Case No: HC-2017-002846

NEUTRAL CITATION NUMBER: [2019] EWHC 1684 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building,
7 Rolls Building, Fetter Lane, London,
EC4A 1NL

Thursday, 9 May 2019

BEFORE:

SARAH WORTHINGTON, QC(Hon) sitting as a Deputy High Court Judge of the Chancery Division

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BETWEEN:

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

Claimant

- and -

ASSOCIATION OF CONSERVATIVE CLUBS LIMITED

Defendant

MR M BOWMER (instructed by Kennedys Law LLP) appeared on behalf of the Claimant
MR M HUBBARD (instructed by Thomson Snell & Passmore LLP) appeared on behalf of the Defendant

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APPROVED JUDGMENT
(ON REFUSAL OF PERMISSION TO APPEAL)

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

1. On 9 May 2019, at the end of oral hearings to deal with the consequential matters raised by my judgment in this case, I refused the Defendant's application for permission to appeal. I reached that conclusion after reading brief written submissions from the Defendant, and considering their elaboration in argument before me. Given the lateness of the hour, I did not set out my reasons for refusal of that permission, although by implication I had not been persuaded by the points raised by the Defendant.

2. On 11 May, I set out those reasons by completing Form N460. Subsequently, on 5 June, I was sent a transcript of my oral refusal by way of draft judgment for approval. In the circumstances, it seems appropriate to repeat in an approved written judgment the reasons set out in summary form in Form N460, as they – rather than my bald conclusion of dismissal – reflect my response to the issues raised by the Defendant.

3. The context is relatively straightforward. The Claimant Liquidator had sought declarations as to the legality of certain past and proposed distributions of the assets of the Edgware Constitutional Club Limited (the Club) on a members' voluntary winding up, and in particular sought confirmation that those assets should be paid to the members subject to payment of the liquidator's proper expenses.

4. This was contested by the Defendant Association of Conservative Clubs Limited (the Defendant) on the basis that the Club was not properly in liquidation, so no assets could lawfully have been paid to the Club's members under the Club's own Rules, or, alternatively, that even if the Club was in liquidation, its surplus assets should have been paid to the Association under the Club's Rules.

5. In a judgment handed down on 9 May 2019 I rejected both limbs of the Defendant's arguments and granted the orders sought by the Claimant on the basis that:

    (i) the Insolvency Act 1986 s 107 was applicable on this winding up, so any surplus should be distributed to members "unless the articles otherwise provide". The Club's Rules did not "otherwise provide", since in this respect Rule 74 only provided that "*except* on the dissolution or winding up" (emphasis added), no surplus should be distributed to members: see in particular *Re Merchant Navy Supply Assoc* [1947] 1 All ER 894.

    (ii) The Club was in liquidation, despite any procedural irregularities in entering into that process, applying *Browne v La Trinidad* (1887) 37 ChD 1.

6. The Defendant applied for permission to appeal on two main grounds. The first was that I had wrongly construed Rule 74 of the Club's registered Rules. That Rule provided that "Any surplus...shall be applied in such manner as the Committee considers best (a) in the interests of the Club ..., or (b) in assisting [the Defendant], provided that except on the dissolution or winding up of the Club no surplus or funds

shall be distributed among the members." The Defendant had argued throughout, and repeated the argument when seeking leave to appeal, that this Rule imposed on the Committee a mandatory "duty" to apply any surplus under Rule 74(b) in certain circumstances, and in particular in the circumstances where a surplus arose when a winding-up was in prospect. I disagreed. By contrast I held that this Rule gave the Committee a discretion between two options while the Club was a going concern, but that clear and long-standing legal authority applied on a winding up, with the effect that any surplus at that date (i.e. any surplus beyond what was required to pay creditors and which had not already been specifically committed to the purposes described in Rule 74(b)) would be dealt with according to IA 1986 s 107, and, here, that meant it would be distributed to members: see the cases cited in my judgment, but note in particular *Re Merchant Navy Supply Association* [1947] 1 All ER 894. In short, I rejected the Defendant's argument that if a surplus cannot be applied under Rule 74(a) then there is a *duty* (as opposed to a discretion) to apply it under Rule 74(b), especially if winding up is in prospect. Given the absence of a duty to distribute any surplus to the Defendant, I therefore held that the Defendant could not establish a legal entitlement to such a surplus on liquidation.

7. The Defendant's second ground for seeking permission to appeal was that I had misapplied the "no harm, no foul" approach to assessing the effect of any defects in the procedures adopted to put the Club into liquidation. The Defendant suggested that in considering whether the same result would inevitably have been reached if proper procedures had been followed for putting the Club into liquidation, I should have considered what "a properly constituted Committee, properly considering its fiduciary duties and powers under Rule 74 [would] have done". But this re-runs the first issue. My task was to consider whether or not the Club had indeed been put into liquidation notwithstanding any defect in following the required procedures for putting the Club into liquidation. The proper counterfactual is whether the same outcome – i.e. a decision to put the Club into liquidation via a members' voluntary winding up – would inevitably have been reached if all the procedures set down for that voluntary process had been properly followed. For the reasons set out in my judgment, I concluded that the facts made it plain that that was the case. I do not consider the contrary is arguable.

8. The Defendant's concern with what "a properly constituted Committee, properly considering its fiduciary duties and powers under Rule 74 [would] have done" is a concern which is not directed at the members' decision to put the Club into liquidation, and the effectiveness of that decision, but is directed at some possible flaw in the Committee's earlier exercise of its duty (as the Defendant would have it) or its discretion (as I would suggest it is, and as the Defendant in the alternative had initially argued) as to how to use the Club's surplus, and in particular its failure to decide that this surplus should be directed to the Defendant. The straightforward "duty/discretion" argument was put to me in the primary submissions and dealt with in my judgment (see especially paragraphs [20]-[24]). In running that argument, no evidence was presented by the Defendant as to any particular impropriety on the part of the Committee in failing to exercise its discretion in favour of distributing the surplus to the Defendant, and certainly no argument that the flaw in the Committee's exercise of its discretion is that the Committee was not properly constituted, and that a properly constituted Committee would – or might – have come to a different decision some years ago. It follows that this can hardly constitute grounds for permission to appeal from my

judgment, since that very particular point was not argued before me, nor was it material to my conclusions. I do not think the argument can be made out, but it does not seem appropriate to give reasons for that in a 'permission to appeal' decision.

9. The points I made in paragraphs [59]-[62] of my judgment were directed at another context entirely. In particular, I was making the point that the Defendant had made much of the procedural irregularities in the Club's winding up even though – given my findings on the construction of Rule 74 – it was not a creditor of the Club and had no entitlement to the Club's surplus assets. I added by way of exceptional emphasis that even if, *contrary to my findings*, the Club had still been operating as a going concern over the past three or four years, then the Defendant would still not be a creditor and nor would it have any entitlement to the Club's surplus. It would – once the Liquidator had reinstated the funds wrongfully paid out during the 'going concern' period in my purely hypothetical scenario – merely be entitled "to request a proper exercise of the Committee's discretion embodied in Rule 74" (paragraph [62]). I added that, given the current membership of the Club, and given their current continuing commitment to a members' voluntary winding up with a distribution to the membership, even this *future* (hypothetical) exercise would likely deliver exactly the same outcome – ie the same Committee exercise of discretion (given the Committee would be constituted from the present membership) and the same decision to put the Club into liquidation. Hence my double conclusion in paragraph [63]. But all this goes well beyond the detailed argument initially advanced by the Defendant and the relevant legal conclusions in my judgment.

10. In short, I consider that the Defendant's proposed grounds for appeal do not have a real prospect of success (CPR r. 52.6(1)), and so I refuse permission to appeal.