DISPUTES RESOLUTION AUTHORITY

Record No. DRA/2/2009

Between:

Darren O Sioradain, Ronan Mac Suibhne, Caoimhin O Baoill, Peadar O hAinli agus Eanna O Floinn (mar ionadai ar son Craobh Cumann Cluain Geis CLG)

Claimants

-and-

Padraig O Cathail agus Seamus O Cuinn (mar ionadaithe ar son Coiste Chontae Longfoirt, Cumann Luthchleas Geal) agus Nicholas O Braonain agus Paraic O Dufaigh (mar ionadaithe ar son Coiste Bainisti Cumann Luthchleas Gael agus Ard Chomhairle Cumann Luthchleas Gael)

Respondents

COSTS AWARD AND STATEMENT OF REASONS

Fundamental principles relating to costs

1. Two fundamental principles need to be borne in mind when considering the entitlement of a disputant in court or arbitral proceedings to an award of costs.

2. The first principle is that costs are awarded at the discretion of the judge or arbitrator. This is reflected in Order 99 rule 1(1) of the Rules of the Superior Courts and section 29 of the Arbitration Act, 1954.

3. The second principle is that, subject to the discretion above, costs "*follow the event*". As such, the successful party has his costs paid by the unsuccessful party. This is specifically provided for in Order 99 rule 1(3)-(4) of the Rules of the Superior Courts:

> *"(3) [Subject to sub-rule (4A)], the costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.*

(4) [Subject to sub-rule (4A)], the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

4. There is no equivalent rule in the Arbitration Acts. However, arbitrators are obliged to act "*judicially*" (see e.g. *The Maria* [1992] 2 Lloyd's Rep 167, in which Evans LJ said: "*I would accept that the discretion* [as to costs] *is "absolute," but in my judgment an arbitrator errs in law if he exercises the discretion otherwise than in accordance with the restraints imposed by law upon a judge.*"). In *Office and Industrial Cleaners Ltd v John Paul Construction Ltd* (Unreported, High Court (McGovern J), 21 February 2008), it was held that the discretion afforded to an arbitrator was not unqualified and had to be exercised judicially. In the context of costs awards, it has been held that the general rule that costs follow the event has equal application to arbitrators as judges. (see e.g. *Vogelaar v Callaghan* [1996] 1 IR 88). The DRA Code expressly enshrines the principle that costs generally follow the event.

The "event"

5. The rationale for the fundamental principle that costs follow the event is logical. Costs are incurred because of the decisions of the parties whether to contest the issue between them. The decision of one party will be right and the decision of the other will be wrong. To contest an issue in which one is unsuccessful, while not always unreasonable, is nonetheless *less* reasonable than to have conceded it: accordingly – in general – the unsuccessful party is responsible for his own costs. By extension, it is not reasonable for that party to expect the successful party to have conceded the issue: hence his usual responsibility for the successful party's costs.

Cases with multiple issues

6. Since cases do not always turn on a single issue, it is not always obvious who was the "successful party" and who was the "unsuccessful party". A claimant or plaintiff might seek a number of different remedies, and succeed to only some of them; alternatively, he may seek one remedy but on a number of different grounds, and success on only one of those grounds may be sufficient to deliver that remedy. In the second example (which reflects the position in this arbitration), if the plaintiff or claimant succeeds on one ground and fails on the others, he may achieve all that he was looking for.

7. Assuming the grounds on which he succeeds were contested, then the plaintiff or claimant will have been more reasonable in pursuing those grounds than the defendant or respondent will have been in resisting them. But so far as the grounds on which he failed are concerned, the defendant or respondent will have been more reasonable in defending the issues than he was in pursuing them.

8. As such, responsibility for costs must lie with the defendant or respondent in respect of the issues brought home and responsibility for the costs of the unsuccessful grounds must lie with the plaintiff or claimant. It is not always straightforward: sometimes issues are layered and overlapping to such an extent that they cannot be disentangled; sometimes the arguments raised on an issue decided one way may well inform the argument and decision on an issue decided the other way; sometimes the time spent on certain issues is so short as not to merit attention as a distinct issue for costs purposes.

9. But where issues arising in an arbitration are discrete and severable, we consider that a Tribunal can and should analyse the relative extent of responsibility for the cost incurred.

10. It is at least arguable that an issue-based approach to costs is required of the courts: Order 99 rule 1(3)-(4) speak of the costs of "*every action, question, or issue*" and "*every issue of fact or law*" following the event. The approach is certainly not alien to the courts (see *Veolia Water UK Plc. v Fingal County Council (No. 2)* [2007] 2 IR 81, *O'Mahony v O'Connor Builders* [2005] 3 I.R. 167).

11. We have seen that Arbitrators are required to deal with costs issues as a judge would. As such, it seems to us that it is open to this Tribunal to take an issue-based approach to costs. There is precedent for it. In *Channel Island Ferries Ltd v Cenargo Navigation Ltd (The "Rozel")* [1994] 2 Lloyd's Rep 161, an arbitrator had decided a number of issues, some in favour of the claimant, some against it. On the grounds that the claimant had not succeeded in all of his claims the arbitrator only made a partial award. Phillips J, dismissed the application to set aside the award. He decried what was suggested to be a practice of not awarding full costs merely because claimants had not secured what they had claimed. However, in this case, the reduced costs award was the result of different issues having been determined in different ways. As such, the award was an issue-

based costs award and was a valid and judicial exercise of the arbitrator's discretion. *Mustill & Boyd* (2001, p 207) commented as follows on the principle developed in that case and others:

> *"Where there are a number of discrete items of claim, it is legitimate for the arbitrator to reflect the fact that the claimant has failed on some of them by reducing the costs recoverable by him"*

12. In these types of cases, the challenge is to determine whether there are discrete issues of claim or "event(s)" arising in the proceedings, and if so to define them. To fail to even attempt to do that is, in some ways, to abdicate the responsibility to see that costs truly follow the event.

This case

13. There were two issues in the present case. The first related to the validity of the particular Longford County Bye-Laws purported to be relied upon in determining the four Claimants to be ineligible to play for Clonguish: it turned on the procedures by which the Bye-Laws were made, and our conclusion was that there was a missing link of substance in the process: the Bye-Law sought to be relied upon was not actually voted upon by the County Convention as required. This was referred to as "the Procedural Argument" and on this the Claimant succeeded.

14. The second issue related to whether any County Committee (operating within the Rules of the GAA) ever had the power to impose what is referred to as "the Parish Rule". This was a matter of interpretation of the Official Guide. On this issue, we held that there was no prohibition on the imposition of Parish Rule and, consequently, the Respondent was the successful party.

15. In our view while the two issues were raised in pursuit of the same remedy, they were distinct and severable grounds of challenge, involving different rules of the Official Guide and, largely, different matters of facts.

16. The hearing of this case took two evenings. It is our view that the time spent on each issue was roughly the same, and that had either party conceded the issue on which they were unsuccessful, the whole case could have been determined in one evening.

Submissions on costs

17. After the decision and interim award were given, both parties applied for their costs. The submissions are detailed and cogent, and the summary below does little justice to their quality.

18. Put briefly, the Respondents believed that they were entitled to their costs on the grounds that (a) they succeeded on the Parish Rule argument, (b) the Claimant had not adequately pleaded the Procedural Argument, so that they were taken by surprise, and (c) they had attempted to resolve the matter in discussions before the arbitration, which would have allowed the Applicants in question the entitlement to remain as members of the Clonguish Club, provided that the Bye-Laws were accepted as valid and adhered to in the future.

19. The Claimants believed that they were entitled to their costs on the grounds that they had succeeded in the ultimate relief that was sought. They reject the argument that their pleadings failed adequately to disclosure the procedural issue and therefore resulted in costs being unfairly incurred by the Respondent. They cite the decision of this Tribunal to allow the argument to proceed, noting the finding that the correspondence and documentation adequately disclosed that the issue was in dispute.

20. On the Parish Rule Argument, the Claimants submitted that this arbitration brought clarity to a complex question of interpretation of the Official Guide for the benefit of the Association and its members. The Claimants objected to the introduction of submissions regarding pre-hearing negotiations. No evidence of such discussions was given at the hearing and in any event any discussions constituted attempts to resolve a dispute and therefore subject to "without prejudice" privilege.

Conclusions

21. On the procedural argument, the claimant has been successful. We do not propose to re-enter on the debate as to whether the matter was properly pleaded or not. We have already determined that question. Had the Respondents conceded the issue upon consideration of the merits of that argument, one might consider a causative link between the adequacy of pleading and the costs incurred; however they fully resisted the claim made under this heading.

22. The Parish Rule Argument was clearly resolved in favour of the Respondents. Moreover, it was a discrete issue. It may well be to the benefit of third parties that clarity has been brought to this question. However, it has not been suggested, still less demonstrated, that confusion reigned throughout the Association on this question or that this was in some way a test case for other existing disputes (and "Parish Rule" has been around for a very long time). In addition, it was implicit from the evidence adduced at the hearing that Clonguish, the Fifth-named Claimant, had a particular interest in the outcome of the Parish Rule Argument, because the Parish Rule, such as it was, deprived it of young players in the position of the First- to Fourth-named Claimants and would do so into the future. This is by no means any criticism of the Club, but it cannot be said that this was equivalent to "public interest" litigation. At all events, irrespective of any interest Clonguish might have had in the outcome, the facts are not such as to persuade us that costs should not follow the event on this issue.

23. Turning to the attempts to resolve the matter prior to the hearing, the first point we make is that the failure to adduce evidence on those disputes is *not* fatal to the point raised. The offers made were not relevant to the substantive issue, only to the question of costs, and it is open to a Tribunal to hold another hearing to deal with any further evidence required specifically on the costs issue (the main decision being an interim award). However, even taking the Respondent's position at face value (no admission is made by the Claimants of the matters stated), it seems clear to us that this was an attempt to resolve a dispute. While such attempts are to be encouraged, the fact that the dispute was not resolved by those negotiations means that "without prejudice" privilege continues to apply to the discussions. That privilege requires waiver by both parties to the negotiations, without which waiver the evidence is inadmissible. As such, a further hearing to address any evidential questions is not necessary. We cannot consider that submission.

24. In the result, there were two issues, and there was success for each party on one. There are no factors sufficient, in our view, to displace the principle that costs should follow the event on each issue. In particular, we reiterate our conclusion that, had the matter been determined on one or other of these issues, it could have been determined in one night.

25. As such, each party is properly entitled to their costs of pursuing *at hearing* the issue on which they were successful, and a set off results.

26. However, it is to be recalled that the Applicants were required to bring these proceedings in order to gain their remedy: ignoring the time spent at hearing, the Respondents are responsible for that expenditure being incurred.

27. That being so, the Claimants are entitled to the costs of preparing the arbitration. In respect of the remaining costs (i.e. the pursuit of the respective arguments at hearing), the relative entitlements of the parties cancel one another out.

28. In view of the fact that neither party has been entirely successful in relation to the costs question, there will be no award in relation to the "costs of the costs" (i.e. the submissions on costs giving rise to this decision).

29. Finally, we note that neither "side" has made any distinction between the parties making up its "side". As such, the entitlements and obligations under the costs award will be joint (and several where applicable).

Award

We award the Claimants the costs of preparing the arbitration (including consultations, preparation of papers for Counsel, drafting papers, written advices/opinions, and preparation of written submissions on the substantive case), as against the Respondents jointly and severally. For the avoidance of doubt, this includes the cost of opinions and advices given to the Claimants but not an instruction fee or brief fee. We make no further award and no award in relation to the direct costs of the hearing.

Dated 4 October 2010

Signed:

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Aoife Farrelly

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Declan Hallissey

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Micheál O'Connell