



Neutral Citation Number: [2019] EWHC 1165 (Ch)

Case No: HC-2017-002846

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
COMPANIES COURT (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th May 2019

Before:

Sarah Worthington QC(Hon) sitting as a Deputy High Court Judge

Between :

Ms FARHEEN QURESHI
(in her capacity as Liquidator of Edgware
Constitutional Club Limited)

Claimant

- and -

ASSOCIATION OF CONSERVATIVE CLUBS
LIMITED

Defendant

Michael Bowmer (instructed by **Kennedys Law LLP**) for the **Claimant**
Mark Hubbard (instructed by **Thomson Snell & Passmore LLP**) for the **Defendant**

Hearing dates: **12, 13 November 2018**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE Sarah Worthington QC (Hon) Sitting as a Deputy High Court Judge

Sarah Worthington QC(Hon):

1. The question in issue in this application is whether the current members of an incorporated club can decide to sell off the club's assets, wind up the club's operations and distribute the club's hefty surplus amongst themselves. The alternative, especially if the club is part of a network of similar clubs engaged in the same endeavours, is that the accumulated funds must remain dedicated to achieving these clubs' broad social and philosophical objects. These alternatives reflect the competing approaches advanced by the Claimant and the Defendant in this application. Which approach is correct depends on the application of statute, the general law and the liquidating club's own constitutional rules.
2. The Defendant is the Association of Conservative Clubs Limited ("the Association"), a company limited by guarantee. Its objects are promoting Conservatism and providing support to its member clubs.
3. The Claimant is the liquidator of the Edgware Constitutional Club Limited ("the Club"), a local conservative club. Its objects are to "carry on the business of a Club and, in so doing, to promote by all proper means the principles of Conservatism and the implementation of the Conservative Party's policies". The Club is expressly affiliated to and inter-affiliated with the Association and subject to the Association's rules and regulations, including restrictions on amending certain of its own Rules unless it has the approval of the Association.
4. The application before the court is brought by Ms Qureshi of Parker Getty Limited as Liquidator of the Club. It seeks a declaration as to the legality of certain past and proposed distributions of the Club's surplus assets on a members' voluntary winding up. These include interim distributions already made to members (amounting to £890,500 – or £6,500 per member – of which the net sum distributed so far is £832,000); the intended final distribution to members (of approximately £250,000); and the payment of the expenses of liquidation, including the legal expenses of this application. These distributions are challenged by the Association, which claims it is entitled to the surplus assets.
5. The application was made by way of a Part 8 Claim issued on 27 October 2017. Although not stated explicitly on the Claim Form, the Liquidator has indicated that the application is properly to be regarded as made under s 112 of the Insolvency Act 1986 ("IA 1986"), by which a liquidator may apply to the court to determine any question arising in the winding up of a company. A liquidator making such an application has a duty to put all relevant evidence before the court.

The legal issues

6. In broad outline, the position of the Club is that it is engaged in a solvent members' winding up that is governed by the IA 1986. That Act provides that surplus assets should be distributed to the Club's members unless the Club's Rules provide otherwise, and they do not. Accordingly, having ensured all creditors were paid, the liquidator has made an interim distribution to members and proposes to make a further final distribution after paying the costs of the liquidation.

7. By contrast, the position of the Association is that the Club is not properly in a winding up, and while it is operating as a going concern its Rules do not permit it to distribute its assets to its members at all. Alternatively, even if the Club is engaged in a winding up, its surplus assets should not be distributed to its members because either (a) the Club's Rules required the surplus assets to have been distributed to the Association before the winding up commenced, and if that was not done then the liquidator must now do it; or (b) the Club's rules gave the Club a discretion while it was a going concern to distribute its surplus assets to the Association, and that discretion was not exercised (or perhaps not exercised appropriately), so the liquidator must now exercise that discretion properly, which would require distribution of the surplus assets to the Association. Furthermore, since the liquidator is now conflicted in carrying out this exercise of discretion (having made earlier errors), the court should exercise this discretion itself.

Background

8. There is no substantial dispute of fact between the parties, although the supporting evidence before the court was often sparse.
9. The Club was incorporated in February 1934 and is now registered under the Co-operative and Community Benefit Societies Act 2014 ("CCBSA 2014"), and previously under its predecessor Acts. These Acts require the Club's rules to be registered, and no amendment to the rules is valid until the amendment has been registered (see CCBSA 2014 s 16(1) and the predecessor Industrial and Provident Societies Act 1965 ss 9 and 10). The Club's registered rules are those registered on 8 October 1982 ("the 1982 Rules"). As discussed later, the Association made much of facts indicating that a proposed change to the Club's rules appears to have been considered in 2011, but these proposed amended rules ("the 2011 Rules") are not the registered rules of the Club.
10. The Club owned and operated premises at 49-51 Manor Park Crescent, Edgware Middlesex, HA8 7LY ("the Club House") for many years. These are the premises referred to in the 1982 Rules.
11. The 1982 Rules provide for the Club to be run by a Committee of either 7 or 8 Officers (e.g. President, Treasurer, Secretary) and 12 Committeemen (Rule 25), each to remain in office until their successors are elected (Rule 25), with elections held annually for the Officers and biennially for the Committeemen (Rules 25 and 34), with 5 members required for a Committee meeting quorum (Rule 34). These Officers and Committeemen are the people given primary conduct of the business of the Club.
12. The Club ceased filing annual returns in 2012, that last return indicating that the Club then had 162 members and had traded at a small loss. The Club also ceased accepting new members in 2012, seemingly because of a suspicion that new members were joining in anticipation of a sale of the Club's assets. Winding up had been under informal discussion from 2011/12.
13. The process of winding up the Club extended from July 2015 until August 2018. This involved a number of crucial acts undertaken by the Club's Officers and its Committee, and resolutions passed at three general meetings held over that period. The first of these meetings of members agreed that steps should be taken to wind the

company up, the second agreed to the winding up itself, and the third ratified the resolutions passed at the second meeting. A major plank in the Association's case is that there were such significant procedural flaws in all these various endeavours that the Club did not successfully embark on any process of winding up, and accordingly the distribution rules that might apply on a winding up are not relevant at all. The detail is considered later in this judgment.

14. On 13 January 2016 the Club House was sold.
15. On 7 June 2016 the liquidator made an interim distribution of £6,500 to each of the 137 known members of the Club (totalling £890,500). Only £832,000 was actually paid out, with £52,000 recorded as returned.
16. On 29 July 2016 the Association's solicitors objected to the distribution and claimed that the Association was entitled to the surplus. In March 2018, the Association expressed further concerns following receipt of the liquidator's witness statement.

Relevant law on the winding up of a registered society

17. Section 123 of the CCBSA 2014 makes it clear that the IA 1986 applies to companies which are registered societies. Such societies may be wound up as if the society were a company, subject to certain adjustments that are immaterial for present purposes. Section 84(1)(b) of the IA 1986 thus enables the Club to be wound up voluntarily if its members so resolve by special resolution.
18. Section 107 of the IA 1986 then sets out the crucial rule governing the distribution of the Club's property on a voluntary winding up:

“107. Distribution of company's property

Subject to the provisions of this Act as to preferential payments, the company's property in a voluntary winding up shall on the winding up be applied in satisfaction of the company's liabilities *pari passu* and, subject to that application, *shall (unless the articles otherwise provide) be distributed among the members according to their rights and interests in the company.*” [emphasis added]
19. Whether the Club's articles “otherwise provide” is thus critical. The Club's registered constitution is its equivalent of a company's articles. In the Club's registered 1982 Rules, the relevant provision is Rule 74:

“74. Any surplus of the Club shall be applied in such manner as the Committee consider best (a) in the interests of the Club and furtherance of the objects of the Club, or (b) in assisting the local Conservative and Unionist Association and Conservative and Unionist Central Office, provided that *except on the dissolution or winding up of the Club* no surplus or funds shall be distributed among the members.” [emphasis added]
20. It is this rule that the Association seeks to suggest prohibits a distribution of assets to members not only when the Club is a going concern but also when the Club is being wound up. The Association's argument is that although on its face the Rule may

permit the distribution of the Club's assets to its members on a winding up, this can never happen in practice since the earlier words of the Rule *require* the Club's Committee to apply any surplus to the ends specified in Rule 74(a) or (b) before the resolution to wind up, or alternatively they require the Committee to exercise its *discretion* to do so, and thus a proper exercise of the Committee's authority under Rule 74 would invariably deliver a distribution to the ends defined in (a) or (b), leaving the Club without an available surplus to distribute to the members on a winding up. Further, to the extent that the Committee has not behaved in this way, it falls to the liquidator, standing in the shoes of the Committee, to do so.

21. This interpretation is doubted for the reasons outlined below.

General comments on IA 1986 s 107 and Rule 74

22. The starting point is to recognise that, whatever the constraints or influences properly affecting the Committee's exercise of its discretion while the Club is a going concern, once the Club goes into a winding up, there is no similar discretion residing in the liquidator to make similar elections. On any winding up, a liquidator's obligation is to distribute the company's assets to those entitled to them; there is no discretion to distribute assets to those who might have stood to benefit from the directors' decisions while the company was a going concern. Were the latter possible, a liquidator might for example choose to make a gift of some part of the company's assets to a charity known to be favoured by the company while it was a going concern, and to do that rather than distribute the assets to the company's shareholders. This would constitute a clear breach of the liquidator's obligations to deal properly with the company's assets. By contrast, if the company's actions, or its inaction, prior to the winding up had generated any entitlements in third parties, then the liquidator would be bound to use the company's assets to meet those entitlements.
23. This is precisely the approach the liquidator was required to adopt here. Her task was to identify the entitlements that third parties could advance as a result of the Club's actions (or inaction) prior to the commencement of winding up. Whether the Association has such entitlements to a distribution of the Club's surplus under Rule 74(b) is considered below.
24. This distinction between entitlements and discretionary distributions was clearly recognised in the decision of Deputy Registrar Garwood in *Re Wykeham Club Limited* (unreported, but a copy of the judgment was provided by the Association as it was a defendant in that claim). The Wykeham Club was a sister club to the claimant in this case. It too was subject to a rule with wording identical to Rule 74 here. The significant difference between that case and this is that the Wykeham Club was in administration, and specifically not in a members' voluntary liquidation, since its members had declined to vote in favour of that. This meant that the Wykeham Club was still a going concern, and hence the Administrators did hold the power to exercise the discretion set out in Rule 74(a) and (b). The court recognised that this put the Administrators in an unusual position for insolvency practitioners, but nevertheless it declined to give directions on the exercise of the discretion, or to exercise the discretion itself, precisely because the discretion resided with the Administrators personally. The court recognised that any statement it might make about the preferred exercise of the discretion would inevitably suggest an inferred entitlement that did not

exist until the Administrators themselves acted. That conclusion is relevant to the present case.

The operation of IA 1986 s 107 as a default rule unless the articles “otherwise provide”

25. Of still more interest in the present context is the dicta in the judgment in *Re Wykeham Club Limited* that wholeheartedly accepted (and the Association as defendant also appears to have accepted) that in a liquidation of a society subject to rules containing wording identical to Rule 74, the society would not only be entitled to distribute to its members but would indeed be compelled to proceed in that way. The Deputy Registrar observed at [24]:
- “What is however accepted by all concerned, by reference to section 107 IA 1986 and *Re Merchant Navy Supply Association* [1947] 1 All ER 894, is that if the Club was moved into creditors’ voluntary liquidation the effect would, without more, be that the Surplus fell to be paid to the Members. ... To do so would not simply be to bring the Members within the ambit of Rule 67 [the equivalent of Rule 74 here] by making them potential beneficiaries of any, or all, of the Surplus. Rather it would result in all of it falling to be divided between them.”
26. The logic of this conclusion depends on the interaction between the company’s articles (Rule 74) and the IA 1986 s 107. On its face, Rule 74 imposes a prohibition on the distribution to members while the Club is a going concern, but provides an exception to that prohibition when the Club is dissolved or wound up. In the latter circumstances, although the prohibition on distributing to the members does not apply, the rules do not specifically provide that a distribution *should* be made to members. That mandate to distribute to members comes from IA 1986 s 107, cited in full earlier, which provides that the company’s property “*shall* (unless the articles otherwise provide) *be distributed among the members according to their rights and interests in the company.*” [emphasis added] The fact that IA 1986 s 107 provides such a mandate when the society’s own rules make no alternative provision is reinforced by the decision of Registrar Briggs in *Re Watford Printers Limited* [2018] EWHC 328.
27. Both of these cases rely on similar conclusions found in the earlier decision of Vaisey J in *Re Merchant Navy Supply Association* [1947] 1 All ER 894. This case may be regarded as even stronger authority, since its memorandum did not express any exception in the case of a dissolution or winding up. Instead, it simply provided that “... the income and property of the company whencesoever derived shall be applied solely towards the promotion of the objects of the company as set forth in the memorandum and no portion thereof shall be transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to members of the company.” But even though there was no specific exception to this provision in the case of a winding up, there was also no rule providing what *should* happen in those circumstances. Representative shareholders as well as the Crown took part in the hearing on the footing that if the surplus could not be distributed to members it would pass to the Crown. Vaisey J held that the relevant clause related solely to the profits of the company whilst it was carrying on its business as a going concern, and did not concern a surplus in a winding up, but that even if it had extended to the company’s property which the shareholders might receive in a solvent winding up, it was

inoperative because it attempted to exclude the then equivalent of IA 1986 s 107, but without substituting any alternative provision. This meant that the clause had crucially failed to “otherwise provide” what should happen. Vaisey J said at 895A-B:

“Counsel for the Attorney-General has argued that this is a case in which the surplus profits ought to go to the Crown ... because the only other claimants are subject to the prohibitive clause which provides that they are not subject to any profit. It may very well be that such was the intention of those who formed the company ... but, if that was the intention, they should have put in an express provision to deal with the surplus assets in a winding up; e.g. the common form provision which is to be found in the memorandum and articles of a company limited by guarantee and registered, pursuant to s 18 of the Act of 1929, without the word “limited” – in other words the form ... which says that on a winding up any surplus assets shall be transferred to some organisation having comparable objects. I find nothing of that kind here, and in all the circumstances it seems to me that [the then equivalent of IA 1986 s 107] must prevail ...”

28. As in that case, Rule 74 does not include any express provision as to what is to happen with the surplus in a voluntary winding up: it does not “otherwise provide”. It does, however, contain an express exception in the case of a winding up or dissolution to the general rule prohibiting return of the Club’s assets to its members. This express exception is completely consistent with the mandatory impact of the default rule in IA 1986 s 107 where the company itself has not “otherwise provided”. In these circumstances it would seem impossible for the Association to argue that the Club’s Rules “otherwise provide”, especially when they expressly contemplate what s 107 makes mandatory provision for.
29. It follows that a straightforward reading of the Club’s Rules, especially Rule 74, together with IA 1986 s 107, would indicate that the liquidator is compelled to distribute any surplus in the Club’s assets to the Club’s members. The issue then is whether the Club has such a surplus, or whether the Association has a prior entitlement to these assets. This is considered under the next heading.
30. One further point is worth mentioning. Although not raised in argument before the court, it is notable that on this approach even the 2011 Rules would have compelled the liquidator to return the Club’s assets to the members on a winding up. In the 2011 Rules, Rule 67 [the equivalent but amended Rule] simply provided that “Any surplus of the Club shall be applied in such manner as the Committee consider best in the interests of the Club, and in furtherance of the objects for which the Club is formed, provided that no surplus shall be distributed among the members.” [In one version before the court, but not in another, the word “annual” is inserted at the start of the clause, so as to read “Any annual surplus”.] This amended clause is on all fours with that considered in *Re Merchant Navy Supply Association* [1947] 1 All ER 894, noted earlier.

The Association’s accrued rights before winding up commenced

31. The Association’s alternative argument – not advanced until October 2018 – is that the Club’s surplus arose before the commencement of any dissolution or winding up, and the Association thus had accrued rights at that stage which cannot be divested or

avoided by any subsequent attempt to liquidate the Club with a view to distributing that same surplus to members.

32. If the Association did have accrued rights to a particular distribution of the Club's assets, then this would be a powerful argument. As IA 1986 s 107 provides, the distribution to members (or to any other "otherwise specified" ends) is only to be made subject to satisfaction of the company's existing liabilities to other parties.
33. The Association can only have such vested rights if it has either a proprietary entitlement (so that the surplus proposed to be distributed to members is not the Club's property to distribute) or an entitlement under the Rules to a particular distribution from the Club's surplus. No suggestion was ever advanced that the Association had a proprietary interest in the Club's assets (as it might have had, for example, if the Club's premises had been granted to the Club by the Association on appropriate terms for their recovery should the Club cease to operate from the premises).
34. That means the Association is left with needing to prove an entitlement under the Rules to a distribution from the Club's surplus. The only Rule that might deliver that is Rule 74, cited earlier but repeated here:

"74. Any surplus of the Club shall be applied in such manner as the Committee consider best (a) in the interests of the Club and furtherance of the objects of the Club, or (b) in assisting the local Conservative and Unionist Association and Conservative and Unionist Central Office, provided that except on the dissolution or winding up of the Club no surplus or funds shall be distributed among the members."
35. No distribution to the Association was agreed by the Committee before the commencement of winding up. Instead, the Association's argument is that if a surplus cannot be applied under Rule 74(a) then it must (ie 'shall') be applied under Rule 74(b). In short, once the Committee realised the Club could or would no longer function, and a distribution under Rule 74(a) was impossible, then a distribution to the Association under Rule 74(b) should have been made before a decision to dissolve or wind up the Club, and a failure to do so gives the Association a legal entitlement to any surplus that should have been so distributed.
36. The logic is not compelling. While the Club is a going concern, the Association has no entitlement to any distribution. It is for the Committee to decide what resources should be used "in the interests of the Club and furtherance of the objects of the Club" and what, if any, should be used in assisting the local Conservative and Unionist Association and the Conservative and Unionist Central Office (via payments to the Association). Assets can be accumulated for Club projects, and if there are no such projects then the Club might, for example, properly decide that the members' subscriptions can be reduced. There is no obligation to pay over to the Association any unused Club surpluses as they accrue. Put simply, the Association acquires no "entitlement" merely because assets have not been exhausted by spending them under Rule 74(a) in the interests of the Club and furtherance of its objects.
37. Similarly, it follows that if a dissolution or winding up is contemplated, and if there happens to be a surplus that will not now be used for the purposes set out in Rule

74(a), then to suggest it *must* be applied to the purposes in Rule 74(b) would seem contrary to the earlier analysis indicating that it is possible – and indeed the only proper thing to do – to distribute the Club’s surplus assets on a winding up to the members as the Club’s Rules contemplate and the IA 1986 s 107 mandates. A contrary conclusion would render the insolvency exception to a distribution to members in Rule 74 wholly redundant.

38. Counsel for the liquidator also pointed out how difficult this approach would be in practice. Matters would have to be managed to ensure that a liquidation could take place, with some sort of declaration of solvency by the Committee, but that any surplus went to the Association rather than to the Club’s members. The Association would in effect become the “priority member”, paid after all the Club’s creditors but before anything could ever be paid to the Club’s real members, if indeed anything could ever be paid to them, and all this despite there being nothing in the Club’s rules mandating that outcome.
39. I am not persuaded by the Association’s argument on this point.

The relevance of the Club considering adopting different Rules in 2011

40. The second of the Association’s alternative arguments is that even if the Club’s Committee did not have an obligation to distribute surplus assets to the Association under Rule 74(b) in the absence of being able to distribute them under Rule 74(a), then it is at least the case that the Committee had a discretion enabling it to do so. That is clearly true. But the Committee did not exercise this discretion. The Association nevertheless suggests that the Committee *should* have exercised its discretion in this manner, and especially should have done so because the members’ vote on the 2011 Rules indicates that the members were in favour of ensuring that no surplus was ever paid out to the members in any circumstance, and it was thus up to the Committee to ensure that these wishes were implemented. Moreover, the liquidator who was subsequently appointed should have appreciated this, and should therefore now stand in the Committee’s shoes and similarly exercise that discretion in the same way.
41. This argument is not compelling as a matter of fact or as a matter of law. The necessary factual assumption is that the members’ wishes were to have the Club’s assets handed over to the Association, as evidenced by an assumed vote in 2011 in favour of still unregistered 2011 Rules. However, that vote, so far as it indicates the members’ wishes, is now contradicted by the more recent facts outlined later showing that on several occasions the members voting on this issue voted unanimously to wind the Club up and have the assets returned to the members.
42. Further, no amended Rules were ever registered. In those circumstances, the extent to which the terms of the 2011 Rules can be relied upon as indicating the members’ views is unclear. The evidence presented to the court suggests that the Club obtained the necessary permission from the Association to amend its Rules, and likely agreed the amendments in general meeting before sending signed copies of the new Rules to the Association as it had requested, but it would seem the Association did not register the Rules as it had indicated in its communications with the Club that it would. From this it might be inferred that there was a positive decision by someone at some stage not to make the change. That conclusion, so far as it concerns the Club, is consistent

with the fact that not a single member of the Club seems to have suggested over the past three years that a distribution of the surplus to the Club's members is inappropriate.

43. More importantly, the argument is not compelling as a matter of law. Even assuming that the members' vote in 2011 to adopt the 2011 Rules were accepted as proof that the members were set against distributing any Club surplus to members in any circumstances, including on a winding up (although see paras [27] and [30] as to the legal effect of such a clause), those views do not of themselves impose a fetter on the discretion given to the Committee by Rule 74, nor impose an obligation on the Committee to exercise its discretion in the same way: see the discussion of *Re Wykeham Club Limited* at para [24] above.
44. It follows that even while the Club was a going concern, the Committee could not have been compelled to exercise its discretion in any particular way in favour of the Association, and, for the reasons noted earlier in paras [22]-[24] above, the liquidator has no right to exercise such an unexercised discretion once she is in post. This argument cannot therefore support any entitlement in the Association to a particular distribution from the surplus assets. Without such an entitlement, the Association has no claim in the liquidation.
45. The result of all of this is that the registered 1982 Rules entitle – and indeed compel – the liquidator to distribute the Club's surplus assets to the members on a members' voluntary winding up of the Club. The Club itself could have determined to pass these surpluses to the Association before the winding up proceeded, but it did not do that and the liquidator cannot now elect to do the same, nor can she be compelled by the Association to do the same.

The impact of procedural irregularities: is the Club in an effective winding up process?

46. The final argument put by the Association is that the processes adopted by the Club for entering into a members' voluntary winding up are so riddled with procedural failures that the Club has not properly entered into winding up process, and so is legally still operating as a going concern. Accordingly, any distribution that has been made to members, or that is proposed to be made to members, is in breach of Rule 74 which makes it plain that except on a dissolution or winding up no surplus can be distributed to the members.
47. A good deal of effort was put into advancing and rebuffing this assertion by the Association and the Club respectively. Nevertheless, the law in this area and its application in the current context would seem tolerably clear, and able to be delivered in very short order. Nevertheless, in recognition of the detailed arguments put to me, I will give a similarly detailed response. I set out the facts before turning to their consequences.

The relevant chronology and detail of procedural flaws

48. The evidence discloses the following chronology:

- (i) **On 3 July 2015** a special general meeting of the Club passed resolutions (“the July 2015 Resolutions”) agreeing that the process of delivering a winding of the Club should be initiated, and in particular that (1) the Club’s premises be sold; (2) the sale proceeds be applied first in paying all debts and taxes owed by the Club; (3) the remaining proceeds be divided equally amongst the Club members listed; (4) thereafter the Club be dissolved or wound up as may be appropriate; (5) the “committee and the officers of the Club for the time being” be authorised to do all such acts as may be necessary to wind up or dissolve the Club; and (6) two specifically named officers of the Club be authorised to give instructions on behalf of the Club to solicitors and other advisors to implement the resolutions.
- The signed minute of this meeting records that the relevant meeting was attended by 48 members and the resolution passed by 46 members with 2 abstentions. An unsigned minute suggests 40 members were present, with 38 voting in favour and 2 abstentions. The further evidence is that there were 137 members at the time. Under Rule 52 of the 1982 Rules, the quorum for a special general meeting is “one-fifth of the members, or 30 members, whichever is the less”.
 - Accordingly, this meeting was quorate, with voting members voting unanimously in favour of the resolutions.
 - However, the Association notes the meeting itself may not have been properly called, especially given the status of the Committee – see immediately below at (ii). This may not be fatal, however, as it has been held in very similar circumstances that even if the resolution summoning the special general meeting was irregular, any meeting of members then called apparently regularly on its face would not be held incompetent to transact the business being conducted: see *Browne v La Trinidad* (1887) 37 Ch D 1.
- (ii) **In mid-October 2015** the liquidator was informed that there were only three Committee members, all others having retired or resigned.
- The first point to note is that these three Officers remaining in post would seem still to hold office, since Rule 25 provides that Officers “remain in office until their successor is appointed”, and presumably that remains the case notwithstanding the breach of Rule 25 in failing to have annual elections.
 - On the other hand, the composition of this small remaining Committee does not comply with the Club’s Rules, and a quorate Committee meeting of five people is quite impossible (see para [11] above).
 - Despite this, however, the observation of Lewison LJ in *Speechley v Allott* [2014] EWCA Civ 230 at [33], is relevant. In describing a similarly important Finance Committee, he noted that “if the *de facto* Finance Committee did not have power to fix the date of the meeting [and other matters], it [is] impossible to see who had that power. The club would have been caught in an impossible Catch-22 situation, since the Finance Committee itself had to be elected at a general meeting.” In addition, Lewison LJ denied that the members of the committee who had resigned or departed remained the members of a properly constituted committee. This approach, advanced in the

context of a judgment generally taking a tough stance on procedural irregularities, has obvious application here.

- Further, the evidence suggests that the Committee had not had the membership specified in the Club's Rules for some considerable time. Accordingly it might be argued that, by process of acquiescence, there had been an informal agreement amongst the members to adopt a practice of a less numerous central governance structure.
- Finally, and perhaps most significantly, the July 2015 Resolutions specifically empowered and authorised the "committee and the officers of the Club for the time being" to undertake the acts needed to wind up the Club. Such delegation for a specific purpose is within the powers of a unanimous vote of a quorate special general meeting with notice of the proposed delegation (as here): see *Isle of Wight Ry Co v Tahourdin* (1883) 25 Ch D 320; *Barron v Potter* [1914] 1 Ch 895; *Bamford v Bamford* [1970] Ch 212.

(iii) **On 13 January 2016**, the Club House was sold.

(iv) **On 22 January 2016 and 28 January 2016** the liquidator and three Officers signed the liquidator's letter of engagement setting out the steps that needed to be taken to put the Club into a members' voluntary winding up.

(v) **On 12 February 2016** a meeting of the Committee of three resolved to convene a meeting of the Club for the purposes of putting the Club into voluntary liquidation and appointing the liquidator.

- In the context of the irregularities this suggests in calling the meeting, see above at (ii).

(vi) **On 4 March 2016** two Officers (ie a majority of the Committee of three) signed the necessary declaration of solvency required by s 89 of the IA 1986, indicating a substantial cash surplus of over £1.486 million.

- In the context of the irregularities this suggests, see above at (ii).
- Further, all the creditors have in any event been paid and nothing now turns on this declaration, especially where there is no suggestion the Club is not amply solvent: see *Re Wesellcnc.com* [2013] EWHC 4577.

(vii) **On 7 March 2016** a general meeting of the Club passed several resolutions: two special resolutions (to wind the Club up voluntarily, and to authorise the liquidator to pay unsecured creditors in full and distribute the Club's remaining assets in specie to the members), and two ordinary resolutions (to appoint the liquidator and to pay her agreed fees) ("the March 2016 Resolutions").

- These resolutions were all passed unanimously by 102 members, with 18 members present and the remaining voting by proxy.

- The Association makes the point that this meeting was not quorate, since only 18 members were present in person and the Club's Rules make no specific provision for proxies.
 - The Club makes two points in response. First, whatever the irregularity in having a quorum present, over 74.4% of all known members were present in person or by proxy, well over the required quorum of 20%, and 100% of these members then voted in favour of all the resolutions of which everyone had been given notice. Secondly, the Club's own Rules (Rule 52) would have permitted those members present after half an hour without a quorum to adjourn the meeting to a day and time as those present might determine, and if a quorum was then not present within half an hour, the members present should constitute a quorum.
 - See too the point at (ix) below on possibly more accurate membership numbers.
- (viii) **On 11 March 2016** notice of the resolution and appointment of Ms Qureshi as liquidator was advertised in the Gazette, together with a notice to creditors to send details of their debts or claims by 6 April 2016 (it being made clear that this was a purely formal notice, all known creditors having been paid or were to be paid). No unpaid creditors have come forward.
- (ix) **On 7 June 2016** the liquidator declared and made an interim distribution of £6,500 to each of the 137 known members of the Club (totalling £890,500). It appears that only £832,000 was actually paid out, with £52,000 recorded as returned. The liquidator gave no indication that any members had complained of or contested this distribution.
- Given the absence of complaint from the members, the returned sums suggest that the number of members at this date may be 128, not 137. Had this also been the correct figure 3 months earlier, on 7 March 2016, when the March 2016 Resolutions were passed unanimously by 102 members voting in person or by proxy, then those resolutions would all have been passed by 79.7% of the known membership, with the remaining 20.3% not voting at all.
- (x) **On 29 July 2016** the Association's solicitors wrote to the liquidator objecting to the distribution and claiming that the Association was entitled to the surplus.
- (xi) **On 27 September 2017** the Club filed its Part 8 Claim Form in this application.
- (xii) **In March 2018** the Association expressed further concerns, following receipt of the liquidator's witness statement.
- (xiii) **On 8 August 2018** the members of the Club unanimously passed resolutions ratifying all the March 2016 Resolutions ("the August 2018 Resolutions"). This meeting was apparently convened upon the request of the members under Rule 50, although no supporting detail was in evidence.
- The resolutions were passed by 69 members, 55 voting in person and 13 voting by proxy, with no members abstaining or voting against.

- The Association suggest that this meeting was not validly called, and so the resolutions are not validly passed.
 - The Association further suggests that in any event the members were incapable of ratifying their own earlier procedural errors at the March 2016 meeting. No authority is given for this assertion, and it is doubted. A properly called and quorate meeting of the general meeting could pass all the resolutions labelled as the March 2016 Resolutions: this is the body with the power and authority to take all these decisions. The general law on ratification would therefore suggest that this is the body that can ratify a purported ineffective set of resolutions passed by an inquorate or improperly called earlier meeting (if indeed the earlier meeting was ineffective as a result of procedural irregularities). See cases such as *Hogg v Cramphorn* [1967] Ch 254; *Bamford v Bamford* [1970] Ch 212.
49. In relation to all these meetings, the Association makes the further point that the Register of members was not in evidence before the court, so the members noted as voting are not necessarily members. In addition, Rule 17 provides that “No member in arrear shall be permitted to make use of the Club or take part in its affairs.” The Association suggests this means that such members are not entitled to vote at general meetings of the Club, and since there is no evidence of membership fees being collected at all after 2012, the necessary conclusion (although the Association did not take its assertion so far) is that no member of the Club existed who was entitled to vote at any of these meetings.
50. I am not persuaded that the Rules deliver this result. Taken in context, Rule 17 would appear confined to restricting members in arrears from engaging in the life of the Club as conducted in the Club House. This is reinforced by Rule 18, which refers to such members as “suspended” and Rule 19 requiring every member on the Club premises to be able to produce the receipt for his subscriptions of his membership card if requested to do so. By contrast, Rule 15 indicates that a member in arrears will only cease to be a member if written notice of the default in payment is sent to the member and the sum is not paid within 14 days after the notice is sent. Indeed, Rule 16 enables the Committee in its discretion to exempt members from the provisions in Rule 15.
51. Further, Deputy Registrar Garwood in *Re Wykeham Club Limited* (unreported), at para [20], citing *Abbatt v Treasury Solicitor* [1969] 1 WLR 561, suggested that variations to the subscriptions required of members may be made informally by the Committee, simply by conduct, and in those circumstances members would remain members, presumably in every sense, until revised subscriptions were determined by the Rules, notice was given of the sum due, and there was then non-payment within the period prescribed. This, he felt, would enable a valuable and proper degree of certainty concerning the membership list. The appropriateness and practicality of this approach in the particular circumstances of this Club, where operations have clearly been running down since at least 2012, is compelling.

The legal effect of these procedural irregularities

52. Procedural rules are commonly included in statutes and corporate constitutions. This is not simply to streamline practices but also to protect those at risk of having their

rights and entitlements inappropriately eroded by the implementation of the decision in issue. In the context of corporate decision-making, the goal of such rules is not to ensure that the protected will never suffer a detriment, but simply to ensure they have an appropriate voice in the decision-making process itself. Protections are therefore typically delivered by way of notice requirements, qualified voting majorities, rights of appearance, and so on.

53. In the present context, concerning an important decision to wind up the Club, the procedural rules are designed primarily to protect those who do not wish the Club to be wound up at all, or, if the winding up goes ahead, those with priority claims to the Club's assets. The former are protected by formal notice requirements for the meeting, eligibility requirements for voting at the meeting, and super-majority requirements for the vote by which the decision is taken. The latter are protected by notice rules and by declarations of solvency by the company's directors with the added third party security that provides.
54. Since procedural rules are designed to afford protection, the sensible approach when considering the effect of an infringement of such rules is to ask what the rules require, and what adverse effect might be delivered by any particular non-compliance with the rules: see Lewison LJ in *Speechley v Allott* [2014] EWCA Civ 230 at [28]. If the protective process is omitted, but the same ends would *inevitably* be delivered even with the protection in place, then the courts will not insist that companies re-run the decision-making process, passing through all the proper hoops, simply to get to the same finishing point.
55. This guiding principle is described forcefully in a number of cases. See Lindley LJ in *Brown v La Trinidad* (1887) 37 Ch D 1 at 17:
- “I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment.”
56. Similarly, see Plowman J in *Bentley-Stevens v Jones* [1974] 1 WLR 638 at 641A: where “the irregularities can all be cured by going through the proper processes and the ultimate result would *inevitably* be the same” [emphasis added] the court will not interfere. See too *Southern Counties Deposit Bank v. Rider* (1895) 73 LT 374.
57. Two qualifications to this approach are important. First, concessions are only granted by the court when there is an irregularity in following prescribed processes; the courts will not validate a decision where no effort at all has been made to adhere to the protective procedures: see Lord Simonds in *Morris v Kanssen* [1946] AC 459 at 471. Also see *In Re Haycraft Gold Reduction and Mining Company* [1900] 2 Ch 230 and *In re BW Estates Ltd (No 2)* [2017] EWCA Civ 1201, [2018] Ch 511. To proceed otherwise might suggest the imposed protection lacks any purpose. Secondly, the rigour of the ‘inevitability’ condition is important: the facts must demonstrate that the same ends *would inevitably* be achieved. It follows, for example, that rights of appearance or rights to state a case will always be insisted upon.
58. Both parties accept this approach. In particular, the Association accepts that the court will not intervene in procedural irregularities if any such intervention would simply

result in precisely the same outcome, but with the added inconvenience of unravelling what had been done and starting all over again merely to arrive at the same end point. As counsel for the Association put it, the court operates on a principle that might in colloquial terms be described as “no harm, no foul”.

59. It is notable that this winding up has attracted no complaint from any of the Club’s creditors or its members. There has been no complaint from these parties about either the substantive decisions that have been taken or about the procedures adopted to reach those decisions. Plainly there have been irregularities, but it would appear that none of them have exercised those whom the procedures are designed to protect.
60. Instead it is the Association that raises the issue of irregularity. It does so even though it has no formal decision-making role to play in any of the Club’s winding up procedures and – given my earlier findings – even though it is not a creditor of the Club and does not have any entitlement to the Club’s assets, whether while the Club is a going concern or on a winding up. In short, and bar the one context outlined in the next paragraph, the Association has no interests to protect in the Club’s winding up. It follows that (bar the one context below) its position is unaffected by anything the Club does or does not do in conducting its winding up, whether those things are done regularly or irregularly.
61. The only circumstance in which the Association has an interest to protect is where the Club’s endeavours to wind itself up were so flawed that they were completely without effect, so much so that the Club ought to be regarded as operating (and as having operated for the past three years) as a going concern, and should accordingly have its activities assessed on a going concern basis. In such circumstances the Club would have committed a substantive breach of Rule 74 in distributing its assets to its members while operating as a going concern.
62. Even then, however, the Association would not be entitled to any particular distribution from the Club’s assets, but would simply be entitled to request a proper exercise of the Committee’s discretion embodied in Rule 74. At that point, the present facts suggest that the members remain entirely committed to a winding up, so the Committee would simply put the Club into a voluntary members’ winding up, with a perfected process in place, and we would eventually arrive at precisely the same finishing point again, bar the further delay and expense.
63. In short, whatever the procedural irregularities in the Club’s processes, the facts very clearly suggest that even if everything had been done perfectly, and indeed even if everything were only now done again perfectly, precisely the same ends would inevitably be delivered.
64. That means that the only remaining strand in the Association’s argument about process is the argument that here there is not merely irregularity in the adopted processes, but a complete failure to engage with the processes required (see para [57] above). I now consider this final point, although the answer is surely self-evident.

Is the Club successfully in a winding up process?

65. The starting point is to consider the purpose of the distinction the court makes between irregularities in process and absence of process. The issue is perhaps most

easily seen in the appointments of directors, despite this example being some distance from current issues. Certain defined constituencies are typically given the right to appoint directors. If a complaint is made that this has not happened properly, a court will never be persuaded to confirm the appointment of X as a director if there has been no effort to engage the appropriate constituency, but it may confirm the same appointment if it can be shown that the right constituency voted, even if without proper notice of the meeting, *and* would still inevitably have voted that same way if a properly called meeting had been held (perhaps shown by demonstrating they would still now inevitably vote the same way). In the former case, the court cannot confirm the appointment of X despite the failure to follow the procedures, because nothing has been done that might be confirmed and no evidence can be presented as to what might have happened had proper processes been pursued. In the latter case it can, and X will be treated as having been appointed at the improperly called meeting despite the failure of process.

66. This same approach is material here. Has the Club endeavoured, unsuccessfully, to follow all the processes required for an effective winding up, or has it simply acted through other routes to deliver that end? Put shortly, is this a case of flawed adherence to the proper processes, or is it adoption of an alternative improper process or no process at all? Although the Association would like to see the flaws in the Club's process as falling within the latter category, I do not consider the facts will support that conclusion.
67. The Club is far from simply continuing its operations as a going concern. It has actively endeavoured to put itself through a members' voluntary liquidation over a period of three years, and its assets have been distributed accordingly. It is simply not possible on the facts to characterise these acts, defective though they may be, as so flawed as to amount to no acts at all.
68. Further, this is not a case where the Club has failed to make any effort to adhere to the mandatory protective procedures. As outlined earlier, the Club has endeavoured to follow the prescribed set of procedures, and to do so with attention to the sequence of steps required. There is no suggestion of impropriety or bad faith as motivating non-adherence, merely the practicalities of elected members running a slowly winding down enterprise. To the extent that the Club has failed to follow the proper processes, there is no evidence that it has departed so substantially from the set practice that its endeavours should not count as an effort in that direction, and nor is there any evidence that its failures have harmed those the processes were designed to protect: see para [59] above.
69. Moreover, there is every indication that all the decisions that were taken then would still have been taken to deliver the same ends even with perfect processes in place. And indeed, were the court to insist that the necessary processes be repeated, properly, it would seem that the same ends of a solvent members' winding up would inevitably be achieved. This is because the members have now voted three times in favour of a winding up, each time unanimously, and each time with sufficient members voting to constitute a quorum (albeit in one of those meetings only by counting those voting by proxy as well as those voting in person); all the creditors have been paid; all the members have received a dividend, and none have suggested such a payment should not have been made from Club assets.

70. It follows that insistence on proper compliance with the Rules would, on the voting facts in evidence, still have resulted in a decision to wind up the Club. Neither the Association, nor the creditors nor the members are affected by the procedural irregularity, and the principle of “no harm, no foul” applies.
71. It follows that while I accept that the necessary statutory and Club Rules were not followed with perfect attention to the necessary detail, even when the Club had the benefit of lawyers and a liquidator to guide it, this has not delivered an outcome that has harmed any individual, and in particular has not harmed the Association (see especially paras [60] and [62] above).
72. I am therefore content to sanction the distributions already made by the liquidator and those further distributions that she proposes to make.

Is the liquidator entitled to her fees?

73. The final issue for the court is whether the liquidator is entitled to claim her fees and have them paid out of the Club’s assets. The short answer is that this depends on whether she has been validly appointed by the Club. Given the initial attempt by the Club to appoint the liquidator in the March 2016 Resolutions and the later decision to ratify those resolutions in the August 2018 Resolutions, and my findings on the “no harm, no foul” position in relation to any irregularities, there can be no objection to the expenses properly incurred in the winding up, including the remuneration of the liquidator, being payable out of the Club’s assets in accordance with s 115 of the IA 1986.

Conclusion

74. For the reasons outlined above, I am content to grant the liquidator the sanctions she seeks in respect of the past and proposed distributions by the liquidator of the Club’s surplus assets on a members’ voluntary winding up, being interim distributions already made to members, the intended final distribution to members, and the payment of the proper expenses of the liquidation.