DISPUTES RESOLUTION AUTHORITY

DRA/3/2008

In the matter of the Arbitration Acts 1954-1998
and in the matter of an Arbitration

Between:-

MAIRC MAC CONMIDHE
-agus-
DAOINE EILE

Claimants

-and-

PARAIC Ó DUFAIGH
(mar ionadaí ar son Árd-Chomhairle Cumann Lúthchleas Gael)

Respondent

STATEMENT OF REASONS AND INTERIM AWARD

Summary

1. The Claimants are members of a number of GAA Clubs throughout the country. Although involved with others in a loosely affiliated group with objectives relating to the preservation of the amateur ethos of the Association, they have brought these proceedings in their own names and as members of the Association. Their status as members has never been in question; the contribution of their witnesses alone to the Association over many years, both as players and administrators, is most impressive; and, quite properly, their standing to bring these arbitration proceedings has not been challenged. As such, suggestions that have been made publicly (although not by those involved in this arbitration) to the effect that the Claimants are in some way "external" to the Association, are both incorrect and unfair.

2. Broadly speaking, they seek to challenge a scheme developed by Central Council in consultation with the Minister for Arts, Sports and Tourism and the Gaelic Players Association (an affiliated group largely made up of inter-county players) whereby inter-county footballers and hurlers would become entitled to certain monies upon satisfaction of certain criteria, on the grounds that it is in conflict with Rule 11 of the Official Guide, the rule book of the Association.

Background

3. In November 2007, Central Council released announcements that a scheme had been agreed with the government and the Gaelic Players Association (GPA) for the making of certain disbursements to inter-county players, a scheme that came colloquially to be known as the "grants" or "awards" scheme. It is not necessary to go into great detail as to the substance of what was announced at that time, but it prompted arbitration proceedings to be commenced by the Claimants (DRA/24/2007) in which it was claimed, on the basis of the Central Council Minutes and the press announcements made at the time, that a decision had been made by Central Council that was in breach of Rule 11. For their part, Central Council contended that what was announced in December 2007 was neither a "grants" scheme nor indeed a finalised or agreed scheme at all.

4. In January 2008, at a scheduled hearing of those proceedings, it was stated by Central Council that such scheme as would be agreed would form the basis of a motion to Congress 2008 and those proceedings were adjourned until after Congress with liberty to re-enter in the meantime.

5. There are different types of motion that may be brought before Congress. So far as relevant here, there are motions to add to or amend the Official Guide, which require a 2/3 majority to be passed (see Rule 82(e)) ("*rule-change motions*"); there are motions to validate interpretations of rule given by Central Council in the year ending 31 December of the previous year (see Rules 76(e), 82(a)(iv)(1) and Rule 85(b)) which would seem to require a simple majority; and there are standard motions, which do not affect the Official Guide, and are carried by simple majority.

6. In fairness to Central Council, it was not stated in January 2008 that the motion that they proposed to bring would be a rule-change motion; nevertheless that was what the Claimants anticipated would be done. Thus when, on 16 February 2008, the terms of a motion to Congress were ratified by Central Council, which was not expressed to be a rule-change motion, the Claimants were dissatisfied and re-entered arbitration proceedings commenced in December 2007, and a hearing was scheduled for 14 March 2008. The difficulty with those proceedings was that they challenged a Central Council decision made in November/December 2007, but matters had significantly moved on since then (indeed on the day of the hearing, a scheme – ultimately the subject of these

proceedings – had been finalised). It might have been convenient to amend the claims made in those proceedings, but on the basis of submissions made at the time, it was ruled that amendments to a claim could not be made that brought the complaint outside the scope of the reference to arbitration save with the consent of both parties (this decision should not be taken as a precedent for that finding as the issue arose in a separate arbitration with a differently constituted tribunal; moreover argument was short, and did not focus on the precise meaning of "submission to arbitration" in the DRA context, and the only legal authority considered was a brief passage in an English textbook).

7. At all events, the proceedings were withdrawn because, in essence, the facts had changed so much since December 2007 that the framework of those proceedings could not accommodate the claims then being made.

8. On 17 March 2008, Central Council held a meeting at which they considered a detailed document (which is appended to this decision) setting out the proposed scheme. This document and what it presents will be referred to as "*the Schemes*" in accordance with its own definition. At this stage, it will be remembered that a Motion had been put on the agenda for Congress, and it is worth setting out the terms of that motion here:

> *"That Congress is satisfied that the scheme proposed by the Minister for Arts, Sport and Tourism, to recognise the contribution of Senior Intercounty G.A.A. players and Additional costs associated with enhancing team performance in the form presented to Congress is in accordance with Rule 11 of the Official Guide and that Congress approves the introduction and implementation of that scheme."*

9. There is no evidence of a decision having been made on 17 March 2008 to actually bring the Schemes into existence, although it has been said on behalf of Central Council that, if the Congress motion is passed, the Scheme will be implemented without further debate. Moreover, at the meeting of 17 March 2008, in anticipation of the future implementation of the Scheme, a resolution was put (and carried unanimously) to increase *for participants in the Scheme* the allowable expenses relating to travel (i.e. "mileage" as colloquially understood) from €0.50 per mile to the approved Civil Service mileage rates).

The arbitration proceedings

10. In consequence of the above events, this Claim was commenced on 22 March 2008. In it, the Claimants seek the following remedies:

> *"1. Rescindment of the decision of* [Central Council] *on 17 March 2008 in relation to "the Schemes""*; and
>
> *"2. To rule out of order the motion forwarded by* [Central Council] *to Congress, in relation to "the Schemes""*.

11. The parties were heard on the evening of 4 April 2008, at which hearing three primary heads of argument arose:

(a) The Claimants argued, as a preliminary issue, that the Congress motion was proposed as motion to ratify a Central Council interpretation of rule and therefore was invalid for failure to comply with Rule 76(e) i.e. it did not concern an Interpretation made in the year ending on 31 December 2007;

(b) The Respondents argued, also as a preliminary issue, that it was inappropriate for the DRA to "pre-screen" a motion to Congress and that the validity of the Schemes could only be challenged after they had in fact been implemented;

(c) If the matter went beyond those preliminary issues, the Claimants' substantive argument arose for determination, *viz.* that the Schemes were contrary to Rule 11 which guarantees the amateur status of Gaelic players.

12. Mr Fahy, Solicitor, who appeared on behalf of the Claimants, asked that a particular exchange of views between him and the Chairman of the Tribunal be put on the record. In summary, it was as follows. Mr O'Reilly B.L. appearing for Central Council, made complaint that no new written legal submissions on the question of validity of the Schemes had been given by the Claimants in accordance with the directions of the Tribunal given on 31 May 2008 (the Claimants had indicated that they were relying on their written submissions made in the previous proceedings (DRA/24/2007)). He stated that that might give rise to a need for a recess after the submissions of the Claimants to allow him to deal with any unanticipated arguments. Mr Fahy objected to this. The Chairman voiced his opinion that it was less than satisfactory for the Claimants

to rely on submissions prepared at a time when the Schemes now being challenged had not even been made, let alone communicated to the Claimants. Mr Fahy took exception to this and asked that the matter be put on the record. This was duly done. The Tribunal conferred and confirmed that Central Council would be allowed a short recess if required.

The First Issue: Validity of the Motion

13. Rule 85(b) of the Official Guide provides in relation to Central Council:

> *"It is the final authority to interpret the Rules, subject to Rule 76(e). It shall consider and adjudicate on recommendations made by the Management Committee on requests for Interpretation of Rule received in writing by the Director-General. Any such Interpretations shall have the force of Rule until the Congress held in the Calendar Year after the Interpretation being given, and which Congress shall, on a Motion submitted by Central Council, approve or disapprove the Interpretation being included in Rule. It may also issue Guidelines and Directives to its Units and Members to assist with their compliance with Rule."*

14. Rule 77(e) provides:

> *"The functions of Annual Congress shall be:*
>
> *(e) To approve or disapprove any Interpretation of Rule given by Central Council by December 31st prior to Congress, in accordance with Rule 85(b), in considering its inclusion in Rule."*

15. The Claimants contend that this motion is an attempt by Central Council to have permanent effect conferred on an interpretation of Rule given by it under Rule 85(b). They say that the motion is invalid because that interpretation was given after 31 December 2007 and is not therefore ripe, so to speak, until Congress 2009. They recognise the difficulty in this argument, *viz.* that if it is an interpretation under Rule 85(b) it has the force of Rule until the next Annual Congress; they say, however, that even as an interpretation of rule under Rule 85(b) it is irregular, because the procedures laid down in that rule have not been followed.

16. Central Council says that on no view of this motion could it be said to be related to any interpretation within the meaning of Rule 85(b). No such interpretation was ever sought, no procedures relating to that procedure was followed, and there is no decision of Central Council duly passed which amounts to an

interpretation bearing any of the hallmarks of Rule 85(b). This motion, they contend, is a straightforward, ordinary motion, that is not intended to confer any special status on the Scheme or change any rule: it is a vehicle to canvass the feeling of the Association towards the Scheme. They recognise that there has been controversy in this whole area so, while not conceding that such a motion is necessary, they wish to allow the supreme Unit of the Association to debate the merits of the Schemes.

17. It has been made clear on behalf of Central Council that if this motion were passed by Congress, they would not consider the Schemes to have any greater or more legally robust status as a result of such motion.

18. In our view, there is no evidence of any decision having been made in accordance with Rule 85(b), still less of compliance with the procedural requirements of that Rule. For that reason, the motion before Congress could not amount to a motion under Rules 76(e). As such, it is not irregular on that ground. A certain degree of confusion on the issue is understandable, however, arising from the wording of the motion, and this will be discussed later in this decision.

The second issue: Prematurity of the Claim

19. Central Council contends that this Claim is premature and should not be entertained by the DRA in the following circumstances. Central Council is deemed by Rule 85(a) to be the supreme governing body of the Association *between Annual Congresses*. It is implicit in this, that Annual Congress is the ultimate supreme governing body.

20. It is further submitted that, once a motion goes before it, Congress, the supreme governing body of the Association, must have an opportunity to consider it. All of the arguments made by the Claimants can be made at Congress, and if, after the motion is determined by Congress, the legality of the Scheme is doubted, the Claimants can then bring a Claim before the DRA. Until then, the DRA should properly exercise restraint when asked to interfere with this democratic process. In this Claim, it is submitted, the DRA is being asked to exercise a pre-screening function in relation to a motion, to act as a motions committee, and to prevent Congress from dealing with it.

21. Central Council contends that for the DRA to exercise such a pre-screening function would not be lawful. It submits that in preparing a motion in accordance with Rule, it must be presumed to have acted lawfully. The proper procedure for submission of a motion was followed, and therefore that motion must find its way to Congress. They say that for the DRA to interpose itself at this stage is (a) akin to the Courts interfering in the considerations of Dáil Éireann and (b) to act *quia timet*, i.e. before any event alleged to constitute a breach has in fact taken place.

22. Decision *DRA/1/2005 (Vaughan v Leinster Council*) was opened, and particular reference was made to paragraph 33 of that decision, which provides as follows:

> *"In our view, there is another aspect to Rule 83(b)* [now Rule 85(b)]*, which aspect was not considered by the Court in Baker v Jones. Central Council (of the G.A.A.) is a body of persons who have a wealth of expertise and experience regarding the operation and enforcement of the Rules of the Association. Central Council is not simply another party to the contract; it is an elected body representing the interests of the Association at large under a complex multilateral contract. Often the Rules will admit of two equally valid interpretations, neither of which is inconsistent with the rules and which must be decided by some authority without need for intervention by the Court. In particular, many questions may involve not only issues of law, but issues of fact – or indeed of opinion – and those aspects of any administrative decision are largely unassailable by a court of law (Australian Football League v Carlton Football Club [1998] 2 VR 546). Moreover the procedure that has developed under Rule 83(b) has proved a useful process in the past, and allows units and members to regulate their positions under the Rules before it is too late to do so. This is particularly relevant where the circumstances are not sufficiently weighty to be the subject of legal proceedings before a Court or the D.R.A."*

23. Central Council also cite the decision of His Honour Judge McMahon (as he then was) in *Barry and Rogers v Ginnitty* (Unreported, Circuit Court, 13 April 2005), in which he said:

> *"One must expect that laymen applying the disciplinary rules will occasionally do so in a somewhat robust manner. Provided those administering the rules, however, do so in a bona fide manner, giving each side a fair opportunity of participating and, the onus on members who wish to challenge findings and decisions is a heavy one."*

24. Insofar as those decisions referred to decisions of Central Council and a County Committee respectively, it was submitted that the sentiments expressed must apply *a fortiori* to decisions of Congress.

25. To bolster the Courts/Parliament analogy, Mr O'Reilly opened the decision of the Supreme Court in *Maguire v Ardagh* [2002] 1 IR 385, and directed our attention to a passage at page 537 of that decision as follows:

> *"That is not to say that the courts will accept every invitation to interfere with the conduct by the Oireachtas of its own affairs: such an approach would not be consistent with the separation of powers enjoined by the Constitution . Specifically the courts have made it clear that they will not interfere in the manner in which the House exercises its jurisdiction under Article 15.10 to make its own rules and standing orders and to ensure freedom of debate, where the actions sought to be impugned do not affect the rights of citizens who are not members of the House: see the decision of this court in Slattery v An Taoiseach [1993] 1 IR 286. It was also held by the former Supreme Court in Wireless Dealer Association v Minister for Industry and Commerce (Unreported, Supreme Court, 14th March 1956) that the courts could not intervene in the legislative function itself: their powers to find legislation invalid having regard to the provisions of the Constitution arose only after the enactment of legislation by the Oireachtas, save in the case of reference of a Bill by the President to this Court under Article 26."*

26. The decisions in *Slattery v An Taoiseach* [1993] 1 IR 286 and *Wireless Dealer Association v Minister for Industry and Commerce* (Unreported, Supreme Court, 14th March 1956) referenced were also opened.

27. The Claimants also cited the decision in DRA/1/2005 in this context, in particular Paragraph 15:

> *"While the strict doctrine of anticipatory breach deals with breaches of contract so fundamental that they amount to a repudiation of the contract, there is ample authority to support the proposition that the Court (or in this case, the D.R.A.) may grant declaratory relief where parties cannot agree as to the meaning of less fundamental terms of their contract and wish to order themselves appropriately with the benefit of an authoritative ruling. The Courts of Chancery had jurisdiction to grant such relief, which was extended to all Superior Courts by the Supreme Court of Judicature Act (Ireland) 1877. That a declaration may be the primary relief in an action (whether in a public or private law action) is recognised in Order 19 rule 29 of the Rules of the Superior Courts. The remedy of a declaratory judgment is relatively common in modern times where a contract requires to be interpreted (see for example Glow Heating Limited v Eastern Health Board [1988] IR 110), and its benefits are succinctly described by Borchard (Declaratory Judgments (2nd Ed., 1941) p. 554) as follows:*

> *"The declaration, rather than the more drastic and definitive coercive decree enables the parties to establish their questioned relations without irreparable injury. The declaration thus has the social advantage which should not be underestimated as an element in the administration of justice."*

28. The Claimants contend that Rule 11 is a fundamental term of the contract that is enshrined in the Official Guide. As such the conduct of Central Council in putting up the congress motion constitutes an anticipated breach that may be enjoined. It has been said on behalf of Central Council that, if the motion is passed, the Schemes will be implemented without further debate. As such, the DRA is empowered to prevent that happening. It is suggested further by the Claimants that an inherent jurisdiction is vested in the DRA to restrain conduct that would bring Rule 11 into disrepute: the motion by passing itself off as a ratification of these schemes with express reference to Rule 11, brings that rule into disrepute. If the motion is passed, then, contrary to what is submitted here by Central Council, the membership generally and the public will consider the Schemes to be insulated from challenge. As such, they state that the motion must be considered for what it is: an attempt to change Rule 11 by the back door and without the required 2/3 majority.

29. We do not consider the Courts/Oireachtas analogy to be entirely apposite to the present circumstances, notwithstanding the authorities opened. First, the Congress/DRA relationship is not quite that which exists between the Oireachtas and the Courts: there is no "separation of powers" doctrine, such as enshrined in Article 15.10 of the Constitution, operating between Congress and the Courts; consequently there is none between it and the DRA. In one sense, Congress has a status superior to the DRA: it can vote it out of existence. It cannot, however vote the law applied by the DRA to it out of existence, and in the absence of the DRA, the Court will perform the function of applying that law.

30. A second point on which the authorities opened might be distinguished is that the *dicta* referenced concerned the law-making process, which, under the separation of powers doctrine prescribed under the Constitution, must be sacrosanct. The Courts will, however, interfere with *other* processes of the Oireachtas which affect the rights of citizens, and will do so in a *quia timet* basis. Here we are dealing, not with a motion to amend or make a new rule: rather it is a motion to seek the approval of Congress to a particular course of action being taken by Central Council. Central Council contends that the subject

matter of that course of action is entirely within its power and that Congress is really being used as a sounding board for the idea as formulated. Central Council nonetheless asserts that that if the motion is defeated, the Scheme will not go ahead, and if it is passed the Scheme will proceed without further debate.

31. On the basis of Central Council's submissions at the hearing, it would seem to us that the references in the Motion to Rule 11 are inappropriate: Rule 11 might figure large in the debate, but Congress' view whether or not the Schemes are compliant with Rule 11 will not alter the fact one bit (unless they choose to legislate for that). The rules are as stated in the Official Guide and members should not have to research old Congress minutes to ascertain what they mean. We should stress, in addition, that, were Congress, acting by simple majority, to attempt to enshrine an incorrect interpretation of a particular rule which would have required a two-third majority to be changed, there is little doubt that the DRA would be entitled to prevent such an abuse of the contractual rules to which Congress is obliged to adhere.

32. Nevertheless, since the motion in this case cannot and will not confer any particular status on the Schemes, and has been properly laid, we consider it inappropriate to prevent that motion going to Congress. Indeed, there is the remaining portion of the motion – which seeks the approval of Congress to the Schemes – which is perfectly regular as far as it goes.

33. Accordingly, the second remedy sought by the Claimants will not be granted.

34. That is not the end of the matter, however, since the decision of Central Council on 17 March 2008 is also challenged. So far as relevant here, on that date, Central Council approved the new mileage rates as would be applicable under the Schemes. It is implicit in the minutes that Central Council also approved the terms of the Schemes for presentation to Congress under the motion. Furthermore it was implicit in the minutes, and made explicit at this hearing, that Central Council will implement the Schemes without question if the required approval is obtained at Congress. As such, its decision to implement the Scheme is now made, subject only to a condition subsequent, which is out of its own hands.

35. While one might say that Central Council is only bound in honour to implement the Schemes if approved, and that it might reserve the right to go against the will of Congress, such prospect is unrealistic.

36. For those reasons, we propose to deal with the third issue for determination in this arbitration.

37. Although as a factor, it could not carry our decision on this issue, it is also worth noting that this is the third attempt by the Claimants to have this issue dealt with by the DRA, and, as Congress will confer no greater legal or contractual status on the Scheme, it is not unlikely that the matter would again come before the DRA, if we were to refuse to deal with it at this stage. The issues have been fully and very ably argued before us and to deal with it now may well save the resources of both parties in the long run.

The Third Issue: Validity of the Schemes under Rule 11

38. Rule 11 of the Official Guide provides as follows:

> *"**Amateur Status***
> *The Association is an Amateur Association. A player, team, official or member shall not accept payment in cash or in kind in conjunction with the playing of Gaelic Games. A player, team, official or member shall not contract himself/itself to any agent other than those officially approved by Central Council. Expenses paid to all officials, players, and members shall not exceed the standard rates laid down by the Central Council. Members of the Association may not participate in full-time training. This rule shall not prohibit the payment of salaries or wages to employees of the Association.*
> ***Penalty:** Twenty-four weeks suspension or expulsion."*

39. The real core of the prohibition is found in the expressions *"payment in cash or in kind in conjunction with the playing of Gaelic Games"* and *"full time training"*. On one reading, the payment of any expenses might be considered to be a payment "*in conjunction with the playing of Gaelic Games*" but if so, it is expressly exempted by the third sentence in the rule. The entitlement to receive payment in cash or kind by the reimbursement or direct payment of expenses is subject, then, to two qualifying factors: the rates must be approved by Central Council, and, implicitly, the payments ought not to be sufficient to facilitate full time training.

40. The Schemes are set out in a comprehensive document, which has been examined in depth by both parties and has been the subject of detailed submissions. There are two schemes: the first is called the "*Annual Team Performance Award*" and the second is called the "*Annual Grant for the Development of Excellence in the Indigenous Sports of Hurling and Gaelic Football*" (it is also referred to as the "*Annual Support Scheme for the*

development of excellence"). The first scheme is for, essentially the top 12 teams in each code, based on the championship, and the second scheme is for teams that fail to qualify for the first scheme. It appears from the document that no team or player can be eligible under both schemes.

41. In summary, the document proposes a system whereby the Government would make certain monies available to players involved in inter-county panels (as defined therein) to meet the cost of what are termed "*eligible expenses*", subject to (a) a maximum sum which is calculated by reference how far the player's panel is involved in the Championship season, and for how much of that time, the player is on the panel; (b) vouching of the expenses; and (c) fulfilment of a number of conditions relating to such matters as participation at training sessions and involvement in extraneous projects relating to games development, promotion of the games and so on. Sums not claimed under the Schemes would be fed into a team development fund to be spent in accordance with a Development Plan prepared by each County and would not be released to any players.

42. Specific attention was drawn to the rationale for the Schemes as evidenced in Paragraphs 1 and 2 of the document. In broad and brief terms, the purpose of the Schemes is said to be to recognise the outstanding contribution of Gaelic inter-county teams to the sport, to meet the additional costs associated with training and preparing to the highest international standards, and to encourage such training and preparation. This will be relevant to some of the issues discussed below.

43. The concept of eligible expenses was the subject of detailed submission from both parties. It is worth setting out the definition in the Schemes in full:

> *"Eligible Expenses means vouched expenses (including but not limited to appropriate mileage expenses) incurred by a player in a Relevant Year in the course of compliance by him with the requirements of paragraph 7.2 (Conditions applicable to players personally).*
>
> *However such expenses must be in accordance with standard rates in respect of such expenses as are from time to time approved by Central Council*
>
> *Eligible Expenses do not include expenses to the extent that those expenses have already been reimbursed or discharged by the County Committee. However, where an expense has partly been discharged by*

the County Committee, the balance of that expense may be included as Eligible Expenses."

44. In relation to the second paragraph above, it would seem implicit that Central Council would not only fix the appropriate rates of expenses, but would also list the types of expenses claimable under the Schemes. Having heard evidence from a number of witnesses, it seems that although *rates* are set by Central Council in the equivalent provision under Rule 11, what qualifies as an expense is not particularly closely defined. It would seem sensible, both in the context of Rule 11 and any enhanced expenses scheme such as that under consideration here, to fix not only rates of expenses but types of expenses allowable, because while certain heads of expenditure might happily fall within any man's view of "expenses" others might extend into what might justifiably be "reward". In this regard, a possible difficulty also arises where expenses are paid directly (e.g where a Club or County Committee pays a hotel for meals for its team): if Central Council fix a specified rate only, it could mean that players whose meal costs more than the fixed amount would – strictly speaking – be obliged to refund the County Committee for the balance, to avoid breaching Rule 11.

45. So far, one rate of expenses – mileage – has been approved by Central Council for the purpose of the Schemes. We were told that the Civil Service rate varies in accordance with the size of one's car engine, and has a present maximum of €1.26 per mile. We were told that in Northern Ireland, the rate is lower than in the Republic of Ireland, which means that players resident in that jurisdiction would be paid what appears to be a lower rate under the Schemes. Outside of the Schemes, the Association's standard mileage rate is €0.50 per mile.

46. As is evident from the definition, the Schemes are designed to supplement the expenses already being discharged to inter-county players by their County Committees, not to relieve those County Committees from their own obligations. Thus a player whose county pays mileage will get his first €0.50 per mile from the County Committee and the balance (up to €0.76) from the Schemes.

47. Mr O'Reilly for Central Council drew our attention to a number of safeguards, which he contended safeguards against any breach of Rule 11:

    (a) All expenses must be vouched. This is certainly a significant factor, although one would wonder how one "vouches" mileage as expenditure.

For the purpose of this assessment, however, we believe it is appropriate to assume that participants in the scheme will be honest, both as to the fact of having driven and the mileage travel. These are aspects that must be monitored but fears of fraudulent conduct in breach of the Schemes could not under any circumstances invalidate the Schemes *ab initio*.

(b) All expenses must be in accordance with the approved rates. It was acknowledged by Central Council that any decision it made fixing rates would be amenable to challenge if considered not to be an expense as contemplated by Rule 11.

(c) No expenses that would give rise to a liability in tax are payable: as such, the Scheme employs an independent mechanism by which to draw the line between expenses and reward.

(d) The total expenses claimable in a given year by any player are subject to a modest ceiling. That is so at present, but if the ceiling was raised on an incremental basis over a number of years, different considerations might apply. For example, if one disregards the ceiling, a player clocking up 500 miles per week travelling to training and games promotion events under the Schemes could become entitled to over €30,000.00 tax free per annum while not having to pay for meals and other what might be called "everyday" expenses. One has only to consider the case of politicians' expenses to see how far this can go. As that ceiling rises, one can envisage another argument emerging, perhaps based on the facilitation of full time training; however there is a low ceiling at present, and any such argument is for another day.

(e) In its own terms (Paragraph 11.4), the Scheme may not be operated in breach of Rule 11 (we suggest that that would be implicit anyway).

48. The Claimants identify a number of factors which they say bring the Schemes outside what is permissible under Rule 11. They object in the first instance that the absence of any approved rates other than mileage makes it impossible to assess the Schemes. We consider that to be an inappropriate complaint, because the Claimants themselves have chosen to challenge the Schemes at this early stage and they have rejected Central Council's attempts to defer any such challenge until after Congress. The Claimants ask whether Congress indeed has sufficient information to assess the Schemes; but as we have made our decision not to interfere with the motion (and as the motion will not copperfasten the Schemes in rule), it would be inappropriate to address that question here.

49. The Claimants contend that, so far as there is information before this Tribunal, the Schemes are not an "*expenses scheme properly understood*" because there is a contractual element arising from the provisions of Paragraph 7.2 of the Schemes (which obliges players to engage in extraneous duties such as being involved in promotion of games, visiting schools etc.). Those conditions distinguish the Schemes from the expenses regime currently in place: at present the only criterion is that the expenses were incurred. We are not entirely convinced by this argument for two reasons. First, to attach conditions to an expenses scheme might represent a change from the position currently obtaining, but it is difficult to say that it is a change in the direction of playing for reward, in breach of Rule 11. Secondly, at any rate, we do not consider that the present situation is different in substance, as there are already preconditions to eligibility under the current regime: one must prove expenditure in order to obtain reimbursement; and one must satisfy the committee concerned that the expenditure was properly incurred. These are preconditions just as much as proving attendance at training sessions or promotional events are.

50. Of course, if the ceiling on expenses rose, and a player's attendance at e.g. promotional events, schools etc. became a source of substantial monies (through mileage) every week, different considerations might apply: however, that argument was not advanced here and, at any rate, as mentioned previously, it is an argument to be had if and when the available monies increase so much as to give rise to a qualitative change in the nature of the Schemes.

51. The Claimants argue that a player could actually end up worse off under the Schemes than he would be at present: if he refused to visit schools or take part in promotional events, he might be denied his expenses. While he would be worse off than his fellow panellists, we do not think that he would be worse off than at present: this is because the Schemes are designed to add to existing expense payments by County Boards, not to supplant them.

52. A detailed and forceful submission was made by the Claimants on the grounds that the Schemes were discriminatory on a number of levels.

53. The most obvious case made was that it created a "top tier" of Gaelic player who was treated in a fashion that set him apart him from other members of the Association: club players, mentors, referees, administrators and so on. The Claimants contend that this was contrary to the ethos of the Association. They ask why an inter-county player should be paid up to €1.26 per mile when any

other member is paid only €0.50 to drive the same mile. Central Council was unapologetic about this and drew attention to the rationale of the Schemes: these players, it contended, gave more of their time, not only because of the demands of inter-county competition but also because they were playing with their clubs alongside their county duties. As a matter of law, Central Council argued that Rule 11 contained nothing prohibiting discrimination and it was on the basis of Rule 11 that this Claim was brought. Indeed, Mr Paraic Duffy, the Director General, gave evidence that the approved meal allowance for referees is at present double that applicable to other members. This, and indeed the proposed enhanced mileage rate, was justified on the grounds that the lower sums payable were not full recompense for expenses: they were contributions only.

54. Central Council argue that if the enhanced meal or mileage rate exceeded what was properly treated as an expense, the Revenue Commissioners would be entitled to tax it and no sums were payable that fell into that bracket: accordingly there is a safeguard against breaches of Rule 11. That does not, in our opinion, answer the question why a (well-off) club should remain *prohibited* from paying its members Civil Service mileage rates (since, by Central Council's definition, those rates constitute expenses and not reward), while inter-county players would be free to collect them.

55. On inspection of the Official Guide, we can find no reference to any provision for equality of treatment between players playing Games at different levels. Leaving aside equality requirements imposed by the general law (which have not been opened or pleaded), it would seem that equality of treatment, while an important part of the ethos of the Association, is more of a policy than a rule.

56. At all events, we accept Central Council's argument that Rule 11 does not contain any bar on discrimination, and consequently that consideration of any discriminatory effect of the Schemes falls outside the scope of this arbitration. For this reason it is not necessary to consider the other instances of discrimination identified by the Claimants, which were:

    (a) Discrimination between successful and unsuccessful teams (since the ceiling is higher for teams that progress further in the championship);
    (b) Discrimination between players resident in Northern Ireland and the Republic of Ireland (as the acceptable Revenue rates for different expenses will vary);

(c) Discrimination against dual players, who can only claim in respect of one code (we do not think that there is in fact discrimination here as the player will still get "ordinary" expenses for the code in which he does not claim the enhanced expenses; moreover, he makes his choice at the end of the season, so it does not discourage dual players).

57. Inasmuch as Central Council referenced liability to income tax as the touchstone for distinguishing between expenses and reward, the Claimants identified "economic activity" as understood by European Union law as the appropriate test. In this regard, the decision of the European Court of Justice in *Deliège v Ligue Francophone de Judo ASBL* (Joined Cases C-51/96 and C-191/97) [2000] ECR I-2549 was opened to us. In that case, a Belgian judo practitioner (a "judoka" for the uninitiated) challenged that the Belgian Judo Federation's refusal to allow her to compete in certain competitions. They had refused to enter her, not because they were limited in the number of contestants they could enter, but because they set a particular standard, which she did not meet. Her complaint was that this was an unnecessary fetter on her freedom to provide services, which was protected under the law of the European Union. Of relevance for the purpose of this arbitration was the Court's consideration that members of sporting organisations that deemed themselves "amateur" might nonetheless be held to be engaged in economic activity. The following passage discusses the point (at paras. 13/14 of the decision):

> *"49 In view of the foregoing considerations and the conflicting views expressed before the Court, it is important to verify whether an activity of the kind engaged in by Ms Deliege is capable of constituting an economic activity within the meaning of Article 2 of the Treaty and more particularly, the provision of services within the meaning of Article 59 of that Treaty.*
>
> *50 In the context of judicial cooperation between national courts and the Court of Justice, it is for national courts to establish and to evaluate the facts of the case (see in particular Case 139/85 Kempf v Staatssecretaris van Justitie [1986] ECR 1741, paragraph 12) and for the Court of Justice to provide the national court with such guidance on interpretation as may be necessary to enable it to decide the dispute (Case C-332/88 Alimenta [1990] ECR I-2077, paragraph 9).*
>
> *51 In that connection, it is important to note first that the judgment making the reference in Case C-191/97 refers among other things to grants awarded on the basis of earlier sporting results and to sponsorship contracts directly linked to the results achieved by the*

athlete. Moreover, Ms Deliege stated to the Court - and produced supporting documents - that she had received, by reason of her sporting achievements, grants from the Belgian French-speaking Community and from the Belgian Inter-Federal and Olympic Committee and that she has been sponsored by a banking institution and a motor-car manufacturer.

52 As regards, next, the concepts of economic activities and the provision of services within the meaning of Articles 2 and 59 of the Treaty respectively, it must be pointed out that those concepts define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively (see, to that effect, Case 53/81 Levin v Staatssecretaris van Justitie [1982] ECR 1035, paragraph 13).

53 As regards more particularly the first of those concepts, according to settled case-law (Dona, cited above, paragraph 12, and Case 196/87 Steymann v Staatssecretaris van Justitie [1988] ECR 6159, paragraph 10), the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the Treaty.

54 However, as the Court held in particular in Levin (paragraph 17) and Steymann (paragraph 13), the work performed must be genuine and effective and not such as to be regarded as purely marginal and ancillary.

55 As regards the provision of services, under the first paragraph of Article 60 services are considered to be services within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

56 In that connection, it must be stated that sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 59 of the Treaty even if some of those services are not paid for by those for whom they are performed (see Case 352/85 Bond van Adverteerders and Others v Netherlands State [1988] ECR 2085, paragraph 16).

57 For example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself.

58 Finally, as regards the objections expressed in the observations submitted to the Court according to which, first, the main proceedings concern a purely internal situation and, second, certain international events fall outside the territorial scope of the Treaty, it must be remembered that the Treaty provisions on the freedom to provide services are not applicable to activities which are confined in all respects within a single Member State (see, most recently, Case C-108/98 RI.SAN. [1999] ECR I-0000, paragraph 23, and Case C-97/98 Jagerskiold [1999] ECR I-0000, paragraph 42). However, a degree of extraneity may derive in particular from the fact that an athlete participates in a competition in a Member State other than that in which he is established.

59 It is for the national court to determine, on the basis of those criteria of interpretation, whether Ms Deliege's sporting activities, and in particular her participation in international tournaments, constitutes an economic activity within the meaning of Article 2 of the Treaty and, more particularly, the provision of services within the meaning of Article 59 of the Treaty."

58. The last paragraph demonstrates that, ultimately, the Court did not deal with the question whether Ms Deliège was engaged in economic activity, preferring to leave it to the national court in Belgium to decide. We cannot see that there is anything in the judgment to suggest that payments received by an athlete pursuant to a tightly controlled scheme based on vouched expenses as is under consideration here would give rise to a finding that economic activity was proposed. Moreover, insofar as a test of economic activity was pronounced, it was clearly influenced by an external factor – the policy of the European Union in favour of enforcing the freedoms of its Treaties (see para 52 of the quoted section) – which does not apply here. On the evidence and authorities examined, we do not think that "economic activity" as defined in European Union law is an appropriate measure of what is or is not amateur within the meaning of Rule 11.

59. Mr Fahy for the Claimants states that the Schemes allow for payments to be made that would infringe Rule 11, and that unless we can look at the Schemes and conclude that they do not permit a breach of Rule 11 to happen, then we must conclude that the Schemes are in breach of Rule 11. We disagree with that contention: the Schemes on their face prohibit the payment of expenses in a matter that would breach Rule 11 (as we have said, this is implicit anyway). Admittedly Central Council has not yet – save in the case of mileage – drawn the full parameters of the Scheme: other types of expenses and the rates claimable have yet to be set. But the Scheme on its face prohibits the payment

of expenses that would breach Rule 11: thus any decision of Central Council to approve payments so as to generate such a breach would be *ultra vires* and liable to challenge before the DRA. Contrary to what is said on behalf of the Claimants, we may not assume that Central Council will use the Schemes in a manner that achieves a contravention of Rule 11. If it were the case that the DRA was excluded from a supervisory role, so that a breach of Rule 11 could go unremedied, that submission might be very persuasive indeed, but that vista does not arise.

60. If one can identify a thread running through the Claimants' arguments it is this: that the absence of clear definitions as to what constitutes eligible expenses gives rise to a concern that the Scheme will be misused, and that the Schemes do not adequately police what they term "the murky overlap between pay and expenses." In the final analysis, however, it cannot be said that any present features of the Schemes breach Rule 11 and if the concerns about misuse were to arise in the future, the DRA would have jurisdiction to treat as invalid any decision of Central Council that gave rise to a breach of that Rule.

61. The Schemes may be a very good idea, and they may be a very bad one. That is not the question that is appropriate for any Tribunal of the DRA to answer, and it is not before us in this arbitration. We are solely concerned with one question: whether the implementation of the Scheme in this form of itself generates a breach of Rule 11. Our answer to that is that it does not.

62. For that reason, we refuse the first remedy sought by the Claimants in this arbitration.

63. Although unsuccessful in the result, it is clear from the two sets of arbitration proceedings that the Claimants cannot be said to have failed in their endeavours. They have applied their resources in successive *bona fide* attempts to ensure that no inroads have been made on the amateur ethos, one of the most precious principles of the Association. In these and the earlier arbitration proceedings, they have tested every aspect of what was prepared by Central Council. While the *bona fides* of Central Council to ensure compliance with Rule 11 is not in doubt, the devil's advocate role of the Claimants cannot but have assisted in the multilateral effort that produced the finely-crafted document we have examined in the context of this arbitration.

64. This is an interim decision inasmuch as costs remain to be determined.

Made this 8th day of April 2008

_____
Michael Loftus

_____
Damien Maguire

_____
Micheál O'Connell (Chairman)