SPORTING CLUBS AND CORPORATE THEORY

BY SAMUEL STOLJAR*

[*Although Victoria and Queensland have now joined Western Australia, South Australia, Tasmania and the A.C.T. and Northern Territory in legislating for unincorporated associations and New South Wales has legislation prepared, numbers of associations do not take the opportunity to incorporate pursuant to such legislation. Furthermore at the time of writing the most recent Acts had yet to be proclaimed. In this article Professor Stoljar examines the law as it operates outside of the statutory modifications and finds it wanting. This deficiency, he suggests, has resulted from the judiciary (and particularly that in Victoria) having passed up opportunities to exercise sufficient courage to place a conceptually unsatisfactory area of the law on a more satisfactory basis. He points a way out of the dilemma by arguing that a case law base already exists from which to develop a general rule that the members of the committee of an unincorporated association from time to time ought to be suable. Providing that they have acted within the association's rules he then concludes that those committee members should be indemnified from the association's common fund, (with personal liability only arising after its exhaustion).*]

We may criticise superior court decisions in various ways. A criticism may decry a decision as unjust or unfair or unwise. Or it may challenge a case on chiefly technical grounds: that it overlooks a pertinent statute or previous precedent. Or, and this is the criticism we shall now pursue, it may argue that judges missed an important opportunity in not displaying greater conceptual courage if only to put an admittedly unsatisfactory bit of law on a more satisfactory basis: more satisfactory both theoretically and practically. Of course judges cannot always reconstruct the law; there are areas of law reform only the legislature can undertake. However there are also areas which come within the province of the courts. Compared with contracts, torts or trusts, the unincorporated association is admittedly a less obvious area of judicial concern; yet it too presents problems about which courts could have shown themselves more imaginative or inventive than they have perhaps dared to be.

The central problem springs from the orthodox dogma that an unincorporated association does not exist in law: that, more particularly, it cannot sue or be sued as such or *eo nomine*, even though as sporting or social clubs they normally conduct, as they are intended to conduct, commonly agreed activities, of a completely legitimate kind, activities which for their realisation often require the association to undertake obligations and transactions which, if entered into by natural persons, would issue in very familiar legal incidents. Are then the undertakings by or on behalf of unincorporate bodies entirely without legal effect? Under the aforementioned dogma this would certainly appear to be the case; still, the

* Professor of Law, Australian National University, Canberra.

paradox is that the courts have shied away from a totally negative answer, with results which leave the present law extraordinarily confused.

1.

In Australia three Victorian decisions now almost dominate the law. In *Freeman v. McManus*[1] the Melbourne Trades Hall Council purported to lease some premises to a local branch of the A.L.P. The latter (as incidentally also the former) being an unincorporated association, the question was whether this arrangement would enable a political club to hold by itself a tenancy of land. The court categorically denied this possibility. The A.L.P. branch could have no rights as lessee for the simple reason that no contract of lease or letting could come into existence at all. Although the branch needed the premises 'to carry on the association as a living organisation and to carry out its programme', the fatal objection was that the local branch was not an entity known to the law, hence not an entity capable of entering into contractual relationships or of doing other juristic acts. Nor would O'Bryan J. entertain the contention that as both sides had made their agreement on the full understanding that they were unincorporated bodies with fluctuating memberships, their agreement could be construed as a tenancy granted to the members for the time being, a periodically identifiable class of persons who, as an association, could well function as joint lessees. This idea was dismissed on the ground that it would require a sort of novation with each change of membership; for each time a person ceased to be a member, or was elected as a new one, there would have to be a novation of the contract: the notion is too fantastic, said O'Bryan J., to warrant serious consideration.[2] In any case our law knows nothing of a lease grantable to a body with fluctuating membership, with the actual tenants having to be determined from time to time, whether one saw this as a proposition based on common sense or on authority.[3] Further support was also found in an argument advanced by Professor Ford who had distinguished the grant of a freehold from the grant of a lease. A grant to an unincorporated body of a freehold can be construed as a grant to the individual members since the latter would here be conferred benefits greater in value than any liabilities which ownership may impose; as joint beneficiaries of property they could do with it as they please. A grant of a lease to an association's individual members, on the other hand, would impose on them mainly onerous personal covenants. 'It is for this reason that courts in the British Commonwealth have refused effect to a lease given to an association *eo nomine*.'[4]

[1] [1958] V.R. 15.
[2] *Ibid.* 19, 21.
[3] See, in particular, *Jarrott v. Ackerley* (1915) 85 L.J. Ch. 135, 136, per Eve J.; and see other authorities cited in *Freeman v. McManus, op. cit.* 19.
[4] Ford H. A. J., (1956) 'Dispositions of Property to Unincorporated Non-profit

All these points are not as strong as they appear to be at first sight. To begin with the last argument, it is undoubtedly true that the grant of a tenancy to association members individually would submit them to constant burdens (covenants for payment of rent or for repairs in particular), which indeed is a very good reason to avoid making the members personally liable, and to this extent the rule that a lease cannot be granted to an unincorporate association is therefore good sense and good law.[5] But this is not where the matter ends. For one thing, it is not at all the case that, failing incorporation, the only candidates for meeting the burdens of a tenancy are the members in their personal capacity. In fact, it is an early and important feature of the law that such members are not personally liable, being protected by what may be described as a principle of limited or sheltered liability according to which individual members of an unincorporated (and non-profit-making) association become liable only in the amounts of the subscriptions or contributions they have agreed to pay.[6] Nor, for another thing, are the members of the committee ultimately liable, for their liability, too, is limited by the fact that they are entitled to an indemnity out of the association funds as well as to a lien over this fund and other association properties, always provided that in running the affairs of the association the committeemen act both within the rules of the club and with prudent awareness of the financial resources within which they can operate. This disposes of a rhetorical question put by O'Bryan J. Suppose, he asked, the executive committee were minded to buy a building for $100,000: could the members be individually made liable for the whole of the purchase money?[7] The answer clearly is no. Not so much because, as the judge thought, nothing here warrants the inference that the committee is authorised to pledge the members' credit.[8] But rather because of the more basic rule that, barring any express or implied agreement to the contrary, the members' liability is anyhow limited. If a committee were to engage in an acquisition palpably beyond the rules and resources of the club, they would not only be personally liable for the price, they would also lose their right of indemnity. Acting as they now do so completely *ultra vires*, they would have only themselves to blame.

We begin to see that the proper candidates to become liable for the legitimate debts of a club are not the members individually, but the association or membership as a whole or (what comes to the same thing) the membership for the time being, fluid and fluctuating and (at least as far as outsiders are concerned) anonymous though that membership is. It

Associations' 55 Michigan Law Review 67, 68; by the same author, *Unincorporated Non-Profit Associations* (1959) 10-11.

[5] *Freeman v. McManus, op. cit.* 21.

[6] The main case on this is *Wise v. Perpetual Trustee Co. Ltd* [1903] A.C. 139; and see Stoljar S., *Groups and Entities* (1973) 53 ff.

[7] *Freeman v. McManus, op. cit.* 24.

[8] *Ibid.* 25.

goes without saying that such a fluid or anonymous aggregate is not a fit party to sue or be sued. But this does not exhaust their character as members. They are members who associate for a purpose or activity managed by their committee and financed by their own fund; the committee and the fund thus represent or externalise the association and, through the association, the current membership. Furthermore, even if a fluid membership constitutes an unsuitable party for litigation, a committee controlling a fund must be relatively more stable, at least stable enough to manage the association's activities. In this light, there remains little or no difficulty about an unincorporated body holding a tenancy. For the particular difficulties arising with leases are now easily met. If, for example, it is a matter of terminating the lease, i.e. of giving notice, or of renegotiating it, there will be a committee that can be approached. If, again, it is a matter of collecting the rent, or damages for breach of covenant, there will be a fund which, one must presume, will be able to finance at least the principal objectives of the association amongst which taking and holding a tenancy would, if part of the specified activities, naturally be one.

In this light, it will further be seen, we no longer need any such theory as novation (or what was later called devolution) precisely because this now reveals itself as unnecessary and, more important, as irrelevant for present purposes: irrelevant because novation seeks to make a person severally liable for a joint debt he himself did not incur, whereas the members of an unincorporated (and non-profit-making) association enjoy, as already said, the protection of limited and sheltered liability. What we do need is a better understanding of the interrelated roles of an association's committee and fund, together with appropriate devices for making committee and fund more easily amenable to legal action. So equipped we would achieve all the objectives this sort of situation demands. Not only would we give effect to the purposes of the association, even facilitate its legitimate pursuits, and in so doing enhance the freedom of association of citizens; we would also protect the special position of the members, that is, protect their right to join in self-organised pursuits in that, subject to their paying their subscriptions, their joint activities would yet remain completely voluntary as they would always be free to stay or go.

The decision in *Freeman* raises some other points. The court seems to have been puzzled by the fact that, notwithstanding the dogma that unincorporated bodies cannot be granted a lease, we sometimes nevertheless do find references to cases in which such bodies seem to be lessees.[9] To explain this the court assumed that, in these cases, the true lessees were specially appointed trustees, not the association as such. Now it certainly is the case that in practice associations often act through trustees: the common belief in fact is that an unincorporated association must so act if it wants to hold

[9] E.g. *Carlisle & Silloth Golf Club v. Smith* [1912] 2 K.B. 177, [1913] 3 K.B. 75; and *Freeman v. McManus, op. cit.* 21-2.

land and to have security of tenure.[10] The question however is what real difference this makes. The trustees will usually act for the association, not for themselves as they will not act without the consent of the members or the committee; and supposing they act properly or *intra vires*, the trustees will in fact be purely nominal holders with a full right to indemnity from the association fund. Hence what is made liable, even in the eyes of the law, is the association itself, unincorporated though it be. This, to be sure, is not to deny that trustees can sometimes be essential for conveyancing purposes as the law now stands; but they cannot be really useful otherwise. As mere trustees they are not involved in the contractual management of the association's affairs, for this is the committee's job. Nor are trustees, as titular holders, 'occupiers' in the fuller sense of that word now evolving in tort law; to become liable for the safety of premises 'occupiers' must carry at least some managerial responsibilities.[11]

Again, it is sometimes assumed that the position of a lessor differs considerably from that of a lessee. Thus a statute may occasionally recognise the possibility of a body unincorporate being a lessor,[12] while there seems to be no corresponding statutory recognition of an unincorporate lessee. Even in this context, however, the differences between the two are by no means quite so serious as supposed, not even as far as their respective burdens are concerned. A lease may be determined by the lessee as well as by the lessor; and even if the lessor may have no obligation to pay rent, he may still retain an obligation to maintain, or pay for, all necessary repairs. O'Bryan J. suggested that the above-mentioned statute should be read as a legislative way of saying that we have to interpose trustees if an unincorporated body is to place itself in the *de facto* position of a lessor.[13] But the suggestion is not really tenable. The trustees so interposed would not constitute an unincorporate lessor but would constitute so many lessors acting jointly as would ordinary individuals. Yet if so, the statutory reference to the unincorporate lessor becomes redundant and meaningless. If we then take the statutory reference as seriously as it was perhaps meant to be, what we get is a real exception to the official dogma that unincorporate associations do not exist in law, for the law now can be seen to contemplate the possibility of there being an unincorporate lessor in addition to a corporate one. More generally, one might already conclude that there is, or should be, no special difficulty about an unincorporated association suing or being sued just as there is, as just argued, no real difficulty about an association holding a tenancy. Unfortunately we cannot so conclude, at least not yet, in view of other problems still to be discussed.

[10] *Freeman v. McManus, op. cit.* 22.
[11] See *Wheat v. E. Lacon & Co. Ltd* [1966] A.C. 552; *Smith v. Yarnold and Others* [1969] 2 N.S.W.R. 410.
[12] E.g. Landlord and Tenant Act, 1948, s. 13(2) referred to in *Freeman v. McManus, op. cit.* 22.
[13] *Freeman v. McManus, op. cit.* 22.

In our next Victorian case, that of *Banfield*,[14] the committees of two unincorporated associations, a cricket and a football club, entered into a contract in 1960 that in consideration of improvements and renovations to be carried out on a ground belonging to the cricketers, the football club would play its home matches there for a period of ten years. In 1964 the football club broke this agreement whereupon three individuals, suing on behalf of themselves and the other members of the cricket club, sued in breach of contract for the expenses incurred. It was successfully objected that no such action could be brought, on the ground that the plaintiffs did not have a sufficient 'common interest' which persons suing in a representative capacity must show, as required by the rules of the Supreme Court (O. 16, r. 9). There was no sufficient common interest because at the date of the writ the plaintiffs then suing could not be said to have the same interest as the members of the club at the time of the contract in 1960. For, so the court believed, allowing the current membership to sue involved the theory that with each retirement and each election of a member the benefits of the 1960 agreement passed to the new membership—which of course was precisely the novation theory already rejected in *Freeman v. McManus* as a theory too fantastic for words. Nor would the court accept a slightly modified theory, now described as that of devolution, under which all new members received an aliquot share of the benefits of such agreements as existed at the time they joined.[15] This was a theory, argued Gowans J., which ignored and obscured the distinction between different interests. It 'is one thing, however, to say that new members may become entitled to share in the fruits of such contracts as the fruits fall in. It is another to say that an interest in the contracts themselves passes to them by assignment or devolution. It is still another to say that an inference must be drawn from the mere fact of becoming a member, that such interests in the benefits of contracts pass to such a member irrespective of what happens to the obligations.'[16] Accordingly, it could not possibly be said that the new members joining since 1960 had the same interest as the older associates; there being no common interest the representative action could not obtain.

A little reflection shows that the concept of 'same interest' was now far too narrowly construed. To say that new members do not share the same interest as old members would be true if what we considered were only the latter's continuing or personal liabilities. Here there was no attempt at all to keep any retiring member bound to an existing liability or to put each new member under an obligation created long before his own membership. What is more, members of an association, whether past or new, have no personal interest nor (apart from their subscription) a personal liability to pass on, for members of a voluntary association are, in this respect,

[14] *Banfield v. Wells-Eicke* [1970] V.R. 481.
[15] *Ibid.* 484.
[16] *Ibid.* 484-5.

fundamentally different from members of a commercial partnership or firm. All that association members acquire is a dual right, the right to participate in the club's activities and the right to use its amenities such as they are. It follows that such members as members only have one (common) interest, namely, an interest in the continuance of the common activities and amenities in ways which their votes determine and their subscriptions subsidise. Thus it seems false to demand a further 'common interest' as between members at the date of the contract and members at the date of the writ. The past members no longer have or leave an interest; the new members accept, on joining, the association as it is. In other words, the only relevant membership, even for purposes of the representative action, should be the membership as it exists from time to time.

Nor should the representative action as it applies to voluntary associations be confused with those representative actions applying to other situations, especially when instituted on behalf of more diffuse classes of litigants. With regard to these it is often essential to insist upon there being 'a common interest alike in the sense that its subject and its relation to that subject must be the same'.[17] So where a number of persons started a representative action against a local authority, on behalf of themselves and all other tenants (13,000 of them), to challenge the authority's new differential rent scheme under which rents would be determined according to the ability of each tenant to pay, it was easily held that this action showed nothing of a common interest: the tenants in fact divided into two classes, those able and those unable to pay more rent; their respective interests were obviously not all alike.[18] It may perhaps be said that the members of a voluntary association, too, may have different interests especially where there are different views as between a majority and a minority. But this overlooks the important fact that in the case of an association, unlike that of a representative action started by a non-organised class, the possibility of internal differences and disagreements is fully assumed; so much so that internal discussion is catered for by special rules, those relating to regular meetings, elections and votes. To air and settle internal differences is part and parcel of an association's 'corporate' life, it is in fact the method of determining the members' common interest.

In *Banfield*, it should be pointed out, the court was careful not to deny that the representative action obtained in relation to unincorporate associations. What was denied was that the writ could be sued in its present form: the writ, it was said, had to be amended, yet without explaining what specific form the amendment should take, except for the suggestion that the writ should not, directly or representatively, include such present members who could not have any interest in matters 'far back in the history

[17] *Markt & Co. Ltd v. Knight Steamship Co. Ltd* [1910] 2 K.B. 1021, 1039.
[18] *Smith v. Cardiff Corporation* [1954] 1 Q.B. 210.

of the club'.[19] The practical effect of this was to require the action to be brought on behalf of those who already were members at the time of the agreement and so remained until the time of the writ. One gathers that the court would have been satisfied with such a formulation, if only because this wording was felt to describe more precisely the class of persons to be included in the writ.[20] Yet it is difficult to see what useful purpose this sort of precision could really achieve. For, as earlier explained, it cannot matter who exactly the members are: for one thing, because they anyhow remain anonymous being immune to personal liability; for another, because, given the principle of limited liability, any liability, whether for breach of contract or tort, does not fall on the individual members, but falls on the association's common fund or property. Not only was the above-mentioned amendment unnecessary if we examine the grounds on which it was urged, it is even doubtful whether any such amendment would have provided the final solution for the problem in hand. The reasons for this doubt will become plainer as we go on.

In our third Victorian case, the *Carlton Case*,[21] the facts were somewhat similar. The defendants, the Fitzroy Football Club, an unincorporated association, agreed, in 1967 through its president and secretary to play its home matches on the Carlton grounds, for a period of 21 years (but subject to 3 years' notice of termination). This was an agreement not for a lease but for a kindred arrangement, the right to occupy land at certain times. The plaintiff club (which was incorporated by guarantee) sought interlocutory injunctions to restrain the defendants and third parties from breaking the agreement by the Fitzroy Club; the injunctions were intended to prevent a tort, but they obviously assumed the existence of a contract between the Carlton and Fitzroy clubs. Hence the major question was whether the latter (unincorporated) club could make a contract at all. The arguments took largely the usual course, the decision being that there was neither a valid contract with the Fitzroy club nor with the officers or members representing it. There was no contract with the club on whose behalf its officers had contracted since the contractual reference to that club, as it did not exist in law, had therefore to mean 'the members of the club as it might be constituted from time to time'. There was no contract with the officers who did the actual contracting since the contract was expressly with the club and not with the officers, the latter having specifically contracted on behalf of the Fitzroy club and its membership.

Could it then be said that Carlton had contracted with the Fitzroy members already existing at the time of the 1967 document. In *Banfield*, it will be remembered, the impression was left that such a formulation might suffice. And though there had been several changes in the pleadings as the

[19] [1970] V.R. 481, 485.
[20] See the remarks by Gowans J. in [1970] V.R. 481, 486.
[21] *Carlton Cricket and Football Social Club v. Joseph* [1970] V.R. 487.

trial progressed, the final statement of claim identifying the defendants in alternative forms, one form nevertheless referred to all those who were members at the time of the document and continued to be such.[22] Thus, at least according to *Banfield*, the requirements of the representative action were satisfied. Yet this now proved to no avail. The court now rejected the view that the plaintiff intended to contract with a specific membership, namely, the members already belonging to the club in 1967. It is impossible to believe, said Gowans J., that the plaintiff club could have thought that it was contracting with the 1967 members only, having regard to the fact that the contract was to operate for 21 years; while, for their part, the 1967 members never contemplated to become individually liable as the committee was simply not authorised, either by the rules or the members' conduct, to make so enduring a contract on their behalf.[23] Nor could there be a contract with the Fitzroy membership as it existed from time to time, for the court believed that such a contract with a fluctuating membership would require a novation or devolution theory which this court, as other courts before, refused to accept.[24] Nor, again, did the committeemen, or the officers and signatories amongst them, assume any contractual liability; the document alone made it clear that they did not pledge their personal credit since everything they did was on behalf of the club.

The total result was disastrous for virtually all purposes of suit. The representative action became inapplicable against either of the two kinds of members, earlier or current ones. The members existing at the time of a contract were not suable as one could not infer their readiness to be liable for any longer term. The members for the time being were excluded because of the fatal novation theory. Neither were the members of the committee now liable, not having assumed any liability, although with regard to them the court did leave something of a loophole. Thus Gowans J. suggested that the committee might be considered to be actually contracting depending on the nature of the transaction involved: a contract of longer duration would not be easily upheld, but a contract for a shorter period or for a single transaction could well be effective since here the inference against assuming long-term obligations would not apply. This situation was not really of great help. Of course contracts may be so short-term as to be virtually cash-transactions, but it is not with regard to these that difficulties occur. If the contract is to be longer, the question is how much longer. Still it is on the basis of this (long-short) distinction that the *Bradley Case*[25] was now upheld. In this important decision, a committee was held directly suable in lieu of the unincorporated association where a servant of the latter mistakenly gave wrong information to the plaintiff instead of the

[22] [1970] V.R. 481, 491.
[23] *Ibid.* 497, 498-9.
[24] *Ibid.* 498.
[25] *Bradley Egg Farm Ltd v. Clifford* [1943] 2 All E.R. 378.

expertly correct information the association was under contract to supply. The plaintiff succeeded in his action for breach of contract against the committee, a result which Gowans J. apparently approved of, on the ground that the case related to 'the doing of a single act'.[26] This view completely overlooked the truer potentialities of *Bradley*, as a case which by pointing at the committee as the party capable of litigation offered a new device for suing an unincorporated body, in fact a more reliable device than the representative action having regard to all its present uncertainties.

The distinctly negative approach of Gowans J. cannot occasion much surprise. Taking the very narrow view he did of the legal position of social clubs, he likened the voluntary association to 'a crowd which is interested in some operation or some incident. In ordinary language one says of such a crowd . . . that "that crowd is still there", when in fact the individuals constituting it may be entirely different persons, and it is only the object of their interest that has remained the same. Because the object of interest has remained unchanged that appears to give the crowd a continuing identity which in fact it does not possess'.[27] But, surely, this analogy was misplaced. A crowd is not an organised group like an association, with a separate fund as well as committee entrusted with the management of its affairs: a crowd lacks these institutional attributes precisely because it is a diffuse and not an organised group. A crowd, furthermore, does not even require legal recognition, unless it be a duty such as to disperse promptly when they are read the Riot Act.

2.

If the trilogy of *Freeman, Banfield* and *Carlton* has virtually dead-ended the Victorian law of unincorporated associations, the corresponding law in New South Wales remains in a more fluid state. Here there are some indications of a more constructive approach, even if some cases seem to follow the restrictive doctrines of the Victorian courts. An outstanding decision is that in *Goddard*,[28] the full significance of which has perhaps not been sufficiently realised. In an agreement for a lease in 1940, on behalf of an unincorporated association as lessees, the signatories for the latter were one G. and J., the president and treasurer respectively. The lessor dealt continuously with the association as such, the latter paying the rent, and receiving all receipts, in its own name. In 1945 the lessor gave notice of termination as he had a right to do, the notice being addressed to G. and J., the original signatories, although both had meanwhile ceased to hold their committee posts. This notice, it was objected, was invalid as it should have been addressed to the true lessees or tenants in possession who were either

[26] [1970] V.R. 481, 499.
[27] *Ibid.* 488.
[28] *Ex parte Goddard, Re Falvey* (1946) 46 S.R. (N.S.W.) 289.

all the members or the current office-holders, the notice being obviously intended to evict the association and not G. and J. personally.

The court however decided otherwise. It accepted that an unincorporated association is not an independent legal entity capable of itself receiving notices, yet nevertheless regarded the elected committee as able to act for the association according to the latter's constitution or rules. The law, said Jordan C.J. (quoting with approval the majority in *Bradley*),[29] must imply an intention that a contract is here made with somebody; but since this cannot be with the society (which does not legally exist), we must choose from among the various persons associated under the society's name those most concerned with making contracts for the society.[30] Normally the persons to be so chosen are the committee; but in this case, argued the court, the ex-office-holders (G. and J.) were also suable; it was they who had made the tenancy agreement on behalf of their society which had in fact expressly resolved to indemnify them against personal liability. The outcome is that a party contracting with an unincorporate association either can sue the committee or can sue any other persons whom the association has at one time or another delegated to contract for them. Even if, to put the second point in another way, the association is not suable *eo nomine*, it can in effect be sued through its demonstrable representatives, that is, persons authorised or empowered by the members to act for them. This second point calls for some emphasis as it adumbrates, once its implications are probed, a sort of agency or representative theory (a representative theory, needless to say, distinct from that of the representative action): the two ex-office-holders (G. and J.) are now made legally suable or approachable not really in their purely personal capacity (for their personal liability may be expressly excluded by the contract itself), but rather as persons representing the association itself. Unless you can presume the existence of the association as, so to speak, the principal hovering in the background, the above decision makes no sense.

Another constructive decision, in its result if not fully in its reasoning, is *Smith v. Yarnold*.[31] A spectator was injured when a grandstand, belonging to an unincorporated sporting club, collapsed. He sued the club committee for damages amounting to $26,500 for breach of contract (the plaintiff had bought a ticket of admission) and in tort for a breach of duty as occupiers, the plaintiff being an invitee. The action was against the defendants as the duly elected members of the committee to whom the care, control and management of the premises was entrusted under the rules of the club. But were these committeemen the proper parties to be sued: were they true parties to the contract or true occupiers to satisfy the relevant tort?[32] A

[29] [1943] 2 All E.R. 378, 386.
[30] (1946) 46 S.R. (N.S.W.) 289, 297.
[31] *Smith v. Yarnold & Others* [1969] 2 N.S.W.R. 410.
[32] The plaintiff also sued the secretary of the club; but his duties were found to

contention that not only the committee but all other members should have been joined was dismissed with relative ease. The committee were held to be the only persons suable, whether in contract or tort. This on two grounds: one, mainly procedural, was that even if it was true that others could also be sued, a verdict can be obtained against some only of several joint contractors, while in tort not all tortfeasors have to be joined.[33] The defendants, admittedly, could have entered a plea in abatement, but this they had not done. Yet suppose they had: what then? This brings us to the second and more substantial grounds on which the committee's liability was put: it was their (the committee's) acts that determined the liability of any of the defendants whoever they might have been;[34] concomitantly, the society not being suable, the committee itself had to be chosen as the responsible co-contractor, this again according to the *Bradley* principle—a principle which, as Herron C.J. now said, offered 'the only method by which justice can be done towards the plaintiff who paid his admission fee and was entitled to expect the security which the invitation involved'.[35]

Yet, as earlier hinted, there also exist N.S.W. decisions which are not so satisfactory, the least satisfactory being perhaps *Amey v. Fifer*.[36] Here three trustees of a sporting club sued a firm of accountants for breach of contract to audit their books properly, the trustees suing on behalf of themselves and all the other club members for the time being. The N.S.W. Court of Appeal held the action to be deficient. The trustees could not sue representatively on behalf of all the members because no representative order could be made at common law in N.S.W. Nor could they sue as representatives, or persons empowered to sue by the members of the association, because no such power in an individual to sue or be sued on behalf of an entire association can be conferred except by statute.[37] Indeed an action such as the latter, it was further held, was defective on the face of it, hence was demurrable as bad at law, even without any special plea of abatement. The court expressly relied on *Banfield*[38] and *Carlton*,[39] the negative impact of which can now be seen to their full effect. The court also said they relied on *Ex parte Goddard*,[40] but this decision, we have argued, can be understood as authority for a very different result, one that does make the

consist mainly of receiving and disbursing the proceeds; hence he was not liable either as contractor or occupier.

[33] *Ibid.* 414.
[34] *Ibid.* 416.
[35] *Ibid.* 415.
[36] *Amey and Others v. Fifer and Others* [1971] 1 N.S.W.L.R. 685.
[37] 'In this State at common law there is no such power to make a representative order, and the difficulty cannot be overcome, either by suing in the name of the unincorporated association as such or, as has been done in the present case, by suing in the names of three members and alleging that they were empowered to sue . . . on behalf of the members of the association.' *Ibid.* 686, per Sugerman P.
[38] *Supra.*
[39] *Supra.*
[40] *Supra.*

representatives of an association, i.e. the persons authorised to manage or to contract for the club, suable in their own names. And if they can thus be sued, why should they not be able to sue, if only because the law has always assumed a parity of reasoning between the capacity to sue on the one hand and the capacity of being sued on the other.

The significant implications of *Goddard* were also overlooked in *Peckham v. Moore*.[41] A person was engaged to play football with a club during the 1970, 1971 and 1972 seasons, the parties purporting to enter into a proper contract in which the former was described as the 'player' and the employer as 'the club'.[42] The contract was signed by the club secretary acting 'pursuant to resolution and authority for and on behalf of' the association. Having suffered an injury in the course of his employment, the player applied for workers' compensation, naming as defendants the members of the committee in 1970, the time the contract was made. The Workers' Compensation Commission held that player as indeed engaged or employed by the named defendants, applying the principle of *Bradley*.[43] But the N.S.W. Court of Appeal reversed this since in their view the player had named the wrong defendants; his true 'employers' at the relevant time were not the committee members of 1970 but those in 1972; it was the latter committee which placed the plaintiff on the 1972 payroll and so employed him for the season during which he suffered injury. Admitting extrinsic evidence the courts learned that the 1972 committee differed from its 1970 counterpart in that several of its members had been replaced by others. The plaintiff's action therefore could not succeed owing to a deficiency of parties, but had to await 'another round of litigation'.[44]

The main reason for this decision goes back to the distinction drawn in *Carlton* between short-term and long-term transactions. Both Hutley and Samuels JJ.A. were deeply impressed by Gowans J.'s observation that a committee might be liable on a contract involving 'the doing of a single act', but not for any long-term or 'continuing obligations in the future'.[45] This led them to look very closely at the 1970 committee's contractual intentions. There was nothing to show, the court thought, that that committee had intended to bind itself for a longer period beyond its own term of office: 'The inference that the members of a committee intend to assume liability is more readily drawn if what is to be done has to be done during their term of office than if afterwards.'[46] Though the court accepted the *Bradley* principle under which one would normally identify the committee as the persons most concerned with making a contract for a voluntary association, they nevertheless took this principle to be confined to situations

[41] *Peckham v. Moore & Others* [1975] 1 N.S.W.L.R. 353.
[42] 'The Canterbury Bankstown District Rugby League Football Club.'
[43] *Supra.*
[44] *Ibid.* 363.
[45] *Ibid.* 370.
[46] *Ibid.* 360.

where a committee makes short-term contracts.[47] As the 1970 committee, furthermore, could not transfer the contract to its 1972 successor, it followed that the agreement with Peckham could only have meant that he would play for the club in 1972 if the 1972 committee engaged him for that season. When they did, the 1972 committee became his employers; it was therefore to them the plaintiff had to look for his rights as a workman.[48]

All this was somewhat strange reasoning. Strictly speaking, the 1972 committee merely exercised an option under an existing contract; the 1970 agreement with Peckham did in fact have longer effects for it continued to be acted on by subsequent committees. To say, with the court, that the 1970 committee could only have intended short-term arrangements leads to somewhat absurd consequences. Suppose in 1972 Peckham had decided to play for another club, before the 1972 committee did re-engage him. At this point no committee could have complained of this breach of contract: not the 1970 committee because their contract was limited to 1970; not the 1972 committee because they had not yet made their own contract. Or suppose the 1972 committee had in the course of the year changed its composition (owing to the death or resignation of some members). On the suggested theory, no committee would again be available to sue or be sued on behalf of the association. Not the earlier committee because this has been replaced; not the new committee because they have made no contract. Or suppose that a committee is specifically instructed by the members to engage players for at least three annual seasons if only because the best players can only be got on longer contracts. If the committee so acts, how can we now say that they do not intend to contract as instructed? And if they contract, is this a short or a long-term contract? Or suppose, finally, that a committee is sued (as in *Smith v. Yarnold*) by a plaintiff injured on club premises; but suppose that the damages recoverable amount to ten times the amount of the funds the committee controls. Are the committee to be liable out of their own pockets, even if they are entirely faultless in causing the injury? Such a result seems hardly acceptable, but it does seem to follow from the present interpretation of *Bradley*. Yet in the latter the committee's indemnity was never in question, whereas here they are threatened with full liability irrespective of any indemnity.

In *Peckham* the court did not really consider these problems. Nor did they fully appreciate that in holding a committee to be personally liable, the committee virtually ceased to be a committee, to become more like a group of personal contractors. However if we treat it as a true committee, we also accept that any such committee acting within the association rules rather represents the association so that all liabilities incurred *intra vires* would be met out of club funds just as it would not matter any longer who exactly the committee members are. Normally, the most practical step in

[47] *Ibid.* 362.
[48] *Ibid.* 362-3.

such actions would be to proceed against the committee for the time being if only because it is this committee that is currently managing affairs. In *Goddard*, as we have seen, the court allowed an action also against ex-office-holders with whom the contract had been made; but this was a special and limited indulgence in that the ex-committeemen, though able to receive and pass on a notice to quit, could not have done anything else on behalf of the association precisely because they were no longer committeemen managing the affairs of members. Nevertheless, the *Goddard Case* also shows, albeit somewhat indirectly, how little the names of the committeemen actually do matter so long as it is obvious that it is the actual tenant, here the association, that is being got at.

At all events, in *Peckham* the error in the writ, if error it was, was of very small significance. Even if it was true that the committee members of 1970 and 1972 were not the same (though largely they were), the fact remains that both committees were recruited from the same class of persons, i.e. the members, were operating under the members' rules and resolutions, as well as doing the same work, that is pursuing the same but in any case common purposes of the association. What the 1972 committee did the 1970 one could have done. If we do not look at a committee in this way, we are led to think of the association's business as, so to speak, fragmented into annual segments, each performed by a specific committee for a given year. The decision was also narrowly technical from the viewpoint of the Workers' Compensation Act under which an 'employer' can be 'any body of persons corporate or unincorporate'. Surely Peckham did not regard himself as employed by a particular committee; his intention was to play for and to be paid by the club; in fact he was paid by cheques drawn on the club *eo nomine*, while the club issued in its own name the tax certificates to Peckham for the three seasons from 1970 to 1972. And since as an 'employee' he had identified the committee that had made the contract, this committee could, for this procedural purpose, well have been taken as a sufficient 'employer' or as procedurally sufficient defendants. This must be why the Workers Compensation Commission held for the player, applying the *Bradley Case* even to the extent of admitting extrinsic evidence to ascertain who the 1970 committee members were.[49]

3.

Disappointing in its final result, *Peckham* adds further problems to the law of unincorporated associations. The N.S.W. Court of Appeal certainly regretted its decision which they said was due to difficulties described as

[49] For a far more acceptable view of workers compensation in relation to unincorporated associations, see *Bailey v. Victorian Soccer Federation* [1976] V.R. 13, where *Peckham v. Moore* was not even cited, probably because it had not been officially reported at that time. Gillard J., who presided in *Bailey's* case was counsel for the unsuccessful complainant in *Freeman's* case.

'procedural'. On the more positive side the decision rightly stresses the crucial role of the committee in all these activities: a crucial role if only because the unincorporated association itself does not legally exist, as well as because a third party cannot contract with each member of a club with a large membership. The committee is involved, as necessarily it has to be, in every step taken by or on behalf of the club; even where the contract refers merely to the 'club', the practical reference must be to the committee managing it for only the committee can act for the association.[50]

On the other hand, the court greatly exaggerated the committee's personal role, at times even outdoing *Carlton* in this respect. Because the committee has no authority to subject members to any liability beyond their subscriptions, the undertaking to pay Peckham a weekly sum during his incapacity was now turned into an undertaking by the committee personally. But, surely, what the committee undertook to pay was money out of club funds; it was only because this committee was in charge of these funds that such an undertaking could be given at all. Worse still, the court observed that the committee would be personally liable even if they did not fully understand the legal consequences of an act, as where they falsely believed that contractual liabilities would be covered by the association's funds or assets, including their right of indemnity or lien, for 'the worthlessness of the rights of the committee is no reason for deducing that they did not intend to enter into legal relations.'[51] This approach seems altogether too sanguine about the committee's personal liability even where (as in our previous hypothetical example) they may be entirely without fault as regards a plaintiff's injury. Why should the law produce so unacceptable a result? If the analysis here presented is correct, a committee can only be liable to the extent of the association's funds. And if these are insufficient, the plaintiff would be in the same position here as where he sues any ordinary individual who is simply not rich enough to meet extraordinary damages and costs.

Of course if there is an insufficiency of association funds which is known or suspected by the committee different considerations would apply. Because now it would matter who exactly the committee are, since any liability to be imposed cannot but fall on the committee members in their personal capacity. In the ordinary law of agency an agent 'drops out', as the phrase goes, once he has contracted with the third party according to his principal's authority, for an ordinary agent does not usually know whether his principal is insolvent or not. But in the case of an association it is the committee who manage the common fund, hence they alone can know or suspect whether the association is in a financial position to incur certain liabilities; hence, again, they themselves would have to be liable if they went beyond a club's financial resources, for doing this they would in effect be acting

[50] *Supra* n. 41, 358.
[51] *Ibid.* 361.

ultra vires, or on their own, so that they would become liable either on the ground of assuming a personal responsibility or for breach of warranty of authority.[52] Indeed in such a situation a committee would be personally liable even if they acted for an incorporated association, for their personal culpability would then be exactly the same.

But apart from this, and confining ourselves to what seems the usual and typical case of a committee properly managing an association's affairs, that is, incurring liabilities only within the scope of the available common fund, the committee though officially liable is in fact only liable in a nominal sense. For the real defendant is the association both because it ultimately pays, i.e. meets the liabilities properly incurred, and, more basically, because it is the association of members that pursues the specified activities according to rules which control and determine the committee's acts. Only, in other words, because an association possesses this 'corporate' character does a committee function qua committee and so can lay a claim to a right of indemnity or right of lien. It is only the dogma that the association does not exist in law that requires us to interpose the committee as plaintiffs or defendants as the case may be. Yet thus interposing the committee, what in effect we are doing is to enable the association itself to be sued or to sue. And in this way, the association, though formally unincorporate, nevertheless functions very corporately indeed.

[52] *Ibid.* 357.