

THE HIGH COURT

[2021] IEHC 679

RECORD NO. 2017/4157P

BETWEEN

MARK MCGROARTY

PLAINTIFF

AND

**DIARMUID KILCULLEN, STEPHEN MCCORMACK CARE OF COBH GOLF CLUB, MIMI
STACK CARE OF COBH GOLF CLUB, CHRISTOPHER STACK CARE OF COBH GOLF CLUB
AND TONY MCKEOWN**

DEFENDANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 28 October 2021

Summary

1. On 5 June 2015, the plaintiff, a scratch golfer, lost his left index finger while assisting with building works at Cobh Golf Club (the "club"), due to negligence on the part of the defendants. The defendants, all trustees of the club save for the fifth defendant, owed a duty of care to the plaintiff and their negligence caused the plaintiff's injury. However, there is a significant dispute about liability in circumstances where the accident took place on the premises of a golf club. The defendants allege the plaintiff was a member of the club and as such cannot sue the other members of the golf club (represented by the first to fourth defendants).
2. The plaintiff argues that he was not a member at the time of the accident due to his subscription not having been paid up at the time prescribed by the constitution of the club and, as such, is entitled to recover as against the defendants.
3. I have concluded that the constitution of the club, properly interpreted, requires that a member's subscription is to be paid by 31 January each year, failing which membership shall be deemed to be terminated. It is true that the practice of the club was to ignore this rule and to treat persons, including the plaintiff, as members even where the subscription had not been paid. Indeed, in this case, the plaintiff entered club competitions and represented the club on teams playing interclub tournaments, although he had paid only a small part of his subscription by 31 January 2015.
4. However, following the decision in *Dunne & Ors v Mahon & O'Connor* [2014] IESC 24, the rules of clubs cannot be taken to be altered by implication, including by the practice of a club, in circumstances where those rules represent a contract between all of the members and where the members commit their efforts and resources to the club on the basis of the rules as they exist at the time of joinder.
5. The club's acceptance of a payment by the plaintiff (such payment being less than the subscription amount) after the termination date does not alter the situation. There was no evidence that the club had reinstated the plaintiff after his membership was terminated, or that this payment was a reinstatement payment. Nor was there any evidence of a waiver by the club of its requirements in relation to payment of the subscription.
6. Accordingly, I find the plaintiff was not a member of the club at the relevant date and is therefore entitled to recover as against the defendants.

Pleadings

7. The personal injuries summons delivered on 29 May 2017 sets out the plaintiff's claim for damages for negligence, breach of duty, breach of statutory duty and/or breach of contract. Particulars delivered on behalf of the plaintiff plead, *inter alia*, that the defendants failed to provide a safe place and system of work, that they failed to adequately assess the risks involved, act on them or warn the plaintiff about them and that they unnecessarily exposed him to those risks. Failures are pleaded in relation to the number, competence and supervision of staff, as well as failures to comply with the Safety, Health and Welfare at Work Acts 1989 and 2005 and the Occupiers' Liability Act 1995.
8. The particulars of the claim against the fifth defendant reproduce many of the pleas as against the first to fourth defendants. In addition, it is pleaded that that the fifth defendant failed to use proper equipment such as a workbench while cutting the timber and he caused or permitted a circular saw (an electrically powered saw) to come into contact with the plaintiff's hand.
9. On 18 July 2017 the solicitor for the first to fourth defendants issued a notice for particulars. In the replies to those particulars of 7 February 2018, the solicitors for the plaintiff identified, *inter alia*, that under the terms of the club's constitution, the plaintiff was not a member as of 31 January 2015, but that he had previously been so since 2010. However, it is pleaded that his subscription was not fully paid on the date of the incident.
10. It was also claimed that, should the plaintiff be deemed a member of the club, then a member to member contract would arise as per the decision in *Dunne*, the terms of which would entitle the plaintiff to compensation in the circumstances of the case.
11. On 9 May 2018, solicitors for the fifth defendant delivered their defence, pleading, *inter alia*, that the plaintiff was acting voluntarily in tandem with the fifth defendant, the works having been organised by Mr. Nigel Britton in his capacity as club captain. Additionally, they plead contributory negligence on the part of the plaintiff.
12. This was followed by the defence of the first to fourth defendants on 18 May 2018. The first to fourth defendants contended by way of a preliminary objection that the plaintiff was a member of the club, being an unincorporated association, and as such was restrained from effectively suing himself. In addition, it was argued that as a member he was himself responsible for ensuring safe and proper work practices. The plea in respect of the member to member contract was denied in its entirety. It was further pleaded that any personal injury was caused by the fifth defendant and/or the contributory negligence of the plaintiff. However, at the hearing of the action, it was accepted that the conduct of the plaintiff could not be described as reckless and as such there was no contributory negligence.
13. The plaintiff delivered a reply of 2 July 2019 which was largely a traverse of the various pleas in the defences.

Facts and Evidence

14. On 5 June 2015 the plaintiff was present at the club, assisting the fifth defendant in the carrying out of building works, specifically, the timber cladding of the outside of the golf pro shop. Both the plaintiff and the fifth defendant were carrying out the said works in a voluntary capacity to benefit the club and were not being paid. They commenced the works on 1 June 2015.
15. The fifth defendant was a qualified carpenter. The plaintiff did not have any training or expertise in the work which was being carried out and was present simply to provide general assistance to the fifth defendant with unskilled tasks such as lifting and moving objects. The plaintiff had been asked to volunteer for the said work by Mr. Nigel Britton, club captain. Mr. Britton had contacted the plaintiff, by telephone, on 31 May 2015, and informed him that the individual who was meant to be available (who he understood to be Mr. McKeown's worker) was not available and enquired whether he, the plaintiff, would assist the fifth defendant. That evening, the plaintiff received a subsequent phone call to confirm he would not be required, but on the morning of 1 June 2015 he was contacted by Mr. Britton by text and was asked to attend, and he did.
16. On the morning of 5 June 2015, the plaintiff was told by the fifth defendant to hold a long plank of timber balanced on a single milk crate, while the fifth defendant cut the timber with a circular electric saw. The plaintiff was holding the timber when the fifth defendant lost control of the saw, which made contact with the plaintiff's left hand. The plaintiff suffered severe injuries to his left hand resulting in his left index finger being partially severed, as well as severing the extensor tendon of his middle finger. He was airlifted by helicopter to Cork University Hospital where he underwent an operation to amputate his left index finger.
17. Mr. Philip Doherty, B.E., expert engineer on behalf of the plaintiff and Michael Byrne B.E., expert engineer on behalf of the fifth defendant gave evidence. Both engineers agreed that the fifth defendant was negligent in the manner with which he attempted to cut the piece of timber in question. In particular, it was agreed that the fifth defendant should have secured the piece of timber by way of a clamp, or otherwise, and not with a human hand. In addition, it was agreed that the use of a milk crate as a support structure was unsafe in all the circumstances. It was also agreed that, due to the plaintiff's lack of expertise and training, he should not have been in such close proximity to the electric saw.
18. In relation to the liability of the club, the engineers agreed that it was negligent and in breach of its statutory obligations as set out in sections 15 and 17 of the Safety, Health and Welfare at Work Act 2005, as well as the Safety, Health and Welfare at Work (Construction) Regulations 2013. It was agreed that there were a number of other construction projects on the club premises at the same time as the works the plaintiff and fifth defendant were engaged in, and that there should have been a suitable person appointed to supervise the manner in which the entire construction site was being operated. Evidence was given that if such a person had been appointed, the plaintiff would not have been allowed on the site as he was unqualified, and, in particular, did not

hold a safe pass for construction works. (Safe pass cards are required by persons working on construction sites. They establish that the worker has completed a safety awareness training programme that aims to allow persons to work on construction sites without being a risk to themselves or others). Evidence was also given that, if the plaintiff and the fifth defendant had been observed carrying out the cutting of the timber in the manner which caused the accident, the work would have been stopped immediately.

19. In relation to the plaintiff's membership of the club, the evidence was uncontroversial in relation to the payment of his subscription. The membership year runs from 1 October to 30 September. The plaintiff had initially joined in October 2009 and had paid both his joining fee and his annual subscription fee over a number of years by way of direct debit spread over the membership year. By October 2012 he had paid off his joining fee and he set up a direct debit for his subscription fee. He continued that practice for the membership year October 2013 to September 2014 and paid off his subscription fee for that year by August 2014.
20. However, because of lack of funds, he cancelled his direct debit and no direct debit payments were made from September 2014 onwards. He made a cash payment in January 2015 of €140 and a further cash payment in April 2015 of €150. However, that meant that on the relevant date of 31 January, by which time his payment for the year 2014/2015 was due under the relevant club rule (rule 3.4.2 (e)), he had only paid €140 whereas in the previous year his subscription was €869. He had therefore only paid a small proportion of his subscription on 31 January 2015.
21. In cross examination, the plaintiff gave evidence that he had played (and won) a competition known as the Captain's Prize on 31 May 2015, some 5 days before the accident, being a competition reserved to members, that he held a handicap authorised by the Golfing Union of Ireland through his membership of the golf club and that he participated in competitions in 2014 as against other clubs, including one known as the Barton Shield. He had always paid his fees by instalment. He never considered he was not a member of the club due to a failure to pay his subscription by 31 January.
22. Mr. Des McKee, the current treasurer and former president of the club, who was also a founding member of the club, gave evidence on behalf of the club. Mr. McKee accepted that that the golf season ran from 1 October to 30 September in any given year and that the version of the constitution of the club in effect at the time of the accident required subscriptions to be paid by 31 January each year.
23. Mr. McKee's evidence was that a lax view was taken of payment of membership subscriptions. Payment by instalment was permitted. Delays in payment were generally accepted on the basis that a full discharge would ultimately be made of the subscription due in that subscription year. Members were also allowed to pay by lump sum.
24. Mr. McKee accepted that for the year 2014/15, the plaintiff had not paid his annual subscription by 31 January 2015. Mr. McKee stated that this rule was not strictly enforced by the club, and that a number of other individuals in the club would have been in breach

of this rule. He gave evidence that a member had never had their membership terminated for not paying their subscription.

25. Mr. McKee gave the following evidence on cross examination:

"Q. So he fell into the category whereby on the 31st he wasn't fully paid up. You ignored the rule. He then had, like the others, the influx of fees. He didn't have an influx. He only paid 150, 150 at that stage, yes.

A. Yes, in April, yes.

Q. Okay. So as I say, you had effectively two, you'd the rules according to the constitution and you'd what was operating on the ground. It seems that you didn't even, you didn't even – not only was the system of payment different, people weren't even deemed terminated or their membership wasn't even deemed terminated. Even that didn't happen. You just turned a blind eye.

A. I'll repeat again, I'm not aware of anybody's membership being constituted – being cancelled on the list February any year."

Case Law on Implications of Club Membership for a Plaintiff

26. It is well established that a club is, as a matter of law, an unincorporated association.

Various consequences flow from this, one of which is that the club *per se* is not a legal entity and therefore cannot be sued in its own name. The difficulty that this presents is circumvented by plaintiffs generally suing the trustees of a club or the office holders of the club, such as the president, secretary, treasurer and so on, who act effectively as nominees on behalf of the body of members. Although it appears from the pleadings that only the identified defendants are being sued, in fact the legal theory underlying such proceedings is that all the members of the club are sued and the office holders or trustees are being identified as a proxy or nominee for all club members.

27. It is clear from the personal injuries summons that the first to fourth defendants of the club are sued on behalf of all persons who are full members of the golf club as of 5 June 2015.

28. In response, the first to fourth defendants plead that they were at all material times the owners and/or occupiers of the club. That it is accepted that the plaintiff, by suing the first to fourth defendants, was in fact suing all members of the club is confirmed by the preliminary objection identified in the defence, which refers to the plaintiff being estopped from suing the first, second, third and fourth defendants *"who are sued on their own behalf and on behalf of all persons who are full members of the Cobh Golf Club, where the Plaintiff was himself a full member of that club at the material time in question and in the premises, the within proceedings against the First, Second, Third and Fourth Named Defendants, being an unincorporated association, amount to a suit by the Plaintiff against himself..."*

29. This plea is unsurprising, given the well-established line of case law that a member of a club cannot sue his or her fellow members. This principle was identified in *Murphy v Roche* [1987] 5 JIC 1504 at para 17 as follows:

"By reason of the legal identification of the Plaintiff with the Defendants by virtue of their mutual membership of the Club the Plaintiff cannot maintain the present proceedings against the members of their Club or these particular members being the Defendants as trustees"

30. In other words, because a club has no separate legal identity from that of its members, a member suing the club by means of an action against the club's trustees or committee members as representatives of the members is in law suing herself.
31. In that case, the club was a GAA club – Wolfe Tone Na Sionna – in Shannon, Co. Clare and it was alleged that the plaintiff had suffered injuries at a dance organised by the club following a fall. His action could not be maintained because he was a member of the club. The position was not altered by the fact that he had paid a fee for admission to the dance.
32. That approach was followed in *Kirwan v Mackey* [1995] 1 JIC 1801, a case involving the accidental shooting of a member of a gun club by another member of the gun club, where Carney J. followed *Murphy v Roche* and held that the proceedings were not maintainable against the officers, committee and trustees of the club.
33. In *Walsh v Butler* [1997] IEHC 9, a case heavily relied upon by the plaintiff, the defendant argued that the plaintiff was not entitled to seek recovery on the basis that he was a member of Bandon rugby football club. The plaintiff alleged that he had been injured while playing rugby for the club. The club had no constitution or rules until 1979. In 1979 rules were adopted. Those rules provided members were to be elected and that, as team members, they were required to pay an annual subscription. In the year 1989/90 the plaintiff took over as team captain of the first team. He had paid his subscription in the year 1988/89. There was no evidence that he paid for the year 1989/90. The accident happened in spring 1990.
34. The plaintiff argued that the procedure provided for in the rules for the election of members was never employed in his case and therefore, although everyone concerned regarded him as a member of the club, he was not in the legal sense a member of the club. He further argued that even if he was a member of the club up to 1988/89, since there was no evidence he paid his subscription, at the time he received his injury he was no longer a member of the club as his membership had lapsed in accordance with the rules.
35. The defendants argued that the plaintiff was estopped by his own conduct from making the point he was not a member of the club as he had held himself out to be such a member. It was further argued it was within the capacity of all members of the club to agree to accept a member into the club without the necessity for following the formal procedure provided for by the rules.

36. Morris J. considered whether, by participating in the full activities of the club, the plaintiff acquired membership of the club but concluded that he did not and could not because of the terms of the relevant rule, being rule 9. This clearly stated that all members, including juvenile members, had to be elected by the general committee and this was the only route by which a person could join the club.
37. Further, he noted that even if payment of the plaintiff's subscription could have been construed as rendering him a member of the club, his failure to pay after that date meant that in accordance with rule 8 his membership lapsed. Accordingly, he concluded that if the plaintiff had ever been a member of the club, he was not a member on the date of the accident.
38. As noted by the plaintiff, the facts in Walsh are remarkably similar to those in the instant case in relation to the question of payment of the subscription.

Was the Plaintiff a Member of the Club on the Date of the Accident?

39. The plaintiff argues that he was not a member of the club by reason of the non-payment of his subscription by 31 January, which triggered an automatic termination of his membership under the club constitution. The defendants argue he was a member and make three alternative arguments in this respect – that the constitution, correctly interpreted, does not require the payment of the subscription by 31 January; that if it does, then that rule was altered by the practice in the club; or if it was not so altered, that the club had waived the requirement for payment by 31 January in the relevant year.

Interpretation of the Constitution

40. The rules of the club consist of a constitution and rules and bye laws. Rule 3.4.2 (a) provides that all categories of members (except for categories not relevant to the plaintiff's situation) shall be required to pay an annual subscription.
41. Rule 3.4.2 (e) is critical in this case. With original emphasis, it provides;

*"Any member whose subscription **shall be unpaid on 31st January** shall not be entitled to use the facilities of the Club, Their membership shall be deemed to be terminated and their name shall be removed from the list of members of the Club."*
42. The plaintiff argues that the effect of the rule is automatic, and no steps are required to be taken by the defendants to remove a member. Accordingly, he says that he was not a member of the club on the date of the accident.
43. On the other hand, the defendants argue that that the rules of the constitution on subscriptions are inconsistent and that, properly interpreted, the rules do not treat a member as terminated on 31 January if the subscription is not paid up but only identify certain consequences of non-payment that stop short of loss of membership.
44. First, relying on rule 3.4.1 (e), they posit that a member is entitled to pay by instalments. Rule 3.4.1 (e) may be found under rule 3.4, entitled "*Subscriptions, Levies and Admissions*", and provides as follows:

"Any member who, with the agreement of the Management Committee, is paying both their joining fee and yearly subscription by instalments over several years shall be entitled to take part in Club Competitions and to represent the Club in interclub matches. They may attend, vote and stand for election at the Men's and ladies Clubs Annual General Meetings and Extraordinary General Meetings of those Clubs only."

45. The defendants note that there is no definition of "subscription" and that rule 3.4.1 (e) may, on one reading, permit payment to be made by instalments and in such case the plaintiff would be compliant with the subscription rules, given his payments in January and April of 2015.
46. That interpretation ignores two salient facts. The reference in 3.4.1 (e) to *"paying both their joining fee and yearly subscription fee by instalments over several years"* and the qualified rights that attend upon persons availing of this payment scheme, i.e. attending, voting and standing for election at certain types of meetings only, strongly suggest that this provision is intended to cater for the time period while a person is paying off their joining fee and instalments together. If the rule was intended to cater for payment by instalment either for the joining fee and yearly subscription fee, or for the yearly subscription alone, it is hard to see why rights would be qualified in this way. Moreover, the word "both" suggests that the rule is intended to cater for the situation where the joining fee and instalments are simultaneously being paid off. It is true that there is an implication in rule 3.4.1 (e) that it may be permissible to pay by instalment simpliciter, but this is not provided for by rule 3.4.1 (e) and nor is it provided for in any other part of the constitution.
47. Further, to interpret the rule in the way contended for by the defendant would be to ignore rule 3.4.2 (e) discussed below, which makes it clear that membership shall be deemed to be terminated if a member's subscription is unpaid on 31 January. The terms of that rule are so clear and unambiguous that, even if I interpreted the constitution as permitting payment by instalments, it seems to me that the final payment would require to be made before 31 January. In saying this I am fully conscious that the club year goes from 1 October to 30 September; but in my view the controlling words of rule 3.4.2 (e) would not leave it open to permit a member to pay in instalments after 31 January.
48. Next, the defendants argue there is an inconsistency between rules 3.4.2 (d) and 3.4.2 (e), in that sub rule (d) and parts of sub rule (e) do not suggest that non-payment of subscription by 31 January disentitles a person to membership, identifying instead other, less draconian, consequences of failure to pay.
49. Rule 3.4.2 (d) provides:

"Any member whose subscription shall be unpaid on 31st January shall not be entitled to enter Club Competitions or represent the Club on any team playing inter-club tournaments until such a payment is made."

50. It is true that sub rule (d) restricts a member from entering club competitions or representing the club on any team playing inter-club tournaments until payment is made, and sub rule (e) restricts a person whose subscription shall be unpaid on 31 January from using the facilities of the club. If sub rule (e) stopped at that point, it would be quite logical to construe the consequences of non-payment by 31 January as being the non-participation on teams or in competitions and the withdrawal of permission to use the facilities. However, sub rule (e) goes on to state quite clearly that membership is deemed to be terminated and as identified above, these words are so unambiguous that they cannot be ignored.
51. In summary, it does not appear to me that there is any ambiguity in sub rule (e) or any inconsistency as between sub rules (d) and (e). The fact that in practice the plaintiff was permitted to enter club competitions and represent the club on teams playing interclub tournaments without having paid his subscription simply means that the club was not applying its own rules. It does not mean that the rules are themselves inconsistent.
52. In fact the rules on subscriptions reflect a coherent approach to membership fees, providing that unless a subscription is fully paid a member may not be entitled to enter competitions or represent the club, that a person with their subscription unpaid on 31 January shall not be entitled to use the facilities of the club, that their membership shall be terminated, and their name removed from the list of members.
53. The defendants have placed considerable reliance upon the dicta of Clarke J. in *Dunne*, specifically his observation at paragraph 5.5 as follows;

"5.5 ... On the other hand, there is authority for the proposition that the rules of a club should not be approached with the same degree of rigour. In In re GKN Bolts & Nuts Ltd Sports and Social Club [1982] 1 W.L.R. 774 at p. 776, Megarry V.-C. observed:

"In such cases, the court usually has to take a broad sword to the problems, and eschew an unduly meticulous examination of the rules and resolutions. I am not, of course, saying that these should be ignored; but usually there is a considerable degree of informality in the conduct of the affairs of such clubs, and I think that the courts have to be ready to allow general concepts of reasonableness, fairness and common sense to be given more than their usual weight when confronted by claims to the contrary which appear to be based on any strict interpretation and rigid application of the letter of the rules. In other words, allowance must be made for some play in the joints."

54. The first to fourth defendants also rely upon the (dissenting) judgment of Clarke J. in *Law Society of Ireland v MIBI* [2017] IESC 31 and the following dicta:

"10.4. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the

understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence.”.

55. As identified above, the wording here is crystal clear in that, if membership fees are not paid by 31 January, the subscription of a member is deemed to be terminated. The observations of Megarry V.C. are simply not applicable here. The defendants are not asking that the rule be construed in one of two or more alternative ways potentially available. Rather they are asking that I ignore the clear wording of the sub rule and construe it so that the consequence of non-payment by 31 January is not exclusion but limitation of membership privileges. Given the clarity of sub rule (e), that in my view is not an interpretation open to me irrespective of what approach to construction I take, whether narrow or liberal. Giving the words of sub rule (e) their natural and ordinary meaning cannot be characterised as a “literal” construction, as suggested by the defendants in their written submissions. It is simply acknowledging the unambiguous way in which the rule is drafted. Thus, even eschewing an unduly meticulous examination of the rules, allowing for “*play in the joints*”, adopting a liberal interpretation, taking into account the context of the constitution, and avoiding an over dependence on purely textual analysis, it seems to me that only way to interpret the sub rule in the manner contended for by the defendants is to do what Megarry VC concedes is impermissible, i.e. to ignore the clear wording of sub rule (e).
56. The defendants note that if the rules do not provide for the payment of a subscription by instalments and a literal construction of sub rule (e) is applied, then the plaintiff’s membership was terminated on 31 January of each year on which he was a member. This may well be the case (although this case does not require me to decide upon any year but 2014/2015), but that argument cannot be used to alter the correct construction of the constitution. A similar argument did not find favour with Morris J. in *Walsh v. Butler*.
57. Accordingly, I conclude there is no interpretation of sub rule (e) that would permit the defendants to treat the plaintiff as a member, despite the clear breach of the rules by him in relation to his failure to pay his subscription.
58. Finally, rule 3.4.2 (f) provides that:
- “Membership may be reinstated at the discretion of the Management Committee on payment of the current Annual Subscription plus a re-entry fine and any appropriate levies as may be set by the Management Committee.”*
59. Contrary to what is asserted by the defendants, there is nothing inconsistent in that rule with sub rule (e). Nor was any evidence whatsoever given as to reinstatement of the plaintiff’s membership. The fact that he made another payment in April of €150 – significantly below the annual subscription rate of €890 – cannot be treated as an exercise by the club of its entitlement under 3.4.2 (f), in circumstances where there was no evidence at all that this payment was an exercise of the powers of the club under the relevant rule.

60. In conclusion, I find that the rules of the constitution provided for the plaintiff's exclusion on non-payment of his annual subscription, and that he was so excluded due to his failure to pay the subscription in full by 31 January.

Practice of the Club

61. The second argument mounted by the defendants was that the practice of the club was always to treat the plaintiff as a full member with all the privileges of membership, including representing the club in inter-club tournaments and playing in internal club competitions, and that the plaintiff regarded himself as a full member as of 5 June 2015. I have set out above the evidence of Mr. McKee, who identified that the requirements of the constitution in relation to the payment of the subscription by 31 January, were widely ignored by the club.

62. The import of this argument must be that sub rule (e) had been implicitly amended by the practice of the club, such that the sub rule was no longer effective. To address this argument, it is necessary to consider the role of the rules of a club. Because of the lack of legal personality of unincorporated associations, the rules of such bodies are particularly important. They are a contractual agreement between the members as to how they have agreed to run the club. Describing the nature of a club, Clarke J. in *Dunne* observed:

"5.1 It is clear that the principal legal basis for the existence of a club is a contract between all of the members for the time being (see Walsh v Butler [1997] 2 I.L.R.M. 81; Conservative and Unionist Central Office v Burrell [1982] 1 W.L.R. 522). As an unincorporated association of individuals, a club has no separate legal personality (Sandymount and Merrion Residents Association v An Bord Pleanala & ors [2013] IESC 51; Feeney v. McManus [1937] I.R. 23). However, that is not to say that a club does not have some form of legal existence. So long as the contract between its members stays in being, then it can reasonably be said that a club continues to exist."

63. The decision in *Dunne* goes on to make it clear that because the rules of the club constitute a contract between the members they cannot be amended by implication. In that case Hogan J., in the High Court, had held that the club rules could be treated as having an implied term in relation to the termination of the club, though the members had not expressly agreed to vary the rules. That decision was overturned by the Supreme Court, with Clarke J. observing as follows;

"6.3 The starting point of any analysis has to be that, prima facie, the rules, representing as they do a contract between all of the members, cannot be altered except by agreement of all those members or in accordance with a specific provision in the rules allowing for such amendment. That is the position which applies in respect of any ordinary contract. A multi-party commercial arrangement cannot be altered without the agreement of all parties affected. The fact that it might make sense that a majority (or perhaps a large majority) could change the contract does not mean that such is legally possible unless the parties have agreed to an amendment mechanism. When people join a club they are committing both

their efforts (whether great or small) and their resources (whether great or small) to the club on the basis of the rules as they then exist. They are entitled to have those rules applied and not to have the rules changed without their agreement (or in accordance with an amendment procedure which is to be found in the rules and to which they must be taken to have signed up by joining a club with such an amendment procedure).

6.4 *Even if it might be taken to be prudent for any club to have an amendment procedure, it does not seem to me to follow that a court should imply one if it is not to be found in the rules. In the context of established errors in contracts, it is clear that a court can, in accordance with the "text in context" method of interpretation, properly interpret a contract in a way which acknowledges an obvious error but only where it is equally obvious as to what should have been in the contract concerned had the relevant error not taken place (Moorview Developments & ors v. First Active plc & ors [2010] IEHC 275)".*

64. In substance, I am being asked to ignore the rules because the club ignored its own rules. But there is no evidence whatsoever in this case that the members had agreed to ignore the club rules enshrined in the club constitution in relation to subscriptions and had decided instead to replace it with whatever the current practice on subscriptions was from time to time. Nor has any authority been cited to suggest that a club is entitled to ignore its own rules in the absence of a decision by the members to take such a step. Such an approach would be contrary to the disavowal in *Dunne* of any principle of implicit amendment of club rules.

65. Further, it is worth observing that any such approach would have serious consequences for the club. To accept this argument would mean that the way of ascertaining the rules on subscriptions in the club would be to identify current practice. Current practice may vary from member to member, from year to year, and from committee to committee. There would be an entire lack of certainty as to the rules of the club in relation to subscription payments and members would be left in a position of complete uncertainty as to their rights and obligations in this regard. It would also undermine the club's ability to enforce its extant rules on subscriptions, thus preventing it from restricting non-paying members from playing in competitions, from using the facilities of the club, and from excluding them for non-payment. This would clearly be a highly unsatisfactory situation for the club.

66. A similar approach had been adopted by Morris J. some 15 years earlier in *Walsh v Butler*, where, in rejecting an argument that the plaintiff should be treated as having been admitted into membership although the procedure set out in the rules providing for election of members had not been followed, he observed:

"24. *To hold otherwise would give rise to a situation where the Committee of the Club would have lost all control over affairs of the Club. Members could be assumed into the Club and shed from the Club without the knowledge of the General Committee. The contractual relationship as between members regulated by their acceptance of*

the General Committee as the regulating authority would be varied without their approval and consent.”.

67. In the premises, I cannot accept that the defendants altered sub rule (e) by conduct.

Waiver

68. Very late in the day, an argument was included in the written legal submissions to the effect that the defendants had waived reliance upon sub rule (e). There are various problems with this argument, the most obvious being that waiver was not pleaded and that no evidence whatsoever was adduced indicating a waiver of sub rule (e) by the defendants. Mr. McKee, the only witness called on behalf of the first to fourth defendants, never referred to a decision by the club to waive its membership rules, either generally or in respect of sub rule (e). There was no evidence of any communication by the club in respect of waiver to the plaintiff. There was no evidence of any awareness by the plaintiff that the constitution contained a rule that excluded him as a member because of non-payment by 31 January or any knowledge that the rule was being waived.

69. The dearth of evidence on the point cannot in my view be overcome by a wholly theoretical reference to same in written submissions delivered some days after the hearing. At a minimum, even if the defendants were to circumvent the pleading point, they would have to show that they were aware of the rule, that they had chosen not to rely upon it, and that they had communicated this to the plaintiff, whether implicitly or explicitly. None of those facts can be assumed in the absence of evidence.

70. Accordingly, I conclude the defendants cannot raise an argument based on waiver.

Implicit Compensation Rule in Membership

71. The plaintiff had pleaded in the alternative to the effect that, even if he was a member, there was a rule implicit in membership that he was entitled to be compensated for injuries or loss suffered. However, that argument does not appear to be pursued with any vigour as no evidence was led in this respect and no legal submissions on this point were made. Because of my conclusion that the plaintiff was in fact not a member of the club at the time of the accident, there is no necessity for me to address this point.

Vicarious Liability

72. It is, I think, fair to say that the defence upon which the defendants placed greatest reliance was that of the club membership of the plaintiff. However, having circumvented that hurdle, the plaintiff must still establish that the club members, as represented by the first to fourth defendants, were negligent, whether directly or through the doctrine of vicarious liability.

73. I am satisfied the plaintiff has established negligence. The first to fourth defendants did not ensure a safe system of work was in place. Nigel Britton must have known the work involved cladding the pro shop and therefore would require the sawing of planks on site, and the fitting of same to the walls and the roof. No action was taken at all by the defendants to ensure the site was a safe place to work. This was particularly important given that it is accepted by all that Mr. Britton had requested the plaintiff to go onto the

site and assist with the work. The plaintiff was not a carpenter or a tradesman of any sort. He had no specialist skill or expertise. He was entitled to be protected by the person who requested his assistance for the week. The fact that the plaintiff and indeed the fifth defendant were not being paid for their work does not alter the members' obligations in this regard.

74. Having heard the evidence not only of the plaintiff's engineer but also that of the fifth defendant's engineer, I conclude there was no safe system of working on the site in respect of the work being carried out by the plaintiff and fifth defendant. Planks of wood were being sawn without being secured by way of a vice grip or bench. The plank was perched upon a milk crate and was not secured. The plaintiff's engineer gave evidence that the only circumstances in which the plank did not need to be secured was where the person holding the plank was some very significant distance from the point at which it was being cut. The necessity for securing a plank arises from the use of a circular saw, which is a powerful piece of machinery that can jam if it catches the wood in a particular way. There is a safety catch that is designed to prevent the otherwise inevitable consequences of it catching in this way but for whatever reason, the safety barrier did not operate so as to protect the plaintiff.
75. Had there been a site supervisor, a different system of work would have been put in place that would have protected the plaintiff. Most obviously, the plaintiff would not have been permitted to go on the site as an assistant since he does not possess a safe pass. Indeed, it is accepted by the first to fourth defendants that they were responsible for the organisation of the works and that the standards applied to the organisation and execution of the work fell below the required standards. That seems an appropriate concession to me given the engineering evidence. The consequences of this failure to ensure safety on the site were disastrous for the plaintiff.
76. In relation to the fifth defendant, the club initially took the approach that they were not liable for the acts of the fifth defendant. However, that is no longer the position of the club in circumstances where it is accepted that, had the club discharged its obligations correctly and retained a site supervisor, the plaintiff would not have been on the site given his lack of qualifications and lack of a safe pass. The revised position of the club may reflect a recognition of the fact that the fifth defendant was giving of his time freely as a member of the club and that in the circumstances, his actions should be treated as those of the club.
77. In the circumstances, despite the undoubted negligence of the fifth defendant in the way he organised the work and the directions he provided to the plaintiff, I will treat his actions as those of the club and therefore as being the responsibility of the first to fourth defendants.

Quantum

78. Having concluded that the defendants are liable to the plaintiff in negligence, I must now turn to the question of quantum. The plaintiff's evidence was that he spent one night in hospital after being brought there by helicopter and that he was operated upon over a

lengthy period of time. His left index finger was amputated, and a small stump was left intentionally. However, due to the very significant pain that he suffered over the subsequent months, it was decided that a second operation was necessary to remove a portion of a nerve ending in the stump of his left finger. Unfortunately, that was not successful in relieving the very intense pain he suffered at times and so a third operation was carried out in 2017 and the stump that had been intentionally left was removed.

79. I have seen the plaintiff's hand and a very neat job was done, but it is readily apparent that he has been left without any part of his left index finger. The plaintiff has suffered excruciating pain which has now happily lessened with the passage of time, but he still requires significant pain relief. For example, when he tries to play golf which he described as being a passion for him, he finds that his hand becomes very painful and he is obliged to stop.
80. On 25 July 2016 Dr. Jason Kelly, the consultant plastic and reconstructive surgeon treating the plaintiff provided a report on the initial injury. He details that the plaintiff's finger was attached solely by a piece of volar skin and there were no clinical signs of blood flow through the finger, and that his adjacent finger suffered a division of a tendon. A replantation was immediately attempted under a general anaesthetic but due to the nature of the injury, a replantation would have allowed only for a shortened finger with a single joint. In those circumstances it was decided that given the lack of function and the aesthetic concerns involved in a replantation, an amputation was appropriate. The amputation was carried out, a stump was created, and a tendon repair carried out on the adjacent finger.
81. Dr. Kelly reports that post-surgery, the plaintiff had difficulty with his pain management and his medications included those affecting the central nervous system, non-steroidal anti-inflammatories and a morphine-based analgesia. He underwent a further surgery on 23 February 2016 to remove a piece of nerve tissue and this brought temporary pain relief.
82. On 11 February 2019 Dr. Kelly provided a follow-up report. He details that four years post-injury the plaintiff had undergone two further surgeries on 23 February 2016 and in 2017 and was suffering from an obvious cosmetic deformity and constant pain. The plaintiff struggled to lift heavy or awkward objects at work due to his missing finger, the loss of strength and the pain involved. The plaintiff continued to suffer intermittent pain that was at times disabling, his pain medications included both a morphine-based analgesia, Tylex, and one affecting the central nervous system, Lyrica. Dr. Kelly states that the plaintiff complained of stiffness across the knuckles of the hand and a loss of dexterity, he further complained that he had to stop playing golf due to his inability to play at his previous level.
83. Psychologically, the plaintiff has suffered very significantly. He has reported that his sleep has been interrupted as a result of the pain and that he has flashbacks of the accident where he recalls running around with his finger gone. He has suffered depression as a result of the loss of his finger and in particular his inability to play golf at the level and

with the consistency with which he once played it. It is true that in cross examination it became clear that he has competed on a very limited basis since the accident and is playing off a handicap of 4. However, it is far from the level at which the plaintiff previously played. He has engaged with his local mental health services and he has also obtained significant assistance from his GP.

84. A report of 8 June 2021 was provided by Dr. Patrick Kirwan, a consultant psychiatrist treating the plaintiff. Dr. Kirwan states that the plaintiff has a diagnosis of post-traumatic stress disorder stemming from his injury. The plaintiff was discharged from psychological treatment in December 2019 following a period of treatment commencing in October 2018. However, Dr. Kirwan reports that the plaintiff suffered a relapse in his anxiety symptoms following an external examination associated with these proceedings. He underwent booster sessions with the psychology department and his return to work helped improve his symptoms somewhat, but residual symptoms remained.
85. In order to resolve this, his GP changed his antidepressant medication. The dose of this antidepressant was increased following an outpatient appointment in February 2021. Dr. Kirwan states that at his most recent review on 8 June 2021, the plaintiff reported a low mood and high anxiety levels. At that review the plaintiff recounted that he had been doing reasonably well until another examination in relation to these proceedings exacerbated his symptoms. Dr. Kirwan concluded that the patient appeared to be in an objectively low mood and his treatment plan was to further increase the antidepressant and to start a second medication to treat his anxiety symptoms in the short term.

Conclusion on Quantum

86. I consider the following factors are relevant to my conclusions on quantum (being factors that have both affected the plaintiff in the past and will continue to do so into the future);
- the fact that he has been left without any part of his left index finger;
 - the fact that the finger in question is the index finger, being the most dominant finger;
 - the fact that he required two additional operations spaced over two years as well as the initial operation which took some significant amount of time and was complex in nature;
 - the psychological toll that the injury took upon him, in particular the anxiety and depression that ensued after the accident and the enduring nature of both of these conditions which have been alleviated but not eliminated by medication, psychiatric assistance and counselling and which it appears from the evidence will remain into the future;
 - the fact that the plaintiff was a particularly skilled and committed golfer who was devastated by the loss of his former ability following the accident. I accept the evidence of the defendant elicited under cross examination that the plaintiff has to a certain extent returned to golf and has in fact managed to compete in a

competition. However, having heard the totality of the plaintiff's evidence, I am persuaded that his ability to participate in the sport of golf has been greatly diminished and that this has a very negative effect on his well-being, including his psychological well-being.

87. The plaintiff must be compensated by way of general damages for his pain and suffering to date and into the future. Insofar as pain and suffering is concerned, he should be compensated for the loss of the left index finger and the physical consequences of it, including the necessary surgeries, and for the very significant pain he has suffered over a significant time period, together with the psychological injuries that were caused by the foregoing.
88. In all the circumstances I estimate that the appropriate sum to compensate the plaintiff by way of general damages for his pain and suffering to date and into the future is the sum of €100,000.
89. In this case, because of the excellent support that his employer, the Navy, provided to him, he has not suffered any loss of earnings and he has not incurred significant costs for counselling since that has been provided free of charge by the Navy. Therefore, the sum of special damages is only €1,495 and I will add that onto the award making a total of €101,495.