IN SEARCH OF AN ASSOCIATIONS DEFINITION: *City of Gosnells v Roberts* (1994) 12 WAR 437

INTRODUCTION

City of Gosnells v Roberts is not a complex decision. It is primarily concerned with compensating victims of an unfortunate road accident. Their path to recovery was complicated by the possible involvement of the Gosnells Polocrosse Club, an unincorporated non-profit association, in the incident. Much of the extended time spent in hearing and determining the action and appeal was devoted to consideration whether this 'association' existed and, if so, the extent, if any, to which it could be 'recognised' and was, through its officers or members, responsible for the accident. This note focuses upon the difficulties faced by courts in seeking to impose liability on a legal non-entity.

FACTS

In 1974 the City of Gosnells agreed to lease land to the Polocrosse Club for a term of five years with a right of renewal. When the City's solicitors discovered that the Club was not incorporated, they arranged that two office bearers, Dixey and Duncan, should execute the lease and take personal responsibility for the performance of the lessee's covenants. In January 1980 and, again, in March 1983, the City decided that a renewal could be effected without execution of a formal document. It relied upon continued occupation of the property by the Club and an exchange of correspondence with the Club. That correspondence did not extend to obtaining acceptance of the renewals by Dixey and Duncan.

At the annual general meeting of members held on 9 August 1983 a motion that '[n]o horse is to be left on the grounds during polocrosse season and only playing horses to be on the grounds during the off-season' was passed. In 1984 a horse, which had been placed in the inadequately fenced field, walked through the fence and strayed on to a nearby road where it collided with a motorcycle. The horse was killed and both motorcyclist and pillion passenger were seriously injured.

The injured parties brought an action against the owner of the horse, the City of Gosnells, which owned the adjoining land, and past and present office bearers of the Gosnells Polocrosse Club.

THE DECISION

After a ten day hearing in the District Court, his Honour Judge Keall found that the owner of the horse, the landowner and the office bearers of the Club at the time of the accident were all liable in negligence. Judgment was also entered against the current office bearers of the Club to the extent of the assets of the Club in their possession. The defendants, except current office bearers, appealed. The Full Court of the Supreme Court of Western Australia allowed the appeal with regard to club officers, past and present. In the course of releasing club officers from liability, the Full Court had to consider the status of the association, its ability to hold property and the extent to which officers are bound by members' resolutions.

Association Property

When claims were made against the City, it admitted that it was the owner of the property but based its defence upon the lease. It claimed that the lessees in occupation of the property had the obligation to erect and maintain appropriate fencing and, following Lord Kenyon in *Cheetham v Hampson*,[1] argued that it owed the plaintiffs no duty to supervise the Club's performance of this obligation.

Whatever the position with the original agreement, the renewal arrangement between the City and the Club could not be a valid lease as it purported to be made with an unincorporated association.[2] The District Court found that, following the renewal, club members had a licence to occupy the property for association purposes. Bereft of the 'exclusive occupation in others' defence, the City was found liable in negligence for permitting club members to occupy the ground and to depasture horses there without adequate fencing.

On appeal the City found no support for its defence. The judgment against club officers was challenged, first, on the ground that no club existed. Anderson J, dissenting, opined:

> The 'club' had no constitution and no rules. It did not therefore have the essential characteristic of an unincorporated association, i.e., a composite body of persons in 'a legal relationship ... giving rise to joint rights and obligations or mutual rights and duties': see *Re Commonwealth Homes and Investment Co Ltd* [1943] SASR 211 at 228, per Mayo J.[3]

In contrast Pidgeon J, who gave the leading judgment for the majority, considered:

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1 (1791) 4 Term Rep 318, 319; 100 ER 1041, 1042.

2 *Freeman v McManus* [1958] VR 15.

3 (1994) 12 WAR 437, 448.

> [T]he proper conclusion . . is that the body did exist as an unincorporated association. The evidence showed the existence of a group of persons carrying on an activity under the name of the Gosnells Polocrosse Club It had a bank account and it held meetings and the activities it pursued were determined at those meetings . The common law relating to the conduct of meetings would apply in respect of these meetings and the moneys in the bank account would be held in trust to carry on the activity of the club as determined by these meetings Any liability which such group would have towards other persons would not be extinguished merely because it did not have a written constitution [4]

Rowland J implicitly accepted these propositions when, in the course of ruling on officers' liability, he remarked:

> The Gosnells Polocrosse Club had no written constitution or any clearly defined rules Those who had joined together and enjoyed this collegiate relationship had organised their affairs to the extent that, apparently each year, they had a meeting to elect officers with authority to open a bank account and obvious authority to organise the playing of polocrosse on the land which the shire had permitted them to occupy [5]

This relaxed view of association requirements draws some support from the 'definition' in the joint judgment of Rich, Dixon, Evatt and McTiernan JJ in *Cameron v Hogan*[6] that:

> [voluntary associations] are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage

On the other hand, the more rigid dissenting view of Anderson J replicates the English view, propounded in *Conservative Central Office v Burrell*,[7] where, in the course of determining whether the Conservative Party was liable to pay tax on its investment income under s 526(5) of the *Income and Corporate Tax Act 1970* (UK), Lawton LJ declared:

> by unincorporated association in this context parliament meant two or more persons bound together for one or more common purposes not being business purposes by mutual undertakings, each having mutual duties and obligations in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will [8]

The majority decision supports the view that any persons who associate together to pursue some lawful non-profit oriented activity are within

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4 Ibid 443
5 Ibid 444
6 (1934) 61 CLR 358, 370-1
7 [1982] 2 All ER 1
8 Ibid 4.

the purview of the body of law developed to regulate unincorporated non-profit associations, whereas adoption of the more specific English definition would have had the effect of dividing associations into those governed by this body of law and a range of more casually constituted bodies whose officers and members being unrecognised as associates would be regulated by the ordinary rules applicable to joint proprietors, joint contractors and joint tortfeasors.

Extent of Committee Liability

While Anderson J discounted any committee liability on the basis that the persons who sometimes behaved like the executive body of a club, 'had no power and no authority derived from any constitution or rules ... [and] had no capacity to deal with others except in their own right and for themselves as individuals;'[9] the majority had to face up to the consequences of their election.

The trial judge ruled that permission for members to agist their polo ponies on the grounds during the off-season made the officers of the Club in 1984 liable for any damages incurred as a consequence of this policy being implemented while the grounds were not adequately fenced and rendered the present officers of the Club liable, to the extent of club funds, for payment of those damages.

Neither of the majority judges adopted this line of reasoning. Pidgeon J recognised that the committee was authorised to spend association funds in connection with the playing of polocrosse:

> If, therefore, in the playing of this game a user of the highway was injured as a result of negligence, then it could be argued that the principles referred to by Herron CJ [in *Smith v Yarnold* [1969] 2 NSWR 410 at 415; 90 WN (Pt 1)(NSW) 316 at 323] would apply on the basis that if committee members were not liable then the person injured by the negligence may well be without a remedy [10]

However, that principle did not have to be invoked where the club had permitted individual members to agist their horses at their own risk. Rowland J, who devoted his judgment to the liability of committee members, supported this approach. He recognised that associations can incur liability in the performance of their functions and that liability will be borne by association officers. However that liability is limited to a collegiate activity or object necessarily part of the activities normally engaged in by members and there was 'nothing in logic, or policy, or law, which would impose any contractual or tortious obligation on the other members, or those whom the members had elected to act on behalf of

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9 (1994) 12 WAR 437, 450

10 Ibid 443.

the members'[11] for an activity which was not an object of the collegiate group which made up the membership of the club.

While it was not material to the judgment, the judge also recognised that committee members may be entitled to indemnity for expenses incurred in carrying out the functions and objects of the association.

The decision does little to develop the law relating to unincorporated non-profit associations but the attention given to determining the definition of an association and the evidence of collegiality necessary to establish one's existence confirms that the tax-led English approach to definition has not been accepted in Australia and will not cause an artificial division in law between formally constituted associations and less self-assertive groups.

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11 *Ibid 445*