

The Legality of Social Clubs' Disciplinary Procedures

STEPHEN C. MILLER

Introduction

From time to time the worlds of leisure and law collide with unhappy consequences. We live in litigious times and, as a result, when the leisure, sport or social club member discovers that he faces discipline and perhaps expulsion from his club for a misdemeanour, he may be tempted to go to law in order to preserve his position. For that reason, the club's management body will need to know the extent to which the court will interfere in its disciplinary and decision-making process. The purpose of this short piece is to outline some of the legal issues a management body would need to be aware of should that eventuality arise.

Reflections on *Lee v. Showmen's Guild*

It may be surprising for the contemporary reader to realise that, when Lord Denning wrote his leading judgment as a Member of the Court of Appeal bench in the seminal case of *Lee v. Showmen's Guild of Great Britain* [1952] 1 All ER 1175, he was settling what was then a controversial area. Up to that point, many learned judges had balked at the prospect of interfering with the disciplinary processes within clubs and the like, considering themselves permitted only to interfere in disputes to protect rights of property (*Rigby v. Connol* [1880] 14 Ch 487; *Cookson v. Harwood* [1932] 2 KB 481). As a consequence, until *Lee*, the degree with which a club's internal disciplinary processes and proceedings might be scrutinised by the court was not at all clear; and *Lee's* livelihood depended on the court being willing to intervene.

Lee had ceased to be a member of the Showmen's Guild following disciplinary procedures taken against him after he squabbled with another member about the prime site at a fairground in Bradford in the late 1940s. The Guild was then a Society of Showmen and a registered trade union formed exclusively to protect the rights and interests of Showmen visiting fairs and show grounds. *Lee* found himself unable to pursue his chosen

Stephen C. Miller is a Partner with MacRoberts Solicitors, Glasgow.

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trade. As a result, Lord Denning was primarily concerned to consider the disciplinary processes of the Guild in the light of the deprivation of Lee's livelihood. In arriving at his conclusion that the Guild had acted *ultra vires*, Lord Denning paused to consider the position in respect of social clubs.

Denning contrasted the position of social clubs with the situation applied in respect of those domestic tribunals that sit in judgment on the members of a trade or profession. He ruled that the court will not treat those domestic tribunals as being on the same footing as a social club. The courts did not have to be bashful or overly respectful in seeking to establish whether or not fair play was done.

But something short of that standard has to apply to social clubs (expulsion from which will have no immediate bearing on the ex-member's livelihood), the committees of which must be accorded a margin of appreciation, as the modern administrative lawyer might put it.

That Denning had this conflict in mind is evident from the following passage:

in the case of Social Clubs the rules usually empower the Committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club and this is a matter of opinion and nothing else. The Courts have no wish to sit on appeal from their decisions in such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules, but will not otherwise interfere.¹

To that extent, Lord Denning was approving the language used in *Labouchere v. Earl of Wharncliffe* [1879] ChD 346. Here, it was stated by Lord Jessel M.R. that 'if, having given the accused fair notice, and made due enquiry, the Committee came to the conclusion that the conduct of one of the members of club was injurious to its welfare and interests, no judicial Tribunal could interfere with any consequences which might arise from an Opinion thus fairly formed'.

These fine words have to be given a modern context. Membership of clubs is no less popular now than in the late nineteenth century, when there was a rash of litigation involving expulsion from gentlemen's clubs (as in the *Labouchere* case). It just so happens that today various social clubs tend to concentrate on sporting rather than purely social interests. Considerable status can attach to membership of certain clubs.

Accordingly, it will undoubtedly fall to a court to consider shortly how

far, if at all, these settled common law principles have to be revisited in the light of the Human Rights Act 1998, and in particular the terms of Article 6(1) of the European Convention on Human Rights, which provides that, 'in the determination of his civil rights and obligations or of any criminal charge against him [the subject] is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Article 6 then provides further rights specifically for those facing criminal charges. While it might well be tempting for social clubs to argue that the Human Rights Act does not directly apply to their processes because of the essentially private nature of the relationship between member and club, the application of the Act in practice is bound to influence the development of the applicable provisions of natural justice.

Recent Developments: *ex parte Fleurose*

In the Court of Appeal decision *R v. Securities and Futures Authority Limited and another ex-parte Fleurose* [2002] IRLR 297, there is an analysis of the processes adopted by the Securities and Futures Authority Disciplinary Appeal Tribunal when it suspended the financial trader Fleurose from registration for two years and made a significant costs order against him. Fleurose's employer, JP Morgan Securities Limited (JPM) found itself contractually obliged to pay £475,000 if the FTSE index ended the month of November 1997 higher than at the start of the same month.

In the event, the obligation did not crystallise thanks to a sudden and mysterious fall in the index during the last six seconds of that month's trading. After an investigation, the London Stock Exchange (LSE) concluded that the sudden fall of the index stemmed from substantial sales by JPM during the last ten minutes of trading (as one reads of these events in the case report, the image in the mind's eye is of an opponent's curling stone being frantically brushed out of the house). The problem for Fleurose and JPM was that this type of intervention is banned by the Rules of the LSE. Those rules prohibit member firms from doing acts or engaging in a course of conduct the sole intention of which is to move the index value. JPM was fined £350,000 by the LSE. Fleurose, who came within the jurisdiction of the Securities and Futures Authority Limited, faced serious disciplinary charges.

Fleurose failed in his attempt to invoke the additional 'criminal court' protections available in Article 6(ii) and 6(iii) of the Convention, such as the presumption of innocence, the right to be informed of the detail of charges and the right to legal representation in view of the quasi-criminal nature of the charges against him. In resolving in favour of the Securities and Futures Authority, the Court made it clear that the issue of whether or not a hearing is fair is a question which should be considered in the round, having regard

to all relevant factors. It does seem, therefore, that even if the Human Rights Act were to apply to social and sporting clubs, Lord Denning's forceful but *obiter* comments in the *Lee* case will still stand to guide the hand of committees forced to consider expelling misbehaving members.

It should also be pointed out that lawyers called to assist the members being disciplined may still find themselves forbidden from entering the committee room in defence of the member. One consequence of the court's finding in *ex parte Fleurose* was clarification of the fact that the right to legal representation is only available when answering genuine criminal charges (*Han and Yau v. Commissioners of Customs and Excise* [2001] EWCA Civ 1048). To that extent the line of authorities making it clear that no party in disciplinary proceedings has an inalienable right to legal representation stands firm. That line depends on the judgment in *Enderby Town v. Football Association* [1971] Ch 591 which provides a closing irony because one dissenting judge in 1971 sought to prevent the type of blanket ban on legal representation as existed at that time within the Football Association Rule Book. The judge? One Lord Denning.

Concluding Thoughts

It is said that Lord Denning was always right with his judgments, but that it sometimes takes time for the rest of us to realise it. It is tempting to speculate that, if he had had an occasion to review his *obiter* comments in *Lee* in the light of Article 6 of the European Convention of Human Rights, he might well have identified the importance of legal representation for the member being disciplined. As more and more clubs voluntarily allow their members the right of legal representation so the standards of fairness in disciplinary practice will improve to the point where it may be impossible for the court to continue to deny legal representation. Certainly, to deny legal representation on the basis that the court is unable to identify a legal argument which could have been expressed by a trained lawyer (as was argued in *ex parte Fleurose*) seems a precarious balance to strike.

Until the law becomes clearer, club members would do well to acquaint themselves with those of their fellow club members who happen to be legally qualified and treat them particularly nicely, because no club is permitted to deny a member the right to be accompanied by a fellow club member in the disciplinary process. As a result, there may well be a role for the Garrick room lawyer to play ...

NOTE

1. *Lee v. Showmen's Guild* [1952] 1 All ER 1175 at 1181.