OUTER HOUSE, COURT OF SESSION

[2018] CSOH 12

P820/17

OPINION OF LORD CLARK

In the cause

ARBITRATION APPEAL NO. 2 of 2017

Petitioners: Young; Pinsent Masons
Defender: Motion (sol adv); BTO Solicitors LLP

22 February 2018

Introduction

[1] The petitioners and the respondents were the parties to an arbitration, in which the respondents were the claimants. On 1 August 2017, the arbitrator made a part award. The petitioners lodged an appeal against the part award under rules 67 - 70 of the Scottish Arbitration Rules. Certain grounds of appeal required leave of the court in order to proceed. On 15 November 2017, the petitioners' application for leave to appeal was refused in respect of those grounds which required leave. The present appeal concerns the remaining grounds. The petitioners make a jurisdictional appeal in terms of rule 67, raising two issues, and a serious irregularity appeal in terms of rule 68.

[2] By interlocutor dated 28 November 2017, the court made an order in terms of section 15 of the Arbitration (Scotland) Act 2010 prohibiting the disclosure of the identity of the parties. In this opinion, I have sought to avoid giving any information which will allow

them to be identified. As a consequence, I have limited the explanation and discussion of the factual background. The parties were shown the draft Opinion in advance of it being issued, to confirm that they were content with the steps taken to preserve anonymity.

[3] The arbitration was between, on the one hand, the Committee of a Club and three Committee members and, on the other hand, a company (the first petitioner) which acted as the administrator on behalf of the Club, and another company (the second petitioner), which was identified in the Club's Constitution as the Management Company.

[4] In his part award, the arbitrator made a number of orders directed against the first and second petitioners. Three of the orders are challenged in this appeal ("the challenged orders"). These were to the following effect: (i) to make over control of all property belonging to the Club in their possession or control; (ii) to make over all books of account kept by them in respect of the Club; (iii) to produce a bank account reconciliation showing what sums properly belong to the Club and to hand over such sums. In relation to order (i) the property was to be made over to the first respondent in his capacity as chairman of the Club. In relation to orders (ii) and (iii), the arbitrator directed that the petitioners hand over and produce the documents and sums to "the claimants".

[5] Three documents are of particular relevance to this appeal. Firstly, there is the Constitution of the Club. Secondly, there is the Management Agreement, which was to be entered into by the Club and the second petitioner. Thirdly, there is the Confirmatory Agreement entered into between the Club and the first petitioner, in terms of which the first petitioner acted as administrator of the Club and its affairs.

[6] In the Constitution, reference is made to "Founder Members", defined as being the first petitioner (referred to as "the Company") and the second petitioner (referred to as "the Management Company"). The Constitution also refers to the Management Agreement,

which is appended to it. "Members" are defined as "the Members from time to time of the Club including the Founder Members unless the context otherwise requires". The Constitution sets out duties of the Founder Members. Clause 11 deals with the appointment of the Club Committee and is powers. Clause 11.1 refers to the business and affairs of the Club being managed by the Committee "save insofar as the same may have been delegated to a management company or the Annual General Meeting". Clause 11.4 provides *inter alia* that "The Committee shall be entitled to delegate to the Management Company hereinafter referred to such of its powers as may be appropriate to enable the Management Company to perform its functions". That clause also provided that until such time as the Committee was constituted, the Founder Members were, on behalf of the Club, to enter into an agreement with the second petitioner, in the form annexed to the Constitution (or as close thereto as circumstances permitted) for the management of the Club. Clause 11.5.5 refers to powers "…delegated to the Management Company under the Management Agreement".

[7] In the Management Agreement, annexed to the Constitution, recital 2 in the preamble states "Whereas…in pursuance of clause 11 of said Constitution the Founder Members have agreed to delegate to the Management Company the general management and administration of the Club". The Management Agreement was not, according to the petitioners, operated. Instead, the administration of the affairs of the Club was carried out by the first petitioner, under the Confirmatory Agreement. The arbitrator found that it was not clear whether the second petitioner had ever been appointed as a manager.

[8] The parties to the Confirmatory Agreement were the first petitioner and the Club, and also two other groups with interests in the Club. Clause 4(1) of the Confirmatory Agreement confirmed the appointment of the first petitioner, by the three other parties, for a three year term from 3 May 2014. Clause 4(2)(a) stated that the first petitioner undertook,

jointly with the other parties, to diligently carry out the duties of the administrator as contained in *inter alia* the Constitution. Clause 4(2)(b) stated that the first petitioner would ensure the carrying out throughout the said term (three years from 3 May 2014) of the duties of the administrator as expressly set out in *inter alia* clauses 11 and 12 of the Constitution.

[9] The arbitration was conducted under clause 20 of the Constitution, which is in the following terms:

> "Any dispute or difference arising out of this Constitution shall be referred to the decision of a single Arbiter to be agreed between the parties or in default of agreement to be appointed upon the application of either party by the President for the time being of the Law Society of Scotland and the award of such Arbiter, including as to expenses, shall be final and binding on all parties."

[10] The arbitration hearings concluded on 31 January 2017. On 15 May 2017, while the arbitrator was considering the evidence and submissions, the respondents sought to introduce an amendment to their Statement of Claim, which would have introduced further factual material and sought various further orders. The petitioners resisted the proposed amendment. On 24 May 2017, the arbitrator refused amendment in respect of most of the matters which the respondents had sought to introduce. However, he allowed the respondents to amend their pleadings to the effect that the Confirmatory Agreement had terminated on 2 May 2017, as he regarded this as of relevance to the issues before him. The arbitrator gave the petitioners seven days in which to state whether they accepted that the Confirmatory Agreement had terminated. On 31 May 2017, the petitioners stated that they accepted that the Confirmatory Agreement had terminated on 3 May 2017.

Submissions for the petitioners

[11] The petitioners' contentions, in summary, were as follows. There were three

grounds of appeal. The first two grounds comprised the jurisdictional appeal under rule 67. The first ground was that the challenged orders were not within the scope of clause 20 of the Constitution. The second ground was that the challenged orders were not within the scope of the dispute referred to arbitration. The third ground, comprising the serious irregularity appeal under rule 68, was that the manner in which the challenged orders were made, and their terms, gave rise to serious irregularity.

[12] In advancing the first ground, it was submitted that the arbitration clause in the Constitution was not binding upon the first petitioner in respect of the matters covered by the challenged orders. Arbitration is only legitimate if the parties have chosen that form of dispute resolution and have consented to arbitration. The petitioners never agreed to arbitration on the matters regarding the Confirmatory Agreement and their role as administrator.

[13] There were a number of authorities to the effect that, where the affairs of the parties are regulated by different contracts, a dispute relating to one contract cannot generally be determined by resort to the arbitration procedure provided for in another contract. In *Am Trust Europe Limited* v *Trust Risk Group SpA* [2016] 1 All ER (Comm) 325, one issue was the correct approach to be taken when the court was faced with multiple contracts which included different provisions as to jurisdiction. The court concluded that the two separate contracts regulated different aspects of the parties' relationship. *PT Thiess Contractors Indonesia* v *PT Kaltim Prima Coal* [2011] EWHC 1842 was an example of a case where, notwithstanding the close connection between the two contracts, they were viewed by the court as separate. In *Coop International Pte Limited* v *Ebel SA* [1998] 1 SLR (R) 615, the claim made was for sums due under a settlement agreement between the parties and not under the distributorship agreement between them. The arbitration clause in the distributorship

agreement did not apply to the dispute under the settlement agreement. *James Gerry* v *Caithness Flagstone Quarrying Company* (1885) 12 R 543, was an older Scottish example, where an arbitration clause in a contract of co-partnery dealt with disputes among partners and did not apply to a dispute between, on the one hand, the whole body of partners, and on the other hand, the pursuer, not in his capacity as partner but as landlord.

[14] In the present case, clause 11.4 of the Constitution referred to the powers of the Committee and to delegation. It envisaged a separate agreement to delegate functions. Clause 11.5.6, which concerned appointment of a lawyer, gave another example of what the Committee could do. Had a lawyer been appointed under that provision, any dispute in relation to the appointment of the lawyer would not be dealt with under the arbitration clause but under the provisions of the agreement with the lawyer. The first petitioner's capacity under the Constitution was as a Founder Member and as the Company. It was acting in a different capacity when managing or administering the affairs of the Club. The underlying dispute between the parties did not arise out of the Constitution. There was a separate arbitration agreement in the Management Agreement and any dispute between the parties to it fell to be determined under that agreement. Thus such disputes did not fall under clause 20 of the Constitution.

[15] The first petitioner was not the Management Company for the purposes of the Constitution. A passage in the arbitrator's part award, in which he referred to the first petitioner as having acted as the Management Company under the Constitution, was an intellectual sleight of hand and did not engage with the argument that was made to him. The first petitioner in a separate contract had undertaken the duties of the second petitioner, but that didn't make the first petitioner the Management Company for the purposes of the Constitution.

[16] The Confirmatory Agreement referred to a combined appointment jointly by all three entities who were the other parties to it. The reference to the administrator in the Confirmatory Agreement was a reference to the duties of the Management Company but there were no specific duties of the Management Company under the Constitution. The Constitution contemplated a separate contract. In terms of the Confirmatory Agreement, the first petitioner was not undertaking the duties delegated under clause 11 of the Constitution. It was an intellectual sleight of hand to say that the first petitioner was exercising functions under the Constitution or that its duties derived from the Constitution. The position was no different from the analogy of the lawyer given earlier where he was appointed under a separate contract in terms of clause 11.5.6 of the Constitution. The first petitioner had rights and obligations which flowed from the Confirmatory Agreement and not from the terms of the Constitution. These were separate contracts dealing with separate aspects of the relationship. The existence of rights and obligations under a separate agreement which involved two other parties indicated that the first petitioner was undertaking responsibilities under a different contract. There were complexities to the dispute between the parties – it was not just a question of handing over the property and accounting for the monies held. The first petitioner had simply not agreed to go to arbitration over this dispute.

[17] Further, in respect of the second ground of appeal, the challenged orders were outwith the scope of the reference to arbitration. It was necessary to identify the cause of action upon which the dispute was referred to arbitration: *The World Era* [1992] 1 Lloyd's Rep 45. In that case an agent was suing on behalf of a principal for losses suffered by that principal - this was held to be a new cause of action, different from that referred to arbitration. The appropriate approach was for the court to reach an objective construction of the terms of reference to arbitration: *The Petros Hadjikyriakos* [1988] 2 Lloyd's Rep 56. In that

case, the additional point raised was not within the matters covered by the reference to arbitration. Other examples were referred to petitioners' Note of Argument.

[18] In the present case, the respondents had been asked by the petitioners at the outset of the arbitration process to clarify what issues were to go to arbitration and had produced a document for that purpose. It referred to termination of the Management Agreement in 2015. The Statement of Claim also referred to termination of the Management Agreement. It expressly stated that the Confirmatory Agreement was not valid. The arbitrator held that the Management Agreement was not operational, which had the consequence that the basis of the arbitration in the Statement of Claim fell away, but he failed to accept that to be so. The respondents had, in identifying the issues for arbitration, effectively proceeded on the basis of an error of fact and law that the first petitioner was a party to the Management Agreement. Their cause of action was therefore that the Management Agreement had been validly terminated and on that basis that the challenged orders should be made.

[19] To use the termination of the Confirmatory Agreement as the basis for recovery of property and documents was to give a decision on a new cause of action. The clear position of the respondents was that the first petitioner was a party to the Management Agreement, that it had been terminated and that as a result they were entitled to the challenged orders. That was not the dispute the arbitrator bears to have determined.

[20] The Confirmatory Agreement was a feature of the dispute only because the petitioners argued that this was the contract which dealt with administration of the Club's affairs and so that the arbitrator had no jurisdiction under it. It was not open to the arbitrator to take the view that the termination of the Confirmatory Agreement was now before him and that he could decide matters on the basis of it. It was only before him as part of a challenge to jurisdiction.

[21] Turning to the third ground, the allegations of serious irregularity, the manner of making, and the terms of, the challenged orders gave rise to serious irregularity. *Ronly Holdings Ltd* v *JSC Zestafoni* [2004] 1 CLC 1168 illustrated that where the arbitrator exceeded his powers by dealing with a matter not, or no longer, before him, that was unfair and amounted to a serious irregularity. In the present case, the respondents were as clear as day that the Confirmatory Agreement was irrelevant and invalid and that the true agreement in issue was the Management Agreement. To allow them to change horses once the Confirmatory Agreement had expired was not fair to the petitioners. That was not the basis upon which the arbitration was conducted. Quite separately from the fairness aspect, if the arbitrator was going to take account of changed circumstances he should have advised the parties. Moreover, to use the amendment for a different purpose from what it was intended – to make orders for the return of property – was improper. He either acted outwith his powers or acted unfairly. There was an issue as to the return of the property which was a matter before the Arbitrator at the very outset, but it was not tied in to the Confirmatory Agreement. There is in fact a subsequent ongoing dispute about amendment of the Constitution. If the arbitrator had continuing jurisdiction to deal with all matters that cropped up in the course of the arbitration then this wider issue would have been put before him.

[22] The petitioners' Note of Argument was adopted in relation to the points raised about the uncertainty and ambiguity of the challenged orders. The challenged orders were directed against both petitioners, but the arbitrator discussed only the obligation on the first petitioner to deliver property and account. The first of the challenged orders is for the return of property to the Chairman, but that person is elected at each meeting Committee and the person being referred to in the order is therefore unclear. The second and third of

the challenged orders were for the delivery of property and funds to "the Claimant", and it was unclear as to how the petitioners were to implement these challenged orders. These points were, however, very much subsidiary to the main point about serious irregularity.

[23] The motion for the petitioners was therefore that the court should set aside the part award by setting aside the challenged orders. Insofar as another order made by the arbitrator referred to him having jurisdiction, that should be set aside in relation to the challenged orders.

Submissions for the respondents

[24] The return of the property was a matter before the arbitrator at the very outset and was tied not to the Confirmatory Agreement but to the Constitution of the Club. The property and monies were entrusted to the first petitioner under the Constitution. Reference was made to paragraphs 65 to 68 of the Statement of Claim, which sought return of these assets and referred to the Constitution. The underlying key document was the Constitution.

[25] It was not accepted that the arbitrator made the challenged orders on the basis that the Confirmatory Agreement had expired. The expiry was in any event flagged up at a very early stage. The arbitrator did not adopt the position that knowledge of termination had just become known as a result of the amendment. He made the challenged orders on the basis that possession of the property could be tied back to the Constitution. He was correct to do so.

[26] In the course of his submissions, Mr Motion explained that he had no recollection of evidence being given in the arbitration that the Management Agreement was never operated, as the petitioners had contended. However, it was clear from the Confirmatory Agreement that the Constitution laid the basis for the first petitioner's role. Clause 4 of the

Confirmatory Agreement referred to the Constitution and duties under it. The performance of duties under the Confirmatory Agreement was carried out under reference to the Constitution. If the Club's Committee became concerned with the first petitioner's conduct, it came back to the Constitution. There was no inconsistency with the Confirmatory Agreement providing the route to the underlying document which is the Constitution.

[27] It was necessary to take into account the fact that the document which sought to clarify the reference to arbitration was prepared by a lay person. The author of the document was simply identifying all of the issues – it shouldn't be construed too strictly, looking for lack of precision. However the author did make the point that property ought to be returned; delivery of Club property was what was being sought.

[28] The right of the Club to recover the property from the petitioners was clear, when it was held with no legal basis and there was no legal relationship with the petitioners, as the relationship had come to an end. The powers delegated in terms of the Constitution were significant. The Constitution included obligations on members to make payments of management fees or charges, which were collected by the first petitioner. If not paid, membership of the Club could be suspended. In a carry-over of the arbitration provision, reference was made to arbitration in clause 11.5.4 of the Constitution. If a member was unhappy with the threat of suspension he could go to arbitration in accordance with clause 20. So 11.5.4 meant that disputes with the first petitioner as Management Company should go to arbitration, and this supported the position adopted by the respondents

[29] In relation to the question of amendment, the expiry of the Confirmatory Agreement was a factual point which related to the issues which the respondents sought to introduce for determination. The arbitrator did not allow this new cause of action. But he requested confirmation from the petitioners on the factual point. The result was that an additional

sentence was added to the Statement of Claim, which the petitioners accepted. The arbitrator rightly excluded points which the respondents tried to introduce, thereby showing that he was acting correctly in this matter.

[30] The arbitrator did not make the challenged orders because of anything in the Confirmatory Agreement. He relied upon the Constitution. This was clear from the terms of the part award. The respondents were the data controllers for the Club and because of the petitioners' failure to hand over the property were being prevented from complying with data protection legislation. This was all the more reason why they should get documents back. In his part award, the arbitrator referred to the first petitioner having become the Management Company, which was not envisaged by the Constitution. This underscored the point that when one looked at the case law one had to consider the situation on the ground in the present case and not simply the documentation.

[31] In relation to the subsidiary points about the alleged serious irregularity, the identity of the Chairman was clear and was accepted by the petitioners.

[32] The petitioners agreed to go to arbitration on the return of the property so that as soon as they lodged answers to the Statement of Claim they engaged on that basis. In relation to the analogy of engagement of a lawyer, mentioned in submissions for the petitioners, the relationship between the petitioners and respondents was based on the Constitution. This differed from an ordinary contract.

[33] Accordingly, the appeal should be refused.

Reply for the petitioners

[34] The central question was: how does a clause in the Constitution come to govern a dispute under the Confirmatory Agreement? That had not been answered. As to the actual

basis for the arbitrator's decision, it was that the petitioners' right to the property under the Confirmatory Agreement which had come to an end so that there was no longer any right and therefore there was an obligation to return the property. This could not arise in the Constitution, which only applied to internal matters, not the rights of third parties under separate contracts. The present situation was akin to a third party, who would not be subject to the arbitration clause, suing the Committee. The arbitrator's key point was that the Confirmatory Agreement had come to an end, as could be seen in the reasoning in his part award.

Decision and reasons

Issue 1: Is the arbitration clause in the Constitution binding upon the first petitioner in respect of the matters covered by the challenged orders made by the arbitrator?

[35] In making the challenged orders, the arbitrator noted that, in terms of the Constitution, the affairs of the Club were to be managed by the Committee unless delegated to a management company. The first petitioner was no longer the administrator or the Management Company and the second petitioner never had been. Accordingly, neither petitioner had any current entitlement to the Club's assets. It was appropriate that the Club's assets were returned. The arbitrator concluded that the first petitioner had a duty to account to the Club and its members for its intromissions with Club funds, and to return Club funds and property to the Club now that its appointment has been terminated.

[36] The arbitrator therefore made the challenged orders. These do not relate to a contractual dispute, for example about an alleged breach of the terms of the Confirmatory Agreement. The Management Agreement and the Confirmatory Agreement dealt only with

the actual management or administrative duties; they did not deal with obligations to return property or to account for intromissions when the agreements have terminated.

[37] As I have indicated earlier, the Constitution makes provision for the affairs of the Club to be managed by the Committee, unless management of them is delegated. The Constitution makes specific reference to delegation to the Management Company. The power of the Committee to delegate is therefore part of the Constitution, as is the identity of the party to whom powers may be delegated – the Management Company.

[38] The challenged orders thus arise not from the detailed terms of the Confirmatory Agreement, but rather as a result of the operation of the provisions in the Constitution about delegation. The Constitution provides the source of delegation. That delegation, to the first petitioner, has come to an end. The Committee is now responsible for administration of the Club. Issues arise as to whether the party to whom the powers were delegated is obliged to return property and to account for intromissions, now that the delegation has ended. These issues therefore fall within clause 20, which covers "Any dispute or difference arising out of this Constitution…"

[39] The point about the Confirmatory Agreement having terminated is of course a relevant factual point, and was admitted by the petitioners. The arbitrator was fully entitled to take it into account. But, as I have said, the Confirmatory Agreement was not the basis for the challenged orders.

[39] The authorities relied upon by the petitioners on this ground are therefore not in point. They largely concern relations between the parties under contractual documents other than the one which contains the provision allowing for parties to refer matters to arbitration. For the reasons I have given, that is not the position here: there is no dispute or difference arising from a contractual document other than the Constitution.

[40] The petitioners are plainly bound by the Constitution. They are Founder Members and they are the Company and the Management Company, named in the Constitution. As a matter of fact, and as the arbitrator found, the first petitioner carried out the duties of the Management Company, delegated to it under the powers in the Constitution. The first petitioner averred, in its answers to the Statement of Claim, that it was, at the relevant time, the Management Company. The first petitioner took on the administrator's role and *de facto* acted as the Management Company. The exercise of delegation by the Committee under the Constitution resulted in delegation to the first petitioner. The first petitioner was therefore bound by the Constitution, including its arbitration clause. The second petitioner was also bound by the Constitution, albeit that in fact the Management Agreement did not, it seems, operate. Contrary to what was submitted on their behalf, the petitioners were not in the same position as third parties who had contracted with the Committee.

[41] I therefore reject the petitioners' contention that the arbitration clause in the Constitution did not bind the petitioners in respect of the subject matter of the challenged orders.

Issue 2: Were the challenged orders outwith the scope of the reference to arbitration?

[42] The issues of return of property and accounting for intromissions were raised from the outset of the arbitration. The Statement of Claim made reference to the delegation of powers under the Constitution and indeed made numerous other references to the Constitution. The central basis upon which the challenged orders were sought was referred to in the Statement of Claim under the heading "Property" (rather than, for example, any contractual obligation).

[43] The arbitrator was correct to say (as he did in relation to his finding on expenses) that the termination of the Confirmatory Agreement was not the basis for his finding. That basis was the duty to return property and the duty to account for intromissions, which arose, as I have mentioned, as a result of the delegation provisions of the Constitution. As I have also indicated, the Confirmatory Agreement does not deal with obligations to return property or account for intromissions. The termination of the Confirmatory Agreement was not, to use the expression in the cases cited by the petitioners, the cause of action. It was merely a relevant fact. The cause of action in the arbitration included whether there were obligations to return property and account for intromissions. I am therefore not in any doubt that the arbitrator's decision in respect of the challenged orders was within the scope of the matters referred to him.

Issue 3: did the manner of making, and the terms of, the challenged orders give rise to serious irregularity?

[44] In my view, there was no serious irregularity in the manner in which the challenged orders were made. It is true that before the arbitrator the respondents focused largely on the contention that the Management Agreement had come to an end. But as I have noted above the challenged orders relate fundamentally to the Constitution. The agreed factual position on the point that the Confirmatory Agreement had ended was something that could be taken into account by the arbitrator in dealing with the matters referred to arbitration, which included the issues of return of property and accounting. There was nothing unfair in that respect.

[45] The suggestion by the petitioners that there is uncertainty or ambiguity about some aspects of the challenged orders is not well-founded. Read and understood in a practical

and reasonable manner, the orders are that property is to be returned to the Chairman, who has been identified, and to the respondents in their representative capacity. The duty to account is also to the respondents in that same capacity.

[46] Similarly, I am not persuaded that the making of the orders against both petitioners creates any serious irregularity. In relation to the first two of the challenged orders, the petitioners are required to make over to the Club property "which is in their possession or control" and to make over books of account "kept by them". Given that the first petitioners were carrying out the management duties, it appears that they will be best placed to satisfy these orders. The third of the challenged orders relates to producing a reconciliation of the bank account and making over such sums as are due. It is a matter of obvious inference that the petitioner having control over the bank account and the funds will require to satisfy that order. On the face of it, this is also a matter for the first petitioner. If the second petitioner has nothing within its possession or control to hand over, then so be it.

Conclusion

[46] For these reasons, the petitioners' appeal is refused.