SUPREME COURT OF QUEENSLAND

CITATION:	*Hogan v Fraser & Ors* [2019] QSC 27
PARTIES:	**PAUL DAMIAN HOGAN** (applicant) **v** **STUART FRASER, MICHAEL PARAMOR, PAUL WILLIAMS, BARRY AASKOV, TYSON CLARKE, MARK GREER, JOHN MULLINS, EDWARD PROFKE, TONY SEE and STUART WADDINGTON** (first respondents) **DAVID BARK** (second respondent)
FILE NO/S:	BS No 715 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2019
JUDGE:	Martin J
ORDER:	**The application is dismissed.**
CATCHWORDS:	ASSOCIATIONS AND CLUBS – JURISDICTION OF THE COURTS – where the first respondents are the committee of an unincorporated association – where the second respondent conducted a postal ballot at the direction of the first respondents – where the applicant says that the ballot was not conducted in accordance with the rules of the association and is invalid – whether the matter is justiciable ASSOCIATIONS AND CLUBS – GENERAL MATTERS – RULES – where the first respondents are the committee of an unincorporated association – where the second respondent conducted a postal ballot at the direction of the first respondents – where the applicant says that the ballot was not conducted in accordance with the rules of the association and is invalid – whether the ballot was conducted in a manner "substantially consistent" with the rules of the association – whether the Court should grant relief

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

Australian Football League v Carlton Football Club Ltd [1998] 2 VR 546

Bal v Minister for Immigration and Multicultural Affairs (2002) 189 ALR 566

Baldwin v Everingham [1993] 1 Qd R 10

Carter v NSW Netball Association [2004] NSWSC 737

Cameron v Hogan (1934) 51 CLR 358

Coleman v Liberal Party of Australia, NSW Division (No 2) (2007) 212 FLR 271

DEF v Trappett [2016] NSWSC 1698

Edgar and Walker v Meade (1916) 23 CLR 29

Harrington v Coote (2013) 119 SASR 152

James v Wilson [2019] NSWSC 17

Mitchell v Royal New South Wales Canine Council Ltd (2001) 52 NSWLR 242

Plenty v Seventh-Day Adventist Church (1986) 43 SASR 121

Re Asset Risk Management Ltd (1995) 59 FCR 254

Rivers v Bondi Junction-Waverley RSL Sub-Branch Ltd (1986) 5 NSWLR 362

Ryan v South Sydney Junior Rugby League Club Ltd (1974) 3 ACLR 486

Scandrett v Dowling (1992) 27 NSWLR 483

Sturt v Bishop of Newcastle [2012] NSWSC 400

SZGME V Minister for Immigration and Citizenship (2008) 168 FCR 487

Wilcox v Kogarah Golf Club Ltd (1996) ACLC 421

J Heydon, M Leeming and P Turner, "Meagher, Gummow & Lehane's Equity Doctrines & Remedies" (5th ed, LexisNexis Butterworths, 2015)

COUNSEL: N Ferrett QC and J Hastie for the applicant
D O'Brien QC and A Nicholas for the respondents

SOLICITORS: O'Donnell Legal for the applicant
HopgoodGanim Lawyers for the respondents

[1] In 1865, the Tattersall's Club was formed as a racing club where members could settle their bets. It was for those who were in the horseracing and business community. And it was for the men in that community. In the century and a half since then, the Club's character has changed and its membership extends well beyond the original categories. In this century, some members of the Club have agitated to have the Club Rules changed so that women may become members. Attempts to do so in 2003, 2005 and 2006 failed. But, in December 2018, a ballot was conducted and, by a slender majority, it was resolved to make changes to the Rules which would allow women to become members of the Club. The applicant says that the ballot was not conducted in accordance with Club Rules and is invalid.

The parties

[2] Mr Hogan, the applicant, has been a member of the Club since 2000. The first respondents are the members of the Club's Committee. That committee is invested with the entire control and management of the affairs and property of the Club.

[3] The second respondent is the Club's Chief Executive Officer. He is not a member of the Club. The evidence reveals that, while he conducted the ballot, he did so at the direction of the Committee. After some consideration, Mr Ferrett QC (who appeared for Mr Hogan) agreed that Mr Bark was not a proper party to the application. The application against him is dismissed.

The application

[4] Mr Hogan seeks:

> "A declaration that the ballot conducted by the respondents, which closed at 6:00pm on Tuesday the 18th of December 2018 and the result of which was announced at a Special General Meeting held on Wednesday the 19th of December 2018, for the purpose of amending the Rules of the Tattersall's Club ('the Rules'), was not conducted in the manner required by rule 30.9 of the Rules and therefore was ineffective to amend the Rules."

The Club

[5] The Tattersall's Club is an unincorporated association with about 4,700 members. The clubhouse is in a building with frontages to both Queen Street and Edward Street. That building is owned by Tattersall's Club Nominees Limited (TCN) which, under the Club Rules, holds it as well as all other real and personal property of the Club on trust for the members.

The ballot

[6] The members of the Club were invited to vote "yes" or "no" to a motion which would have the effect of altering the Club Rules so that membership would be open to both men and women.

[7] The result of the ballot was:

In favour	1,405
Against	1,368
Invalid	242

[8] The Rules provide for the process which is to be followed for a ballot. Those requirements, and whether they were met, are considered later in these reasons.

The issues

[9] Three issues were argued:

(a) should the court intervene in the internal affairs of the Club?

(b) was the ballot conducted in accordance with the Club Rules?

(c) are there discretionary reasons for not making a declaration?

Should the court intervene in the internal affairs of the Club?

[10] There is a long line of authority to the effect that a court will not intervene in the internal affairs of voluntary associations.

[11] The leading Australian case in this area is the High Court's decision in *Cameron v Hogan*,[1] Mr Hogan had been the Premier of Victoria and leader of the State Parliamentary Labor Party. Mr Cameron and others – who constituted the executive of the State Labor Party – resolved to exclude Mr Hogan from the Party and refused to allow him to nominate as a candidate of the Party at the then pending State election. Mr Hogan was re-elected but, because of the actions of the executive of the Party, he did not become leader of the State Parliamentary Labor Party and, therefore, did not receive the emoluments of that office. He sought declarations that his exclusion from the Party and his non-endorsement as a candidate was wrongful together with an injunction and damages. In the Supreme Court of Victoria it was held that, although the executive was not justified in taking the action it did and that such action amounted to a breach of contract, because Mr Cameron had no substantial or proprietary interest in the property of the Party neither an injunction nor a declaration was available to him. He was awarded damages in the sum of one shilling.

[12] The appeal was allowed and the judgment for damages was set aside. In considering whether there was any basis for making a declaration or granting an injunction the majority said:[2]

> "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." (emphasis added)

[13] Later in their reasons, the majority said:[3]

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1 (1934) 51 CLR 358

2 At 370

3 Rich, Dixon, Evatt and McTiernan JJ

> "The foundation of the jurisdiction to grant an injunction is the existence of some civil right of a proprietary nature proper to be protected. The property under the control of the central executive and that under the control of the branches might, if all the members concurred in dissolving the association, be distributed among them, but if so, it would be by reason of a decision under the rules authorising that distribution. Except for this, the respondent has no interest capable of enjoyment. … it is reasonably clear that membership of the association carries with it no tangible or practical proprietary right."[4]

[14] In concluding their reasons, the majority acknowledged that a voluntary association will need money to carry on, that there must be some margin of revenue over current expenditure, some continuing possessions for use by its officers, and some rights incidentally acquired in the process of fulfilling its objects. They also described the State Labor Party as "a political machine designed to secure social and political changes."

[15] Such a description does not, of course, apply to the Club in this case. It comes within the more wide-ranging description given by the majority to voluntary associations in general:

> "They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract."[5]

[16] The majority concluded that Mr Cameron was not entitled to invoke the jurisdiction of the courts of law either with respect to his complaint about his nomination being improperly withheld or that his expulsion was unauthorised or unjustified within the rules. With respect to the association of which he had been a member, they said:

> "It furnishes its members with no civil right or proprietary interest suitable for protection by injunction. Further, such a case is not one for a declaration of right. The basis of ascertainable and enforceable legal right is lacking. The policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment."[6]

[17] In order then, for the applicant to obtain relief he must first demonstrate that the policy enunciated above does not apply or that there is some other reason for distinguishing the decision in *Cameron v Hogan.* He advances three grounds to support the intervention he seeks. They are that:

(a) there is a public interest in the enforcement of the Club's Rules,

(b) the applicant has a sufficiently important personal interest in play, and

(c) the Rules of the Club are contractual in nature.

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4 At 377-378
5 At 370-371
6 At 378

Is there a public interest in the enforcement of the Club's Rules?

[18] This ground is based upon the decision in *Baldwin v Everingham.*[7] In that case Dowsett J held that the rules of the Liberal Party of Queensland (Queensland Division) were enforceable. Mr Baldwin had sought a declaration that the pre-selection process in which he had engaged had been irregular and in breach of the Party constitution and, thus, the pre-selection process was void.

[19] Dowsett J recognised that the principle in *Cameron v Hogan* may no longer reflect the position in society of some unincorporated associations:

> "On general principles, where an albeit voluntary association fulfils a substantial public function in our society, it may appear indefensible that questions of construction concerning its constitution should be beyond judicial resolution. It is one thing to say that a small, voluntary association with limited assets, existing solely to serve the personal needs of members should be treated as beyond such supervision; it is another thing to say that a major national organisation with substantial assets, playing a critical role in the determination of the affairs of the country should be so immune."[8]

[20] His Honour went on to say that it is not for a judge sitting at first instance to determine matters of policy. Although the difficulties inherent in applying *Cameron v Hogan* to very many organisations and domestic tribunals have been considered on a number of occasions, if the principle enunciated in *Cameron v Hogan* applies fairly to the circumstances of the case before the court, then it must be applied. I respectfully agree with that.

[21] The circumstances in *Baldwin v Everingham* took it outside the conclusions in *Cameron v Hogan.* Dowsett J held that the provisions of the *Commonwealth Electoral Act* 1918 (Cth) conferred legislative recognition upon the political parties and, in doing so, took them beyond the ambit of mere voluntary associations. In reaching that conclusion he relied upon the reasons of Isaacs J in *Edgar and Walker v Meade*[9] where statutory recognition was bestowed on industrial organisations by the *Conciliation and Arbitration Act* 1904 (Cth). That led him to the view that the object of the legislative provisions recognising such bodies could be frustrated if breaches of the rules of those organisations were not liable to some form of review.

[22] *Baldwin* was followed by Palmer J in *Coleman v Liberal Party of Australia, NSW Division (No 2)*[10] and, more recently, by Lindsay J in *James v Wilson,*[11] Both cases concerned the interpretation of the constitution of a political party and, for that reason, may be distinguished from this case. It might also be observed that, in addition to the effect of the *Commonwealth Electoral Act*, the recognition of political parties in s 15 of the Commonwealth Constitution only adds to the force of the reasoning in those cases.

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7 [1993] 1 Qd R 10
8 At 17
9 (1916) 23 CLR 29
10 (2007) 212 FLR 271
11 [2019] NSWSC 17

[23] Mr Ferrett QC sought the shelter of *Baldwin v Everingham* by arguing that there is a public interest in the enforcement of the Club's Rules (and thus a basis for curial intervention) because of:

(a) the exemption of the Club, as a voluntary association holding land, from liability for land tax – see s 56(2) *Land Tax Act* 2010, and

(b) the Club's obligations under other legislation such as the *Privacy Act* 1988 (Cth).

[24] There is a thread, on Mr Ferrett's argument, which runs from *Edgar and Walker* through to the *Baldwin* cohort of cases to the effect that "where an organisation, if it were not governed in an orderly fashion, would get in the way of … statutory objects … [then] there is a public interest in enforcing the rules of those organisations." I do not accept that such a broad principle arises from the decisions in those cases. First, in cases involving industrial organisations, those bodies must apply for registration and be successful before the provisions of the relevant legislation applies. The legislation to which the applicant points applies to the Club and all other unincorporated associations without the need for those bodies to do anything other than exist. The *Land Tax Act* will apply to the property of a small bowls club as well as that of clubs with property in the central business district of Brisbane. Secondly, the cases involving political parties can be distinguished by the reason and purpose for their existence. Once again, there is a requirement for such an association to seek registration in order for it to both benefit from and be subject to the constraints of the relevant legislation.

[25] In any case, the legislation referred to for the applicant does not purport to require that the voluntary associations it affects have any particular rule or rules. There was nothing advanced on this subject which demonstrated that, in order for the *Land Tax Act* or the *Privacy Act* to be effective, there was a need for intervention in the internal affairs of an association by a court. Those statutes are not specifically directed to unincorporated associations and there is no legislative recognition of such associations as there was, for example, in the *Conciliation and Arbitration Act.*

Does the applicant have a sufficiently important personal interest "in play"?

[26] The applicant contends that the courts will intervene where some interest short of a legally enforceable one is in play and seeks support for that contention in the decision of Palmer J in *Carter v NSW Netball Association*[12] which, it was argued, is consistent with the High Court's decision in *Ainsworth v Criminal Justice Commission*.[13]

[27] In *Carter* the plaintiff was a volunteer coach with a local sporting body. She was the subject of an adverse finding by the defendant's disciplinary tribunal which led to her being banned as a member and to notification being given to the Commission for Children and Young People under the *Commission for Children and Young People Act* 1998 (NSW). Because of that notification her name was "registered" with the Commission and was a matter which would be taken into account should she seek to engage in child related employment in the future.

[28] There are a number of authorities which support the proposition that where the decision of a domestic tribunal affects a person's livelihood then a court can intervene if it is

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[12] [2004] NSWSC 737
[13] (1992) 175 CLR 564

alleged that the decision was made without good faith.[14] In *Carter* it was accepted that the plaintiff did not seek to protect a right of property nor was it said that her livelihood depended directly on membership of the defendant. The effect of the decision of the disciplinary tribunal was held to have "branded [her] as a child abuser" and thus caused damage to her reputation and self-esteem. Palmer J referred to the decision in *Ainsworth* where it is said by the majority that: "It has long been accepted that reputation is an interest attracting the protection of the rules of natural justice. Thus, over a century ago, Jessel MR said in *Fisher v Keane* … 'according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, [they ought not] to blast a man's reputation for ever - perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct."[15] Palmer J concluded on this point that the direct effects of the defendant's decision on the plaintiff's reputation and its indirect effect on her livelihood were sufficient to warrant the exercise of the Court's discretion in favour of intervention.[16]

[29] *Carter* is but one of a number of cases in which there is consideration of whether an adverse effect on the reputation of a member caused by the act of a private body constitutes grounds for a Court to intervene. *Carter* was not followed in *DEF v Trappett*,[17] It was followed in *Sturt v Bishop of Newcastle*[18] in which two Anglican priests challenged disciplinary action against them but it, in turn, was doubted by the Full Court of the Supreme Court of South Australia in *Harrington v Coote*.[19]

[30] In this case it is unnecessary to attempt to resolve the differences of opinion exhibited in the cases referred to above. The plaintiff has not demonstrated an interest which is similar to or analogous to the reputational rights considered in *Carter* and the other cases which followed. The only interests identified are:

(a) the benefit of membership of the Club – but no argument was advanced to demonstrate how that would be adversely affected,

(b) access to the Club's considerable facilities – again no argument was advanced to demonstrate how that would be adversely affected, and

(c) association with the rest of the members.

On the last point I was reminded by Mr O'Brien QC that the objects of the Club do not refer to, and are not directed to, any particular sex. The restriction of membership to men is the subject of a rule only.

Are the Rules of the Club contractual in nature?

[31] The plaintiff argues that there are strong reasons to conclude that the Rules of the Club demonstrate an intention, on the part of those subscribing, to be bound by those Rules. In support of that argument, the plaintiff identifies the following Rules:

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[14] See, for example, *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546; *Mitchell v Royal New South Wales Canine Council Ltd* (2001) 52 NSWLR 242

[15] *Ainsworth* at 578

[16] *Carter* at [109]

[17] [2016] NSWSC 1698

[18] [2012] NSWSC 400

[19] (2013) 119 SASR 152 at [19 – 20]

Rule 3 This provides that purchases, investments and so forth, as well as legal proceedings, shall be entered into in the name of TCN and that all real and personal property of the Club shall be vested in and held by TCN upon trust for the members for the time being.

Rule 9 Upon resignation all monies due and payable by a member to the Club remained due and payable and are to be paid forthwith.

Rule 20 The Committee and all officials are indemnified "against all damages and the cost of any legal proceedings or enquiries that may be instituted against them or involving the Club in consequence of the performance of their duties".

Rule 23 Any real property of the Club or held by TCN may only be sold or disposed of after the holding of a postal ballot of all members which permits such disposal.

Rule 24 Members are to pay subscription fees by a particular date.

Rule 26 The accounts of the Club are to be audited annually.

Rule 29.1 The property of the Club is to be held in trust for the members by TCN.

Rule 29.2 It is expressly declared that the Club is not carried on for the purpose of profit or gain to its individual members.

Rule 33 If the Club is wound up, then any property remaining is to be transferred to a like institution.

Rule 34 This rule acknowledges the obligations of the Club under privacy legislation.

[32] In addition to those Rules, the plaintiff points to the "relative sophistication" of the Club the Club's property holding, and the fact that it provides hospitality, health and fitness facilities, and accommodation services on a significant scale. It is also the landlord of retail properties within the Club's building. Of course, all those activities are undertaken by TCN on trust for the Club.

[33] As there is no acknowledgement of any contractual rights within the Rules or elsewhere one must, for the plaintiff's argument to succeed, imply a contractual relationship. There is, within the Rules a declaration by the members of the Club of the objects of the Club. No hint of a contract appears there.

[34] A different species of relationship – applicable to clubs – was identified in *Scandrett v Dowling.*[20] In that case, a church was given power under a private Act of Parliament to pass by-laws. The plaintiff complained that the by-laws had been breached. The nature of the relationship among the members of that Church, pursuant to the by-laws, was described by Priestley JA as a "consensual compact" – a term which had found use in cases involving the internal affairs of churches. Priestley JA, with whom Hope AJA

[20] (1992) 27 NSWLR 483

agreed, said that the by-laws were merely part of a consensual compact which would only be enforced by a court in certain circumstances.

[35] The term was referred to by Young J in *Wilcox v Kogarah Golf Club Ltd*[21] to describe the status of rules or procedures which, construed in their context and with regard to their purpose, can be seen as adopted by the members of a non-profit organisation in order to express their shared ideals, purposes or beliefs rather than in order to create contractually binding rights and duties enforceable in a court of law.[22] That description is consistent with the statement of the majority in *Cameron v Hogan* that:

> "If a member of a voluntary association complains, not of an invalid expulsion, but of some failure to observe the rules on the part of the committee or other officers, it would be necessary for the member complaining to show that the rules were intended to confer upon him a contractual right to the performance of the particular duty upon which he insists. **It can seldom be the true meaning of the rules of any large association of such a kind that those undertaking office thereby enter into a contract with each and every member that they will execute the office in strict conformity with the rules**."[23] (emphasis added)

[36] If it were the case that a contract did exist between and among the members then all manner of difficulties might arise. One which was identified (with their usual flair) by the learned authors of *Equity: Doctrines and Remedies*[24] was described in this way:

> "Another difficulty is the volume of litigation that would be unleashed if the theory were openly embraced. It might involve the restraining not only of a wrongful expulsion but also all sorts of breaches of negative stipulations, for example a rule that afternoon tea should not be served in the smoking room of a club until after 3:30 pm."

[37] The Rules referred to above, together with the objects of the Club, do not support a conclusion that there is a contractual relationship. The reason for the Rules relied upon can be identified as being unrelated to an intention to form a contract. For example, the holding of property by a corporate trustee is a common way of avoiding the difficulties which faces an unincorporated association. While the members of the Committee are indemnified, that indemnity is against the "funds of the Club" which they control and not from individual members. Members are expressly prohibited from receiving any property interest or disposition or distribution of any property of the Club. Should a member fail to pay an annual subscription, for example, then there are non-contractual means of redress available such as suspension or termination of membership or reference to an internal review tribunal.[25]

[38] The defendants point to three other matters which they say also tell against the intention that any contractual relations should exist among the members.

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21 (1996) ACLC 421
22 See *Carter* at [86]
23 At 373
24 J Heydon, M Leeming and P Turner, "Meagher, Gummow & Lehane's Equity Doctrines & Remedies" (5th ed, LexisNexis Butterworths, 2015) at 757, 21-315
25 The Member Behaviour Review Tribunal established under Rule 36.

[39] First, they say that if the members had intended that the Rules should give rise to a contractual relationship then they could have taken steps to incorporate under the *Associations Incorporation Act* 1981 or they could have formed a company limited by guarantee. Neither of those steps are difficult to take and would have been available had a contract been desired.

[40] Secondly, remedies for any grievance that the plaintiff might have in relation to the ballot result or the Rules of the Club can be dealt with by using the Rules themselves such as the capacity under Rule 30 to seek an alteration of the Rules.

[41] Thirdly, the Rules do not recognise any right of recourse to the courts in the event of an internal dispute between the members about the Rules or their application. The defendants draw a distinction between these Rules and those that existed in *Plenty v Seventh-Day Adventist Church*.[26] That case concerned whether a statement of claim sufficiently disclosed a justiciable claim. The Full Court of the Supreme Court of South Australia held that the church rules appeared to recognise a right of recourse to the courts and that was a sufficient indication that the members of the church contemplated the creation of legal relations. That was not a final decision but merely a recognition that there was a case which might be made by the plaintiffs. In any event, the Rules do not contemplate the settlement of any internal dispute through any external agency, It is the absence of such a provision that tends to suggest a lack of intention that there be a contractual relationship.

[42] In *Cameron v Hogan* the majority said[27] that "unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adapted for their governance would not be treated as amounting to an enforceable contract". I do not accept that the Rules of the Club exhibit that, or any, "clear positive indication". Many of the Rules relied upon for this finding by the plaintiff are explained by the nature of an unincorporated association and the need to conduct the business of the Club in an efficient way. They do not express an indication of the kind necessary to hold that the Rules establish an enforceable contract among the members.

Conclusion on justiciability

[43] A recognition that the Court should not intervene in a case of this nature means that the application must be dismissed. But, should I be wrong in that conclusion, and as both parties argued the second point with considerable skill, I will consider whether the ballot was invalid.

Was the ballot conducted in accordance with the Club Rules?

The Rules for voting

[44] The motion the subject of the ballot sought to change two rules and insert another so that women could become members of the Club.

[45] Rule 30.9 of the Club Rules provides:

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[26] (1986) 43 SASR 121
[27] At 371

> "A Rule of the Club shall be altered, amended or repealed only by a postal ballot substantially consistent with the process for elections by postal ballot as per Rules 13 and 14."

[46] Rule 13 concerns voting by members on questions of importance. Rule 13.5 provides that: "Elections to the positions of members of the Committee shall be by the members by ballot as provided for in Rule 14." Each of Rule 13 and Rule 14 provides for voting by way of postal ballot but with some minor differences, for example, the requirements concerning the provision of envelopes are different. Under Rule 13 only one envelope need be provided, whereas under Rule 14 two envelopes must be provided.

[47] As Rule 39 directs that the ballot be substantially consistent with the process for elections, it follows that it is the procedure under Rule 14 which must be considered.

[48] Rule 14.7 sets out the procedure for a contested election. It is accepted by the plaintiff that, apart from the issue of the notation of a member's number on the larger envelope, the ballot was conducted "with the highest standards". It is unnecessary, then, to set out all of Rule 14.7 and a brief description of the requirements of that Rule will suffice:

(a) the Committee must appoint a presiding officer and two scrutineers,

(b) the presiding officer must provide a locked ballot box to the CEO,

(c) the CEO must forward to each member a marked envelope as well as a smaller, unmarked one, a ballot paper, and voting instructions,

(d) each member desiring to vote fills out a ballot paper, puts it into the smaller envelope, places that inside the larger envelope, signs it and returns it,

(e) when the time comes for voting, the presiding officer, in the presence of the CEO and scrutineers shall:

  (i) inspect each larger envelope to establish "by reference to the number on the larger envelope" that the member is "qualified to vote" and that the envelope is "properly vouched for",

  (ii) at some subsequent, convenient time, destroy those envelopes that do not comply,

  (iii) place the smaller envelope for each qualified vote in the ballot box,

  (iv) open and count the votes, and

  (v) provide a written report.

[49] The rule which requires particular attention is Rule 14.7.3:

> "The Chief Executive Officer within twenty-one (21) days from the closing of nominations shall forward to each member at his prescribed address two (2) envelopes of unequal size, the larger envelope bearing the address of the Chief Executive Officer of the Club, **together with the registered number of the member**, and the smaller envelope endorsed "Voting paper", enclosing with these envelopes a list of the candidates nominated (distinguishing the names of members of the existing Committee by an asterisk opposite their names), together with instructions as to the number of appointments to be balloted for, and the mode in which the candidates are to be selected. The

> instruction shall be framed in such a way as to ensure secrecy with respect to the ballot." (emphasis added)

[50] A "voting pack" was sent to each member. It contained a number of documents relating to the motion the subject of the ballot including arguments for and against the motion. It also contained the formal Notice of Motion, voting paper, a blue envelope for the endorsed voting paper, and a larger white envelope addressed to the Club's CEO.

[51] The voting papers sent to members also contained voting instructions. One of those instructions was:

> "Place the sealed smaller blue Voting Paper envelope in the larger return paid envelope and sign your name on the inside flap of the larger envelope. **Write your Membership Number in the space provided on the outside flap of the larger envelope**, and after sealing, return to the Chief Executive Officer." (emphasis added)

[52] When the CEO sent the material to the members the larger envelopes did not bear the roll number (as it is described in Rule 13) or the registered number (as it is described in Rule 14) of the member to whom it was sent. Rather, each envelope had the following marked on it: "Membership No. …….".

[53] Of the 3015 votes cast 242 were deemed to be informal. Of that number, 110 were held to be informal because there was no identifiable membership number on the back of the larger envelope (96) or the membership number was the same as on another envelope (7 "pairs" of votes).

Was there substantial consistency?

[54] The plaintiff argues that the issuing of an envelope "individualised" in the case of each member is an integral part of the process. It provides, it was said, a high level of confidence that the voting paper inside it is one completed by the member whose number appears on the outside. Further, the step required of a member, that is, to mark his membership number on the envelope was not authorised by the Rules and was in contradiction to the requirement that the CEO, in effect, carry out that task.

[55] The failure to comply with the requirement to insert the member's number on the large envelope meant, the plaintiff said, that the ballot could not be regarded as having been conducted in a manner substantially consistent with the process set out in Rules 13 and 14. As a result the ballot did not comply with the Rules and therefore was invalid.

[56] The defendants' argument is in two parts: first, the postal ballot was "substantially consistent" with the voting process set out in the Rules, and secondly, the court would, in its discretion, decline to grant declaratory relief.

The meaning of the Rules

[57] I turn first to the construction of the Rules. Rule 30.9 requires that a postal ballot be substantially consistent with the "process for elections" – not substantially consistent with any particular part of that process but with the process as a whole. Some assistance in the consideration of this matter is afforded by the decision in *SZGME V Minister for*

Immigration and Citizenship.[28] In that case, the validity of a protection visa application (Form 866) was in question because certain parts of it had not been completed. The Full Court of the Federal Court considered the meaning and applicability of s 25C of the *Acts Interpretation Act* 1901 (Cth) which then provided:

> "Where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient."

[58] The majority[29] held that the question of substantial compliance was to be judged by reference to compliance with the whole of Form 866 and not by reference to the individual parts. Consistent with that was the earlier decision in *Bal v Minister for Immigration and Multicultural Affairs*[30] where it was held that substantial compliance was to be assessed by reference to the purpose of the form in eliciting the applicant's claim to be a refugee and that the questions posed in the form were only guidelines to that end.[31]

[59] In a similar vein were the statements of Burchett J in *Re Asset Risk Management Ltd*.[32] His Honour considered the effects of a provision of the *Corporations Law* which allowed for a declaration to be made where particular provisions had been "substantially complied with". Burchett J held that substantial compliance is a matter of degree. The court is concerned with the practical effect of what has been done, which should be compared with the practical effect the legislature appears to have sought to have achieved.

[60] Although the decisions referred to above concern the construction of a similar term contained within a statute, they do provide some illumination of the manner in which a similar term might be construed in a set of rules such as those under consideration.

[61] It is reasonably apparent that one, perhaps the only, purpose of having the member's number on the larger envelope was so that the CEO could satisfy himself in accordance with Rule 14.7.6 which provides that the [CEO] "shall first satisfy himself that the member (by reference to the number on the larger envelope) is qualified to vote". That purpose can be satisfied in more than one way such as having a member write his membership number on the back of the envelope.

[62] The plaintiff argued that this departure from the letter of the Rule could, and in this case did, lead to some votes being excluded on the basis that a member might forget to inscribe the number or may not write it in a legible way. One cannot, of course, construct a voting system which will infallibly record a voter's intention. In this case, for example, 61 votes were marked with a tick instead of a cross in contravention of the voting rules and were invalidated. What has to be examined is the process and not the manner in which a particular member or members will respond to the process.

[63] The requirement that a member write his number on the envelope rather than having a numbered envelope provided will still serve the purpose of identifying those members entitled to vote which must be the substantial purpose, under the Rules, for the inclusion of the membership number. This is a minor departure from a part of the procedures set

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28 (2008) 168 FCR 487
29 Black CJ and Allsop J
30 (2002) 189 ALR 566
31 At [39]
32 (1995) 59 FCR 254

out under Rule 14. The practical effect remains the same. The process adopted was substantially consistent with the process for elections by postal ballot set out in Rules 13 and 14.

Are there discretionary reasons for not making a declaration?

[64] The defendants also argued that, even if the process adopted was not "substantially consistent" with the voting process, then discretionary relief should not be granted.

[65] The court will not, generally, grant relief where all that can be shown is a minor breach of the rules without any apparent consequence for the integrity of the election. It was put this way by Hope and Priestly JJA in *Rivers v Bondi Junction-Waverley RSL Sub-Branch Ltd*:[33]

> " … The discretion to make declarations is very wide, but it is nonetheless a discretion; a plaintiff does not have an automatic right to a declaration because he can point to a failure by the defendant to comply with some requirement. … No doubt it is often as well to have a member of the club who is concerned with procedural requirements and who seeks, within the club, to have them carried out. There are however other factors than mere non-compliance which the court must consider in deciding whether it should intervene and exercise its discretion to make a declaration."[34]

[66] In arriving at that conclusion, their Honours affirmed the statement by Holland J in *Ryan v South Sydney Junior Rugby League Club Ltd*:[35]

> " … I think that it would be going too far to say that the court would have no option but to declare an election void if there was any breach of a member's rights under the articles even though, on the evidence before the court, it appeared that the majority of voters had not been prevented from electing the candidates of their choice or that there was no reasonable ground for believing that the majority might have been so prevented. To do so would be to give no weight to the interest of the members as a whole in having an election to settle a contest for control of the company brought to a conclusion with reasonable expedition so as to remove uncertainty and avoid the delay and expense involved in a succession of elections because of some breach of the articles."[36]

[67] In this case, it was not contended that the method of placing members' numbers on the envelope led to any member being disenfranchised. The completion of the envelope was in the hands of each member and the procedure adopted did not prevent any member from taking part in the ballot. Where the rules provide that the process for a ballot is to be "substantially consistent" with the manner of electing Committee members, and where the members have decided upon a lower threshold for the acceptability of the process, then those matters, together with the other matters referred to, lead to the conclusion that a court would not interfere on the basis advanced by the plaintiff.

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33 (1986) 5 NSWLR 362
34 At 376-377
35 (1974) 3 ACLR 486
36 At 499

[68] In the light of the above conclusion, it is not necessary to consider whether there are any other discretionary grounds to refuse to make the declaration. I merely observe that the absence of any allegation that the applicant would suffer any harm, or would face any diminution in his capacity to enjoy the facilities of the Club, would tend strongly against the making of such a declaration.

Conclusion

[69] This is a case which falls within the category described in *Cameron v Hogan* and, thus, the court should not intervene in the internal affairs of the Club.

[70] If it were a case which allowed for intervention, then the plaintiff has failed to demonstrate that the ballot was conducted in breach of the Rules.

[71] The application is dismissed. I will hear the parties on costs.