

CA on appeal from High Court Newcastle upon Tyne County Court (HHJ Behrens & HHDJ Alderson) before Schiemann LJ; Brooke LJ. 6th March 2003.

LORD JUSTICE SCHIEMANN

1. My Lord will deliver the first judgment.

LORD JUSTICE BROOKE:

2. This is an appeal by the claimant, Albert Whiting, against an order made by Judge Behrens in the Newcastle-upon-Tyne County Court on 19 July 2002 when he dismissed his appeal against an order made by District Judge Alderson in the same court on 29 April 2002. The district judge had ordered a stay of these proceedings pursuant to section 5 of the Arbitration Act 1996.
3. This is a second appeal. It is concerned with the interpretation of a particular arbitration agreement in the events that have happened in this case. When Laws LJ granted permission to appeal a "without notice" hearing he did not suggest that the appeal raised any important point of principle or practice. He seems to have been impressed by the fact that the district judge and the circuit judge had reached the same decision for different reasons, and that the district judge's decisions had been taken on an erroneous basis. Why Laws LJ considered that there was a compelling reason for this court to hear the second appeal was not altogether clear from his short judgment.
4. Mr Whiting became a member of Wallsend Rotary Club on 5 June 2002. On 7 November 2001 members of the club, who purported to be the council of the club, decided to terminate his membership. This litigation is not concerned with the question whether they had good cause to terminate his membership, although Mr Whiting maintains that they did not. Mr Whiting's complaint is that the people who voted to terminate his membership did not as a matter of law constitute the council of the club, so that they had no power under the club's constitution to terminate his membership.
5. It will be convenient to consider the constitution of the club before describing the events which happened in this case and the legal issues to which they gave rise. At all material times Wallsend Rotary Club had adopted the standard RIBI club constitution. Article XI of this constitution is headed "Duration of Membership". Section 5 of that Article, which follows sections concerned with automatic termination for non-payment of dues and termination for non-attendance, is headed "Termination - Other Causes". Section 5(a) provides: *"Good Cause. The council may terminate the membership of any member who ceases to have the qualifications for membership in the club or for any good cause by a vote of not less than two-thirds of the council members, at a meeting called for that purpose."* Subsections (b) and (c) contains procedural provisions which are of no immediate relevance on this appeal.
6. Section 6 is headed "Right to Appeal or Arbitrate Termination". It provides, so far as material:
"(a) Notice. Within seven (7) days after the date of the council's decision to terminate membership, the secretary shall give written notice of the decision to the member. Within fourteen (14) days after the date of the notice, the member may give written notice to the secretary of the intention either to appeal to the club or to arbitrate as provided in article XI.
(b) Date for Hearing of Appeal. [This is concerned with the procedure governing the hearing of the appeal at a regular club meeting].
(c) Arbitration. In the event of a request for arbitration, each party shall appoint an arbitrator and the arbitrators shall appoint an umpire. Only a member of a Rotary club may be appointed or umpire or as arbitrator.
(d) Appeal. If an appeal is taken, the action of the club shall be final and binding on all parties and shall not be subject to arbitration.
(e) Decision of Arbitrators or Umpire. If arbitration is requested, the decision reached by the arbitrators, or, if they disagree, by the umpire shall be final and binding on all parties and shall not be subject to appeal."
7. Section 7, which is headed "Council Action Final", provides: *"Council action shall be final if no appeal to this club is taken and no arbitration is requested, the decision reached by the arbitrators, or, if they disagree, by the umpire shall be final and binding on all parties and shall not be subject to appeal."*
8. Article XV governs the arbitration of disputes other than as to a decision of the council. It provides: *"Should any dispute, other than as to a decision of the council, arise between any current or former member(s), and the club, any club officer or the council, on any account whatsoever which cannot be settled under the procedure already provided for such purpose, the dispute shall be settled, upon a request to the secretary by any of the disputants, by arbitration. The procedure utilised for such arbitration shall be as provided in article XI, section 6, sub-section (c) and (e)."*
9. It will be seen that this Article provides for a compulsory arbitration mechanism for all disputes within the club other than as to a decision of the council. A decision of the council under Article XI, on the other hand, may be challenged by the affected member either by an appeal to the club or by arbitration. In this context, therefore, arbitration is an optional remedy in the sense that the constitution also gives to the affected member a right of appeal to a regular meeting of the club instead.
10. I return now to the history of events. By a letter dated 13 November 2001 Mr Whiting was informed of the council's decision. He was also sent a copy of the Rotary arbitration document and relevant sections of the constitution. On 16 November he wrote to the club's president. He said that the council had no good cause to terminate his membership. He also went on to say:
"[I] take this first opportunity to give formal notice of my wish to arbitrate in accordance with Article XV and under the procedure provided for in Article XI section 6(c) and (e) of the constitution."

11. On 4 December the president replied. In the material part of his letter, he wrote: *"I have decided in the interests of resolving the issue between the Club and yourself to accept your invoking arbitration and therefore inform you that I anticipate the 15 day period suggested (ie not mandatory) by Rotary, during which you should make a decision about your choice of arbitrator as beginning, from receipt of this letter."*
12. On receipt of this letter Mr Whiting seems to have had second thoughts about arbitration. In a letter dated 8 December he told the president: *"Accordingly, I hereby give formal notice that I withdraw my request to invoke the arbitration procedure to enable the matter to be dealt with in Court, where you will have no choice but to answer questions properly [that the court] put to you and attempt the impossible task of explaining your disgraceful actions in public."*
13. Solicitors then appeared on the scene and took over the correspondence on Mr Whiting's behalf. Of the subsequent correspondence it is only necessary to quote two paragraphs from a letter sent to those solicitors by the officers of the club on 31 January 2002:
"In deciding in his letter of 8th December... to withdraw from the ... process of arbitration, after invoking it, in relation to his differences with the Club ... your client decided for himself to terminate membership irrevocably ... Your client's position as a Rotary District Official is not for us to determine; your client informed District governor Marilyn in December 2001 of his decision to withdraw from arbitration and it is for her and her executive to decide on his situation."
14. On 20 March 2002 Mr Whiting issued the present proceedings. As I have said, he did not assert that the council did not have a good cause to terminate his membership of the club in his claim form. He relied on his contention that some of those who took part in the council's vote to expel him were not properly qualified members of the council. In a witness statement the club's president has accepted that in some cases there has not been strict compliance with all the rules of the club. He does not accept, however, that this affects the right of those present at the council meeting on 7 November 2001 to expel Mr Whiting.
15. The defendants in this action are sued on their own behalf and on behalf of all the other purported members of the Wallsend Rotary Club, apart from Mr Whiting. On being served with the proceedings they applied for an order that the proceedings be stayed pursuant to section 9 of the Arbitration Act 1996. The district judge made the order sought. He took the view that the relevant dispute was not whether the council's decision was right or wrong, but whether the persons making it had jurisdiction to make it. Such a dispute was not a dispute as to a decision of the council, and it therefore fell within Article XV of the constitution which made arbitration mandatory. In any event Mr Whiting invoked the arbitration clause himself.
16. Judge Behrens reached the same conclusion but by a different route. He was of the clear opinion that the decision made on 7 December 2001 was a decision of the council within the meaning of Article XV of the constitution. The mere fact that Mr Whiting asserted that the council was not properly constituted did not prevent the decision from being a decision of the council. In his judgment, this was a decision of the council to terminate Mr Whiting's membership, and any challenge to that decision must be in accordance with section 6 of Article XI. He continued:
*"To my mind it is clear that any challenge to the termination must be in accordance with section 6. Under section 6(a) the member may give notice to the Secretary of his intention either to appeal or to arbitrate. In my view, as a matter of construction, there are only 2 methods opened to a disgruntled member. It is true, as Mr Ashton pointed out, that section 6(a) uses the word 'may'. However in my view it is used in the context of 2 options. Reading the rules as a whole it is to my mind quite inconceivable, as a matter of construction, that the disgruntled member could by-pass the options and challenge the termination by means of court proceedings.
In any event Mr Whiting exercised one of the options by giving notice of his wish to arbitrate on 16th November 2001."*
17. The judge then dealt with two subsidiary points. He said, first, that although Mr Whiting's notice of his wish to arbitrate had been given to the president of the club, and not to the secretary as the constitution required, this was at most a procedural irregularity which it was open to the club to waive, and it was indeed waived by the president's letter of 4 December 2001. He then went on to reject what he understood to be a contention that an agreement to arbitrate had been rescinded by mutual agreement. In this context Mr Whiting relied on the letters dated 8 December 2001 and 31 January 2002, the material parts of which I quoted. The judge said that the first of these letters was not an offer to rescind the arbitration agreement at all. It was a unilateral decision by Mr Whiting to withdraw from the arbitration procedure. The club's letter dated 31 January 2002 was not the acceptance of any such offer. Nor was it evidence that such an offer had been made. All the club was doing was expressing an opinion as to the effect of Mr Whiting's unilateral decision to withdraw from the arbitration agreement.
18. The claimant has identified two issues as arising on this further appeal: (1) Did Article XI preclude him from commencing any legal proceedings in respect of the termination of his membership of the club? (2) Was there an effective withdrawal of the arbitration reference and therefore no grounds for a stay of the legal proceedings?
19. He maintains that the answer to the first question is "no". It is not in issue before us that he has raised a serious question as to the validity of the decision to terminate his membership, but that issue is susceptible of being decided in the arbitration proceedings. He says, however, that he is not wishing to litigate about whether there was good cause to terminate his membership - although he would argue that there was not - but about whether the council's decision was a valid one. In those circumstances his case was not embraced by a rule which has the

effect that any challenge to a termination for good cause must be submitted to arbitration if an appeal to the club is not mounted.

20. In my judgment this contention involves a misinterpretation of the combined effect of section 6 of Article XI and Article XV. Section 6 of Article XI provides for a right to appeal or arbitrate in every case in which the council terminates a member's membership. This will include cases in which the council decides to exercise its discretion to terminate membership for unpaid dues under section 3, or cases in which the council so acts because of a member's poor attendance under section 4, as well as cases involving "good cause" termination under section 5. In any of these cases section 6 gives the member the right to appeal to the club or to arbitrate, and there is nothing in that section to suggest that the validity of the council's decision cannot be an appropriate subject of the appeal or arbitration.
21. We have heard a fascinating argument on the hearing of this appeal as to whether the district judge was right in categorising this as an Article XV case or the circuit judge was right in categorising it as an Article XI case. I do not consider it necessary to decide for the purposes of this appeal between these rival views, since in the latter case, if it is an Article XI case, Mr Whiting opted for arbitration rather than an appeal to the club. Mr Hedley, in his able submissions suggested that the answer to this conundrum might be that in so far as Mr Whiting was challenging the makeup of the membership of the council who purported to terminate his membership, that was a dispute between members which should go to compulsory arbitration under Article XV. In so far as he was wishing to challenge the decision to terminate his membership for good cause that was a decision, supposing that the council was properly constituted, which was susceptible either to challenge by arbitration or by an appeal to the full membership under section 6 of Article XI. Mr Whiting ought to have made his challenge on each front simultaneously. However it may be, Mr Whiting did decide to opt for arbitration and in either case Mr Whiting is therefore bound by the club's constitution which represents an agreement to arbitrate disputes (apart from the appeal to the club allowed for by section 6(a) of Article XI), and he cannot unilaterally go down the litigation path.
22. So far as the second issue on this appeal is concerned, the constitution confers no right on a member to resile unilaterally from arbitration for which he has opted. The officers' letter dated 31 January 2002 was not their acceptance by conduct of an offer to withdraw the arbitration reference; it was the acknowledgment of the practical effect of a purported ultimatum, as Judge Behrens found. Mr Hedley has made it clear to us today, however, that the club is quite willing to proceed with the arbitration if Mr Whiting does not wish to regard the arbitration as at an end.
23. Mr Ashton in his skeleton argument suggested that his client could avoid the mandatory effect of section 9(1) of the Arbitration Act 1996 in the circumstances of the present case. That section provides: "*A party to an arbitration agreement against whom legal proceedings are to be brought... in respect of a matter which under the rules is to be referred to arbitration may... apply to the court [for a stay].*" (Emphasis added).
24. Mr Ashton argues that the words "is to be" connote the existence of an agreement whereby the reference to arbitration is mandatory, and that this is inconsistent with the permissive nature of section 6 of Article XI. Because the court could not compel a member to proceed by way of arbitration, because he has the option of proceeding by way of appeal, he submits that section 9(1) has no application.
25. For my part I do not consider that the question in the present case can be usefully resolved by reference to hypothetical situations. Mr Whiting did elect to arbitrate, and from that date onwards his dispute under the rules was a matter which was to be referred to arbitration. Section 9 accordingly has full force.
26. For these reasons I would dismiss this appeal.

LORD JUSTICE SCHIEMANN:

27. I agree.

(Appeal dismissed with costs; such costs to be assessed by a costs judge; £6,000 to be paid on account within 28 days).

MR DAVID ASHTON (instructed by McKeags Solicitors, Newcastle-upon-Tyne NE3 1HN) appeared on behalf of the Appellant
MR RICHARD HEDLEY (instructed by Hammond Suddards Edge, Leeds LS3 1ES) appeared on behalf of the Respondents