IN THE MATTER OF THE ARBITRATION ACTS 1954-1998
THE DISPUTES RESOLUTION AUTHORITY

DRA 17/2009

Between:-

DARROCH O'MAOLCATHAIL

Claimant

-and-

COISTE EISTEACHTA LAIGHEAN, COISTE EISTEACHTA CILL DARA and COISTE CHEANNAIS NA gCOMORTAISI CILL DARA

Respondents

INTERIM AWARD AND STATEMENT OF REASONS

Background

1. The Claimant is a member of Athy GAA Club. On 7 August 2009, as a member of that Club, he officiated as Umpire at an Under-16 Football match between Athy and Clane GAA Club. The game was played in Clane. The Claimant was at the goal at what has been referred to as the Pavilion end of the pitch and his co-umpire there was a gentleman from the Clane Club (hereinafter referred to as "the Clane Umpire"). During the first half, an altercation developed between the Claimant and the Clane Umpire.

2. The precise facts of this altercation were not the subject of detailed submissions or evidence before the Tribunal as the nature of the claims in this arbitration do not require determination of the facts of the incident. It has to be noted, however, that, after several hearings within the disciplinary process, the facts of the altercation remained somewhat unclear and as will be seen that lack of clarity has led to questions of some importance here. In that context, we emphasise from the outset that – whatever happened at that game – no view expressed in this decision should be taken as evidence leaning toward any one version or another.

3. The Referee officiating at the game prepared a report of the game in the ordinary way and in the course of that report he stated as follows:

"*Umpires*

Approximately half way through the first half, before an Athy side line ball, I became aware that they two umpires at the pavilion goal were on the ground fighting. This was on the side of the goal where the Clane umpire had been standing. I did not see how the fighting had started.

With the assistance of Club Officials and Mentors from both Clubs the Umpires were separated. I asked both Clubs to replace the two original Umpires before play resumed. This was done, play resumed, and the match was completed without further incident. I recorded the names of the two original Umpires."

4. Somewhat oddly, in light of the last sentence from the report set out above, the Referee did not actually state the names of the Umpires involved in the altercation.

5. It then appears that a short email was sent on behalf of the Clane GAA Club to a member of the Kildare Competitions Control Committee (the Second-named Respondent above, hereinafter referred to as "the CCC") referring to the incident and placing the blame squarely on the Claimant. This email was dated 16 August 2009.

The Disciplinary Action

6. Arising from the foregoing, a meeting was held by the CCC on the 19 August 2009. It appears that the Claimant was notified of this meeting orally and was told only that it was an "investigation". A number of individuals attended this meeting and gave information to the CCC. It appears that the persons invited to the meeting were divided into two groups, one being from the Clane Club and one being from the Athy Club. Each group was interviewed separately and the persons involved gave their information in the absence of the other group. Minutes have been made available to us of this meeting (although these do not appear to have been given to the Claimant in the course of the subsequent hearings). We understand that the contents of the email referenced above were put to the Claimant in the course of the interview with the Athy group.

7. A Notice of Disciplinary Action issued on behalf of the CCC to the Claimant on 20 August 2009. This was served in the proper manner. The relevant terms set out in the Notice are as follows:

"*Arising from the contents of the Referees report concerning a game under the rules of the Association between*

Claonadh v Athai on 7/9/09 at Claonadh and Subsequent Investigation.

A copy of which report is attached, you are hereby notified that you have been reported to have committed the following infraction, that is to say

misconduct considered to have discredited the Association.

> *Which is classified as a category* <u>*(e)*</u> *infraction and carries the appropriate penalty set out in rule 146 T. O. 2008."*

8. The rule references above are somewhat out of date, in that the Official Guide has been renumbered as of 2009 so that Rule 146(e) is a now Rule 7.2(e) but it is quite obvious what rule was being referenced, and quite properly, no issue was taken in that regard.

9. The penalty proposed under paragraph 3 of the Notice was a suspension of eight weeks at all codes and at all levels, which is the minimum penalty for the Infraction of conduct considered to have discredited the Association.

10. The Claimant issued a Reply to the Notice of Disciplinary Action refusing to accept the proposed penalty and thereby seeking a hearing. No complaint was made by him in the context of sending this Reply form that he was not properly informed of the charge and no requests for further information were made by him. The Reply form used includes what is effectively an invitation to raise queries relevant to the Disciplinary Action.

11. A hearing was held by the Kildare County Hearings Committee (the Third-named Respondent above, hereinafter referred to as "the CHC") on 27 August 2009. Minutes were available at the hearing before this Tribunal, however, in view of subsequent proceedings, the events occurring at this meeting are of limited significance. Arising from the hearing before the CHC, a suspension of eight weeks was imposed. The Claimant appealed this and the appeal was upheld by the Hearings Committee of Leinster Council (the First-named Respondent, hereinafter referred to as "Leinster Council") in the following terms:

> "<u>*Decision:*</u> *That your appeal be upheld as Coiste Eisteachta Contae Cill Dara failed to comply fully with the procedures outlined in Rule 7.3(h); 7.3(i) and 7.3(n) T.O. 2009.*
>
> *That the matter be remitted for re-hearing by Coiste Eisteachta Contae Cill Dara."*

12. At the hearing before this Tribunal, the representative of Leinster Council indicated that the primary reason for this decision was the absence of a proper Disciplinary Report. More specifically, it was explained that the Referee's Report contained no information as to the names of the parties involved and therefore did not comply with the requirements of the rules.

13. While we do not propose to engage on any detailed analysis of the first hearing before the CHC, it might be useful to observe at this point that the Claimant's own name was identified in the Notice of Disciplinary Action. Naming him on the Notice and enclosing the Referee's Report would ordinarily be sufficient to satisfy the requirement of identifying him as a party involved in the incident for the purpose of Disciplinary Report. For that reason, condemning the failure to name the Claimant in a Disciplinary Report was somewhat harsh by Leinster Council. It is important to remember that the obligation to furnish a Disciplinary Report comprises an obligation to provide four pieces of information per rule 7.3(i) and no more. It does not require a

separate document or form and indeed, in the vast majority of cases, the Referee's report taken together with the Notice of Disciplinary Action will be sufficient to provide those four pieces of information. We draw the distinction here between, on the one hand, the *information* that must be contained in a Disciplinary Report (the purpose of which is to identify in broad terms the case a Defending Party is required to meet) and, on the other, the *evidence* that must be put before a hearing (the purpose of which is to satisfy the Hearings Committee that the matters alleged occurred). They are not to be confused with one another.

14. At all events, arising from the decision of Leinster Council, the matter was remitted for rehearing with a direction that a Disciplinary Report be furnished. It is to be recalled that the defect in the original decision identified by Leinster Council was the absence of a sufficient Disciplinary Report, and this was addressed by the furnishing of a short report dated on its face "7/7/09" (this was explained to be a clerical error and should refer to 7/9/09). It is evident from this Disciplinary Report that the CCC did not propose to summons any party to give evidence at the hearing, although it is indicated that seven named persons were interviewed in relation to the matter. The description of the events alleged states as follows:

> "*Ref Report stated that Umpires were fighting on the ground on the side being used by the Clane Umpire.*"

15. The rehearing took place on 18 September 2009. We have been supplied with minutes of the Hearing and neither party disputes the contents or accuracy of these minutes. The minutes show that, having referred to the decision of Leinster Council, the case was opened for the CCC by its secretary, Mr. Dunney, who (it is stated):

> "*did not reiterate what had happened in detail but outlined what had been discussed at the previous hearing. He stated that following an investigation into the match the CCC had found that the Athy Umpire had a case to answer. Basically there had been a disputed decision between the Umpires and the Athy Umpire had left his position to "discuss" his reason for the decision he made when he became entangled with the Clane Umpire.*"

16. The minutes then go on to relate what was said on behalf of the Claimant in his defence, and to record that a decision was made again to impose an eight-week suspension on the Claimant. The Claimant's appeal to Leinster Council against this finding and suspension was dismissed.

17. Before moving along to that point, however, it is worth pausing here to discuss the above quoted section, which represents, albeit in summary, the totality of the evidence that was put forward in support of the charge against the Claimant.

The evidence before, and decision of, the CHC

18. In examining what is recorded to have been said on behalf of the CCC at the hearing on 18 September 2009, we can only describe it as a statement by a representative of the CCC of that committee's opinion as to the facts of the incident alleged, derived entirely from the aforementioned interviews with members of the Clane and Athy

Clubs on 19 August 2009. No witness as to the events alleged gave oral evidence before the CHC and no document or other evidence was adduced save for the Referee's Report.

19. At the hearing of this Arbitration, an extensive discussion was had regarding the entitlement of the CHC to make findings of fact based on the statements of the CCC representative at the Hearing. What was said on behalf of the CCC was characterised by Mr McDonald (Solicitor for the CCC and CHC) variously as a "proposal" on behalf of the CCC, the CCC's "take" on the matters investigated, and indeed as oral evidence of the matters alleged. In our view, while it may well have constituted a "proposal" or "take" on matters previously discussed between the CCC and the various parties concerned, it certainly was not evidence. The CCC's representative expressly gave his information in his capacity as a representative of the CCC, arising from its interviews on 19 August 2009, and not as an eyewitness to the events in question. At best, therefore, the CCC's submissions constituted hearsay, but we hesitate to call it even that because the CCC's representative did not report direct statements given to him; rather, his statements are better described as a coagulation by the CCC of the various pieces of information heard and assimilated by the CCC from the various interviews conducted on 19 August 2009.

20. Rule 7.3(aa) of the Official Guide sets out the rules of evidence at disciplinary hearings. That rule prescribes that evidence shall be given orally save in excepted circumstances, which are set out in that rule. The Respondents were not in a position to identify under what exception to the general requirement to give evidence orally, the statements or submissions of the CCC's representative at the Hearing might have been admissible. Our attention was drawn to Rule 7.3(aa)(1)(ii) which states:

> "*the Hearings Committee shall attach to documentary evidence (including video evidence) such level of reliability as befits it in the circumstances of the hearing.*"

21. If it was being suggested on behalf of the Respondents that this was being relied upon (and in fairness to the Respondents we are not sure that it was), we must say that a document recording hearsay is not acceptable proof on a hotly contested matter of fact arising from eyewitness testimony. But even at a factual level, this suggestion would fail in the present circumstances, because no document was in fact put forward as evidence (the minutes of the meeting of the CCC were not supplied to the Hearing).

22. It was also stated that the Hearings Committee had the power under Rule 7.3 (bb) to determined matters of fact. This paragraph provides as follows:

> "*The Hearings Committee <u>has the final power to determine all matters of fact and all sources of evidence submitted to the Hearing shall be considered</u>. An Infraction shall be treated as proved if, in the opinion of the Hearings Committee, the infraction alleged is more likely to have occurred than not to have occurred.*"

23. This provision gives the Hearings Committee the entitlement to determine matters of fact. What it does not allow is for the Hearings Committee to make findings of fact in the absence of evidence. We might add that, if it is the case that the CCC's

submissions at the Hearing were taken as evidence, the failure to identify the source of the various items of information and to question and challenge those sources would have given rise to an obvious denial of natural justice to the Claimant. But we need not go as far as that. Quite simply, the submissions of the CCC were not evidence at all under the Rules of the Association.

24. Under Rule 7.3(aa)(1)(vi), the Referee's report is an exception to the general rule that evidence should be given orally at a Hearing. In this case, there was a Referee's Report before the CHC, and it indicates that an altercation took place and that the names of the Parties involved were recorded by him. Although ultimately it is not relevant to our decision, we find as a fact that there was sufficient evidence before the CHC to determine that the Claimant was involved in the altercation. The submissions made on his behalf and in his presence at the hearing were predicated on his having been involved in the incident, albeit in an innocent role. For that reason, the absence of specific evidence of his involvement in the altercation on the face of the Referee's Report was not operative.

25. However, the Referee's Report is silent as to the relative conduct of the two umpires in instigating the altercation: this is understandable, as the Referee stated that he did not see how the fighting had started. That the Claimant was on the Clane Umpire's side of the goalposts does not prove anything additional. Merely to be on that side of the goalposts was not of itself misconduct. That fact might corroborate an account that the Claimant had travelled across and assaulted the Clane Umpire, had such an account been given to the CHC. But no such account was given to the CHC, so there was nothing to corroborate. On its own, the fact that the Claimant was on the Clane Umpire's side of the goalposts was insufficient to constitute probative evidence.

26. As noted above the decision of the CHC was adverse to the Claimant. The minutes state as follows:

> "*an open discussion then took place between the Members of the Hearings Committee. All agreed that:*
>
> *(1) An incident did occur.*
> *(2) Darroch Mulhall was definitely involved, by his own admission.*
> *(3) He was guilty, whether or not he was less or more guilty then charged."*

27. It might be observed that the vote on the outcome was not unanimous; however as a Hearings Committees act collectively and are responsible as such, it is not relevant that there may have been a dissenting minority. Likewise, suggestions on behalf of the Claimant that a member of the Kildare Hearings Committee resigned arising from this event (which were denied by the various Respondents) are irrelevant, even if proven.

Analysis of the decision of the CHC

28. At its essence, it would seem that the decision of the CHC was either:

(a) a decision, which can only have been based on the submissions of the CCC at the hearing, which laid the blame for the incident in question on the Claimant, or

(b) a finding that the mere involvement in the incident, irrespective of the Claimant's role (be it defensive or offensive), was sufficient to constitute misconduct considered to have discredited the Association.

Whichever of the above explanations represents the essence of the decision made, it is a problematic one.

Analysis (a)

29. Taking the first analysis, it is evident from the foregoing analysis that the Secretary of the CCC was not a competent witness (in the sense that he was not speaking as an eyewitness to the events), and therefore nothing he said constituted evidence before the CHC as contemplated by rule 7.3(aa). As identified above, the most commonly relied-upon exception is that pertaining to the Referee's Report. But, as further indicated, the Referee's report in this case only stated that the incident had occurred and there is no information as to how it started or whether the Claimant was the aggressor (bearing in mind of course that, in a situation like this, both parties might be considered aggressors). Accordingly, taking the CCC's submissions at the Hearing on behalf of the CCC out of the analysis, there was no evidence to demonstrate that the Claimant was the aggressor. He might have been. But what was before the CHC warranted two equally balanced conclusions: one, that the Claimant contributed to the altercation, and two, that he did not.

30. The conclusions as to the Claimant's involvement being equally balanced, the CHC could not conclude that the CCC had satisfied the requirement (under Rule 7.3(bb)) of showing that "*the infraction alleged is more likely to have occurred than not to have occurred*", unless of course it is holding that mere involvement in an incident constituted misconduct tending to discredit the Association (the second analysis, to which we will now turn).

Analysis (b)

31. Under the second analysis above, the question arises as to whether mere involvement in a fracas of the type concerned, without evidence of active participation, can constitute "*misconduct considered to have discredited the Association*" contrary to Rule 7.2(e) of the Official Guide. The various Respondents appeared to be of the view that it could.

32. We cannot agree with that opinion. Rule 7.2(e) (hereinafter referred to as "the Discredit Rule") is a broad catch-all infraction, designed to cater for conduct that is not specifically prohibited in rule. A rule of this type is common to the codes of most sports organisations (and indeed analogous terms will be seen in employment contracts) because sports organisations (and employers) cannot legislate for every situation that might arise. The advantage of such a rule is that it does not allow serious misconduct to go unpunished or unremedied merely because the rules do not contain an exhaustive list of infractions. Its disadvantage is that it is susceptible to abuse (not necessarily in bad faith) because it tends to define the offence after its commission.

The Discredit Rule is an exception to the general principle that a member of the Association must know in advance, from a reading of the Official Guide, what conduct is likely to expose him to disciplinary action. As such, in order for the behaviour in question to be classified as misconduct under the Discredit Rule, it must be obvious to an ordinary and sensible member of the Association that that behaviour is plainly and unambiguously wrong. One cannot logically argue that being the innocent victim of a physical attack is behaviour that is plainly and unambiguously wrong.

33. We hasten to observe that we are not here stating that the Claimant here was an innocent victim of anything. As has been emphasised previously, we know little about the incident in question and make no findings of fact in relation to it. However, on the evidence before the CHC in this case (being the Referee's Report and nothing else), that conclusion was as open to the CHC as a more condemnatory conclusion. As such, the CHC is not entitled to apply the Discredit Rule to undetermined facts, merely because at one end of the spectrum of conclusions as to what might have happened, the conduct would have been sufficiently offensive. If the evidence proves a range of possible conclusions, without demonstrating which is the correct version of events, then the most innocent version of events (within reason) must warrant the finding made and the penalty imposed. That was not the case here.

34. The Claimant makes a sophisticated argument that the failure to commence disciplinary action against the Clane Umpire demonstrates that the mere occurrence of the altercation cannot constitute the misconduct alleged: it demonstrates that the CHC was making a more serious allegation. While we do not accept the argument in those terms, we consider that it adds weight to the argument that mere involvement in an altercation does not constitute misconduct under the Discredit Rule. We say this because the only actual evidence before the CHC was the Referee's Report, and if the Referee's Report disclosed an Infraction (which necessarily follows from the argument that mere involvement in an altercation is the Infraction), then, pursuant to Rule 7.3(d)(1), disciplinary action would have been commenced against the Clane Umpire by virtue of the Report, and the CCC would be obliged to proceed with it. The fact that they did not proceed against the Clane Umpire does not conclusively prove that an Infraction was not disclosed: that would offend logic. However, it certainly undermines the credibility of the Respondents' argument that the Referee's Report did disclose such an Infraction.

The division of function between Competitions Control Committees and Hearings Committees

35. Regrettably what has happened here discloses an apparent misunderstanding of the changes to the rules of the Association brought about in 2007. Prior to that date the concept of the "Investigation" existed. This involved the old Games Administration Committees holding formal Investigations at which findings of fact were made and recommendations put to the County Committees. That system was by no means fundamentally unfair; however it gave rise to a risk of error and abuse (not necessarily through *mala fides*), because the same body investigated the incident, proposed the charge and adjudicated upon the facts of the matter. This in turn begot a range of possible risks to the quality of the procedure, for example, the risk of evidence being

taken into account that the accused player had not had an opportunity to address or challenge.

36. The rules brought about in 2007 eliminated the Investigation and replaced it with the idea of an informal investigation which involved no findings of fact. Simply, the CCC collects evidence and suggests a penalty to the Defending Party. If the Party does not accept that he is at fault, that evidence is put before the Hearings Committee. The Hearings Committee is the sole arbiter of fact. This regime has the advantage that the case is *decided upon* by a different body to the body *preparing* it. In turn, this ensures that both the CCC and the Defending Party are present at a single comprehensive hearing, at which all the evidence is made available to the arbiter of fact. Without intending to equate the disciplinary process a criminal prosecution, which is a different process, with greater consequences and greater obligations, we suggest that the latter provides a useful analogy: the CCC are like the police in the system (with the function of gathering evidence, charging and presenting the evidence), while the Hearings Committee are like the judge and jury, who are presented with the prosecution and defence evidence in a single hearing and adjudicate on the facts and the ultimate issue of whether a rule/law has been breached.

37. But, contrary to protestations to the contrary from the Respondents, what has occurred here is that the CCC has appropriated to itself a function in adjudicating upon matters of fact. The remarks attributed to the Secretary of the CCC in the minutes of the Hearing, be they "proposals" or his "take" on statements made to him (in the absence, it is to be noted, of the Claimant and without an opportunity for he or his representative to challenge those statements) cannot be characterised as anything but an adjudication (even if preliminary in nature) of the information given to the CCC in a separate meeting. That is not permissible in the regime in place since the rule were changed in 2007.

38. We should emphasise that there is nothing wrong with holding meetings such as those conducted on 19 August 2009. The problem was that, having carried out the meeting/hearing, the CCC then proceeded as if it was unnecessary to put the witnesses before the CHC. The air of formality apparent from the minutes of the interviews on 19 August 2009 gives the impression that a hearing of sorts was taking place, which is perhaps consistent with the attitude of the CCC, who believed that they were entitled to filter the evidence and produce a summary to the CHC.

39. What should have happened in the context of this Disciplinary Action (given its particular circumstances) was as follows. The CCC should have investigated the matter by means of interviews, conducted informally, and without the requirement of a hearing or the fair procedures attached to such a hearing. Following on the carrying out of interviews, assuming it was satisfied that there was a case to answer and wanted to commence Disciplinary Action, the CCC should have sent Notice of Disciplinary Action incorporating a Disciplinary Report as is required in all cases. That did not have to consist of a formal document, such as the specimen in the Disciplinary Handbook produced by Croke Park, although that is a useful precedent. In light of the broad nature of the Infraction alleged under Rule 7.2(e), the Disciplinary Report should have included a brief, but informative, description of what was being alleged against the Claimant. In other words, it ought to have been stated whether it was the Claimant was accused of instigating, prolonging or otherwise

contributing to the incident, in order that the Claimant might know what it was about his behaviour (as alleged) that was considered to have discredited the Association. The Report should also have included a list of witnesses that the CCC proposed to produce at the hearing. The witnesses should be chosen by the CCC as they saw fit, but in light of the equivocal terms of the Referee's Report, this was clearly a case where further evidence was required, and in light of the contested nature of the allegations, we do not believe that the CHC would be justified in accepting signed statements or the like. At the hearing, the witnesses ought to have been asked to give their version of events, and to answer any questions put to them by the Claimant or his representatives. The parties would all be expected to respect the authority of the CHC and observe due decorum in conducting the hearing.

40. In that context not only would the Hearings Committee be given its proper function of adjudicating upon the evidence (as distinct from proposals or interpretations of evidence), but the Claimant would have had an opportunity address the evidence against him. The CHC would then have been free to come to a decision as to the facts of the matter, and that decision on the facts would only be reviewable if it was irrational, i.e. where no evidence whatsoever supported it.

41. The foregoing is not to state that the Claimant is correct in all that his submissions. For example, we do not consider that his complaints about the contents of the Disciplinary Report and the Notice of Disciplinary Action are well founded in circumstances where (i) he did not raise any queries on the contents of the document, despite having an opportunity to do so, and (ii) by the time the matter came before the CHC on the second occasion, it had already been heard on the first occasion, so, even if the decision was ultimately made without evidential foundation, the Claimant knew in broad terms what was coming. The disciplinary process is a two-way process and the Defending Party is not entitled to sit on his hands waiting for a technical breach, in the expectation that he can later rely to his benefit on some resulting prejudice.

42. In light of the short time frame available to deliver this decision and the fact that the Claimant has succeeded on the primary ground advanced, it is not necessary to go any further into the detail of the other grounds of claim.

Conclusions, interim award and directions

43. In conclusion, we are of the view that the CHC has erred in either taking into account irrelevant considerations (i.e. the unsubstantiated statements made on behalf of the CCC) in coming to its conclusion on the hearing of 18 September 2009, or by misinterpreting Rule 7.2(e) (the Discredit Rule) so as to include within its scope the "mere" involvement of the Claimant in an altercation without some proof that he had contributed in some positive way to the incident. The first conclusion might be classified as a finding of administrative unreasonableness but it is unnecessary for us to consider it as a separate basis of challenge.

44. In our view – if analysis (a) of the decision of the CHC on 18 September 2009 is correct – the acceptance by the CHC of mere assertions as if they were evidence, compromised the Claimant's right to a fair hearing to such an extent that an injustice has occurred. If analysis (b) is correct, then there has been a misapplication of Rule

7.2(e). In either case, therefore, Leinster Council ought to have upheld the second appeal, pursuant to Rule 7.11(m).

45. We therefore quash the decision of the CHC made on 18 September 2009 to suspend the Claimant for 8 weeks on a finding of misconduct considered to have discredited the Association contrary to Rule 7.2(e).

46. The Tribunal has jurisdiction pursuant to Section 11.3 of the Disputes Resolution Code to direct parties to take or abstain from taking any steps under the Rules of the Association, including but not limited to the rehearing and reprocessing of disciplinary processes. Rather than to direct a rehearing or reprocessing of the matter commencing from any particular point, we would leave the CCC free to decide whether to commence Disciplinary Action *de novo*, but in the event that it does, the following shall apply to any recommenced Disciplinary Action:

   (a) In light of the fact that this has already been heard twice by the Kildare CHC, we would direct that the Hearings Committee next dealing with the matter be comprised of different personnel, to include any member of the CHC not present at the hearings of 27 August and 18 September 2009 and any additional temporary members appointed under Rule 7.14 of the Official Guide;

   (b) In light of the fact that the Claimant has stood suspended from 27 August to 3 September 2009 and from 18 September 2009 to this date (essentially four weeks in total), in the event that an Infraction is proved against him in the context of any re-processing of the matter, that period is to be treated as already served when calculating date of expiration of any suspension imposed.

47. This is an interim decision and award inasmuch as the question of costs (if any) remains outstanding, and written submissions are requested in that regard.

Dated the 16th day of October 2009

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Jimmy Gray

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David Nohilly

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Micheál O'Connell