Disputes Resolution Authority
An Córas Eadrána

DRA 06 of 2020: In the matter of an arbitration under the Disputes Resolution Code and the Arbitration Act 2010

Between:

BRIAN KEARNEY

Claimant

v.

AN COISTE ÉISTEACHTA CÚIGE ULADH – (ULSTER HC)

First Named Respondent

And

RUAIRI ÓG

Second Named Respondent

And

COISTE ÉISTEACHTA AONTROMA – (ANTRIM HC)

Interested Party

And

AN LÁR CHOISTE ACHOMHAIRC – (CAC)

Interested Party

Hearing: 3rd June 2021, Remotely

Tribunal: Mr. Micheal O'Connell SC, Mr Eamonn Denieffe, Mr Con Hogan

Secretary to the DRA, Rory Hanniffy BL

VERDICT: The claim succeeds.

KEYWORDS: *Appeals from decisions of Club Executive Committees – applicable rules – Club Constitution, Section 5.11.2 – Official Guide, Rule 7.11*

Appeals – "one appeal" rule – Official Guide, Rule 7.11(a)

Consequences of invalid decisions – collateral challenges

Disciplinary Action within Clubs – Fair procedures – applicability of rules - Club Constitution, Section 5.11.1 – Official Guide, Rule 7.3

LIST OF REMOTE ATTENDEES:

Claimant

Karl McGuckin BL
Feargal Logan – Solicitor
Brian Kearney
Niall Kearney

First Respondent – Ulster HC

Gerry O'Hare – Solicitor
Dick Butler – Chairperson for Index Appeal
Ailis McEntee – Secretary for Index Appeal
Sean McKenna – Secretary
George Carthwright - Chairperson

Second Respondent – Ruairí Óg

Daniel Delargy – Chairperson
Aidan McAteer – Former Chairman / Current Club Development Officer

Interested Party – Antrim HC:

Pat O'Hagan – Chairperson
Ms Una McGurk BL – Secretary

Interested Party – CAC:

Matt Shaw – Current Chairperson

FACTUAL BACKGROUND

1. The underlying background to the dispute that gives rise to this arbitration involves allegations of very serious wrongdoing by a third party in relation to the finances of the club concerned. The investigation into those matters then led to a view taken by the club that the Claimant, who was Chairman of the club, had also been guilty of misconduct, although it must be emphasised that the misconduct alleged is of a lower order entirely than that alleged against the third party. Nevertheless, it cannot be denied that the allegations against the Claimant appearing on the papers furnished to us are very serious in the context of management of a club.

2. Beyond that summary, it is neither necessary nor appropriate for us to delve into the detail of those allegations, still less to adjudicate on their factual content, so we will set out – in tabular format and as briefly as we can – the protracted procedural history which has led to this arbitration.

Date	**Event**
15 August 2019 (23:49)	A document headed "*Notice of Disciplinary Action*" was sent by email by the Second-named Respondent ("**the Club**") to the Claimant notifying him of a finding that he was in serious breach of trust and imposed penalties pursuant to section 5.11.1 of the Club Constitution, as follows: (a) Suspending him from all club activities for a period of 96 weeks; and (b) Disqualifying him from again holding office or serving on the Club Executive Committee. The notice informed the Claimant that he had the right of appeal within seven days to the Antrim Hearings Committee. It is common case that no document had issued to the Claimant at any time previous to this, charging him with misconduct.
19 August 2019 (10:14)	The Claimant sent an email to the secretary of Antrim County Committee, forwarding a copy of the emailed document of 15 August 2019 and stating: "*On foot of receipt of below letter I wish to appeal this disciplinary action.*"

20 August 2019 (13:49)	The secretary of the County Committee replied by email to the Claimant as follows: "*Brian* *See attached.* *This is the rule that sets out the appeal process and what's required by you -* 1. *How to request an appeal.* 2. *What's required at the appeal?*" A copy of Rule 7.11 of the Official Guide was attached.
20 August 2019 (14:19)	An email was sent by the Claimant to the secretary of the County Committee stating: "*I wish to apply for an oral hearing ref ban from* [the Club] *as previously sent. Money is transferred*."
20 August 2019 (15:35)	Proof of payment of fee was sent by email from the secretary of the County Committee to the Hearings Committee of Antrim County Committee ("**Antrim HC**").
4 September 2019	The Claimant furnished a standard appeal document in the form appearing in the Official Guide. This did not identify the date of the decision against which the appeal was taken. The grounds of appeal were stated to be as follows: "*5.11.1 has been misapplied due to the lack of a full and proper investigation and due process into matters stated by the club. We will also provide information to prove the accusations are false*."
13 September 2019	An email was sent by the secretary of Antrim HC to the Club confirming that a hearing of the Claimant's appeal would be arranged, and requesting minutes of any meeting(s) or hearing held by the Club.
3 October 2019	An email was sent by the secretary of Antrim HC to the Club and the Claimant advising of the date for the hearing of the Claimant's appeal.
6 October 2019	The Club lodged an appeal to the First-named Respondent ("**Ulster HC**") against the decision to fix a hearing date before Antrim HC
14 October 2019	Ulster HC decided this appeal, annulling the decision of the Antrim HC to fix a hearing of the appeal stating, first, that Section 5.11.2 of the Club Constitution (TO 2019) was infringed and that the decision was made pursuant to Rules 7.11(o) and 7.3(u-aa) of the Official Guide 2019.
	The Claimant lodged an appeal to the Central Appeals Committee ("**CAC**") against the decision of Ulster HC.

26 November 2019	CAC upheld the Claimant's appeal against the decision of the Ulster HC and remitted the matter to Antrim HC "*for reprocessing by rescheduling the appeal hearing*". The grounds were explained in detail and noted that the Claimant had never had an opportunity to be heard in relation to any of the decisions in relation to the validity of his appeal to Antrim HC, and that the decision to permit the appeal to be heard by Antrim HC was not a decision that was amenable to appeal under Rule 7.11 of the Official Guide. The CAC did not rule on the question whether the Claimant had a right of appeal from the decision of Ulster HC.
16 January-7 February 2020	The matter having been remitted for a full hearing to Antrim HC and heard on 16 January 2020, it ruled first on a preliminary issue raised by the Club on the validity of the appeal. On the two issues raised, it was decided: (a) The original appeal was compliant with Rule 7.11(g)(i) because the Claimant was unable to state the specific rules that were infringed or misapplied because the Club had failed to state which rules he was alleged to have infringed. (b) The appeal was not out of time and out of order because the emails (and attachments) of 19 and 20 August 2019 were sufficient (it was stated that the standard form issued on 4 September 2019 had been excluded from consideration). On the substantive issue, the Claimant's appeal was upheld, and in accordance with Rule 7.11(p)(ii) the matter was directed to be reprocessed by the club with a recommendation that the club establish processes which ensure compliance with Rule 7.3 of the Official Guide. It was held (under the heading "*panel considerations*" that: "[the Club] *had failed to demonstrate and evidence the application of any process which ensured compliance with Rule 7.11(o)(ii), which describes (the Claimant's right to a fair hearing). Specifically,* [the Club] *confirmed that* [the Claimant] *had not been afforded the opportunity to present his case at the meeting on 11 July 2019, it being the only meeting convened, with* [the Claimant] *being present, specifically to address the issues being investigated.*"
9 February 2020	The Club lodged an appeal to Ulster HC

13 March 2020	Ulster HC upheld the Club's appeal against the decision of the Antrim HC on the grounds that the following rules were infringed or misapplied: Rules 7.11(g), 7.11(h)(ii) and 7.11(o)(i), all of the Official Guide, 2019. The decision of Antrim Hearings Committee was annulled with the direction that no further action be taken.
18 March 2020	An Appeal was lodged to CAC by Claimant against decision of Ulster HC
21 March 2020	A Request for Arbitration issued to the DRA.
22 September 2020	By email, the CAC referred the parties to the DRA
15 March 2021	On the date scheduled for the DRA hearing, the parties held discussions and agreed that the matter would be dealt with by the CAC in the first instance.
25 March 2021	The CAC issued a decision stating that the Claimant's appeal to it was out of order. Again, the CAC did not rule on the question whether the Claimant was entitled to an appeal from the decision of Ulster HC.
5 May 2021	After a further preliminary hearing before the DRA, the parties agreed that the Claimant was not in fact entitled to an appeal to the CAC, although they differed as to what consequences flowed from that.
3 June 2021	The substantive hearing of the claim to the DRA was heard.

3. So, in summary, there were seven decisions made by different bodies within the Association, as follows:

(a) 15/08/2018: Disciplinary action by the Club

(b) 13/09/2019: Preliminary decision by Antrim HC to accept Claimant's appeal ("**the Claimant's original appeal**")

(c) 14/10/2019: Decision on appeal by Ulster HC

(d) 26/11/2019: Decision on appeal by CAC

(e) 16/01/2020: Decision on Claimant's original appeal by Antrim HC

(f) 13/03/2020: Decision on appeal by Ulster HC

(g) 25/03/2021: Decision on appeal by CAC

4. Regrettably, although the right result was reached on some occasions, every single one of these decisions exhibits one error or another, as we will discuss below.

5. At all events, when the matter came before us for the substantive hearing of this arbitration, the Claimant had two main points to make, as alternative reasons why the decision of Ulster HC should be quashed. First, he argued that the original disciplinary proceedings were fundamentally flawed, since, if Rule 7.11 invalidated the Claimant's original appeal (as Ulster HC held), then the comprehensive requirements of Rule 7.3 also applied to the Club's disciplinary action which quite obviously was not conducted in any sort of compliance with that rule. Secondly, and in the alternative, he argued that Rule 7.11 did not apply to the Claimant's original appeal, so the requirement to set out the grounds of appeal in accordance with Rule 7.11(g) did not apply and an appeal in any format was valid.

6. The Respondents contended that Rule 7.3 could not be applied by a Club to internal discipline and noted a number of inconsistencies and anomalies that would result. At the same time they argued that Rule 7.11 did apply and pointed us in particular to Rules 1.9 and 3.5 and Appendix 1 in arguing that the rules applicable to a club member appealing a decision of his or her club incorporated those in the Official Guide, including Rule 7.11. As a preliminary issue, they argued that, since – as was common case – the Claimant was not entitled to an appeal from the Ulster HC to CAC, the original decision of the CAC on 26 November 2019 was invalid and the decision of the Ulster HC on 14 October 2019 should stand undisturbed.

7. We should observe that the last two paragraphs is an imprecise distillation of what we regard as the key points in this arbitration, and scarcely do justice to the

detailed and helpful written and oral submissions made on behalf of the parties by Mr McGuckin, Barrister, and Mr O'Hare. Solicitor, respectively.

DISCUSSION

8. As we have said, all of the decisions listed above have been flawed in one way or another. We think that it is worthwhile explaining why, but we will leave any discussion of the Club's original decision until last.

9. We should preface our discussion by stating that the rules governing disciplinary action within clubs, as well as appeals therefrom, have been fundamentally altered with effect from March 2021 to give greater clarity and guidance to both members and clubs. We are dealing here with the now-extinct regime.

The first Antrim HC decision

10. The preliminary decision of Antrim HC (or perhaps its secretary) to accept the Claimant's original appeal was correct in the result; however the reasons underlying both it and the second decision of Antrim HC (deciding the same question as a preliminary issue), were not valid.

11. A plain reading of, on the one hand, the Club Constitution (as it was), and, on the other, Rule 7.11, shows that an appeal from a decision by a club on a disciplinary matter was governed by one rule only: Section 5.11.2 of the Club Constitution.

12. Section 5.11 of the Club Constitution (as it then was) read as follows:

> "*5.11.1 The Executive Committee shall have the power to investigate any matter, and to expel, suspend, warn, fine or disqualify Members from Club activities for breach of this Constitution and Rules or the Official Guide or for conduct considered to have discredited or harmed the Club or the G.A.A.*
>
> *5.11.2 Such persons, if Full Members (including Honorary Members) or Youth Members, shall have the right to appeal to the Hearings Committee of the*

County Committee of the G.A.A., within seven days of being notified of such decision.

5.11.3 Unless the offence is brought to the notice of the County Committee of the G.A.A. by the Club, and that body, having considered the merits of the case and having regard to the rights of the player or member, confirms the penalty imposed, the member continues to be a legal member of the Association and is suspended from Club activities only."

13. On its face, Section 5.11.2 allowed for an appeal and imposed one stipulation, namely that the appeal be taken within 7 days of notification of the decision.

14. Under the heading "*Right of Appeal*," Rule 7.11(a) of the Official Guide provided (and still provides) as follows:

> "*(a) Subject to Rule 7.11(d) and (e) below, a Member or Unit directly involved in any decision made by a Council, Committee-in-Charge or County/Provincial Convention (the Decision-Maker) shall have a right of one Appeal (and one Appeal against the rejection of an Appeal for non-compliance with formalities) as follows:*
>
> *(1) In respect of decisions of a Divisional Committee or other Sub-Committee formed under Rule 3.19(l), to the County Hearings Committee or as otherwise specified in County Bye-Laws;*
>
> *(2) In respect of decisions of a County Committee or a Sub-Committee formed under Rule 3.20 exercising plenary powers, to the Provincial Hearings Committee;*
>
> *(3) In respect of decisions of a Provincial Council, to the Central Appeals Committee; and*
>
> *(4) In respect of decisions of the Central Council Sub-Committees, to the Central Appeals Committee.*"

15. None of the four cases provided for in Rule 7.11(a) captures an appeal from a club's decision, so the words "*Council, Committee-in-Charge or County/Provincial Convention*" appearing in its introductory text cannot be taken to include a club or its committees.

16. It might also be noted that, insofar as Rule 7.11(f) and (g) set out a number of requirements for a valid appeal (including that the grounds of appeal be stated), one of those requirements is that such appeal be taken within three days from the date and time of notification of the decision, which is patently inconsistent with the provisions of Section 5.11.2 of the Club Constitution allowing seven days.

17. As such, it is immaterial what might be stated in other parts of the Rules regarding the interaction between administration within a club and administration by units above club level. Besides, we do not consider that the rules and appendices quoted by the respondents have the effect of incorporating Rule 7.11. Rule 3.5 states that the Club Constitution and Rules (the elongated name for what we refer to here as "the Club Constitution") govern the affairs of all clubs. While amendments made by a club to its constitution may not conflict with the Official Guide, that does not mean that the standard form Club Constitution must be construed as incorporating the rules (besides which, if they did, that would mean that Rule 7.3 was also incorporated, a position denied by the Respondents). Rule 1.9 provides that members and units are subject to "*the Association's Rules, Bye-Laws and Regulations*" but that does not mean that the Rules are to be applied to cases they are not expressed to cover. The definition of "*Rule*" in Appendix 1 includes the expression "*any of the Association's Rules, Bye-Laws and Regulations, the Club Constitution and Rules*" but that is preceded by the phrase "*where the context requires*" which directs the reader to interpret the Rules to identify the situations to which they apply. As hopefully explained above, "*the context*" does not require Rule 7.11 to be incorporated as a component of the Club Constitution: on the contrary, Rule 7.11 and Section 5.11.2 of the Club Constitution (as it then was) are mutually exclusive.

18. While Rule 7.11 did not apply to appeals under Section 5.11.2 of the Club Constitution, it might often be convenient, in processing an appeal from a club decision, to adopt by way of directions some procedures from Rule 7.11 as a form of "best practice," in circumstances where there was no guidance given in the Club Constitution about the conduct of such appeals. However, the right to an appeal or the scope of an appeal could not be cut down by reference to procedural requirements peculiar to Rule 7.11.

19. We note from Antrim HC's submissions to Ulster HC on the appeal from its second decision that it regarded the Club Constitution as taking "*precedence*" over Rule 7.11, suggesting that Rule 7.11 (including the restrictions therein) did apply where not inconsistent with the Club Constitution. However, in our view, that is not the case: Rule 7.11 cannot limit the right of appeal or impose specific conditions upon the right of appeal, additional to those in the Club Constitution.

The first Ulster HC decision

20. Before addressing this decision, we pause to note that it might be argued that – since discipline under the Club Constitution is wholly governed by the Club Constitution – there was in fact no appeal available to a member or club from the determination by a County Committee of an appeal taken under Section 5.11.2 of the Club Constitution. However, that argument was not made before us and, even if it was, the fact that the parties at all times proceeded as if there was an onward appeal from the decision of the Antrim HC has consequences (which we will discuss further below in connection with the later decision of the CAC). In those circumstances, we will proceed on the basis that an onward appeal was available from a decision of a County Hearings Committee on an appeal from a club decision (we would add that, since the rules around this area have since changed, the question is unlikely to arise again).

21. The reasons for the decision of Ulster HC on the first appeal from Antrim HC are somewhat obscure, in that it is stated that a breach of Rule 5.11.2 had occurred, but nothing is said to identify what that breach was. Since the only decision of

Antrim HC at that stage had been to fix a hearing date, one is driven to the conclusion that the decision was based on a finding that the requirements of Rule 7.11 (in particular Rule 7.11 (g) requiring the grounds of appeal to be set out) were applicable to appeals from club decision and had not been met. In that respect, for the same reasons as are set out in Paragraphs 11 to 19 above, the decision was flawed in its reasoning and result. Other errors were made as subsequently (and accurately in our view) pointed out by CAC, but they are historical at this stage.

The first CAC decision

22. The first decision of CAC was correct on the matters it addressed, and indeed it was an excellent analysis of the substantive matters it decided. However, perhaps understandably, since neither party had raised the issue, the CAC failed to consider its jurisdiction to hear an appeal from the Claimant in the first place. It was subsequently agreed by the parties (albeit in the context of the second appeal to CAC) that the Claimant had no entitlement to appeal to CAC in the context of the second Ulster HC decision, so it follows that they agree that the CAC equally had no jurisdiction to hear an appeal from the first Ulster HC decision. The parties were correct to agree that this is the case, and we propose to spell out briefly our view why this is so:

    (a) We have seen from Rule 7.11(a) that all parties have a right to "*one appeal*" from a "*decision*." Assuming (as we do for present purposes: see Paragraph 20 above), that an appeal was available from the decision of Antrim HC, the first "*decision*" coming into the reckoning here is that of Antrim HC (since – as discussed above – a "*decision*" of a Club is made pursuant to the Club Constitution not the Rules of the Association, and Rule 7.11 has no application to it).

    (b) Rule 7.11(a)(2) identifies a "*decision*" of a County and provides for an appeal to the Provincial Council. Here (parking for a moment the flaw that the decision to fix a hearing date was not an appealable decision), the Club lost

and was therefore entitled to "*one appeal*" (and of course if the Claimant had lost, he would have been entitled to "*one appeal*" in the same way).

(c) We then come to the decision on that appeal (i.e. the decision of Ulster HC here). That determination was to the effect that Antrim HC was wrong. Although, read literally, that decision is a "*decision*", it is not a "*decision*" as contemplated by the "*one appeal*" entitlement. This is best explained by identifying the consequences of the contrary view, i.e. if we said that a decision on an appeal is a "*decision*" for the purpose of Rule 7.11(a). If that contrary view were correct, then each time an appeal was decided, a new "*decision*" would exist, and the right to "*one appeal*" would be re-activated. But if that were so, then there would in fact be no limit on how many appeals could be taken. To illustrate:

(i) assume the initial decision is by a Divisional Committee: that would be subject to "*one appeal*" under Rule 7.11(a)(1) to the County Hearings Committee;

(ii) the County Hearing Committee's decision on that appeal (if a "*decision*" for this purpose) would be subject to "*one appeal*" under Rule 7.11(a)(2) to the Provincial Hearings Committee; and

(iii) the Provincial Hearing Committee's decision on that appeal (if a "*decision*" for this purpose) would in turn also be subject to "*one appeal*" under Rule 7.11(a)(3) to the CAC.

In other words, all original decisions could be appealed all the way to the CAC, and the words "*one appeal*" would be deprived of any meaning.

(d) Consequently, the effect of the "*one appeal*" rule must be that (subject to the exceptions we will identify below), there is only one appeal from a decision, and that appeal is only available to the losing party. The party who succeeds in the original decision does not have a second appeal "in the bag" to be deployed if their opponent succeeds on appeal.

(e) There is nothing inherently unfair in the party who succeeds at first instance not having an appeal to deploy at a later date if required. Appeals to higher jurisdiction in the courts (which deal with far more serious matters than this) are restricted in a similar way (subject to limited exceptions).

(f) There are two exceptions to the "*one appeal*" rule, specifically provided for in Rule, which are perfectly consistent with what we have said above:

(i) First, under Rule 7.11(a), there is an express right of appeal against a decision ruling an appeal out of order. This is expressly included as an exception.

(ii) Second, under Rule 7.11(b), there is a special right of appeal to a County Hearings Committee against a decision of a province. Clearly, the word "*decision*" here (contrary to how it is used in Rule 7.11(a)) means a decision on an appeal and only that. The context shows that this is a special case and does not change what we have said above. First of all, it is an appeal by the "*decision-making committee*" of a County, which implies that a decision has been made by that County which in turn means that this special right of appeal is from a decision <u>on</u> an appeal. Secondly, if the general rule in Rule 7.11(a) were not as we have stated it, Rule 7.11(b) would be unnecessary and duplicative.

23. As such, the Claimant did not have a right of appeal to the CAC from the first decision of Ulster HC, and the CAC ought not to have entertained it (the Claimant did, of course, have the right at that time to seek arbitration by the DRA but he did not exercise that right at the time). Nevertheless, the CAC accepted and decided that appeal, without any objection to its jurisdiction, and we will return presently to the consequences of that fact.

The second Antrim HC decision

24. Moving onwards to the second Antrim HC decision, it follows from what we have already said that, in deciding that the Claimant's original appeal was valid, this decision was correct in its conclusion but mistaken as to the reasons for its conclusion, based as it was on the erroneous assumption that Rule 7.11 applied to an appeal from a club's decision (it has to be said that, if Rule 7.11 did apply to the Claimant's original appeal, the conclusion that the Claimant's original appeal satisfied the requirements of that Rule would be difficult to sustain). Thus, although the route was wrong, the correct destination was reached: the Claimant's original appeal was indeed valid, but because the requirements of Rule 7.11 did not apply to it.

The second Ulster HC decision

25. Parking Antrim HC's decision on the substantive matter (i.e. the validity of the Club's original decision) alongside the Club's original decision for the moment, we move onto the second decision of Ulster HC on the appeal of the Club. Again, this decision is somewhat enigmatic, since it refers to Rules said to have been infringed, without explaining what the breach actually was. It is impossible to confirm with certainty whether the decision related solely to the issue of the validity of the Claimant's original appeal or whether a decision was also made on the substantive question whether the Claimant's appeal should have been upheld on the merits. Having regard to the rules quoted in Ulster HC's decision (Rules 7.11(g), 7.11(h)(2) (which relate to the formalities around an appeal notice) and 7.11(o)(i) (which is neutral as to the subject matter)) and the minutes of the hearing, it seems fair to conclude that the decision turned on the applicability of Rule 7.11 to the Claimant's original appeal, and therefore effectively repeats the mistakes in Ulster HC's first decision. (It is perhaps ironic, given the complaints about the infirmities in the Claimant's original appeal that the Club's second appeal to Ulster HC is itself cryptic by alleging breaches of a list of Rules without stating what the breaches were, although we note that its written submissions on that appeal did attack Antrim HC's decision on the substantive merits).

The second CAC decision

26. Finally, we come to the second CAC decision. The flaw with this was to rule on the validity of the appeal by reference to the notice issued by the Claimant and not by reference to the logically anterior question whether the Claimant had a right of appeal to the CAC at all. For the reasons discussed above, he did not and his appeal should have been rejected on that basis.

Consequences of the flaws

27. So what are the consequences of all these flaws? This question turns on the scope of the DRA's jurisdiction in any case and the extent to which it can "unwind" errors of the past.

28. It is clear as a matter of law that administrative decisions that are made *ultra vires* (i.e. in excess of the power or jurisdiction of the decision-maker) may nonetheless acquire a form of legality or unimpeachability, in circumstances where parties entitled to challenge them have not done so in accordance with the available mechanisms and with the applicable time limits. This arises in different areas of law, and the manner in which validity is preserved may arise through a variety of concepts, such as *res judicata*, estoppel, acquiescence, *locus standi* and exercise of discretion against inappropriate collateral challenges to decisions. Thus, while the rules are not absolute and exceptions exist, in general, a decision that is legally flawed but has not been challenged within the time frames available and by the persons concerned, it will enjoy a presumption of validity that will survive even a clear demonstration that it was made ultra vires. The decision is, as it were, "mineralised" by time and circumstance. Speaking about invalid statutory provisions (an appropriate analogy for an invalid decision in this context), O'Neill J said in Q v Mental Health Commission [2007] 3 IR 755 (at page 771):

> "*The principle that a legal or statutory provision which is subsequently found to be invalid may be sheltered from nullification and thus accorded the continuance of legal force and effect, where its invalidity is not asserted at the appropriate time, and where those affected by it and concerned with it, in good*

faith, have treated it as valid and acted accordingly, is now well established in our jurisprudence following the judgments of the Supreme Court in A v Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88."

29. In this case, the decision of the Club was appealed, and the first decision of Antrim HC was challenged and overturned, so neither of these was left unchallenged. Nor was the first decision of Ulster HC, because it too was appealed and overturned. The appeal to CAC should not have been permitted, but it was, and no claim was taken to the DRA to overturn it. In addition, all parties affected acted in compliance with that decision. As such, the decision of the CAC to take in the appeal and the decision on that appeal became mineralised and is now beyond challenge. It is not open to us in these arbitral proceedings to quash it.

30. The second decision of Antrim HC was appealed (to Ulster HC) and overturned so it did not become protected from attack. Likewise, the second decision of Ulster HC was both appealed and challenged by arbitration (this is not the first time that a member or unit has "ridden both horses" when unsure about which route was properly open to him and it is a sensible approach to take where there is uncertainty (as there was here, in light of the first decision of CAC)), so that decision is "fair game" in this arbitration (the second CAC decision can effectively be disregarded as irrelevant at this stage).

31. So, to deal with the submission of the Respondents that – in light of the (correct) acknowledgement by the parties that the Claimant enjoyed no right of appeal to CAC – the decision of the CAC on 26 November 2019 should be overturned and the decision of Ulster HC on 14 October 2019 should stand while everything after it falls, we do not agree that that can be the case. Our jurisdiction as an arbitral tribunal extends to the decisions or series of decisions which remain under challenge. The first decision of CAC was not challenged by means of a challenge brought to the DRA and the parties went along with its directions: a collateral challenge at this remove is impermissible. We have been referred to the decision

of the DRA in Case No 15/2011 (*Cill Mhoconog-Ath Na Sceire v CAC*) in which a panel of the DRA, faced with challenges to successive decisions by Leinster HC and then CAC, concluded that the decisions of those two bodies were not unlawful on the grounds argued for by the claimant club but that the earlier decision (by Leinster HC) was unlawful on a ground not argued by the claimant. That is not analogous to what we have here: the decision of Leinster HC in that case was never allowed to mineralise, in the way that the first decision of CAC has in this case.

DECISION

32. In consequence of what we have just considered, what is before us is the lawfulness of the decision of the Ulster HC made on 13 March 2020. The Club's appeal appears to have decided on a single issue, namely the validity of the Claimant's original appeal to Antrim HC; however – in case we are wrong about that – we propose also to address the substantive merits of that appeal

33. We have explained earlier why the procedural challenge to the format of the Claimant's original appeal was not well-founded (*viz.* because Rule 7.11 did not apply to that appeal). That is a matter of interpretation of Rule and not the exercise of judgment or discretion, and consequently, the decision of Ulster HC of 13 March 2020, insofar as it turned on that procedural challenge, must be set aside, and the decision of Antrim HC to treat the Claimant's original appeal as valid must be reinstated.

34. Insofar as it may be concluded from the Rules listed in the Club's appeal against the substantive decision of Antrim HC of 16 January 2020, that Antrim HC's substantive decision was challenged, and therefore formed part of the appeal to be addressed by Ulster HC (and only not addressed because it was considered unnecessary in light of the findings on the validity of the Claimant's original appeal), we think it would be unfair to the Club (if not also to Ulster HC) not to consider that aspect.

35. The decision of Antrim HC on the substantive issue involved two components as far as we are concerned here. First, they adjudicated on the process actually adopted by the Club, and, having concluded that it was inadequate, they remitted the issue to the Club for reprocessing in a manner that would "*ensure compliance with Rule 7.3*."

36. In our view, there is no basis for overturning the first aspect of the decision of Antrim HC. In expressing that view, we are not saying that Rule 7.3 applies to discipline within a club (it does not, as we will explain below) and we are not saying that the Claimant has disproved the allegations against him (he has not). What we are saying is that the conclusion that the process adopted by the Club fell short of what was required as a matter of fair procedures was well within the range of conclusions open to Antrim HC on the evidence. Indeed, as we see it, Antrim HC could not have come to any other legitimate conclusion.

37. The idea of commencing disciplinary action by notifying the accused party that they had already been found liable for misconduct and informing them of their penalty fails any test of procedural fairness. While it was common case that there were two meetings prior to the notice being sent, it was also common case that the Claimant was not informed before either of these meetings that he was being charged with any form of misconduct carrying sanctions (and at any rate one of the meetings was an AGM, which is no proper forum for a disciplinary hearing).

38. The Club put its position starkly and honestly in its written submission to Ulster HC in the second appeal to that body, when it said "*there is nowhere within the T.O., Code of Conduct, Club Constitution or Disciplinary Handbook which directs a Club to offer a hearing*" (emphasis in original). That is true, and it is correct of the Club and the Respondents to argue (and incorrect of the Claimant to argue to the contrary) that Rule 7.3 of the Official Guide did not (at that time) apply to or govern disciplinary process within a club. As with Rule 7.11, there was nothing to incorporate Rule 7.3 into the Club Constitution as it was before 2021. Indeed, prior to 2021, the Club Constitution had no stated rules on how to conduct

disciplinary action against its members, and was left to its own devices in establishing methods to operate *ad hoc* when required (this was something of a "blind spot" amid the wholesale upgrading of the Rules in the Official Guide some years ago, thankfully now remedied).

39. Nevertheless, there is no question but that the ordinary rules of natural justice must be implied in any contractual disciplinary system. The golden rules – (i) not to be a judge in one's own case and (ii) to hear both sides – do not need to be stated to be applicable: they are implied in any disciplinary regime and they apply to discipline within a club.

40. Prior to 2007, the Rules of the Association in relation to discipline (though never as cursory as in Club Constitution) were somewhat less developed than they are now, and units of the Associations faced some of the difficulties that clubs continued to face in operating Rule 5.11, until 2021. In the context of those previous rules, Mr Justice McMahon (then a Circuit Court Judge) in *Barry and Rogers v Ginnity* (Unreported, Circuit Court (McMahon J), 13 April 2005) made a number of observations that bear repeating in any case of this type. On the standards to be demanded of officials discharging their duty, the overall context must not be forgotten:

> "*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."

41. However, that did not mean the fundamental principles of natural justice were to be ignored. Ultimately, a robust form of natural justice sufficed, commensurate with the circumstances of the case and the seriousness of the consequences:

> "*The truth is that the law will demand a level of fair procedure which is sufficient in all circumstances to ensure justice for the player or member affected by the decision. The more serious the consequences the higher the standard that will be required*."

42. In the present case, serious allegations of misconduct had been made against the Claimant. As identified in the notice sent to him and further amplified in the papers furnished to us, these allegations are concerned with club finances and go well beyond the type of wrongdoing that ordinarily troubles disciplinary committees within the Association. So, insofar as the Club believed those allegations to be well-founded, the serious penalties imposed on the Claimant are not at all surprising. However, that in itself underlines the importance of that second golden rule of fair procedure: the obligation to hear both sides. In a case like this it means that Claimant should have been told in advance what he was being accused of; he should have been told that he was in a disciplinary process (i.e. that what he was accused of was a breach of the Club Constitution with sanctions); he should have been heard in his defence; and he should have been given have a fair opportunity to assemble such evidence as he might be able to procure to substantiate his defence. The deficiencies in the Club Constitution (thankfully now remedied) do not mean that those requirements are excluded, although it was perhaps foreseeable that the Association's failure to upgrade

these rules might result in an assumption by clubs that discipline could be administered in as summary a manner as occurred here.

CONCLUSION AND DETERMINATION

43. In view of the foregoing, it is clear to us that the decision of Ulster HC must be set aside. It would be open to us to remit the matter to Ulster HC for re-determination but we consider that that would be a disservice to all concerned, as it is clear that only one conclusion could be lawfully be reached on the decision before it, namely that the Club's original appeal was valid in form and unanswerable in substance. Indeed, it is clear that only one conclusion could lawfully have been reached by Antrim HC. The only misapplication of rule by Antrim HC was in suggesting that the Club was obliged to adhere to the provisions of Rule 7.3 in re-processing the disciplinary action: that is not the case.

44. Consequently, rather than to remit the matter to either Ulster HC or Antrim HC, we propose to substitute for the decision of Antrim HC a direction that the matter be remitted to the Club for re-processing, but without the stipulation that it adhere to the requirements of Rule 7.3.

45. We are conscious of the fact that the Club Constitution as it was at the commencement of the disciplinary action was grossly deficient as a source of guidance for what procedures are required, and that they essentially left clubs to their own devices in setting up an *ad hoc* process in every case, with all the traps and pitfalls that might exist in the absence of professional assistance. The guidelines given by Mr Justice McMahon in the *Barry and Rogers* case may assist, but it would make more sense for the parties to formally agree in advance to either (a) apply the procedures in Rule 7.3 by analogy with the universal requirements of due process, or (b) to apply the new provisions of Section 5.11.1 of the Club Constitution as amended in March 2021

46. If agreement cannot be reached, it is for the Club to determine what procedure to adopt, in which case, provided the golden rules of fair procedures are respected, even a "*robust process*" will suffice.

47. Impartiality in the decision-making committee is going to be difficult in a case like this. Under the regime that was in place until 2021 (which will govern this remitted process in default of agreement otherwise), a club simply had to do the best it can to ensure that members of its management committee who were witnesses or who had taken positions on the matter would not take part in the decision-making process. The Claimant and Club can agree that independent persons (perhaps nominated by the County Committee) be co-opted to the Management Committee for the purpose of the process, but in the absence of co-operation in that regard, the Club's officers must simply do their best: if a quorum of the Executive Committee cannot be assembled from persons who are considered independent, then what is called a bias of necessity arises, and a quorum must be assembled from those least affected by questions of impartiality and they must endeavour to be even-handed.

COSTS AND EXPENSES

48. The Tribunal requires further submissions on the difficult questions relating to the costs and expenses of this arbitration. It is clear that, while the Claimant has ultimately prevailed, his success has been in spite of his failure on many occasions to make the arguments on which he ultimately succeeded, and it will not require much to dislodge the general presumption that costs follow the event.

49. A supplemental decision will be made when the parties' submissions have been received and considered.

Date of Hearing: 3rd June 2021

Date of Agreed Award: 18th June 2021

By email agreement on agreed date above.

Micheal O'Connell SC

Eamonn Denieffe

Con Hogan