[2003] QSC 218

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Date: 10 July, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No 5402 of 2003

MALCOLM ALEXANDER STEPHEN MURDOCH	Applicant
and	
GBST HOLDINGS PTY LTD (ACN 010 488 874)	First Respondent
and	
GBST INVESTMENTS PTY LTD (ACN 082 192 550)	Second Respondent
and	
CROWN FINANCIAL PTY LTD (ACN 000 188 367)	Third Respondent

BRISBANE

..DATE 26/06/2003

JUDGMENT and ORDER

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HIS HONOUR: This is an application for declaratory orders and final injunctive relief.

The applicant is a director and minority shareholder of the respondent. The other directors are Mr Puttick, another minority shareholder, and Mr Sundell, who represents the largest shareholder. Mr Sundell has three votes on the Board, Mr Puttick has one, and the applicant has one.

The company conducts a business of providing and servicing computer software with an annual turnover of approximately $20 million.

In the year 2000 the applicant borrowed $1.7 million from the respondent to buy some shares in the respondent. There was a written loan agreement called a shareholders loan agreement. Interest was payable under that agreement at a defined rate.

Clause 4 of that agreement provides that the applicant must repay a portion of the loan and interest in each financial year. The financial year ends on 30 June. The amount to be paid each year must be not less than that which is defined as the minimum amount.

In September 2001 an agreement entitled Shareholders Agreement was made. The parties to this agreement included the applicant, Mr Puttick, the company, that is the respondent company, and the shareholder represented by Mr Sundell which is Crown Financial Pty Ltd.

Clause 7.1 of the Shareholders Agreement is as follows:

> "7.1 Despite any other provision in this Agreement and the Subscription Deed, the parties agree to pursue a dividend policy or a bonus scheme providing for fair and equitable payments to John Francis Puttick and Malcolm Alexander Stephen Murdoch that that will cover the cost of servicing the loan their Continuing Shareholders Loans and any loan entered into to service the cost of their projected personal income tax liability on those loans for each relevant year."

Clause 20 of that Shareholders Agreement provides:

> "Where there is any conflict between the provisions of this Agreement and the Constitution of Company, the provisions of this Agreement prevail and upon a written request being received from any party, all parties must cause the Constitution of the Company to be amended in order to remove the conflict."

In the Shareholders Agreement the term "parties" is defined to mean "Crown Financial, and the continuing shareholders and their respective successors and permitted assigns." It will be seen then that the term "parties" does not include the respondent company itself.

Clause 20 refers to the constitution of the company. Clause 8.15 of the constitution provides as follows:

> "8.15 Notwithstanding any other provisions of rule 8, the Board must pursue a dividend policy that will pay the Continuing Shareholders dividends on shares held by them or an associate of them, to cover the cost of servicing the Continuing Shareholders' Loans and t heir projected personal income tax liability on those dividends for each relevant year, or in the alternative, pay a bonus to each of John Francis Puttick and Malcolm Alexander Stephen Murdoch in an amount which enables each of them to

> service their respective loans and to meet the tax liability in respect of such bonuses."

Also in September 2001 the applicant signed an agreement called an Executive Services Agreement. Clause 6.2 of that provides as follows:

> "The Board may also agree to pay you a performance based bonus in addition to any bonus or dividend paid to you or any entity related to you of the purpose of servicing your loan from GBST."

Under the loan agreement the applicant must pay the minimum amount to the respondent on or before next Monday, 30 June. The respondent claims that this minimum amount is the sum of $253,029. The applicant claims that the respondent is obliged to pay or credit that amount to him by way of a dividend or a bonus. If that is paid or credited to him the applicant will have to pay tax on it in an amount of $238,389. The applicant says that the respondent will have to pay that further amount of $238,389 or credit it to him some time in the next financial year.

These orders are sought by an originating application upon the submitted basis that the applicant's entitlement is so clear that the Court can and should declare now that the applicant has that entitlement and should now grant final and mandatory injunctive relief to compel the respondent to pay or credit to him the amount of $253,029 on or before next Monday.

One submission on behalf of the applicant is that clause 8.15 of the constitution is in terms which entitles him to a bonus

in the amount of the minimum amount, that is $253,029 in this case.

Upon this submission a bonus is treated by clause 8.15 differently from a dividend. There is a factual dispute here as to whether a dividend could be paid at least because there is a dispute as to whether the company will derive a profit for the relevant year.

Within clause 8.15 the Board is to pursue a dividend policy whereas there is no reference to a policy within that clause in the case of a bonus.

I am satisfied that the evidence establishes that there is sufficient cash for the payment of a bonus that could, of course, be paid in the sense of an actual payment to the applicant corresponding with his payment of the minimum amount to the respondent. Alternatively it might be paid by something in the nature of a journal entry.

The respondent submits that a bonus like a dividend should be paid only out of profits. I do not accept that submission. A dividend must be paid out of profits but it does not seem to me that there is anything about a bonus which requires it only to be paid out of profits.

The respondent also, however, points to clause 7.1 of the Shareholders Agreement which is in apparently different terms

so far as a bonus is concerned from clause 8.15 of the constitution.

Clause 7.1 provides for the parties to pursue a dividend policy as does, in relation to dividends, clause 8.15 of the constitution, but clause 7.1 of the Shareholders Agreement in relation to the matter of a bonus requires the parties to pursue a bonus scheme providing for fair and equitable payments to Mr Puttick and the applicant that will cover the cost of servicing the relevant loans.

To my mind, this language of clause 7.1 suggests a more qualified obligation which is to pursue a scheme which is fair and equitable, rather than simply to cause a bonus to be paid. If clause 7.1 was the applicant's only basis for his claim, in my view his entitlement would depend upon whether the payment of a bonus to him would be fair and equitable. That would require a factual enquiry, because there is evidence sufficient to raise issues to be tried in that respect, including in relation to an issue of whether it is financially prudent for such a bonus to be now paid with the consequence of an obligation to pay to the applicant that sum of approximately $238,000 in the next financial year.

This apparent inconsistency between clause 7.1 of the shareholders' agreement and clause 8.15 of the constitution apparently engages clause 20 of the shareholder's agreement. If so, then the applicant, upon a written request made under

clause 20, would be obliged to cause the constitution to be amended to remove that conflict.

Now, the respondent company is not a party to the promise in clause 7.1, but still there is an apparent inconsistency between that provision and clause 8.15 of the constitution, because other persons who are parties to the promise in clause 7.1 are parties bound by the agreement contained in the constitution.

If there is an inconsistency between these two provisions, then to enforce clause 8.15 over the inconsistent provisions of clause 7.1, would be to deprive the parties of some of the benefit of the shareholders' agreement, being that provided by clause 20. In other words, the Court should not assist the applicant to sidestep the potential operation of clause 20 by enforcing clause 8.15 where it is apparently inconsistent with clause 7.1.

As I have said, reliance upon clause 7.1 requires a factual enquiry in this case. The applicant contends that, upon the evidence, the Court can conclude now - that is without a hearing in the normal way and with appropriate interlocutory steps, that the performance of the obligation in clause 7.1 must inevitably result in an entitlement to the payment at least, of a bonus in the sum claimed. In my view however, there are, as I have said, issues to be tried going to the broad question of whether the performance of clause 7.1 would

have the result that the respondent would have to pay that bonus to the applicant.

In my view, the same applies to the applicant's other claims made by this originating application which are that the interest payable by him, according to the loan agreement, has not been increased by agreement as the respondent contends that it has been. Similarly, the applicant's claim that the respondent has wrongly added amounts to his loan account is met at this stage by evidence which indicates that there are factual issues to be tried. Accordingly, the application should in each case be dismissed, and I shall hear the parties as to costs.

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HIS HONOUR: I order:-

1. That the applicant file and serve a statement of claim against the respondent and against any other party as he may be advised on or before 7 July 2003.

2. That the respondents file and serve a defence and counterclaim, if any, on or before 21 July 2003.

3. The applicant file and serve a reply on before 28 July 2003.

4. That the parties exchange lists of documents on or before 18 August 2003.

5. That inspection be conducted on or before 25 August 2003.

6. That there be liberty to apply.

7. That the proceedings be listed for further directions before me at 9 a.m. on 28 August 2003.

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HIS HONOUR: There will be a further order pursuant to rule 14 that the proceeding continue as if started by a claim.

As to the costs of the application heard yesterday, in my view the trial Judge will be in a better position than I am to judge the merits of the applicant's course in applying for final relief as he did. Although he has been unsuccessful in that application, it may ultimately emerge that there was, indeed, no proper basis for the factual issues which I have decided warrant a hearing. Accordingly, the costs of the application heard on 25 June 2003 will be reserved.
