DUCKITT v MACKIE GROUP PTY LTD BC201213055

Unreported Judgments Vic · 29 Paragraphs

Supreme Court of Victoria — Commercial and Equity Division

Robson J

SCI 2012 04894

3, 4 December 2012

Re Mackie Group Pty Ltd [2012] VSC 656

Headnotes

CORPORATIONS — Directors of company deadlocked — Application by one director for company to be wound up — Appeal from order of Associate Justice staying the application to wind up a company on the grounds that an arbitration agreement required the dispute between the directors to be referred to arbitration — Arbitration clause in articles of association — Arbitration clause construed — *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1 applied — Arbitration clause not enlivened — Appeal allowed — Corporations Act 2001 (Cth), ss 461.1E and 471.1K and 462.2C — Commercial Arbitration Act 2011 (Vic), s 8(1).

ARBITRATION — Directors deadlocked — Arbitration clause in articles of association — Arbitration clause construed — *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1 applied — Arbitration clause not enlivened — Corporations Act 2001 (Cth), ss 461.1E and 471.1K and 462.2C — Commercial Arbitration Act 2011 (Vic), s 8(1).

Robson J.

[1] I have before me an application for leave to appeal from an order of an Associate Justice made 11 October 2012 whereby His Honour stayed an application by the plaintiff, Mr Duckitt, to wind up the second defendant, Mackie Group Pty Ltd (MGPL), pending arbitration of the issues referred to in the resolutions of 31 July 2012 and 7 August 2012.

[2] The sole directors of MGPL are Mr Duckitt and, the second defendant, Mr Mackie. They effectively own or control half of MGPL each. The shareholders are Mr Duckitt, who has nine shares, and Mackie & Staff Pty Ltd (Staff), which has nine shares. Staff is owned and controlled by Mr Mackie and his wife.

[3] MGPL acts as trustee of a unit trust. The units are owned equally by the superannuation fund of Mr Duckitt and his wife, Homecare Pty Ltd, and Zagger Pty Ltd, the trustee of the Mackie settlement (a company controlled by Mr Mackie).

[4] On 27 August 2012, Mr Duckitt applied for an order winding up MGPL on the grounds that it is just and equitable. Alternatively, Mr Duckitt relied on the ground that Mr Mackie has acted in the affairs of MGPL in his own

interests rather than in the interests of the members as a whole. The application is made under ss 461.1E and 471.1K and 462.2C of the Corporations Act 2001 (Cth).

[5] On 4 October 2012, by way of a cross-claim in the winding up proceeding, Staff applied for an order against Mr Duckitt seeking, inter alia, a stay of the winding up proceeding pursuant to s 8 of the Commercial Arbitration Act 2011 (Vic). The affidavit in support of the winding up (sworn by Mr Duckitt on 27 August 2012) relevantly provides that MGPL has ceased to carry on business and has assets that are principally represented by the fruits of a judgment in the Supreme Court proceeding in the amount of $1,583,828.60, which is held in an ANZ joint account and is available to satisfy the judgment in favour of MGPL. MGPL is entitled to have the costs of the proceeding and appeal taxed and paid to it.

[6] Mr Duckitt says that costs are a significant amount, in the hundreds of thousands of dollars.

[7] The third party creditors recorded in the annual accounts (as at 30 June 2011) include trade creditors and an Australian Tax Office liability amounting to $19,690. It was common ground that, as at the day of the hearing before the Associate Justice, the creditors were not substantial. A meeting of directors was convened for 31 July 2012. Eight resolutions were put; none were passed due to a deadlock between Mr Duckitt and Mr Mackie.

[8] A further meeting of directors was convened for 7 August 2012, with further resolutions being put forward for consideration. The resolutions put forward at the meeting of 31 July 2012 and that convened for 7 August 2012 are the resolutions that the Associate Justice ordered be the subject of arbitration. On 6 August 2012, Mr Mackie proposed that Arts 107.1 and 107.2 be invoked to resolve the deadlock. As explained below, these Articles provided for arbitration in the event of equality of votes at a general meeting called to consider the resolutions that were subject to an equality of votes at a directors' meeting.

[9] Mr Duckitt took the view that the arbitration procedure contained in those Articles was premature, because no general meeting of shareholders had been convened. Such a meeting had not been convened or held at the time of the hearing before the Associate Justice. In Mr Duckitt's affidavit, he says in relation to those events that "On the day before the meeting [of 7 August], namely on 6 August 2012[,] Ralph sent me an email in which he proposed that deadlock resolutions be resolved under Arts 107.1 and [107.]2 of MGPL's Articles of Association".

[10] Mr Duckitt says, "On any view, Ralph's push for arbitration was premature because there had been no meeting of shareholders. Ralph also requested the meeting for 7 August 2012 be changed to 14 August 2012". He says he responded to that email early on 7 August in the following terms:

> Ralph, there exists a fundamental and permanent management read director deadlock. Your proposed appointment of an arbitrator to settle disputes between shareholders is in apposite and will resolve nothing. It is impractical as well as being prohibitively expensive and even downright silly to expect two arbitrators to keep making awards, that is, trying to permanently run the company in the surely forlorn hope that even if they could, the loser will then roll over and ratify.
>
> Whoever drafted Clause 107 was either in cloud cuckoo land or never intended the clause to be used to solve a permanent management deadlock. As to that deadlock, I have observed previously that you seem to regard Mackie Group as your personal fiefdom. That is, you and your associated companies are trying unilaterally to milk the cash cow by debiting a variety of very substantial and in my opinion completely inappropriate charges to Mackie Group while no longer even charging those entities for my services. I am resisting and must continue to resist as long as I remain a director.
>
> My resistance appears to have spawned a tit for tat mentality on your part resulting in your last week rejecting resolutions even to secure the Redding monies in the Mackie Group banking account and to pay the company's solicitor a relatively modest sum to recover several hundred thousand dollars in outstanding costs from Redding. A dispassionate observer might see this as a bloody-minded dereliction of your director's duties including your duty to act in good faith in the best interests of the company.
>
> I intend to put those resolutions again today in the hope that good corporate governance and common sense will prevail,

> but whatever the fate of those resolutions, the deadlock problem will not go away and we need to recognise this, put further pussyfooting aside and procure that the company is immediately put in the hands of a liquidator whose job includes resolving the state of the company's accounts. I have considered calling a shareholders' meeting to vote for a members' voluntary winding up, but this would be doomed to fail, not only because I expect you'll vote against the resolution, but also because we can never agree on a company statement of assets and liabilities to put to the members, and which is a prerequisite to calling such a meeting.
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> That realistically leaves only a compulsory winding up to resolve an endemic problem and unless you can today convince me otherwise I intend to institute winding up proceedings in the Supreme Court next week. However, I would prefer to do so with the support of the directors and will today be seeking a resolution of support. The only way to resolve this impasse short of a winding up, it seems to me, is for one of us to buy out the other's shares and units. This may be impossible to achieve for we must surely disagree fundamentally on the value of the units given that we can't even come close to agreement on the company's accounts.
>
> Nevertheless, I will be happy to meet with you immediately following today's directors' meeting to discuss a possible buyout all on a without prejudice basis with Tony being present, if he is willing, purely as a facilitator. Regards, Graham.

[11] Although the above email is only one side of an obviously disputed state of affairs, it gives some indication of the depth of the dispute between the two parties. The resolutions put before each meeting of directors, although not identical at each meeting, were in substance directed towards how the proceeds of the judgment are to be applied and how to finalise the affairs of MGPL, including attending to the outstanding cost issues and the latest accounts.

[12] Mr Mackie and Staff rely on an arbitration agreement contained in Art 107 of the Articles of Association of MGPL. There is no issue that Mr Duckitt is contractually bound by the Articles of Association. Article 107 states in sub-article 1, "In the case of an equality of votes for and against any resolution proposed or submitted at any meeting of the directors, such resolutions shall be put to a meeting of the company convened for the purpose".

[13] Sub-article 2 provides:

> In the event of an equality of votes for and against any resolution proposed or submitted at any meeting of members of the company, then such resolution or the question to be determined thereby, whether it be or concerns an issue of law or fact, or policy of management of the company, or any other matter or question concerning the affairs of the company, shall be submitted to the arbitration of two arbitrators, one of whom shall be nominated by the shareholders voting for the resolution and one by the shareholders voting against the same, and their umpire. If the arbitrators shall not be able to agree upon an award, then any such reference shall be subject to the provisions of the Commercial Arbitration Act 1984.
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> Upon the making of such an award, each of the members and directors of the company shall, as far as he may legally do so, convene or cause to be convened a meeting of the company for the purpose of passing any resolution or resolutions necessary to give effect to the award of such arbitrators or their umpires as the case may be, and each of the members and directors of the company shall, so far as he may legally do so, vote in favour of each and every such resolution, and shall do or concur in doing all acts and things necessary to give effect to such award.

[14] Section 8(1) of the Commercial Arbitration Act 2011 states:

> A court, before which an action is brought in a matter which is the subject of an arbitration agreement, must, if a party so requests, not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed.

[15] In *Metrocall Inc v Electronic Tracking Systems Pty Ltd*,[1] the Full Bench of the Industrial Relations Commission Court of New South Wales, in dealing with a similar provision, found the International Arbitration Act 1974 (Cth) said that the proper approach was first to identify what the "matter" was for the purposes of s 7 of the International

Arbitration Act 1974 (Cth).[2] Their Honours said that this involves identifying the subject matter of the controversy which falls for determination in the proceedings sought to be stayed.

[16] Their Honours said that the next step in the analysis required an examination of the terms of the arbitration clause and the context of the agreement to determine if the "matter" or matters in dispute were intended by the parties to be resolved through arbitration.[3] Mr Mackie says in this case the subject matter — the winding up application — is the inability of the directors to agree on resolutions that are necessary to wind up the affairs of the company. Mr Duckitt says that the subject matter is whether, in the opinion of the court, MGPL should be wound up on the just and equitable ground. As mentioned above, the relevant clause is Art 107, headed "Deadlock".

[17] This article provides a process to resolve a deadlock at board level. The process may involve arbitration. The process provides that in the case of an equality of votes for and against a resolution at a meeting of directors, *then such resolutions shall be put to a meeting of the company convened for that purpose* (my emphasis). The clause then provides that "[i]n the event of an equality of votes for and against any resolution proposed or submitted at any meeting of members of the company, then such resolutions or the questions to be determined thereby" shall be submitted to arbitration.

[18] It can be seen, therefore, that the clause deals with resolutions that were deadlocked at board level, as well as other resolutions that may be put to general meetings of members. At the hearing before the Associate Justice, Mr Duckitt contended that the application by Staff was premature, as there was no controversy between Staff and Mr Duckitt that had enlivened the agreement to arbitrate. Mr Duckitt says that arbitration is not enlivened until there is a deadlock at a general meeting, as provided for in Art 107. The Associate Justice addressed this argument in his reasons. His Honour said:

> The plaintiff also contended the stay was futile as the arbitration mechanism had not been invoked.
>
> It is a two-stage process pursuant to Article 107, first a deadlock at a meeting of directors and second a deadlock at a meeting of members. The second meeting could not be considered a meeting of members and reliance was placed upon *BI Constructions Pty Ltd v George Shad and Chikal Pty Ltd* *[2010] NSWSC 484*. I agree with the contention that there has not been any meeting of members, however, s 8 of the Commercial Arbitration Act is in the following terms.

His Honour then quotes sub-s 1 and sub-s 2; where an action referred to in sub-s 1 has been brought, arbitral proceedings may nevertheless be commenced or continued and an award may be made while the issue is pending before the court. His Honour says:

> As a matter of construction, s 8 may be invoked where the matter is the subject of an arbitration agreement.
>
> It is not necessary that there be an existing reference at the time the party requests a reference to arbitration. That construction is supported by sub-s.2 which provides that the arbitral proceeding may nevertheless be commenced whilst the issue is pending in a court.

Accordingly, His Honour rejected the submission.

[19] Before me, Mr Mackie has contended as follows. He says that the company's constitution has effect as a contract between the company and each member, the company and each director, and between a member and each other member. He says that it is well established that general principles of construction of commercial contracts are applicable to corporate constitutions. He says that, accordingly, Art 107 of the Articles, like any other clause in a contract, is to be construed objectively. He says that the whole instrument is to be considered and proper effect is to be given to unambiguous words. Mr Mackie says that as it is a commercial contract, the articles should be given a business-like interpretation, taking into consideration not only the language but also the commercial circumstances and the objects it was intended to secure. Mr Mackie says that to the extent possible,

the words of the arbitration clauses should be construed liberally, consistently with the ordinary meaning of the words. He says that the arbitration agreement in Art 107 of the Articles applies to resolve a deadlock at the board level which cannot be resolved by the members of the company.

[20] Mr Mackie says that the words "At any meeting of members of the company" in Art 107 of the Articles do not create a condition precedent which is to be satisfied before a deadlocked resolution can be referred to arbitration. He says that such a construction fails to consider the articles as a whole. He says that it also fails to give effect to the commercial circumstances addressed by Art 107 of the Articles, and the objects it was intended to secure, namely to end a deadlock at the board level".

[21] Mr Mackie refers to Art 48 of the Articles, which provides that "[n]o business shall be transacted at any general meeting unless a quorum of two members is present at the time when the meeting proceeds to business". He says that there are only two members of Mackie Group Pty Ltd, namely Mackie & Staff and Mr Duckitt. He says that if Mr Duckitt failed or refused to attend the general meeting — as he has foreshadowed in a letter — there would be no quorum, the deadlock resolutions could never be put to the members, and effect could never be given to the arbitration agreement found in Art 107 of the Articles.

[22] Mr Mackie contends that a reasonable person in the position of the parties would understand that referring a deadlocked board resolution to members was a way to end the deadlock and to avoid the costs associated with arbitration. Mr Mackie says that a reasonable person would not understand the referral to be a mechanism by which a further deadlock could be achieved so as to prevent the arbitration agreement found in Art 107 of the Articles ever being invoked. Mr Mackie says that, accordingly, that the holding of a general meeting is not a condition precedent to a deadlocked board resolution being referred to arbitration.

[23] He says that, rather, Art 107 provides the directors with a more cost effective option to resolve deadlocked board resolutions, if that option is practically open to them. Mr Mackie says, "In this case, it is clear that putting the deadlocked board resolution to a general meeting would not have resolved that deadlock". He said that it was therefore not a viable option available to the directors to resolve the matter. In my opinion, after taking those arguments fully into account, the learned Associate Justice did err in law.

[24] The agreement to arbitrate is only enlivened when a resolution at a general meeting has been put and the votes in favour and against are equal. In those circumstances, the obligation to arbitrate is enlivened and the parties are obliged to follow the process there set out. The argument that putting of resolutions at a general meeting is not a condition precedent misses the real issue. It is the resolutions that have been subject to equality of votes or "[t]he questions to be determined thereby" that are submitted to arbitration for resolution. Those resolutions define the ambit of the issues intended by the parties to be the subject of arbitration.

[25] I agree with the Associate Justice that there need not be an existing reference at the time the parties request a reference, but in my view there must be an issue that the parties have agreed should be subject to arbitration, at the time that the reference is sought. Upon the making of the award, the directors and the members are to convene a meeting for the purpose of passing any resolutions necessary to give effect to the award. In my opinion, unless the resolutions are identified by the prescribed procedure, there is no issue upon which the arbitrators can enter and arbitrate.

[26] It might be arguable that a failure to attend a general meeting at which a vote is taken should be treated as a vote against a resolution sought to be put at the meeting. I do not need to decide that issue, as it is not relevant at this stage. I find that the application under s 8 is not enlivened. During the discussion, the issue was raised of whether an implied term might arise that enlivens the arbitration procedure where the directors are deadlocked at a directors' meeting. In my opinion, such an implied term would be inconsistent with the express term that provides for the resolution to go to a general meeting before the arbitration procedure is enlivened.

[27] It is not necessary for me to consider whether or not Art 107 is void or ineffective for the reasons given in *A*

Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd,[4] or to consider the judgments that have subsequently considered it, in particular *ACD Tridon Inc v Tridon Australia Pty Ltd*[5] and *Fulham Football Club (1987) Ltd v Richards*.[6]

[28] There are also issues raised in the affidavit in support by Mr Duckitt that may not relate to deadlock — for example, Mr Duckitt complains that Mr Mackie retains under his control the monies that are to be applied towards the judgment in favour of MGPL. There is also the failure to have costs taxed, which Mr Duckitt complains about. These matters may or may not go to the issue of whether Mr Mackie has been acting in his own interests. It is unnecessary for me to resolve any of those issues at this stage in view of the findings I have made.

[29] Accordingly, I grant leave to appeal from the order of the Associate Justice of 11 October 2012, and allow the appeal. I remit the further hearing of the application to wind up the company to the Associate Justice.

Order

Orders accordingly.

Counsel for the plaintiff and respondents to interlocutory process: *Mr P W Collinson SC* and *Mr P F Agardy*
Counsel for the second defendant and applicants by interlocutory process: *Mr M D Wyles SC* and *Mr J S Mereine*
Solicitors for the plaintiff and respondents to interlocutory process: *Charles Fice*
Solicitors for the second defendant and applicants by interlocutory process: *ICA Lawyers*

1 *(2000) 52 NSWLR 1*.
2 Ibid, [44] et seq.
3 Ibid, [55] et seq.
4 *[1999] VSC 170*.
5 *[2002] NSWSC 896*.
6 *[2012] Ch 333*.