SUPREME COURT OF QUEENSLAND

CITATION:	*McCleverty v Australian Karting Assoc Ltd* [2015] QSC 323
PARTIES:	**JOHN HAROLD McCLEVERTY** (applicant) **v** **AUSTRALIAN KARTING ASSOCIATION LIMITED** (respondent)
FILE NO/S:	No 6623 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2015
JUDGE:	Dalton J
ORDER:	**The decision of the respondent Board dated 23 March 2015 and the decisions of the respondent's tribunal dated 13 February 2015 and 11 March 2015 are void.**
CATCHWORDS:	ASSOCIATIONS AND CLUBS – JURISDICTION OF THE COURTS – OTHER MATTERS – where at the time of hearing the applicant was the President of the Australian Karting Association (Qld) Inc – where the Australian Karting Association Limited is a company limited by guarantee – whether there was a contract between the parties sufficient to establish a basis for the Court's jurisdiction ASSOCIATIONS AND CLUBS – EXPULSION, SUSPENSION and DISQUALIFICATION – EXERCISE OF POWER – DENIAL OF NATURAL JUSTICE GENERALLY – where the applicant submits that proper particulars of the case he was to meet were not given – where the applicant submits that the tribunal had regard to material that was not provided to the applicant – where there was contact between one of the tribunal members and the Australian Karting Association Limited – whether there was a denial of natural justice ASSOCIATIONS AND CLUBS – EXPULSION, SUSPENSION and DISQUALIFICATION – EXERCISE OF POWER – GENERALLY – where the Board of the Australian Karting Association Limited did not follow the procedure in

its constitution – whether the decision of the Board on 23 March 2015 is void

Corporations Act 2001 (Cth) s 140, s 231

AFL & Ors v Carlton Football Club Ltd & Anor [1998] 2 VR 546
Chiropractic and Osteopathic College of SA Inc v Struthers (1981) 97 LSJS 49
Harrington v Coote [2013] SASCFC 154
Millar & Ors v Houghton Table Tennis & Sports Club Inc [2003] SASC 1

COUNSEL: F G Forde for the applicant

SOLICITORS: James K Legal for the applicant
B J Heath of Carter Newell, solicitor, for the respondent

[1] At the time I heard this application John Harold McCleverty was the President of Australian Karting Association (Qld) Inc (AKAQI) and a life member of Karting Association Queensland and the Toowoomba Karting Club. He engaged in a course of conduct which some within AKAQI found so obnoxious that in October 2014 the then President of AKAQI complained to the National Body – Australian Karting Association Ltd (AKAL). The National Body then purported to suspend Mr McCleverty from both the AKAL and AKAQI for 10 years. He challenges this decision of 23 March 2015 and the tribunal decision of 13 February 2015 which was a precursor to it.

[2] Before a Court will interfere with the decisions of private tribunals such as those which are challenged in this case, the applicant must show a basis for the Court's jurisdiction. An infringement of property or contractual rights is usually sufficient.[1] The AKAL is a company limited by guarantee. Thus s 140 of the *Corporations Act* 2001 applies, providing that its constitution has effect as a contract between the company and each member, under which each person agrees to observe and perform the constitution so far as it applies to that person.

[3] The constitution of the AKAL provides for various classes of membership – see r 2. Ordinary members are State and Territory karting organisations. One tier down are associate members, which are karting clubs affiliated with the State and Territory organisations. Lastly, so far as is relevant here, are provisional members. These are financial members of karting clubs. All the subsidiary documents which would be necessary to strictly prove agreement by a provisional member to the constitution of the AKAL were not in evidence before me. It was Mr McCleverty's case that he was a provisional member of the AKAL. The solicitor who appeared for the AKAL at first

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1 *The Law Relating to Non-Profit Associations in Australia and New Zealand,* Fletcher, Law Book Company (1986), p 67; *Justice in Tribunals,* 4th ed, Forbes, The Federation Press (2014), [3.1]; *AFL & Ors v Carlton Football Club Ltd & Anor* [1998] 2 VR 546, 550 per Tadgell JA; *Chiropractic and Osteopathic College of SA Inc v Struthers* (1981) 97 LSJS 49, 51 cited in *Harrington v Coote* [2013] SASCFC 154 [128]-[132]; *Millar & Ors v Houghton Table Tennis & Sports Club Inc* [2003] SASC 1, [107] ff.

relied upon Mr McCleverty's not being a member of the AKAL based upon the register kept by the company. He withdrew that submission, and conceded that Mr McCleverty was a provisional member when I pointed out that if Mr McCleverty were not a provisional (or other) member of the AKAL, it had no jurisdiction to subject him to a tribunal process; make findings about his conduct, or suspend him.

[4] The solicitor appearing for AKAL had leave to put in supplementary submissions on some topics. He did not have leave to put in supplementary written submissions on this topic. Nonetheless he did. In a way which I regard with disapproval, he once again changed his stance on this topic, submitting that Mr McCleverty was not a member of the AKAL within the meaning of s 231 of the *Corporations Act,* but was simply in a consensual relationship with the respondent, which was not characterised by an intention to create contractual relations. This is completely contrary to what he said at the hearing: "I have instructions not to – to abandon that argument, your Honour. It's conceded that he is a member for the purposes of the determination of the matters in issue in this case. So the submission about relying upon section 231 is not pressed." This concession was made before counsel for the applicant began his oral submission in Court.

[5] I do not regard the change of position evidenced by the written submissions as open to the respondent's solicitor. Even if it were, the position he seeks to adopt is in my view plainly incorrect. Both the constitution and Member Protection Policy (which documents I refer to below) evince an intention to create a compact of the type discussed in *Struthers* and *Harrington v Coote* (above). The formal, and rights based nature of both documents is explicit. Further, the law has been clear for some time that subsequent conduct of parties is examinable for the purpose of determining whether or not a contract existed between them. In my view, the formality attending the resolution of the AKAL to establish a tribunal to hear the complaints against the applicant, and that tribunal's plainly proceeding in a formal way support the conclusion I have reached. The consensual compact between the parties was sufficient to establish a relationship between them to give this Court jurisdiction.

[6] I proceed on the basis conceded at the hearing to be correct: that Mr McCleverty was a provisional member of the AKAL and that therefore he was in a contractual relationship with it by reason of s 140 of the *Corporations Act* 2001, under which he was bound to abide by the AKAL's constitution and rules, and so was the AKAL bound, in its dealings with him.

[7] The constitution of the AKAL provides at r 6 that the Board of AKAL may discipline a member, including by suspending the member, and further provides:

> "(b) If a motion is proposed at a meeting of the Board for the disciplining of a member the Chairman shall first put a motion that the member be called upon to explain its conduct to the Board.
>
> (c) If that motion is carried by a simple majority of those present and voting, the motion for the disciplining of the member must be adjourned to a meeting not less than fourteen days later.
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> (d) The member named in the motion must be given notice by delivering to its contact address in the Register of Members:-

(i) of the conduct complained of; and

(ii) that the member is entitled to present oral or written evidence or arguments to the Board at a meeting on a given date.

(e) At the later meeting, the Board must:

(i) give the member, if requested, the opportunity to be heard; and

(ii) consider any written document presented by the member or on its behalf.

(f) The Board may then, by a majority of its members, determine:-

(i) whether to discipline the member; and

(ii) the penalty.

…"

[8] Rule 8.1 of the constitution provides that the AKAL has power to do anything necessary or convenient for the purposes of the AKAL. Pursuant to this power the Board implemented something called a Member Protection Policy which forbids members of the AKAL to "harass any person" or "create a hostile environment within the sport". The Member Protection Policy gives the right to complain about a breach to the CEO of the AKAL and provides that the CEO may "appoint a person to investigate the Complaint" or "refer the Complaint to a hearings tribunal".

[9] The Member Protection Policy has provisions about the hearing tribunal. It gives it jurisdiction to hear and determine matters referred to it by the CEO. It provides that the hearing tribunal must observe natural justice and must proceed as expeditiously and with as little formality and technicality as is consistent with a fair and proper consideration of the matter before it. The Member Protection Policy gives an inclusive definition of natural justice, including that the person is fully informed of allegations made against them; that they be given a full opportunity to respond and raise any matters in their own defence, and that the decision-maker must be fair, just and unbiased.

[10] The AKAQI and the Ipswich Kart Club complained about Mr McCleverty's behaviour in October 2014. The CEO of the AKAL proposed a resolution and the Board passed it, so that on 21 October 2014 the Board referred the complaint to a tribunal, "for investigation and if considered warranted by the Tribunal determination". The AKAL wrote to Mr McCleverty giving him notice of this and saying that his offending conduct was that he had:

"1. Through the repeated misuse of technology, made false and misleading statements, allegations and the imputations arising that are incorrect and possibly defamatory, engaged in bullying, cyber bullying, harassment, verbal abuse, unwarranted and unwanted conduct and treated people associated with the sport of karting with disrespect such that your behaviour has caused offence, has belittled, threatened, humiliated and intimidated certain Members of KA.

2. Done so deliberately and wantonly by repeatedly and prolifically [sic] sending broadcast emails ('Postings') to multiple persons that are

inaccurate, misleading, inappropriate and hurtful with complete disregard for the psychological wellbeing of the persons and bodies that have been the subject of your Postings and that in so doing you have breached the rules and policies of KA that are designed to ensure that KA's core values, good reputation and positive behaviours and attitudes are maintained thereby ensuring that every person involved in our sport is treated with respect and dignity, and is safe and protected from abuse.

3. Done so in an attempt to destabilise the governance structure of KQ.

4. Directly and publicly made false and misleading statements and imputations, engaged in bullying, harassment, verbal abuse, defamation, unwarranted and unwanted conduct and treated people with disrespect such that your behaviour has caused offence, has belittled, threatened, humiliated and intimidated certain Members of KA."

[11] I do not understand why the allegations could not have been put in language that was simple and specific, but in essence what was alleged was that Mr McCleverty had sent obnoxious emails in order to harass people and destabilise the then current office holders of Karting Queensland. Mr McCleverty sent a prolix and combative request for particulars. In response AKAL simply sent Mr McCleverty a bundle of all the emails it relied upon – this bundle is Court Document 4. It is about 140 pages long.

[12] The tribunal then asked Mr McCleverty to attend at a nominated time and place, where he met two tribunal members who he did not know. He was handed 12 emails from the larger bundle, which is Court Document 4. The CEO for AKAL was in attendance. In response to questions from the tribunal he said he relied on other emails of which notice had not been given. When Mr McCleverty insisted on a chance to take time to read these, the CEO withdrew them.

[13] The tribunal questioned Mr McCleverty as to some (but not all) of the 12 emails. Mr McCleverty was told that he had the opportunity to produce any evidence which he wished to produce to the tribunal and to ask questions of the CEO who was in attendance. He tendered a letter. He was told he could make a statement to the tribunal as to his position. He did so. He said that he was just trying to have rules enforced and made comments about how he thought the Queensland Karting Association was badly managed. He told the tribunal he thought that he should foster debate, although he conceded that he would have to try to be more careful with his email correspondence in future. Mr McCleverty told the tribunal that he was engaged in a power struggle with the current executive of the Queensland Karting Association and just trying to hold them to account. Mr McCleverty said this all took place in under one hour.

[14] On 13 February 2015 Mr McCleverty was sent a letter containing the tribunal's decision. The tribunal found that he was bullying and harassing other members of the Queensland Association and of AKAL. The findings included that the conduct of Mr McCleverty was bringing the sport of karting into disrepute; that the documents written by him contained misleading or false misrepresentations, and that his conduct was responsible for various members resigning from the Queensland Karting Association.

[15] The letter of 13 February 2015 called for submissions on penalty. Mr McCleverty wrote in response, saying that he would accept an admonishment that he should moderate his emails in the future. The tribunal issued another decision of 11 March 2015 to the effect that the appropriate penalty was to suspend Mr McCleverty for 10 years. The tribunal recommended that the Board of AKAL implement the recommended penalty. The March letter says that the tribunal had found that Mr McCleverty had breached the rules of AKAL by his conduct in sending the emails and also his conduct at the hearing. This latter part of the finding seems inconsistent with the 13 February 2015 decision. The penalty decision also made a finding that Mr McCleverty had lied in his submission to the tribunal. There is either no basis for that finding expressed, or it is expressed as: "He clearly admitted at the hearing that his conduct may have offended some individuals. That he denies in his submission." If that is the reason for the conclusion of lying, it is not a proper reason.

[16] The applicant complained that he was never given proper particulars of the case he was to meet at the tribunal. He said this amounted to a breach of natural justice. I think in the circumstances, the provision of the bundle of emails was sufficient particularity. When those emails are considered with the grounds of the Board's letter outlining the complaint, I think it is sufficiently clear what the complaint against Mr McCleverty was.

[17] There was a second complaint that the tribunal had regard to material which was not provided to Mr McCleverty. The decision of 13 February 2015 records that both Mr McCleverty and AKAL had filed written responses with the tribunal. It says that "copies of all documents have been provided to each of the parties". However, Mr McCleverty swore that he did not receive the submissions of the AKAL. I find that that was so. It was conceded by one of the members of the tribunal in cross-examination who tried to minimise the effect of this by saying, "It was merely two pages of several hundreds of pages that we relied upon".

[18] The submission which Mr McCleverty did not receive was a letter which annexed a bundle of factual material, such as emails and letters. The covering letter in effect gave evidence as to the Queensland Association's need to take legal advice; that the writer had left the karting sport because of Mr McCleverty; that he thought that "a string of individuals" had been affected by Mr McCleverty's behaviour, and that the writer feared he would not be the last, presumably to leave the association. That is, it was a mix of submission and facts, none of which was presented in a very satisfactory way in terms of reliability or evidence. Mr McCleverty was never given a chance to respond to what was in this document and its annexures, and it seems to me that was a substantial breach of natural justice, and that for this reason both decisions of the tribunal must be declared void.

[19] Thirdly, in cross-examination of the CEO, it appeared that one of the tribunal members had contacted him prior to the hearing and asked him to provide a smaller bundle of emails at the tribunal hearing. There was no evidence that the contact was any more than this and I think in the circumstance that contact between the tribunal member and, in effect one of the parties to the complaint, did not amount to anything which could be seen as bias or apprehended bias.

[20] Fourthly, it was submitted on behalf of the applicant that the findings of 13 February went beyond any evidence before the tribunal. In particular it was said that it must be inferred that the tribunal relied upon assertions (vague) in the bundle of emails sent as particulars that people would leave the sport of karting, but there was in fact no actual evidence of this. Further, the member of the tribunal who was cross-examined at the hearing before me admitted that, in effect, where emails between Mr McCleverty and other members asserted contrary versions of events, the tribunal assumed that Mr McCleverty's assertions were incorrect – t 1-59. This assumption was apparently the basis for findings that Mr McCleverty had written documents which were misleading and contained false misrepresentations. It does appear that the tribunal's conduct was unsatisfactory in this regard.

[21] I would prefer not to decide whether or not a failure to act upon proper or sufficient evidence could amount to a failure to accord natural justice. The finding is strictly unnecessary as it does appear that that decision of the tribunal must be set aside (above). Nor do I venture an opinion upon whether or not the penalty suggested by the tribunal was, as submissions on behalf of Mr McCleverty had it, "manifestly excessive". I am not persuaded that this Court has jurisdiction to deal with errors (if it is an error) of this type made by domestic tribunals.

[22] Fifthly, it was said that the hearing tribunal had no power to investigate the matter, only to hear it. Certainly the letter to the tribunal referred only to a rule which began "The KA tribunal has jurisdiction to hear and determine matters referred to it …" – see p 120 of the exhibit bundle to Court Document 6. However, this is contrary to the Board resolution (above) and the letter to Mr McCleverty from AKAL which advised him that the referral was for "investigation, hearing and determination" – see p 123 of that exhibit bundle. It was contended on behalf of Mr McCleverty that the relevant rules established by the AKAL required that investigation be separate from hearing. Whatever the arguments as to that may be, I do not think they properly arise for my determination. There is no evidence before me that the tribunal did investigate, it simply purported to hear and determine the complaint.

[23] The tribunal decision on punishment dated 11 March 2015 recommended that the Board of AKAL implement the penalty the tribunal proposed. The Board resolved to do so. It was conceded that the Board did not follow the procedure at r 6 of the constitution (above) after having received that recommendation. In my view it was not open for the Board of AKAL to substantially depart from the r 6 procedure. The Board of AKAL had exercised a general power to make the Member Protection Policy and to refer the matter of Mr McCleverty's behaviour to a tribunal. No doubt that was in order, but general powers such as those did not give the Board power to dispense with very specific parts of the constitution, such as r 6. The proper course would have been for the Board to have gone through the r 6 procedure once it received the decisions and recommendations of the tribunal.

[24] For the above reasons both the decisions of the tribunal dated 13 February 2015 and 11 March 2015 and the decision of the Board of AKAL notified 23 March 2015 are void as being in breach of the constitution of the AKAL.

[25] I will hear the parties as to costs.