

TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

No 800 of 1999

CIVIL JURISDICTION

CHESTERMAN J

IN THE MATTER of the Associations Incorporation Plaintiff
Act (Qld) 1991

and

IN THE MATTER of an application by Jeffrey Defendant
Jerome Vassallo pursuant to Part 8 of the said
Act

BRISBANE

..DATE 23/03/99

JUDGMENT

HIS HONOUR: I declare that the amendments made to the constitution of the respondent pursuant to the special resolution of 24 July 1987 are unlawful and invalid. I order that a general meeting of the respondent be convened on or before 30 April 1999 for the purpose of electing a management committee and secretary in accordance with the Act and the rules of the respondent as they were prior to 24 July 1997.

I order that until the election of a management committee and secretary in accordance with the previous order that the affairs of the respondent be managed and controlled by those who were designated as its directors prior to the making of this order.

I order and declare that all resolutions of the board of directors as constituted by the amended constitution and all acts done pursuant to any such resolution including contracts made by and or on behalf of the respondent be valid notwithstanding the first declaration, and that all such contracts be enforceable by and against the respondent. I give liberty to apply.

...

HIS HONOUR: I order that the applicant's costs of the application be taxed and paid by the respondent. I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND No. 800 of 1999

Brisbane

IN THE MATTER of the Associations Incorporations Act 1981

-and-

IN THE MATTER of an application by JEFFREY JEROME VASSALLO
pursuant to Part 8 of the said Act

REASONS FOR JUDGMENT - CHESTERMAN J

Judgment delivered 23 March 1999

CATCHWORDS:

INCORPORATED ASSOCIATION - amendment of constitution - whether amendments vesting power in a Board of Directors were lawful and valid under the *Associations Incorporations Act 1981* - construction of Part 7 of Act - whether court should validate proceedings at an irregularly convened meeting - whether contracts made by Board of Directors whilst lacking lawful authority should be validated.

Counsel: Mr B Cronin for the applicant

Mr A Maher for the respondent
Solicitors: Trehernes for the applicant
Presser Law for the respondent
Hearing Date: 11 March 1999
IN THE SUPREME COURT OF QUEENSLAND No. 800 of 1999

Brisbane

IN THE MATTER of the Associations Incorporations Act 1981

-and-

IN THE MATTER of an application by JEFFREY JEROME VASSALLO
pursuant to Part 8 of the said Act

REASONS FOR JUDGMENT - CHESTERMAN J

Judgment delivered 23 March 1999

1 The respondent, Gold Coast Basketball Incorporated, is a voluntary association incorporated pursuant to the provisions of the *Associations Incorporation Act* 1981 ("the Act"). Its objects are to encourage and promote the game of basketball on the Gold Coast and to support representation of the association at national and international levels of competition. It is empowered, *inter alia*, to do all such things as are incidental or conducive to the attainment of its objects.

The applicant is a member of the respondent.

2 The respondent's constitution was substantially amended at a special general meeting held on 24 July, 1997. The amendments, and the means by which the meeting which approved the amendments was convened, are the subject of the application.

The applicant seeks in effect, though not in terms, a declaration that the amendments to the constitution are invalid and that the resolution giving effect to those amendments was unlawful.

3 The respondent by a cross motion seeks a declaration that the constitution as amended is valid and an order validating the convening of the special general meeting.

4 Section 3 of the Act provides:

- "(1) Written notice of a proposed special resolution, and of the time and place of the general meeting at which it is proposed to move the resolution, must be given personally or by post, as required under the association's rules, before the general meeting to each member of the association who has a right to vote on the resolution.
- (2) The notice must state the terms of the proposed special resolution.
- (3) A special resolution about which notice has not been given under this section has no effect."

5 Notice of the special resolution leading to the amendment of the constitution was not given as required by section 3. What happened was that written notice was:

- (i) given out at competition games in which members of the respondent participated;
- (ii) displayed on notice boards; and
- (iii) advertised in the local newspaper.

The notice said:

"All members of Gold Coast Basketball Incorporated are invited to a Special General Meeting to be held on Thursday 24 July 1997, in the back foyer area at the Carrara Entertainment Centre, Nerang Broadbeach Road, Carrara, commencing at 7:00 p.m.

The Meeting will consider a motion to amend the Constitution to incorporate a Board of Directors and longer terms of office.

Copies of the proposed changes to the constitution can be collected from the office of Gold Coast Basketball Inc. ... between 9:00 a.m. and 5:00 p.m. ... Monday to Friday."

6 The court has an undoubted power, pursuant to section 133 of the Act, to validate proceedings which occur at a meeting which is irregularly convened by reason of insufficient notice. The power exists even where the Act itself prescribes what notice is to be given. The applicant contends that the changes made to the constitution contravene express provisions of the Act and the members in general meeting had no lawful power to make the changes. In the circumstances the applicant submits the Court would not overlook the deficiency in notice.

7 If the applicant's major premise is correct then the amendments made to the constitution are of no effect because they contravene the Act. If that be the result it is unimportant whether the meeting which made the changes was properly called. If it were not, no purpose would be served by validating the meeting.

8 The notice scarcely told the full story. The changes made to the constitution were far reaching. Rule 11 A, "The Board of Directors", was added. It provides:

- " 1. Save as otherwise provided herein by the *Associations Incorporation Act 1981* control and management of the Association shall be vested in the Board and for the purpose of the Act the Board shall be deemed to be the Directors of the Association.
2. The Board of Directors shall comprise the Chairman of Directors in addition to six (6) Directors elected and two (2) Directors appointed, by majority vote of the seven elected Directors.
3. The position of Director shall be honourary and part time."

9 Rule 1(A), headed "Office Bearers" is also new. It provided that the respondent's officers should be:

- "(a) The Chairman of Directors;
- (b) Six (6) Directors;
- (c) Two (2) additional Directors appointed by the Board;
and
- (d) A non voting Executive Director."

10 Rule 11 entitled "Membership of Management Committee" was extensively changed. It had provided that the management committee should consist of the president, vice-president, secretary, treasurer, junior chairman, registrar and club delegates, all of whom should retire at annual general meetings but be eligible for re-election. As amended, the management committee consists of the board of directors and a delegate from each club approved and recognised by the respondent. The former positions are abolished. The requirement for annual resignation and re-election is deleted. Instead, the chairman and six designated directors are to be elected for a term of three years. The two additional directors are to be elected for two years. The secretary and treasurer are both "appointed by secret ballot... from the board of six directors".

11 Rule 14 initially made provision for the functions of the management committee. As amended it provides instead for the functions of the board of directors:

- "1. Except as otherwise provided by these rules and subject to resolutions of the members of the association carried at any general meeting, the Board of Directors -
- (a) shall have the general control and management of the administration of the affairs of property and funds of the association

...

2. The Board of Directors may exercise all powers of the association -

(a) to borrow or raise or secure the payment of money

...

(b) to borrow money from members ...

(c) to invest in such a manner as the members of the association may from time to time determine."

12 Rule 15 dealt with meetings of the management committee. Sub-rule 8 was amended to transfer the chairmanship of meetings from the president to the chairman of directors. A new rule, 15A, governs the procedure to be followed at directors' meetings. Rule 23(1 a) makes the chairman of directors, not the president, the presiding officer at every general meeting.

13 Finally, rule 26(1) provides that the management committee shall have a common seal and keep it safe, but:

"(2) The common seal shall only be used by the authority of the Board of Directors and every instrument to which the seal is affixed shall be signed by a member of the Board of Directors and shall be countersigned by the secretary or by a second member of the Board of Directors or by some other person appointed by the Board of Directors for the purpose".

14 Part 7 of the Act is headed "Management Committee". Two themes may be detected in the sections which comprise the Part. One is the vesting of control of an incorporated association's affairs in a group of people identifiable as a "management committee". The second is to ensure that the members of the management committee are responsible to the association's membership.

15 Section 60 of the Act provides that "the business and operations of an incorporated association shall be

controlled by a management committee". By section 61(1) an incorporated association must have a management committee. Section 62 provides:

"The members of the management committee shall be elected at the annual general meeting or any general meeting of the incorporated association in accordance with its rules".

By section 64(1) the member of the management committee shall hold office, retire and be removed from office as prescribed by the rules of the association.

16 The Act regards the secretary's functions as of considerable importance. Section 66 obliges the management committee to ensure the secretary is:

- (i) a member of the association who is elected by the association as secretary; or
- (ii) a member of the management committee and appointed by it; or
- (iii) appointed by the management committee in which case the secretary need not be a member of the association.

17 This rehearsal of the amendments and the requirements of the Act show that there is significant conflict between the management structure of the respondent and the positive requirements of the Act.

18 The new dispensation is irreconcilable with section 60(1). The applicant submits that control of the business and operations of the respondent now vest in the board. I think this is plainly right. It seems impossible to read rules 11 A, 14 and 26, in particular, any other way. It is true that rules 11A and 14 are qualified. In the former, control and management are vested in the directors "save as otherwise provided herein by the *Associations Incorporation Act*", but it is difficult to know what the qualification means. Perhaps a word is missing and the proviso should be

understood as if it read "Save as otherwise provided herein or by the *Associations Incorporation Act*" control is vested in the directors. There is a broadly similar proviso to that which appears in rule 14. There it is said that the board has the general control and management of the administration of the affairs, property and funds of the respondent "except otherwise provided by these rules and subject to resolutions of the members ... at any general meeting". But there is nothing in the amended rules which allow either proviso to operate or to diminish the force of the provisions of the constitution which entrust the control and management of the respondent's business and affairs to the directors. If the proviso to rule 11A is meant to make the rule inoperable where it conflicts with a provision of the Act, then that rule would have no scope at all for operation because, contrary to section 60, it vests management in the directors. That result will leave untouched the amended rules 14 and 26 which, without reference to the Act, thrust power, if not greatness, upon the directors.

19 No doubt, as Juliet observed, there may be nothing in a name. The constitution of an incorporated association may comply with section 60 of the Act, though its controlling body not be called a "management committee". It is no doubt convenient that the controlling body have that name but if the constitution confers control on a group of people whose relationship to the members conforms to the provisions of Part 7 there will be a "management committee" whatever name it be given. The respondent might have called its controlling group "board of directors" rather than "management committee" and not run foul of the Act. The difficulty is that the new constitution provides for two separate bodies, one of which is expressly designated as the management committee but which does not answer to the statutory understanding of such a committee. It does not control the business and operations of the respondent and it is not elected by the membership at a general meeting. Power is instead conferred on a differently named body

which, because it does not comply with the statutory requirements, cannot be a "management committee".

20 The respondent argues that the changes to the constitution are more apparent than real. The reality is said to be that ultimate control remains vested in the management committee which has delegated part of its functions to a sub-committee which, unimportantly, is named "board of directors". It is pointed out that the model rule 17 allows a management committee to delegate any of its powers to a sub-committee consisting of such members as the management committee thinks fit. The same thing is said to have happened here. The respondent has not, however, adopted the model rules and its own rules do not include any analogous power to that found in rule 17.

21 More important, the amended rules which I have described make it clear that the management committee has not delegated powers to the board of directors. The directors have supplanted the members of the management committee in the running of the respondent's affairs. The named positions on the management committee, president, vice-president etc. are abolished. It is the board of directors who is given power to raise and spend money, deal with the respondent's property and affix the common seal. Power of general control is expressly conferred on the board of directors which, for that purpose, replaces the management committee. It is not possible to regard the board as a delegate of the management committee.

22 The respondent submitted that an examination of the minutes of meetings of the management committee and of the board of directors would reveal that it is the former which in reality exercises control over the business and operation of the respondent. I do not think this is right. Both meet on the evening of the third Thursday in each month. The meeting of the management committee immediately precedes that of the directors. My impression is that the latter deals with more, and more important, items of business.

23 The real point is not how power is actually exercised but on whom it is conferred by the constitution. As I have pointed out it is the directors who have immediate as well as ultimate power.

24 The Act makes it obligatory for an incorporated association to have a management committee which controls the association's business and operations. The second thread found in Part 7 is that members of the management committee and the secretary are to be answerable to a general meeting of members of the association. The members of the management committee are to be elected by the membership. The secretary is to be elected by the membership or appointed by the management committee. The amended constitution (rule 11(2)(i)) specifies that the secretary is to be "appointed by secret ballot" of the board of directors. This precludes one of the options for filling the secretary's position which section 66 allows. The rule further limits the secretary. He or she must be one of the six directors elected at a general meeting. This eliminates the third option allowed by section 66.

25 The composition of the management committee created by the amended rules contravenes section 62. Members of the management committee are not all elected by the membership in general meeting. Instead the committee comprises:

- (a) delegates from clubs which are "recognised and approved" by the management committee; and
- (b) the board of directors, two at least of whom, are elected by the board.

26 The applicant argued as well that the two and three year terms for which the directors were elected contravened section 62 which provides that the committee members shall be elected "at the annual general meeting or any general meeting", but I think the submission is wrong. It is true that model rule 12 found in the third schedule to the *Associations Incorporation Regulations* provides that all the members of the management committee shall retire at the

annual general meeting but be eligible for re-election. An association is not obliged to have rules that conform to the model rules. Their adoption in whole or in part is optional. Schedule 2 to the regulations contains the matters which must be provided for in the rules. Clause 8 of schedule 2 compels the inclusion of a rule to regulate "the term of office of the members of the management committee". The clause would be otiose if the Act itself required annual terms. No doubt that is the norm, but it does not seem to be a requirement of the statute. I am reinforced in this view by the terms of section 62 which allow election to the committee to occur at the annual general meeting "or any general meeting". No doubt the alternative allows for an election to fill a casual vacancy but it also seems apposite to allow for election of all members of the committee other than at the annual general meeting. Section 64 provides that members of the management committee shall hold office "as prescribed by the rules". This appears to envisage that rules may provide for members of the management committee to hold office for longer for one year. Section 64 might be thought to conflict with section 62 if the latter required annual terms. A construction should be adopted which avoids conflict.

27 Accordingly I do not think that the amended rules allowing directors to be elected for a period in excess of twelve months are, for that reason, unlawful.

28 It follows that the amended rules are in conflict with the terms of Part 7 of the Act. Whether non-compliance with the Act invalidates the amendments to the constitution depends upon the legislative intention ascertained from construing the Act itself.

"The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved notwithstanding non-compliance...

The only true guide to the statutory intention is to be found in the language of the relevant provision and the

scope and object of the whole statute ... the intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement"

See *Tasker v. Fullwood* (1978) 1 NSWLR 20 at 23 - 24.

29 The provisions of part 7 of the Act are, I think, what used to be called mandatory. Clearly the legislation regards the existence, functions and mode of composition of the management committee as something fundamental to the operation of associations incorporated pursuant to the Act. The sections in the Part enact, in some detail, the means by which the affairs of an incorporated association are to be managed and how those who manage them are to be responsible to its members. Incorporation of a voluntary association confers considerable benefits in terms of the ease with which property may be acquired and dealt with and how contracts may be made without incurring personal liability on the part of individual members. To obtain those benefits the legislation requires certain standards to ensure that the affairs of an association are responsibly conducted by those who have the confidence of the membership so that, in turn, outsiders dealing with the association know that they may safely transact business with it. To achieve this result the Act insists upon the management structure described in part 7. A departure from that structure is, in my view, prohibited by the statute and is invalid.

30 The applicant has moved slowly. The changes were made eighteen months before the applicant sought the Court's adjudication on their efficacy. In the meantime, those who were elected as directors have conducted the respondent's affairs in the belief that they were lawfully authorised to do so. They have made contracts including a valuable sponsorship from a substantial company. The directors are naturally concerned that a declaration that the amended rules which led to their appointment are invalid will retrospectively erase all that has occurred in

the interim to the great confusion of all concerned. The respondent asks the Court to exercise the powers given by section 133 of the Act to preserve what has been done since 24 July, 1997. Section 133(3) provides:

"... where any omission, defect, error or irregularity ... has occurred in the management or administration of an incorporated association ... whereby any breach of any of the provisions of this Act has occurred ... the court

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- (a) may ... make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity; and
- (b) shall before making any such order satisfy itself that such an order would not do injustice to the ... association or to any member or creditor thereof;..."

31 The section is remedial and should be afforded a liberal construction. The passage of the special resolution of 24 July, 1997 and the consequent amendment to the constitution falls within the words "error ... whereby ... breach of any of the provisions of this Act has occurred ...". The Court, therefore, has jurisdiction, subject to the pre-condition in section 133(3)(b) to make such order as it thinks fit to rectify or modify the consequences of the error or to validate anything rendered invalid by reason of the error.

32 The applicant, very properly, supports the making of such an order to preserve what has been done by the directors in good faith since July 1997.

33 A very substantial majority of the respondent's members have indicated at general meetings that they support the changes made to the constitution. The directors also appear to have overwhelming support for the manner in which they have conducted the respondent's affairs. There

is, of course, some dissent which explains this application. When considering whether to exercise the power conferred by section 133(3) I think it relevant that what has been done, though lacking lawful authority, has the approval of the majority of the members. There is no suggestion that the directors have not acted in the best interests of the respondent. The applicant and those who support him differ from the directors in relation to the devolution of power within the respondent's structure but, I do not understand them to criticise any particular decision made by the directors.

In these circumstances it is appropriate to make the order sought. Accordingly:

- (a) I declare that amendments made to the constitution of the respondent pursuant to the special resolution of 24 July, 1997 are unlawful and invalid;
- (b) I order that a general meeting of the respondent be convened on or before 30 April, 1999 for the purpose of electing a management committee and secretary in accordance with the Act and the rules of the respondent as they were prior to 24 July, 1997;
- (c) I order that until the election of a management committee and secretary in accordance with the previous order that the affairs of the respondent be managed and controlled by those who were designated as its directors prior to the making of this order;
- (d) I order and declare that all resolutions of the board of directors as constituted by the amended constitution and all acts done pursuant to any such resolution including contracts made by or on behalf of the respondent be valid notwithstanding the declaration in (a) and that all such contracts be enforceable by and against the respondent;
- (e) I give liberty to apply.