first proceedings was that if the nineteen plaintiffs succeeded in obtaining the relief they were seeking in the expulsion cases, then they would also receive their costs in the first set of proceedings.
10. Another feature of the expulsion proceedings was the way in which the proceedings were divided and dealt with by the Court. There were nineteen individuals initially, but one discontinued. This meant there could be eighteen separate cases that had to be run with a lot of factual overlap in relation to many of the issues.
11. However, in the interests of saving time and money, it was decided that the best way to resolve the issues would be to select three individuals from the eighteen, divide all of the eighteen plaintiffs into three groups, and select one as the head of one group. The test member for each group would have their case decided on its merits and, depending upon the outcome of their case, every other member of that group would have their case decided in the same way regardless of the merits of their own case. The test members were decided by allowing the plaintiffs to select one test member, the defendant to pick another test member, and the Court to pick the last test member.
12. Two questions were heard. The first was whether or not ANSCI's constitution contained what was styled as 'the fairness term'. The second was whether or not the constitution contained a separate term styled 'the expulsion term'. The fairness term was essentially the classic, procedural fairness entitlement and the expulsion term was a term that provided, as the plaintiffs claimed, that they could not be expelled from the club unless they had persistently and willfully acted in a manner prejudicial to the interests of the club.
13. Ultimately, the Court determined that both the aforementioned questions should be answered in the affirmative. The matter came for final hearing in May 2021. By that time, the issue of whether or not the terms existed in the club constitution had been decided.

Expulsion Under the Club Constitution

14. The three test members received a 'show cause' letter. One of the letters stated that the recipient had unlawfully removed records from the club and that they kept those records in the boot of their car. Another test member received an allegation that it was found, many

years after the test member had been elected life member of the club, that the process was incorrect as the person had not been a general member of the club first for a particular period of time. The third test member received a letter stating that as a result of having been expelled from the club, that individual went on to establish another club and therefore the member was not promoting the interests of ANSCI.

15. When the case came to trial in early 2021, the issue in dispute was whether or not the three individuals who purported to exercise the power of expulsion had the power to expel the three test members. The plaintiffs alleged that the club constitution promised them certain rights before their membership could be taken away. Clause 11 explained that if a club member's membership was under consideration for expulsion, the member has a right to appear before a meeting and a right to make written and oral submissions.
16. The eighteen club members were invited to provide a response in writing to the show cause letters and many of them did. However, they were not invited to attend any meeting at which their membership was under consideration. Nor were they invited to make any oral submissions before such a meeting. The Court concluded that a failure to afford that right to make oral submissions before a club meeting was a significant failure. It was thereby deemed that a denial of that particular right meant that the expulsions were invalid. For these reasons, the plaintiffs were ultimately successful in the case.
17. The principle relied upon in arguing that the failure to afford that particular right to the plaintiffs meant that their expulsions were invalid was a principle discussed in cases about incorporated associations. If there is a procedure in a club constitution that the club must follow before it expels somebody, then that procedure must be followed and complied with strictly. In this case, it was not sufficient to allow the plaintiffs an opportunity to put their position in writing. The requirement of strict compliance with the club's constitution meant they had to be given an oral opportunity to make submission before a meeting.
18. The other issues related to whether the expulsion term and fairness term in the club's constitution had been breached. With respect to the expulsion term, this meant delving into the three expulsions. Ultimately, there was no evidence of the allegations that were the basis of the expulsions.

Procedural Fairness

19. There was also the question of whether the fairness term had been breached. This came down to whether the three test members had been afforded procedural fairness in relation to their expulsions. The plaintiffs argued that the expulsions were not fair due to principles of apprehended or actual bias concerning one of the people who sat on the ICC. This came down to the person's involvement in the first set out of proceedings. The individual had instructed solicitors, been a witness, and had verified a statement of claim in those earlier proceedings in which very serious allegations were made against people, including the three test members. The plaintiffs' position was that that person could not be the accuser

of the three individuals and then bring a fair and unbiased mind to the question of whether or not they should remain members.

20. In addition, the individual had given evidence in the expulsion proceedings that it was she who had complained about the conduct of each of the test members that ultimately led to them being issued show cause letters that ultimately led to their expulsion. One of the requirements of the constitution was that there actually be a complaint before a club could move to consider whether or not to exclude someone. When a complaint was made, it was apparent that one of the decision-makers was actually the complainant. The plaintiffs contended that the person could not be an accuser as well as the person who makes the decision regarding the member's expulsion. The reason for this being that it infringes upon principles of apprehended bias.
21. The other main reason as to why the plaintiffs contended that there was a denial of procedural fairness was that there appeared to be a whole series of other reasons for why some of the members of the ICC wanted to expel the three test members. In cross-examination, one of the other ICC members said things that made it clear that he in his mind had very different reasons as to why he thought the plaintiffs should be expelled to the reasons the other members of the ICC had in their minds. The Judge was asked to compare the evidence this member gave to the evidence the other ICC member gave.
22. In addition, the Judge was asked to have a look at the show cause letters and the reasons that were given at the time the three test members received those letters. It became clear that many of the reasons for the expulsion of the individuals were never actually put to them and they never had a chance to respond to them. Thus, the plaintiffs argued that there was a serious denial of procedural fairness as a result of these extraneous reasons contributing to the decision-making process. Ultimately, the Court accepted that there had been a denial of procedural fairness and that the fairness term implied in the club's constitution had been breached for that reason.

Other Issues

23. Another question was whether the plaintiffs were estopped from contending that ANSCI did not have the power to expel them by reason of certain conduct. This was put on the basis that there was a conventional estoppel, which is an estoppel that arises as a result of the parties conducting themselves in a particular way and everyone assuming that their legal rights were one particular set of rights which may have been different from their strict legal rights. The Court found that the estoppel defence was not made out.
24. There was also an issue raised by ANSCI which reasoned that even if their members had been denied procedural fairness, they should not receive any relief because there was no practical injustice suffered. This argument was introduced from administrative law concepts and cases. The plaintiffs argued that there was no authority for being able to import those principles into contract law and its application to incorporated associations. It

was further argued that even if those principles could be imported in this case, there had been a serious practical injustice in this case since everybody had lost a proper opportunity, as a result of the bias and extraneous reasons, to put their position properly and fairly as to why they should remain members of the club.

The Power to Expel

25. At the time the separate questions were being determined as to whether there was an implied expulsion term and fairness term in the constitution, there was a question by the Court as to whether the ICC actually had the power to expel a member from the club and where the express power is under the constitution. It was discovered that there was no express power in the constitution for a member to be expelled.
26. The constitution does specify that the management committee had power to deal with complaints about a member. However, those provisions dealing with complaints do not address the power of expelling a member. The club constitution does mention that a member ceases to be a member when they are expelled, but does not speak of the process for expulsion.
27. Clause 22 of the constitution referred to a 'policy procedures manual'. The Court decided that an ICC properly appointed would have the same power a management committee had. If the management committee did not have the power of expulsion, then neither did the ICC. The Court decided that even if the policy procedures manual existed, the individuals of the ICC paid no regard to such a document at the time they made the determination to expel the plaintiffs.
28. Ultimately, the Court concluded that in this factual context, it is most likely that the only avenue by which a member could be expelled is through the avenue of the entire body of the members of the club, through either an annual general meeting or extraordinary general meeting.
29. Rein J explained that 'once it is clear that the Management Committee cannot exercise a power to expel because it cannot be inferred that there is a power to expel and/or because it cannot follow a non-existent procedure there remains the question whether ANSCI [the club] in General Meeting can exercise the power to expel. Given the existence of the implied term and cl 10.0(d), I think it is appropriate to view ANSCI as having the power to expel a member by holding an AGM or Special General Meeting at which, in accordance with cl 10.0(d), the member facing potential expulsion can present written or oral material to the meeting "in which their General Membership" was under consideration.'

Bias and Reasoning

30. Regarding apprehended bias, one of the ICC members had stepped into the role of prosecutor and accuser by having made the complaints against each of the test members.

In the case of one particular test member, the bias went back to their childhood. He had been mentored by the deceased brother of the management committee member who was trying to accuse and expel him. The ICC member felt that the test member had betrayed her brother by leaving the club for another.

31. The plaintiffs' position was that the test member did not bring a fair and impartial mind to the task as to whether the test member should retain their membership. There was strong evidence to support the contention that there was apprehended or actual bias and that the principle that one cannot be both the accuser and the decision-maker was infringed. There were also findings made as to the way in which the responses that were provided on behalf of the individual plaintiffs were actually dealt with by the ICC.
32. The show cause letters that were sent set out some of the reasons why the club was considering expelling the plaintiffs. Once they were sent, responses were sent on behalf of the plaintiffs indicating why they should not be expelled and seeking information so that they could provide a more fulsome response to the allegations that were made against them. Ultimately, the Court was persuaded that these were reasonable responses and that these were questions that could have been answered, yet they were not.
33. The response from the ICC to these requests for information was in much the same terms in each instance and explained that the plaintiffs' requests did them no credit and instead of dealing with the issues, the plaintiffs chose to obfuscate. The plaintiffs thought this was a high-handed approach from the ICC to have taken in relation to what the plaintiffs thought were reasonable questions being asked. Ultimately, these were argued and the Court concluded that there were sufficient reasons to be satisfied that the fairness term had been breached and the test plaintiffs had not been given 'natural justice' in effect.
34. In relation to one of the test member's life membership, the Court concluded on the evidence that it was incorrect to suggest that an individual who had been elected a life member was many years later subject to an allegation that the election was not properly held and should be expelled because they did not become a life member through proper processes. The Court concluded that there was no legitimate basis for the club to assert that the requirements of the expulsion term had been met in respect of this individual.
35. In relation to the test member who was accused of stealing documents, storing them in the boot of his car and acting aggressively, cross-examination of the key witness for the club showed the witness to be quite evasive in articulating the basis upon which the allegation was made. At one point in time, the Judge intervened and put to the witness that the proposition regarding the individual who had supposedly kept documents in the boot of his car for two weeks, was simply untenable and contradicted by the witness's own evidence earlier in the proceedings. The Court became skeptical regarding the veracity of some of the evidence given by the club as to the genuineness of the reasons.
36. The Court explained that 'there was no evidence of him [the test member] having behaved in an aggressive and hostile manner. He is not shown to have breached any rule or by his actions done anything that would support his expulsion. The Expulsion Term has, therefore,

been breached'. The Court further explained that the absence of any proper basis for complaints made against the test member gives some colour to a theme of the plaintiffs that the real reason for the expulsion of all nineteen plaintiffs is that there was some plan by the club to try and prevent the club from being exposed to serious costs in the earlier proceedings. This put in the mind of the Judge that there were real ulterior motives behind the expulsion that were way beyond what the club had put in writing to the individuals.

37. Regarding the final test member, the Court concluded that establishing another sporting club was not consistent with the fundamental objects of being a member of the ANSCI and promoting its interests. The Court concluded that this was a breach of the club's constitution and therefore, it was not something that the Court would look favourably upon. However, the Court explained that the lack of procedural fairness and opportunity for the individual to explain why they had gone to establish another club meant the Court did not accept the club's reasons for expulsion.

Orders

38. Ultimately, all the plaintiffs were successful because the three test members won their cases.
39. The Court was persuaded to grant some relief. ANSCI sought to argue that the Court should refuse to give declaratory relief for a series of reasons, including the contention that there was no utility in giving this relief. The Court did not accept that there was no utility in giving the relief because all the test members had expressed their strong desire to once again be members of the club and expressed how much the club had meant to them over several years. Ultimately, the Court granted the declarations that each of the plaintiffs had sought, which essentially meant that all of them had not been validly expelled.
40. There are still some cost issues yet to be decided. There is also the possibility that an appeal may be brought by the club against the orders that were made. A notice of intention to appeal has been filed.

Key Learnings

41. Some important points can be garnered from this case. Firstly, one must read a club constitution in this type of case. Secondly, it must be precisely put in writing as to what one is complaining about. Thirdly, it is important for a club delivering expulsions to give an opportunity for the members to be heard in front of as many members as possible.
42. Clubs must be sure that the terms of their constitution are followed precisely and strictly before a person is expelled from the club. The club needs to be very cautious about the procedures that are followed and to be very careful to ensure that what is done is ultimately fair. It is also crucial that a club's constitution is as clear as possible to avoid having gaps in relation to important matters such as the expulsion of members.

BIOGRAPHY

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Mr Furlan was admitted to practice as a solicitor in 2001 and admitted to the bar in 2007. He maintains a diverse practice including but not limited to commercial law, contracts and employment and industrial law. Prior to coming to the bar, Mr Furlan was a solicitor at Baker, Mackenzie and Tipstaff to the Honourable Justice Palmer in the Supreme Court of NSW.

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Mr Lees practices across many areas of law and runs a generalist practice. He graduated with his Macquarie University law degree in 1986.

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