Neutral Citation No. [2003] NIQB 52

Ref: **GIRC3986**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **7/7/03**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JEFFREY DONALDSON MP, REV W MARTIN SMYTH AND DAVID BURNSIDE MP

Plaintiffs;

-and-

SIR REGINALD EMPEY OBE, LORD MAGINNIS OF DRUMGLASS, JAMES NICHOLSON MEP, COUNCILLOR JAMES RODGERS, DERMOT NESBITT, LORD ROGAN OF LOWER IVAGH, JACK ALLEN OBE, JAMES COOPER, DON McCONNELL OBE AND MAY STEELE MBE JP SUED ON THEIR OWN BEHALF AS OFFICERS OF THE ULSTER UNIONIST COUNCIL AND ON BEHALF OF ALL OF THE MEMBERS OF THE DISCIPLINARY COMMITTEE OF THE ULSTER UNIONIST COUNCIL

Defendants.

JUDGMENT

GIRVAN J

[1] The present proceedings arise out of a dispute within the Ulster Unionist Party relating to the future direction of the party in the light of the so-called joint declaration between the British and Irish Governments. Although the dispute raises highly contentious political matters the court has no function of a political nature in these proceedings and must simply determine the legal questions arising out of a decision made by the officers of the Ulster Unionist Council ("the UUC") to refer the plaintiffs to the party's Disciplinary Committee and arising out of the interim suspension by the Disciplinary Committee of the plaintiffs. In setting out its decision the court must studiously avoid expressing any view on the merits or otherwise of the political stances adopted by the parties in dispute. The decision of the court

must not be interpreted as in any way reflecting a political decision. It is no such thing and although the decision is ultimately in favour of one side and may have political repercussion it is a decision arrived at by an analysis of the law and that alone.

[2] The plaintiffs in the proceedings are Jeffrey Donaldson, Rev Martin Smyth and David Burnside who are all Ulster Unionist Members of Parliament. Jeffrey Donaldson is one of the four Vice-Presidents of the UUC and the Rev Martin Smyth is the President. The action arises out of the laying of disciplinary charges against the plaintiffs by the officers of the UUC at a meeting which took place on 26 June 2003. In a letter of 27 June 2003 Mr Raymond Ferguson, writing as Chairman of the Council's Disciplinary Committee, informed the plaintiffs that the officers of the UUC had referred the following charges to the Disciplinary Committee for consideration:

> "The officers of the UUC have reason to believe that by opposing the policy of the party and the decisions of the Ulster Unionist Council and by proposing to enter into a relationship with parties opposed to the Ulster Unionist Party and its policies Rev Martin Smyth MP, Mr Jeffrey Donaldson MP and Mr David Burnside MP are acting in a manner detrimental to the best interests of Ulster Unionism and disadvantageous to the best interests of the Council. Further the officers of the Ulster Unionist Council have reason to believe that by refusing to endorse or adhere to the decision of the Ulster Unionist Council the Rev Martin Smyth MP and Mr Jeffrey Donaldson are in breach of their duty as officers generally and of Rule VI.4(iii) in particular."

The letter went on to state that the Disciplinary Committee had met on 27 June 2003 and determined that a further hearing of the Committee should take place at the party headquarters on 17 July 2003 and informed the plaintiffs that they had a right to appear and be heard in person. The letter stated that the Committee's practice was to allow one supporter in attendance with the party charged (but not a legal representative) and the party charged might also call up to two witnesses in support of his case. The letter concluded by informing the plaintiffs that pending the hearing on 17 July the plaintiffs were suspended from membership of the Ulster Unionist Party with effect from the date of the letter.

[3] The background to the disciplinary charges lay in the fact that the plaintiffs by letter of 23 June 2003 had written to the leader of the Ulster Unionist Parliamentary Party, Mr David Trimble MP, informing him of their

decision to resign the whip of the Ulster Unionist Parliamentary Party with immediate effect. The plaintiffs stated that this followed the decision of the UUC by a narrow majority to adopt the leader's position on the joint declaration promulgated by the British and Irish Governments. They alleged that the leader had failed to uphold key Unionist principles and that he was pursuing a policy which they believed was detrimental to Ulster Unionism. They could not support the joint declaration under any circumstances and could not on principle endorse the policy. According to Mr Donaldson's affidavit the plaintiffs considered that they were bound by their principles to vote in accordance with their conscience and otherwise than with the parliamentary party whip. Mr David Trimble responded to the plaintiffs' letter of 23 June 2003 stating that the reasons for their action were disingenuous. It was a direct repudiation of the Council's decision. Their actions were not in the best interests of the party. As officers of the Council the President and Vice-President were obliged by the constitution to "implement the decisions of the Council." It was impossible for the President and Vice-President to resign the whip and still retain their offices. Mr Trimble stated that he took it that to be consistent their resignation also applied to those offices.

[4] The background to the plaintiffs' decision to resign the whip lay in the meeting of the UUC of 16 June 2003 when the party by a relatively slender majority of 54% to 46% backed the leader's approach to the joint declaration.

[5] Following receipt of the plaintiffs' letter of 23 June 2003 Mr Trimble requested an emergency meeting of the party officers to be held on 26 June at 10.00am to discuss the implications of the letter. Jeffrey Donaldson as Vice-President of the Council attended. The Rev Martin Smyth did not attend sending an apology since he was at a meeting in London. Jeffrey Donaldson participated in some of the discussions at the meeting but according to his affidavit was "prevailed upon to leave the meeting." Eventually under protest he did so. He was not re-admitted into the meeting. It was his understanding that the leader proposed that disciplinary charges against the plaintiffs should be referred to the Disciplinary Committee. It was further his understanding that it was agreed that the Chairman and Vice-Chairman of the Executive Committee would "co-opt" any additional members required in consultation with Mr Jim Rodgers. Mrs Roberta Dunlop was as he understood co-opted by this method. She holds views on party policy opposed to the plaintiffs' views.

[6] Mr James Cooper, the Chairman of the Executive Committee of the UUC and who was present at the meeting of the officers, states in paragraph 9 of his affidavit that it was "further agreed at the meeting of the officers on 26 June 2003 that I should consult with other officers in order that we might co-opt further members onto the Disciplinary Committee." As a direct result of the decision Mrs Roberta Dunlop and the Rev Robert Coulter were co-opted

as members of the Disciplinary Committee. The handwritten minutes of the meeting that took place on 26 June 2003 is recorded as stating that Mr Trimble at the meeting suggested that the Chair (referring to Mr Cooper) should have authority (in consultation with others) to arrange other (standby) members of the Disciplinary Committee. Mr McConnell is noted as having said that the Chairman should consult with at least three other members of party officers to include Mr Rodgers.

[7] Mr Larkin raised a number of legal arguments challenging various stages and aspects of the decision reached by the officers and with the Disciplinary Committee the first of which was as to the charges referred to in Mr Ferguson's letter of 27 June 2003 do not accurately reflect charges in respect of which disciplinary powers are available under Rule 19(1). That provision spells out two bases on which the officers may make a referral to the Disciplinary Committee, that is to say there exists reason to believe that the conduct of a member of the party (i) is detrimental to the interests of Ulster Unionism or the Ulster Unionist Party or (ii) is disadvantageous to the objects of the Council. The Disciplinary Committee's letter refers to the plaintiffs acting in a manner detrimental to the best interests of Ulster Unionism and disadvantageous to the best interests of the Council. Mr Larkin contends that there is a subtle but important difference between the wording of the rule and the wording of the letter.

[8] At the officers' meeting it was clear that the officers were referred to the wording of Rule XIX which Mr Cooper quoted to the officer present. Mr Morgan QC stressed that the proper approach to interpreting and applying the rules set out in the constitution of the UUC should take account of the fact that one is looking at and applying the rules of a working political party. Accordingly in construing and applying the rules the court should avoid an over technical approach to the rules. I accept that in looking at the dispute which has arisen between the plaintiffs and the leadership one must keep one's feet on the ground and avoid an over technical approach. I am satisfied that at the meeting of the officers they were aware of the nature of the plaintiffs' actions and conduct, were aware of the wording of Rule 19, did decide that there were grounds for referring the matter to the Disciplinary Committee and were aware that it was not for the officers to decide the question of the guilt of the plaintiffs. The triggering events for a referral of the matter to the Disciplinary Committee had thus occurred. The Disciplinary Committee if properly constituted accordingly had jurisdiction to deal with the matter referred to it. The formulation of the charges set out in the letter of 27 June 2003 from Mr Ferguson was not entirely correct or accurate and does not follow the wording of Rule 19. There are subtle but important differences between the wording of Rule 19 and the words of the charges set out in the letter. If in fact any Disciplinary Committee addressed the matter on the basis of the charges as formulated in the letter the resultant decision would be flawed because the Disciplinary Committee would not be addressing the

particular issues which they can address under Rule 19. That does not detract from the fact that the officers have referred the matter under Rule 19 to a Disciplinary Committee for investigation and decision. Whether there is a properly constituted Disciplinary Committee is a separate issue which I will address later.

[9] Mr Larkin's second line of attack was that the leader of the party was very actively involved in the decision-making process of the officers of whom he was not one. He argued that Mr Trimble had no right to attend the meeting let alone lead and participate in the referral of the charges.

[10] It is clear that Mr Trimble is not an officer of the UUC. It is clear that he could not cast a valid vote on the proposal to refer the matter to the Disciplinary Committee. It was conceded by Mr Morgan QC that Mr Trimble did vote, that he was not entitled to vote and that his vote was incorrectly counted in the decision to refer. There is nothing in the rules to prohibit the attendance of Mr Trimble at the meeting Rule VI.4(ii) imposes a duty on the officers to consult regularly with the leader. I can see no legal basis for saying that it was improper or contrary to the constitution of the UUC for the officers to liaise with the leader by way of consultation over the issue discussed at the meeting. Had Mr Trimble not been physically present in my view they could legitimately have consulted him by phone or by video link. His physical presence at the meeting was not unlawful or unconstitutional. Although his vote was irregular and should not have been counted the decision was reached by a majority of the officers present and in my view was not an invalid decision on the ground of Mr Trimble's involvement.

[11] A separate point was taken that Mr Donaldson was wrongly excluded from the meeting when the decision was made. Mr Donaldson did attend the meeting, spoke and was heard. He withdrew from the meeting. He said he was prevailed upon to do so. Mr Cooper in his affidavit said that it was explained to Mr Donaldson at the outset to the meeting that he would be given an opportunity to speak and that he may wish to withdraw when his position was being considered. Mr Donaldson, according to Mr Cooper, did not object to that course and made a final address before he withdrew and he not vote on the proposal. He was entitled to vote on the resolution notwithstanding his interest. *Josling and Alexander* on the *Law of Clubs* 6th Edition at page 45 states that unless the rules so provide a member of a private association who has an interest in the subject matter of the resolution need not abstain from voting. Since Mr Donaldson in my view did voluntarily withdraw from the meeting and did not insist on his vote being taken against the referral of the matter to the Disciplinary Committee it cannot be said that that decision to refer the matter to the Committee was unlawfully taken.

[12] Separate points are taken in relation to the manner in which the decision was made in relation to the constitution of the Disciplinary Committee. It is argued that whatever may be said about Mr Donaldson's exclusion from the decision to refer the matter to the Committee the decision as to the constitution of the Committee was bad because Mr Donaldson was not involved in the decision about it and it arose after he left the meeting. He had no opportunity to make any statement or to vote on that resolution if there was a resolution put (which is unclear).

[13] The decision in relation to the constitution of the Disciplinary Committee was irregular on a number of separate grounds. One must firstly try to establish what if anything was actually decided about the composition of the Committee. The affidavit of Mr Cooper asserts that it was agreed that Mr Cooper should consult with "other officers" in order that "*we* might co-opt further members". This paragraph is quite unclear. It is not clear whether he was saying it was agreed that he would consult with all the other officers or with some of the other officers and if so which ones. The word *we* is left undefined. The minutes of the meeting record that Mr Trimble said that the chairman should have authority in consultation with others (undefined) to arrange other "standby" members. Mr McConnell said that the Chairman should consult with at least three other members to include Mr Rodgers (who had voted against the proposal to refer the matter to the Disciplinary Committee). No vote is recorded as having been taken. No resolution was formulated or put to the meeting. Even if a decision was taken the decision was flawed on the ground that under Rule XVIII.1 it was for the officers to appoint the Disciplinary Committee not for some of the officers to do so. The power to appoint the Disciplinary Committee was a function delegated to the officers. Applying the principle *delegatus non potest* delegare I do not consider that the officers could sub-delegate that function to a sub-class of the officers. Moreover the proposal as such if it was a de facto if unrecorded resolution was raised in the absence of Mr Donaldson who was entitled to attend the meeting and vote (for the reasons already discussed). His voluntary withdrawal on the issue of referral to the Disciplinary Committee cannot be interpreted as a waiver in relation to other matters such as the constitution of the Disciplinary Committee.

[14] Since the Disciplinary Committee as constituted at the time of the decision recorded in the letter of 27 June 2003 was not a properly constituted Disciplinary Committee, that Committee had no jurisdiction or authority to make any decision. On that ground alone its purported interim suspension of the plaintiffs had no legal effect. The decision to suspend on an interim basis was in any event outwith the powers of the Committee under the constitution since the rules confer no such power and none could be implied. The rules do contain a limited suspensory power vested in the executive committee in relation to delegates or representatives of affiliated association (see Rule X.14). Rule XIX does contain a power to suspend or expel but only after proper

investigation and after hearing the party charged. In this case there had been no completed investigation and the purported interim suspension was made without giving the plaintiffs any opportunity to be heard. Mr Morgan QC sought to justify the indefensible by arguing that the circumstances were of such a unique and urgent gravity that the Committee could legitimately come to the conclusion in the way in which they did. However the rules of basic fairness were broken in arriving at the decision. The plaintiffs were not informed that a suspension on an interim basis was under consideration. They were given no opportunity to make representations.

[15] Mr Larkin QC challenged the propriety of Mr Fitzsimons being involved in the Disciplinary Committee. Mr Fitzsimons is the Vice-Chairman of the Laganvalley Constituency Ulster Unionist Association. He was the lead signatory to a requisition for a meeting of the Association to consider a motion that the Association had no confidence in its Member of Parliament. The requisitioning signatories recorded the view that Mr Donaldson was acting in a way detrimental to the Ulster Unionist Party, wording very close to the wording of Rule XIX. Mrs Tulip a member of the Disciplinary Committee in the past declined to act because she was the constituency secretary of Laganvalley Ulster Unionist Association and she felt that it created a conflict of interest. It is difficult to understand how Mr Fitzsimons failed to appreciate the conflict of interest situation in which he found himself. Mr Fitzsimons could not properly act on the Disciplinary Committee in view of the conflict of interest in which he found himself. It was argued that he was still free to listen and was capable of deciding with an open mind. In Porter v Magill [2002] 1 All ER 465 the House of Lords enunciated the test of apparent bias as being whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the relevant member of the tribunal was biased. Applying that test I am satisfied that Mr Fitzsimons could not properly sit on the Disciplinary Committee. It can be assumed that the officers must not have been aware of Mr Fitzsimons position when they discussed the constitution of the Disciplinary Committee for had they known of it they most certainly would have appreciated the undesirability of Mr Fitzsimons participating in the committee. Had Mr Donaldson been involved in the decision making process in relation to the constitution of the committee the officers would have been made aware of the point. Furthermore the fact that the members of the improperly constituted Committee made the invalid decision which they did to suspend the plaintiffs on an interim basis would disqualify them from acting on a properly constituted Disciplinary Committee for the decision that circumstances were so grave as to justify the making of such a draconian and previously unheard of form of suspension represents the taking of a position in relation to the charges that would lead an objective observer to doubt their capacity to conduct a dispassionate investigation and to arrive at an unbiased decision.

[16] In the result I shall grant the following relief:

(1) A declaration that the officers of the UUC have failed to properly constitute a Disciplinary Committee of the UUC for the purposes of investigating and determining charges against the plaintiff as referred to the Disciplinary Committee by the officers.

(2) A declaration that the purported suspension of the plaintiffs from the membership of the UUC and the purported suspension of the first and second plaintiffs from office in the UUC by members of the improperly constituted Disciplinary Committee communicated to the plaintiffs by letter dated 27 June 2003 is unlawful, invalid and of no force or effect.

Mr Morgan QC argued that the court should not grant injunctive relief since no proprietary interests of the plaintiffs were at stake in relation to the decisions. Mr Larkin did not press for an injunction at this stage. In view of the declaratory relief which I have granted and in view of the contents of this judgment the legal position should be clear. Accordingly at this point in time I do not grant injunctions. I shall hear counsel on the question of costs.