Disputes Resolution Authority
An Córas Eadrána

DRA 06 of 2019: In the matter of an arbitration under the Disputes Resolution Code and the Arbitration Act 2010

Between:

GLANMIRE LADIES FOOTBALL CLUB, MICHAEL HANNON, DAMIEN KELLEHER and KEVIN WALSH

(Claimants)

and

CORK LADIES GAELIC FOOTBALL ASSOCIATION, MUNSTER LADIES GAELIC FOOTBALL ASSOCIATION APPEALS COMMITTEE, MUNSTER COUNCIL, LADIES GAELIC FOOTBALL ASSOCIATION, and NATIONAL APPEALS COMMITTEE LADIES GAELIC FOOTBALL ASSOCIATION

(Respondents)

CORK LADIES GAELIC FOOTBALL ASSOCIATION APPEALS & INVESTIGATIONS SUB-COMMITTEE
TIMPAT O'DONOVAN
and EAMONN O'CONNOR

(Interested Parties)

Hearing: Midlands Park Hotel, Portlaoise, Co Laois at 7.30pm on 16 April 2019

Tribunal: Micheál O'Connell, Patrick Moloney, and Michael Delaney

Secretary to the DRA, Rory Hanniffy BL

VERDICT: The claim is upheld, orders accordingly

KEYWORDS: LGFA – disciplinary code – investigations – fair procedures – notice of disciplinary proceedings - Official Guide 2017, Rules 179(d), 266-272, 283, 292, 294 - Official Guide 2019, CODA Rules 1.2, 3.3.1, 7.1-7.24, 8.3

Disrepute rules – proper application - irrationality - Official Guide 2017, Rule 288 - Official Guide 2019, CODA Rules 2.3(m)

Proper award on upholding claim - remittal, prohibition and other awards and directions – role of the DRA - transition to new procedural rules – transition to new substantive rules

Role of "interested parties" in DRA arbitrations

DRA Code – Section 11.3 and 11.4 – proper purpose – role of DRA

LIST OF ATTENDEES:

Claimants

Dermot Kelly
Stephen O'Donoghue BL
Michael Hannon
Damien Kelleher
Kevin Walsh
Mark Byrne
Ger Scannell
Dave Marah

Respondents:

Larry Fenlon (All Respondents)
Morgan Crowe (All Respondents)

Marian Crowley (Sec – Cork LGFA)
Robbie Smyth (Chairman – Cork LGFA)
Mary Courtney (Munster Appeals Committee)
Geraldine McGovern (Chair – National Appeals Committee)
Paula Prunty (LGFA)

Interested Parties:

TimPat O'Donovan
Eamonn O'Connor

THE ESSENTIAL ISSUE

1. Following an investigation carried out by the First-named Interested Party ("***the Investigations Sub-Committee***"), the Claimants were found at a Special General Meeting of the First-named Respondent ("***Cork LGFA***") to have been guilty of conduct calculated to bring the Association into disrepute contrary to Rule 288 of the then Official Guide then in force (respectively "***the Old Disrepute Rule***" and "***O.G. 2017***") (there was a suggestion in subsequent appeals that a number of rules had been breached but all other rules mentioned were jurisdictional and enabling rules, empowering the committees concerned to impose penalties but not in themselves creating offences for which penalties could be imposed on the Claimants). Severe penalties were imposed.

2. On appeal to the Second-named Respondent ("***Munster Appeals Committee***"), not only was the appeal dismissed but the suspensions imposed on the Second- to Fourth-named Claimants were altered so as to run consecutively and not concurrently, which in effect doubled the suspensions. Further appeals taken by the Claimants to the Third-named Respondent ("***Munster Council***") and thereafter Fourth-named Respondent ("***the NAC***") were, in turn, dismissed *simpliciter*.

3. While the Respondents did not concede that the proceedings against the Claimants were conducted in breach of fair procedures (save in a limited respect by the NAC which they accepted invalidated its decision), they wisely did not attempt to argue with any vigour that the Claimants had been afforded fair procedures in those proceedings. It is clear to us that the proceedings at all levels were manifestly defective.

4. The solution proposed by the Respondents was to recommend that the entire matter be remitted to the NAC for a hearing that would cure all the ills of what went before, by virtue of its being a *de novo* hearing of the entire matter. The Claimants trenchantly resisted this proposal and instead argued that the decisions of all of the Respondents be quashed without remittal: in substance,

they seek an award prohibiting any re-processing of any disciplinary proceedings against them in connection with the subject matter of the flawed proceedings to date.

5. Accordingly, the kernel of the dispute, and the issue which we must decide concerns what should happen next, in circumstances where the decisions challenged must be set aside. Regrettably, to reach a conclusion on this issue requires more analysis of the case than we might have hoped.

CHRONOLOGY 1: BACKGROUND AND EVENTS UP TO THE REPORT OF THE INVESTIGATIONS SUB-COMMITTEE

6. Like many disputes that end up in litigation, the origins of the trouble were trivial by comparison with the *sequalae* that resulted. We emphasise at the outset that, in summarising the background to the matter, we are making no findings of fact in relation to that background and we will endeavour not to name individuals. Indeed, in our endeavour to be as brief as possible and not to inflame matters further, we may generalise to the point of imprecision and possibly even inaccuracy, but for reasons that will emerge, little turns on that.

7. At the times material to this background, the Second- to Fourth-named Claimants were respectively the Chairman, Registrar and Secretary of the First-named Respondent club ("***Glanmire***"). The Second- and Third-named Interested Parties were members of Glanmire.

8. The Second-named Interested Party was involved in training an underage team and, in that context, with the authority of Glanmire having been given at a club meeting, was involved in collecting contributions from the players' parents in 2017 to defray expenses that were being incurred. He had a certain sum of money collected when it appears that he took umbrage at the apparent fact (discovered before the club AGM in late 2017) that Glanmire had a second bank account with a substantial amount of money in it, which had not been "declared" to Cork LGFA. We understand that no disciplinary action was ever taken against Glanmire arising from any such breach and we have insufficient

information to comment on the allegation that it was not declared. However, it seems that the Second-named Interested Party took it upon himself to return the monies he had collected to those parents from whom he had collected it. It is not clear when the monies were returned but it seems to be common case that Glanmire did not authorise this course of action.

9. The Third-named Interested Party appears to have "stepped away" from any administrative rule in Glanmire after discovering the existence of the second bank account. Reading his initial complaint, there appears to have been a deterioration of sorts in the relationship between Third-named Interested Party and Glanmire, or its executive, over a 6-8 month period before May 2018. For example, an incident involving an illegal player being fielded by Glanmire resulted in disciplinary action, and it appears that the Third-named Interested Party was a part of the committee that imposed sanction (never a good idea, even if he voted against his club, since any perception of bias must be assessed from the beginning of such a process). The Third-named Interested Party contended that he and his daughter were excluded from group text messages, though he did not state whether that was before or after May 2018.

10. There was evidence from minutes of meetings of Glanmire that the club's officers had been trying to contact the Second-named Interested Party since early 2018 to address the issue of the collected monies. As regards the Third-named Interested Party, it is less clear what attempts were made to engage with him or when issue was first taken with him, but in emails after May 2018 there are various cryptic references to "rumours" that the club's officers wished to discuss with him, the content of which has never been disclosed (whether it had anything to do with the issues mentioned above or not is unclear).

11. At any rate, when the membership of all members of Glanmire came up for renewal in May 2018, Glanmire received cheques from both the Second- and Third-named Interested Parties but declined to renew their memberships. No advance warning of this course of action was given and it was some time

afterwards that the two parties were in fact made aware of this fact, and in quite unsatisfactory ways. In particular, in the case of Third-named Interested Party, his lack of membership might have impaired executive decisions of Cork LGFA to which he was party, although no evidence appears to have emerged of any decision being actually invalidated.

12. There were communications between Glanmire and the Second- and Third-named Interested Parties between June and September 2018, which surprisingly featured more discussion about the rather trivial issue of the return of the subscription fees than the more substantive issues between them.

13. It appears that the Third-named Interested Party joined another club on 4 July 2018, possibly to ensure the validity of his position on Cork LGFA. It is not clear to us whether he wishes to return as a member of Glanmire.

14. On some date before 27 August 2018, letters of complaint were received by Cork LGFA from the Second- and Third-named Interested Parties, and on that date the First-named Interested Party ("***the ISC***") was appointed as an Investigation Sub-Committee to investigate the complaints. The rules around Investigations are discussed further below.

15. The ISC, having been duly appointed, carried out its investigations between then and 5 November 2018, when – having met representatives of Glanmire and the Second- and Third-named Interested Parties – they prepared two reports (collectively "***the ISC Report***") and submitted them to the Executive Committee of Cork LGFA. No serious criticism has been made of the conduct of their investigation by the ISC and it appears to us that, perhaps uniquely among all of the parties involved in this mess, they performed the task allotted to them adequately and fairly and in accordance with the applicable rules. The ISC Report concluded as follows:

    (a) In relation to the Second-named Interested Party:

"*The failure by Glanmire LGFC to submit the registration of* [the Second-named Interested Party] *to the LGFA was unfounded and an improper way of dealing with club issues. If the Club had a genuine difficulty with [him] continuing as a member and needed to carry out an investigation, it should have automatically renewed his membership in advance of June 1st and then proceeded with the investigation in accordance with the Rules of the Association.*

[The Second-named Interested Party] *should immediately be re-instated as a member of Glanmire LGFC upon payment by him of the annual membership subscription. Furthermore, his membership of the Association and of Glanmire LGFA should be deemed to be valid since June 1st as his application was submitted and processed in advance of that date. All other issues should be dealt with at the Club AGM or by way of club investigation where necessary and a detailed report of the AGM furnished to the Cork County Board within 10 days of the holding of the AGM.*"

(b) In relation to the Third-named Interested Party, almost precisely the same conclusion was set out.

16. We pause in the chronology at this point to discuss briefly the rules of O.G. 2017 concerning investigations.

INVESTIGATIONS AND SUBSEQUENT DISCIPLINARY ACTION

17. Eight rules appeared under the heading "*Investigations*" in O.G. 2017 as follows:

"*265.* [Not relevant].

266. A motion to carry out an investigation into any matter must be proposed and seconded and must have the support of a simple majority of the relevant Committee, Board or Council entitled to vote.

However, in an emergency situation the Management Committee of Provincial or Central Council by a majority decision shall have the power to pass a motion to carry out an investigation.

The Investigating Committee shall report back to a meeting of Provincial/ Central Council for decision.

267. The Committee, Board or Council shall decide the composition and terms of reference of the Investigating Committee.

268. The parties shall be notified of any proposed investigation in writing. They must be given the opportunity to present their case and call relevant witnesses.

269. The Investigating Committee shall report its findings to the parent Committee, Board or Council.

270. If following an investigation, any irregularities including illegal constitution is proved, the prescribed penalties for the offences involved shall be enforced.

271. In the interest of natural justice, a member of an Investigating Committee cannot sit on the Committee, Board or Council in charge that shall give judgement on the Investigating Committee's findings.

272. A Member, Club, County or Council may be penalised following an investigation. All parties shall be officially notified of the decision at the meeting or by telephone, or other means by the Committee, Board or Council in charge. This shall be followed by notification in writing, fax or electronic mail within 5 working days."

18. Viewed in isolation, this set of rules would operate to permit the Committee, Board or Council in charge to receive an investigation report and with no intervening steps to both formulate a charge and adjudicate upon that charge, allowing no interregnum between these three events for the alleged offender to know and meet the charge for which he might be held liable. The party charged would have to divine from the fact of an investigation having been called (a) that he or she was going to be charged with some breach of rule, and (b) what that rule was. Thus, a member of the Association might attend a meeting with an ISC, believing themselves to be a witness, and later find themselves charged, convicted and sentenced without having been given any further opportunity to adduce evidence or submissions. If that is the effect of these rules, then they would operate in such a manifestly unfair manner that consideration might be given to declining to allow the Respondents from relying on them on grounds of public policy (see comments at paragraph 38 of *Fennell v Dublin County Committee* (DRA/3/2010), citing *Lee v Showman's Guild of Great Britain* [1952] 2 QB 329).

19. However, in our view, the provision relating to the imposition of sanctions cannot be construed without reference to Rule 283, which provided as follows:

> *"283. Where the relevant Committee, Board or Council proposes to adjudicate on <u>any</u> disciplinary matter, other than a case in which the automatic 2 Yellow Card suspension applies, it shall give the <u>Member, Club, Committee, Board or Council alleged to have offended</u>, notice <u>of the alleged offence</u>.*
>
> *The member or body may make written representation or seek an oral hearing in relation to the offence. 48 In the absence of written representation or personal appearance at the hearing, the relevant Committee, Board or Council may make a decision on the evidence before them"* (emphasis added)

20. It is true that this rule appears separately from the sequence of rules set out above in relation to Investigations, and appears under the heading "*Suspensions and Reinstatement*" but for a number of reasons, we consider that the layout of the rules and the interposition of that heading does not mean it is disapplied from disciplinary proceedings or penalties arising from investigations. There are numerous reasons for this:

    (a) First, the rule is universal in its expressed application ("*<u>any</u> disciplinary matter*"), and not stated to be limited to "*suspensions*" or "*reinstatement*";

    (b) Second, if the headings are supposed to create hermetic seals between what goes before them and what comes after, then it would follow that no finding of liability under the Old Disrepute Rule could be made on foot of an investigation, since Rule 288 (embodying that rule) appears after the heading "*Suspensions and Reinstatements.*"

    (c) Third, and most compellingly, considerations of natural justice weigh heavily in favour of Rule 283 being applicable in cases where reports from an investigation give rise to penalties. While the Claimants here had a right under Rule 268 to "*present their case and call relevant witnesses,*" as noted earlier, in the absence of any knowledge what – if any – breach was alleged against them, they could not know what case (if any) they had to meet or whether it was necessary to engage at all. In any fair system of governance, a person should know what breach of rule is being alleged before having to make his or her case. But under the rules in question, an Investigation

Sub-Committee had no function in alleging offences (indeed it is noteworthy that no offence was alleged by the ISC here). In effect, Rule 283 saves the investigations process from being disapplied on public policy grounds.

21. It necessarily follows from the above conclusion, that the Claimants could not lawfully have been precluded from making submissions or adducing evidence over and above that which was made to the ISC, or recorded in its report, and we will return to that feature, as well as Rule 283, presently. But first we will return to the chronology.

CHRONOLOGY 2: EVENTS FROM THE REPORT OF THE INVESTIGATIONS SUB-COMMITTEE TO THE SPECIAL GENERAL MEETING OF CORK LGFA

22. The ISC report having been submitted to Cork LGFA, it was considered by the Executive Committee of Cork LGFA at their meeting of 14 November 2018. The Third-named Interested Party was a member of the Executive Committee but did not attend. The minutes of that meeting record a "lengthy discussion" having taken place and proposals that the Chairperson, Registrar and Secretary of Glanmire should have sanctions imposed on them. One member proposed a 12-month suspension for each complaint and that proposal was seconded, and it was proposed that the suspensions would run concurrently. Fines on Glanmire of €1,000 for each complaint were proposed. It was proposed to hold a Special General Meeting of Cork LGFA on 3 December 2019 [*sic, recte* "2018"], evidently for the purpose of progressing the imposition of these proposed sanctions.

23. On 25 November 2018, an email was sent on behalf of Cork LGFA to Glanmire, enclosing a copy of the ISC Report and stating that the Special General Meeting would be held on 3 December 2018 to "*discuss the findings of the committee and …ratify if passed any sanctions or recommendations that are proposed and seconded by the Executive or delegates*." No mention of any intention to impose any sanction on any individual was mentioned, despite a specific intention in that regard having been agreed at the Executive Committee meeting.

24. It was clear that the possibility existed of some "*sanction*" being imposed, at least on Glanmire, but curiously, rather than to raise Rule 283 or indeed to ask the simple question what breaches of rule were alleged against Glanmire (or anyone else), the Secretary of Glanmire responded on 26 November 2018, asking what the purpose of the Special General Meeting was (the purpose having already been stated) and asking who had proposed and seconded the meeting (a trivial matter compared to what he neglected to ask).

25. By reply dated later on 26 November 2018, the Secretary of Cork LGFA advised that "*the findings of the* [ISC] *are not automatically implemented. They must be discussed and ratified at a County Board Meeting….*" The email went on to state "*Please note that Glanmire delegates can remain in the room while the Investigation Committee's findings are readout to the floor. The complaints against Glanmire are not open for any further discussion and the Glanmire delegates of the complainant are not allowed to add anything to it. Then the Glanmire delegates and the complainant will have to leave the meeting. The meeting will discuss the findings. Having discussed the Investigation Report, any proposals from the Executive Committee or from the floor that are seconded will be put to the meeting to be voted on and subsequently ratified…..*"

26. In light of what we have concluded above in relation to Rule 283, this email evidences a misinterpretation of the applicable rules.

27. We have not seen any response to this email, so it seems, again, that the key question – what offence was alleged – was never asked.

28. When the SGM took place on 3 December 2018, two delegates appearing on behalf of Glanmire (the club President and another member, neither of whom was a Claimant here). The minutes of the Executive Committee meeting (at which the SGM was called and at which specific sanctions on Glanmire and on its principal officers were proposed) were neither circulated nor their contents mentioned. The ISC report was read to the floor and it appears that the Glanmire were asked whether they were satisfied with it. The minutes record that they stated that they were, and they were then asked to leave the room. According to

Cork LGFA's own minutes, when the delegates appearing for Glanmire had left the room, an officer of Cork LGFA addressed the room and:

(a) submitted to the floor that Rules 179(d), 288, 292 and 294 of O.G. 2017 had been breached, despite no mention of any breach of rule having been put to Glanmire or any of its officers arising from their acts or omissions;

(b) submitted to the floor that penalties of €1,000 (x2) on Glanmire and 12 months (x2 concurrently) on the Second- to Fourth-named Respondents should be imposed, despite no mention of any intention to impose sanctions having been put to Glanmire or any of its officers arising from their acts or omissions, and despite there being no rule imposing derivative liability on officers, save in limited circumstances not applicable here; and

(c) went on to make arguments supplemental and additional to the report to support the foregoing submissions, despite Glanmire's delegates not being present and despite Glanmire having been advised that no further discussion or additions could be made arising from the ISC report.

29. On a vote, the sanctions proposed by the executive were imposed by a substantial majority (there was some dispute later about a minor error in the recording of the votes, and this was regrettably typical of the parties' misplaced focus on trivialities).

30. The chronology may conclude here as subsequent events are less significant factually, but before commenting on the procedural errors at the various levels at which the matter was dealt with, we pause to examine the rule pursuant to which the sanction was imposed.

THE OLD DISREPUTE RULE

31. Rule 288 of the O.G. 2017 provided:

> "*Any member of the Association found guilty of conduct calculated to bring the Association into disrepute shall be liable to expulsion or suspension by the Committee, Board or Council concerned.*"

32. Most sports organisations have a rule of this type, and its equivalent in the GAA was discussed by the DRA in *O'Maolcathail v Coiste Eisteachta Laighean* (DRA/17/2009) (at paragraphs 32 *et seq*). The following passage taken from Paragraph 32 is worth repeating:

> *"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."*

33. For an officer or unit to misapply a rule in the course of discharging his or her duty is "wrong" in the broadest sense of the word, but not in the sense of being in breach of rule, especially a rule designed to catch serious misconduct. Officials often make mistakes, but in the absence of something akin to malice or conscious misfeasance it is difficult to conceive of any circumstances in which a disrepute or discredit rule could have any application.

OBSERVATIONS ON THE PROCEEDINGS BEFORE THE SPECIAL GENERAL MEETING

34. As this is the first decision of the DRA in relation to the Ladies Gaelic Football Association, it is perhaps worth setting out the passage from the judgment of Judge McMahon (as he then was) in *Barry and Rogers v Ginnitty* (Unreported, Circuit Court (McMahon J), 13 April 2005), when contextualising the administration of justice in sports organisations (specifically the GAA in that case). Although rules and structures in both the GAA and the LGFA have become more sophisticated than they were in 2005, this passage remains the

cornerstone of the approach to be adopted in a legal analysis of the work of laymen in this field:

> "*The people, who wash jerseys, line the pitches and man the turnstiles, do so on a voluntary basis. The same is true, in general, of the officers of the clubs and of the County Boards. There are a few exceptions, but the general picture is one where the local administration is done by unpaid volunteers who do so for the love of the games and out of a sense of social duty. This means, of course, that they are not normally lawyers or persons of legal training. Rather are they characterised as persons who are committed to the games and the ideals of the Association, and as persons who in their decision-making roles display large measures of pragmatism and common sense. For the most part, they are not trained professional administrators, but enthusiastic amateurs. It would appear to me that provided the basic rules are not inherently unfair on their face, the process is not flawed because it relies on commonsense and a layman's pragmatism, even if, on occasion, it is a somewhat robust process. In such a situation one cannot demand a level of sophistication in the administration that one might expect of a lawyer or of a professional administrator. Further, to demand such a level of professionalism in the administration might well undermine the very success of the organisation to the detriment not only of the Association itself, but to the detriment of society in general*."

35. However, even allowing the latitude that the above dictum recommends, there is little exaggeration in concluding that the events that took place following receipt of the report of the ISC were something of a parody of what might pass for fair procedures:

    (a) Contrary to Rule 283 and most basic requirements of due process:

        (i) No charge was put to any of the Claimants that they had breached any rule, still less to identify any such rule;

        (ii) No warning was given to the Second- to Fourth-named Claimants that any adverse findings might be made against them personally, still less that any sanction might be imposed on them;

        (iii) The Glanmire delegates were excluded from the room when submissions and proposals were made against their club and its officers;

(iv) The prior intention to recommend very severe sanctions against them was concealed from the Claimants;

(v) Being ignorant of all of the above, and bearing in mind the absence of any reference to punishment in the ISC Report, to seek and minute the Glanmire Delegates' expression of satisfaction with that report comes across as rather grotesque.

(b) While it was clear that Glanmire and the officers involved in the failure to renew the membership of the Second- and Third-named Interested Parties acted incorrectly and in breach of the rights and expectations of those members, the evidence found by the ISC and stated on its report was not sufficient on any reading to support a conclusion that the Claimants or any of them were guilty of conduct in breach of the Old Disrepute Rule.

(c) Sanctions were imposed on the Second- to Fourth-named Claimants, not as actors in the events investigated or authors of any personal wrongdoing, but merely by virtue of the offices they held, despite there being no rule allowing for derivative sanctions to be imposed on officers save in specified circumstances involving the fielding of illegal players (see e.g. Rules 149/150 and 196/7 and 281 of O.G. 2017).

36. The application of Rule 283 would have prevented many, if not all, of the above problems arising. It is rather surprising that, at no point in any of the many hearings and proceedings and correspondence that followed the completion of the ISC report did any of the parties make reference to Rule 283. The Claimants clearly identified the underlying unfairness that resulted from the procedures that were adopted, and even in the absence of Rule 283, the Claimants would have succeeded in having the sanctions set aside, by the disapplication of rules if necessary. However, it is not necessary to go that far, because the procedural rules work – perhaps a little awkwardly, but nonetheless properly – once they are read as a coherent whole, as long as Rule 283 is taken into consideration.

THE MUNSTER APPEALS AND OBSERVATIONS THEREON

37. It is not necessary to discuss the ensuing appeals in any great detail.

38. It is evident that the appeal to Munster Appeals Committee was conducted *de facto* as a review of the process, as distinct form a *de novo* re-hearing where Cork LGFA would present a case against the Claimants which would then be met with contrary evidence and submissions. While the then rules were silent as to the appeal process and as to the circumstances in which an appeal might be upheld, it seems to follow from the fact that an appellant was required to set out his or her grounds of appeal, that the appeal operated as a review and not a *de novo* re-hearing. Since it was a review, the appeal constituted an assessment of the lawfulness (under rule) of the process before Cork LGFA. As such, this Tribunal in assessing the lawfulness of the decision of Munster Appeals Committee need only ask itself the question whether it was correct or otherwise in upholding the decision of Cork LGFA: it is not necessary to show that it was irrational. In upholding the decision of Cork LGFA, Munster Appeals Committee was fundamentally mistaken, and its decision cannot stand. For that reason, it is unnecessary for us (at this point) to address the Claimants' other (procedural) complaints about the hearing before Munster Appeals Committee.

39. The next appeal was from Munster Appeals Committee to Munster Council itself, and the same appeal rules applied, so this also operated as a review. Accordingly, in upholding the decision of Cork LGFA, it erred on a matter of law and this Tribunal is entitled to quash its decision. The increase in effective penalty by directing that the suspensions should run consecutively falls with the substantive decision.

40. The next appeal taken was to the NAC.

THE APPEAL TO N.A.C. AND THE CHANGE OF PROCEDURAL RULES

41. Under O.G. 2017, an appeal to the NAC was run on the same basis as an appeal to a provincial appeals committee and a provincial council. It appears that that was how the NAC *de facto* conducted the appeal from Munster LGFA in this case.

42. However, the appeal to NAC was lodged after the new procedural rules took effect on 1 February 2019. So far as may be relevant here, these rules (in the section known as the CODA Rules) provide as follows:

(a) At Section 1.2 that "*an Appeal hearing is a Fresh Hearing*" and

(b) At Section 8.3 that "*Any appeal to the Appeals Committee of the next highest Unit shall be a fresh appeal* [*sic, recte* "hearing"] *as if the first hearing before the Hearings Committee never took place*."

(c) At Section 3.3.1 that "*A Disciplinary Action is commenced when…(c) An incident comes to the attention to the CODA that warrants Disciplinary Action*" (A "*CODA*" is a designated officer of each County, College Provincial Council and Central Council having various tasks including various functions in the management and prosecution of disciplinary proceedings: see Section 2.1).

(d) At Section 7.1 that "*The Hearings Committee shall activate the hearing's procedure on receipt of a Request for Hearing or a Notice of Hearing from the CODA*."

(e) At Section 7.2 *et seq*, various rules around the conduct of hearings, presentation of evidence etc, which read as a clear and coherent roadmap for the fair and efficient resolution of *inter alia* disciplinary hearings. Appeals were to be conducted as a "*fresh hearing*."

43. The position of the Respondents is that – by conducting an old-style review rather than a *de novo* hearing – the NAC misapplied the CODA Rules. This position is fundamental to the issue we must decide in this arbitration and we will address it further below. We are not aware of any transitional provisions addressing whether or not the new rules apply to existing or pending proceedings or appeals, and it seems to us that a debate might have been had as to which rules properly applied to the Claimants' appeal to the NAC here (especially given that a "new-style" hearing to be conducted by a Hearings

Committee and re-conducted by an Appellate Committee presupposes prior acts and events that would not have taken place under the old rules and did not take place here, a point to which we will return below). However, no such debate was had before us: the Claimants seem content to accept the concession that they were entitled to a *de novo* hearing (although for reasons discussed later they reject the Respondents' proposal for a remittal so that that *de novo* hearing can or should be directed). In light of the concession, it is not necessary for us (at this point) to make any further findings about the decision and the decision-making process of the NAC: the decision must be quashed, and the issue to be determined is what ancillary decisions or directions are to be made.

"INTERESTED PARTIES"

44. Before addressing those, we wish to deal briefly with the position of the "Interested Parties." These three parties were named in the proceedings as "Interested Parties" before we came to decide the matter, so we did not admit them as such. At the hearing we indicated our view that these parties did not have a right of audience and that they would only be heard as witnesses if one or other of the parties wished to call them. The DRA Code says nothing about interested parties. The idea of "interested parties" in the context of the DRA's activities derives from a section in Form 2 appended to the Code, wherein each Respondent is required to identify "*any further persons/committees/ bodies concerned or affected*" by the proceedings. The purpose of this, as we see it is to ensure that consideration can be given to the possible need to join additional parties who wish to be joined if they are directly affected by the outcome. In our view, none of the named "Interested Parties" here met that criterion. Two of them were witnesses in the investigations and "victims" of the wrongdoing alleged, but just as victims of crime are not party to criminal prosecutions, neither are complainants of wrongdoing in a sports organisation properly party to disciplinary proceedings (or ensuing legal challenges) merely because they made the complaint or suffered as a result of the wrongdoing alleged. Of course the power is there to join other parties but it must not be exercised without good

cause, otherwise there would be no end to the list of possible "interested parties" (e.g. a club slated to meet the club affected by a suspension in the next round of the championship, or in the round after that etc: see DRA/09/2005 *Vaughan v Central Appeals Committee*, Paragraphs 34-45).

THE CORE ISSUE: ANCILLARY ORDERS

45. The foregoing chronology and interposed observations on the law lead us to the core issue at hand. Having quashed the decision of the NAC, what ancillary steps are required to give proper effect to our findings? To reach a conclusion on that we must first address the competing proposals advanced by the parties.

46. Logically, given the concession, we should address the Respondents' proposal first. They say that the matter should be remitted for re-determination by the NAC by means of a *de novo* hearing. What, it must be asked would this mean? Assuming the new rules applied, a simple remittal for a *de novo* re-hearing without any ancillary directions would mean that the rules in Rule 7.2-to 7.24 would govern the procedure, although the substantive breach wold have to be of the Old Disrepute Rule and not its replacement under Rule 2.3(m) of the CODA Rules ("***the New Disrepute Rule***"), since it would be intolerable that any person could be found in breach of a rule that did not exist at the time of the alleged breach). However as noted earlier, the procedure presupposes a number of factors which did not exist at various key times: most notably, there was no CODA when the disciplinary action commenced, no notice of the type prescribed by Rule 7.2 was ever given, in the absence of a referral under Rule 7.1 at the commencement of the process (since Rule 7.1 dd not exist), there is no information available to the NAC to prepare a notice under Rule 7.2.). A re-hearing would also allow the prosecuting entity (whoever or whatever that might be) to collect new evidence that had never previously been put to the Claimants to support the disciplinary action. The Respondents acknowledged that there would be difficulties but indicated their willingness to accept such conditions as this Tribunal might impose on the hearing to protect the position of the Claimants.

47. There are other arguments raised by the Claimants against a remittal to the NAC, which we will discuss further below, but it is not necessary to do so here, because on a review of the new and the old rules, we do not think that we can remit to the NAC without – in effect – drafting a set of rules designed to merge the old procedures with the CODA rules for the purpose of one hearing. This equates to re-writing the parties' contract (since ultimately the relationship between the various parties is based on contract) which is not an appropriate task for a court (or by extension an arbitral tribunal such as the DRA) to perform, apart from which it would be riven with hazard, since rule-drafting is a difficult business and not properly done "on the hoof."

48. However, the foregoing does not automatically mean that the Claimants are "in the clear," since quashing the decisions of the Respondents *simpliciter*, leaves it open to the CODA of Cork LGFA to commence new disciplinary proceedings. Even if the doctrine of *autrefois acquit* applied in the context of sports disciplinary procedures, an award setting aside the decision of the respondents is not an acquittal on the merits.

49. In truth what the Claimants want is an order quashing the decisions of the respondents and an award that prohibits the respondents or their officers from re-processing any disciplinary action arising out of the same facts. Having rejected the proposal of remittal, the remaining question is whether:

    (a) we direct such a prohibition

    (b) we decline to give any direction, leaving the CODA of Cork LGFA to proceed without any limitation, or

    (c) we decline to prohibit further disciplinary action but give directions referable to any fresh disciplinary action, if taken, against the Claimants.

50. The next matter to consider, then, is the arguments of the Claimants against remittal and in favour of prohibition.

51. The first point they make is that the NAC and indeed all of the Respondents were "*incurably biased*." However, much of the submissions and evidence adduced to support this proposition related to the conduct of the hearings themselves. But bias must generally arise external to the process: otherwise any procedural decision or direction in the course of a hearing would raise arguments about the committee's freedom from bias in deciding the substantive issue. Likewise, the fact that procedural errors were made by the Respondents (as indeed they were by the Claimants back in May 2018) is not of itself evidence of bias. Furthermore, the fact that severe penalties was imposed by Cork LGFA (and even harsher ones by Munster Appeals Committee) is not evidence of bias: harshness perhaps, possibly even irrationality, but not bias. The fact that members of Cork LGFA spoke against the Claimants at the Special General Meeting is not external to the process either: under the old rules, the process was essentially inquisitorial (whereas now it is for the CODA and not the decision-making committee to argue in favour of a finding of guilt). There are two issues raised that are external to the process. First it is said that the Third-named Interested Party is an officer of Cork LGFA and a member of Munster Council. This is not sufficient to disqualify Cork LGFA or Munster LGFA or their appropriate hearings committee under the CODA Rules from conducting hearings where he is involved as a witness or alleged victim of wrongdoing. If there is any bias it is a bias of necessity, because if Cork LGFA had declined to conduct disciplinary action against the Claimants merely by dint of the alleged victim being one of its officers, it would mean it could not perform its proper functions under the applicable rules wherever one of its officers might be a witness or affected. The second allegation of bias external to the process is that a member of Munster Council who it is alleged was vociferous in the course of the appeal before it in a manner hostile to the Claimants is the husband of a member the Munster Appeals Committee. In the case of successive appeals the decision-maker of the first appeal does not have an "interest" in the outcome that can be shared by a person connected with her (such as her husband). However, communications about the subject matter of the appeals between members of two different

decision makers would be highly undesirable. Equally undesirable would be a rule that has the effect of restricting communications between spouses, whose marital privacy in all respects is entitled to constitutional protection. In that context, we agree that the husband, a member of Munster Council, ought to have recused himself. However, this is not an "incurable" bias in the context of the present discussion. A straightforward direction addressing the make-up of possible future committees would readily overcome it.

52. Although not raised by the Claimants specifically, we did entertain a concern that new evidence in the case of a new hearing before the NAC would allow Cork LGFA a "second bite at the cherry." That would also apply to any fresh disciplinary action by the CODA of Cork LGFA under the new CODA Rules. However, we have already found that – under the old rules – Rule 283 applied, so it follows that any disciplinary proceedings were not limited to the facts stated in the ISC Report. As such, to limit the evidence to the ISC report would accord with neither the letter nor the spirit of either the procedural rules in O.G. 2017 or the new CODA Rules. For that reason, while it does mean that the CODA of Cork LGFA would be in a position to adduce further evidence if fresh disciplinary action were commenced, an analogous situation regularly arises where convictions or decisions of administrative bodies are quashed: both sides incur the risk and both sides take the benefit of the opportunity to adduce further evidence.

53. The main plank of the Claimants' arguments against remittal (and by extension in favour of prohibition of future disciplinary action) is that the circumstances disclosed can never amount to a breach of the Old Disrepute Rule and that any decision that it could, would be irrational in the legal sense. While we are inclined to agree that a finding of a breach of the Old Disrepute Rule by reference only to the ISC report would indeed be irrational, we consider that to prohibit any future disciplinary action based on this opinion is the wrong approach. As noted above, under the old procedural rules, the parties were not confined to the evidence in the ISC report. In any fresh disciplinary action under the CODA

Rules, the ISC Report would play no part, since the evidence would have to be put from scratch. Consequently, for us to make a finding that any future decision finding the Claimants guilty of a breach of the Old Disrepute Rule would be irrational, is to make a finding without knowing what evidence might be adduced or what facts might be found by the committee authorised to determine those facts. There may be cases where such a finding could be made i.e. where the facts were comprehensively set out and agreed (or not contested) by the parties. In that case a Tribunal of the DRA wold be free to draw inferences from those facts and come to a conclusion that they were incapable in any circumstances of amounting to a breach of a particular rule. However it was a feature of this case that there has never been a clear and coherent statement of the facts of this case (a stark instance is the question of "rumours" involving the Third-named Interested Party, which the Claimants themselves are unwilling to state, despite the fact (if not also the content) of such rumours being central to the events leading to the non-renewal of his membership).

54. The Claimants may be right in saying that any finding of a breach of the Old Disrepute Rule would be irrational, and as we have concluded, if all that is put up is the same evidence as was found and set out in the ISC Report, then it would indeed be irrational to conclude that there has been conduct in breach of the Od Discredit Rule. Indeed, if – as they have argued – the object of their conduct was an admittedly ham-fisted attempt to get the Second- and Third-named Interested Parties to attend meetings with the officers of their club, the case against them would be even weaker (and their conduct ironically less improper than that of the various respondents who conducted the disciplinary proceedings against them). However, to conclude that *any* finding of breach would be irrational is improper where the background facts have never been fully thrashed out and determined (and it would not have been appropriate to do so before the DRA as a tribunal of first instance).

55. We ought to address here the provisions of Sections 11.3 and 11.4 of the Code. Section 11.4 provides:

> "*In the event of a decision or procedure being quashed, and with agreement of both parties, the Tribunal may conduct a full hearing as if it were an appellate body of last resort under the Rules of the Association, with power to fully conduct the procedure which has been quashed. No decision made by the Tribunal in this context shall be susceptible to appeal or review by any body*" (emphasis added)

56. It was argued on behalf of the Claimants that this Tribunal had power to rehear and redetermine the substantive case (and we were invited to do so), notwithstanding the objection of the Respondents. This is an unstateable proposition. The words of Section 11.4 are clear: consent of all parties is required. The Claimants opened a number of previous decisions of the DRA wherein proceedings were re-heard under Section 11.4. Some of those decisions omitted to state on their face whether the consent of the parties had been given, but given the clarity of the section itself, we must assume that consent was given in those cases. If as a matter of fact, any Tribunal of the DRA has taken upon itself the function of hearing without the consent of the parties, then it has erred and we would respectfully decline to follow such example. However, as noted, there is no definitive evidence of that having happened.

57. It should also be said in relation to Section 11.4 that, even where consent is given, the Tribunal has discretion whether to re-process any hearing. The mere fact that previous Tribunals of the DRA have on occasion exercised their power under this Section, does not mean that they must always do so. Each case turns on its own facts, and there can be dangers associated with re-hearings. The present case is an example: for the same reasons we are not prepared to remit to the NAC, even if consent was given under Section 11.4, we would have declined to conduct a substantive re-hearing.

58. Section 11.3 of the DRA Code provides:

> "*The Tribunal may direct any party to the dispute resolution proceedings to take, or abstain from taking, any steps, within the Rules of the Association and with due regard to the rights of third parties, including, but not limited to, the re-hearing of any disciplinary or other decision making process, with or without directions as to the proper procedures to be applied.*"

59. This is no more than a statement of the powers afforded to a Tribunal of the DRA on upholding a challenge. It is not a guide to the circumstances in which any one or more of the powers listed should be exercised. In the same way, the numerous previous decisions of the DRA opened to us, wherein primary or ancillary decisions or directions were given in reliance upon Section 11.3, were of limited if any assistance to us. The powers are broadly drafted, and they present a wide array of options, but the exercise of those options depends on the facts of the individual case before the Tribunal in question.

AWARD AND DIRECTIONS TO BE MADE

60. In conclusion, then, neither the position contended for by the Claimants, nor that contended for by the Respondents, represents to us the proper approach to the resolution of this matter. Instead, we propose to quash all of the decisions of the various Respondents, with certain ancillary awards and directions as follows:

    (a) The suspensions imposed on the Second- to Fourth-named Respondents are quashed with immediate effect;

    (b) The fine imposed on Glanmire is quashed and the monies charged are to be returned within 21 days;

    (c) There is no prohibition on future re-processing of disciplinary action against the Claimants; however, if any disciplinary proceedings are commenced arising from the events giving rise to these proceedings (including connected matters such as the alleged second bank account and any delay in returning subscription fees (or execution of cheques associated therewith)), the following directions apply to such proceedings:

        (i) The new procedural rules will apply to any such proceedings.

        (ii) The old substantive rules and penalties will apply to such proceedings.

(iii) No derivative liability can be imposed on any person merely by virtue of their being an officer of Glanmire.

(iv) No documents or evidence previously made or adduced (including minutes of any meeting of the Respondents or the ISC report) will have any special status, and any facts alleged must be proved in accordance with the new procedural rules.

(v) In the event that any costs are awarded to the Claimants arising from this arbitration, then, prior to the commencement of any such disciplinary action, the sum due for costs must be paid (if agreed, measured or taxed), and if the sum has not been agreed or measured or taxed, then a sum equivalent to the costs claimed must be lodged with the Claimants' Solicitors as stakeholder pending agreement, measurement or taxation.

(vi) Without prejudice to the normal rules concerning conflicts and recusal, the following persons shall be disqualified from participation in any committee involved in the prosecution or determination of any such proceedings or appeal arising therefrom (we are not making findings of actual bias but seeking to avoid the perception that the listed personnel might consult their previous knowledge in conducting any future proceedings):

1. All members of the Cork LGFA Executive Committee attending the meeting of 14 November 2018;

2. All persons who made submissions at the Special General Meeting of Cork LGFA on 3 December 2018;

3. The members of Munster Appeals Committee and Munster Council who conducted the appeals in early 2019; and

4. The spouses, parents or children of (i) the CODA conducting the disciplinary action, (ii) any person deemed disqualified by this award from participating, and (iii) the members of any decision-making committee dealing with such future disciplinary action (i.e on an appeal therefrom).

Non-committee members may be co-opted in the event that the above exclusions render any committee inquorate, and any disputes about disqualification of members shall be referred to the Secretary of the DRA for final determination by him.

(vii) For the avoidance of doubt, the refusal to decide that the decision(s) of the respondents were irrational does not preclude the Claimants from arguing in the context of any such disciplinary proceedings or appeals therefrom or legal challenge before the DRA that any decision made therein was irrational.

(viii) If proceedings are taken against the Claimants and if any of them are suspended, the period of suspension already served shall be counted to reduce or extinguish the actual effect of any suspension imposed.

COSTS AND EXPENSES

61. The Claimant's having succeeded in their claim, the Tribunal directs the Secretary to reimburse the deposit previously lodged. The Tribunal further directs that the Respondents equally discharge the Tribunal costs.

62. The Tribunal invites written submissions on the question of costs and any agreed variation that the parties wish to the above ancillary directions. The Claimant is afforded a week within which to furnish submissions to the Secretary and the Respondents are afforded a further week to furnish their submissions. Such submissions should be copied to all parties.

This is the unanimous decision of the Tribunal

Date of Oral Hearing: 16 April 2019
Date of agreed Award: 7 May 2019

By email agreement on agreed date above.

Michael Delaney

Patrick Moroney

Micheál O'Connell (Chairperson)