SUPREME COURT OF QUEENSLAND

CITATION:	*The Body Corporate for Liberty CTS 27241 v Batwing Resorts Pty Ltd* [2012] QSC 340
PARTIES:	**THE BODY CORPORATE FOR LIBERTY CTS 27241** (applicant) **v** **BATWING RESORTS PTY LTD** (respondent)
FILE NO/S:	BS 833/2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	12 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2012
JUDGE:	Dalton J
ORDER:	**1. Originating application dismissed.** **2. Application filed 1 May 2012 dismissed.**
CATCHWORDS:	ARBITRATION – THE AWARD – ENFORCING AWARDS – GENERALLY – application pursuant to s 33 of the *Commercial Arbitration Act* 1990 (Qld) for leave to enforce an arbitration award – effect of chapter 6 of the *Body Corporate and Community Management Act* 1997 (Qld) – whether the arbitration was ineffective to resolve the dispute between the applicant and respondent *Body Corporate and Community Management Act* 1997 (Qld) *Commercial Arbitration Act* 1990 (Qld) *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 *Cockatoo Dockyard v Commonwealth of Australia (No 3)* (1994) 35 NSWLR 689 *Henderson and Anor v Body Corporate for Merrimac Heights CTS 19563* [2011] QSC 336 *James v Body Corporate Aarons Community Title Scheme 11476* [2002] QSC 386 *James v Body Corporate Aarons Community Title Scheme 11476* [2004] 1 Qd R 386 *Mark Blake Builders Pty Ltd v Davis & Anor*, BC 9403294

COUNSEL: Mr DA Keane for the applicant
Mr C Carrigan for the respondent

SOLICITORS: Ledger & Co Lawyers for the applicant
Mathews Hunt Legal for the respondent

[1] The applicant, Liberty, is the body corporate of a community titles scheme which runs a large (predominantly) residential block on the Gold Coast. In 2004 Batwing took an assignment of an On-site Management Agreement (OMA) originally dating from 15 September 1999. Batwing under the agreement was both the letting agent and service contractor within the meaning of the *Body Corporate and Community Management Act* 1997 (Qld) (BCCMA). Something named "Security Objective" is set out in the schedule to the OMA as part of the services which the service contractor must provide. The parties fell into dispute about the provision of security services by Batwing. There was an arbitration conducted and the arbitrator delivered an award on 19 May 2011.

[2] Liberty makes an application pursuant to s 33 of the *Commercial Arbitration Act* 1990 (Qld) for leave to enforce the arbitration award and for a declaration that Batwing's annual remuneration under the OMA be reduced. Batwing makes a cross-application for declarations that the award is a nullity.

[3] The OMA provided for a yearly on-site manager's fee payable in monthly instalments – cl 6.2. At clll 6.12 and 6.13 it contained express provisions for the body corporate to reduce services provided by the service contractor and reduce the fee paid to the service contractor accordingly. Clause 19.2(b) mentioned security services in particular in this context. Strangely the provisions were never relied upon by the applicant. Nonetheless there is no suggestion that they are exclusive of the parties' rights and obligations.

[4] Clause 12 of the OMA deals with default and termination. Clause 12.1 lists a number of specific defaults, none of which is said to have occurred here. Clause 12.2 then provides that on such default there is a procedure to terminate the OMA. Clause 12.7 provides that if there is any dispute between the parties with respect to the subject matter of default or termination (which must mean as those words are used in the preceding subclauses), there is a particular dispute procedure which applies. That dispute procedure includes at cl 12.10:

> "If the dispute is not resolved by the exchange of notices the parties must confer in the presence of a mediator appointed by the Queensland Law Society Incorporated. If the dispute has not been resolved within thirty days after the appointment of a mediator by the parties, the dispute shall be submitted to arbitration administered by the Queensland Law Society Incorporated. …"

[5] On 4 March 2010 the chairman of the body corporate committee sent an email to Batwing attaching a complaint about security services from a lot-holder. One gathers that this is not the first such complaint as it is described in the email as the "straw that broke the camel's back". The email continues:

> "I will be recommending to Committee that the Body Corporate takes over the responsibility of Security as soon as we can vote on it at the next meeting and deduct the allowance from your contract …

you can contest the issue, but I am confident we have more than adequate justification for making this move. …"

[6] Batwing replied on 5 March 2010 saying:

"I have never contested the issue of BC taking on security.

It's all yours.

Make me an offer, and if acceptable by me, draw up the deed of variation and it's done."

[7] Later that same day the chairman replied, taking issue with some of the Batwing email not extracted and continuing:

"Nevertheless, this will all become the Body Corporate's concern now that you have again agreed to relinquish Security. I'm sure the Committee will pass a VOC to confirm it, and set up an EGM as soon as it can be arranged.

The price is already set, as a breakdown of your Salary was determined in 2001-2002 and attached to the Contract.

The original Security figure of $183,750.00, adjusted annually at 5% is now $271,482.44, as shown for year 8 on the attached chart. That is the amount by which your remuneration will be reduced. GST is not included in these figures.

We'll make immediate arrangements for the VOC and EGM and get Security off your plate for you as soon as possible."

[8] On 8 March 2010 Batwing replied saying:

"Your calculation is totally flawed.

…

I will collect 3 quotes 'like for like' to provide the same service security has provided for Liberty over the last 6 years.

You will collect 3 quotes for the same service 'like for like'.

We then average out each of our quotes to determine a contract amount.

If we both fail to come to an agreement on the amount, a Law Society/Real Estate Institute of Qld will make the final decision on the contract amount.

His decision is final.

How fair is that.

Please advise when you have collected your 3 quotes."

[9] The same day the chairman responded saying:

"I won't argue about the price at this stage, but I believe the breakdown was part of the contract and should apply.

Nevertheless, there are other ways of calculating the right deduction as you suggest. The committee has not recently discussed those alternatives, but I'm sure that we would accept them if the breakdown of your remuneration is not applicable.

> For the moment, suffice to say you have agreed to relinquish Security and the Body Corporate Committee has agreed to take direct control of Security, if the owners vote accordingly.
>
> I think it can all be achieved by 1 May 2010, if we move along reasonably quickly with care.
>
> We have to resolve by VOC to put the matter to an EGM. Those processes will take some time. Please confirm we can commence the procedure by taking the first step – the VOC, while quotes etc are being obtained."

[10] The same day a reply was received from Batwing:

> "Please proceed with your VOC.
>
> Hopefully I will have my quotes by week's end.
>
> I am happy to proceed in a business like manner.
>
> The stress is not worth it Greg."

[11] On 17 March 2010 the committee of the body corporate unanimously resolved:

> "1. THAT an Extraordinary General Meeting be convened on 23 April, 2010 to consider a motion to vary the On-Site Management Agreement with Batwing Resorts Pty Ltd by changing the annual remuneration increase during the next option period from a minimum of 5% to a fixed 3%.
>
> 2. THAT the same Extraordinary General Meeting consider a motion to remove security duties from the On-Site Management Agreement and reduce the annual remuneration accordingly, and also consider a motion to approve the engagement of an external security firm to provide the required security duties."

[12] An EGM was conducted on 23 April 2010. The second resolution foreshadowed above was passed in the following terms:

> "THAT the On-Site Management Agreement with Batwing Pty Ltd be varied to remove security duties from that agreement and reduce the annual remuneration accordingly and the Committee be authorised to execute an appropriate Deed of Variation to that effect."

It was passed with 49 votes for, 11 against, and six abstaining.

[13] Later that morning the committee of the body corporate met again. Three quotations were tabled by Batwing and three on behalf of the committee. Discussions failed to reach an agreement as to the figure which should be deducted from the on-site manager's remuneration.

[14] On 9 July 2010 the committee of the body corporate met again. Further quotations were tabled and again there was no resolution. The minutes record, "In accordance with Mr Batros' request for an independent Valuer to determine the purchase price, the BC requested the community manager to seek an appointee from the Law Society of Queensland". This may have been a reference back to Batwing's email of 8 March 2010. The minutes of that meeting were approved at the next meeting without question by Mr Batros. However, on 10 August 2010 solicitors instructed

by Mr Batros wrote to the secretary for the body corporate saying that Mr Batros had never requested an independent valuation.

[15] On 27 September 2010 the chairman of the body corporate committee wrote to the Queensland Law Society:

> "We seek the immediate appointment of an arbitrator of the Law Society to determine a simple issue between the Body Corporate of Liberty and our On-Site Manager, Batwing Resorts Pty Ltd.
>
> Under our current On-Site Management Agreement, the provision of 24 hr Security service is provided by Batwing Resorts Pty Ltd and forms part of his annual remuneration package. Both parties recently agreed that Security would become the direct responsibility of the Body Corporate and a Motion to that effect was duly passed by Lot Owners at a recent EGM.
>
> It was further resolved that, if and when agreement could not be reached on the appropriate reduction in remuneration, we would request an Arbitrator from your Society to be appointed to determine a fair price. We propose that both parties make written submissions on price within 14 days so your nominee can determine the fair price reduction.
>
> …"

The letter was marked, "C.C. Batwing Resorts Pty Ltd".

[16] A response was received from the Law Society dated 7 October 2010:

> "Thank you for your correspondence dated 27 September and received in this office on 1 October 2010.
>
> You have requested that, in accordance with the terms of an agreement between the parties, the President of the Queensland Law Society appoint an arbitrator to assist with the resolution of a dispute between the parties.
>
> You will appreciate that the agreement is between the parties, that the President is not a party to the agreement and is not contractually bound by its terms. In an attempt to assist the parties to resolve their dispute and in accordance with the parties contractual agreement the President will, however, take steps to make the requested appointment on the following basis:
>
> 1. all parties consent to the appointment,
>
> 2. …
>
> …
>
> To confirm that both parties agree to the appointment being made on the above basis, please have them sign on the attached copy of this letter and return with payment of the administration fee together with a copy of the Agreement by Friday 22 October 2010 for the appointment to proceed."

[17] The letter makes provision at its foot as follows:

> "I confirm I agree to the President appointing an arbitrator in accordance with the above terms and conditions and subject to the reservation of rights regarding the payment of a high fee."

[18] There is provision for the chairman of the body corporate and for the director of Batwing to sign. The letter is marked as "c.c. the director Batwing Resorts Pty Ltd".

[19] Both the chairman of the body corporate and the director of Batwing signed a copy of this letter and returned it to the Law Society.

[20] An arbitrator was appointed by the President of the Law Society and on 8 November 2010 wrote to the parties:

> "I have been appointed as Arbitrator in relation to a dispute arising out of the [OMA] by the President of the Queensland Law Society.
>
> I have been provided with a copy of the [OMA] and a series of Deeds of Variation to that Agreement. I note that clause 12 of the agreement is the operative dispute resolution clause and that I am to conduct the arbitration in accordance with the laws of Queensland."

[21] The body corporate made submissions to the arbitrator. Then, on 20 December 2010, Batwing sent a letter to the arbitrator saying:

> "Batwing Resorts Pty Ltd is withdrawing from mediation on the Security Services being returned to Liberty Committee. As in accordance with Batwing's contract, I am not in default and therefore Batwing does not have to proceed with arbitration.
>
> Batwing's intention at the time, although not contractually obliged, was to agree to arbitration to mutually agree on a reduction in salary, and hand back security.
>
> The current relationship between the Chairperson and myself is somewhat strained, and therefore whatever the result from arbitration would not be agreed to by the Chairperson. …"

[22] The arbitrator was asked to stand advised that, "Batwing Resorts Pty Ltd, at this point in time no longer has any intention to remove its obligation to provide the security services from the Agreement, irrespective of the consideration for the transaction." It appears that by this stage the parties were in further dispute about other matters dealt with by QCAT.

[23] The mediator took the view that he had entered onto the arbitration and it was not possible for one party to unilaterally attempt to bring the process to an end. On 22 February 2011 solicitors acting for Batwing sent a letter dated 18 February 2011 to the arbitrator saying that: 1) the committee for the body corporate for Liberty did not have the requisite authority to commence the arbitration proceedings (s 312 of the BCCMA); 2) there was no default so as to enliven the dispute resolution clause (cl 12) of the OMA which referred to an arbitration; 3) cl 12 of the OMA did not comply with s 229(2) and s 318 of the BCCMA, and 4) even if cl 12 of the OMA did apply, the prerequisite notices and mediations prescribed by it had not been undertaken.

[24] The arbitrator was not deterred and curiously enough, without any explanation as to the inconsistency in approach, also on 22 February 2011, Batwing provided written submissions in support of the merits of the position it took in the dispute, to be considered by the arbitrator in deciding the point referred to him for arbitration. The committee responded to Batwing's substantive submissions and then Batwing, on 3 March 2011, responded to the substance of the committee's response.

[25] The arbitrator wrote to both parties saying he would consider questions of jurisdiction and asking for any additional material. Mr Batros then replied:

> "I do not wish to present additional material.
>
> The Committee has not requested additional duties for security that would increase the labour content in the current contract, so therefore please proceed on the basis of my schedule of works.
>
> Please proceed to determine a 'fair market value' for security services for Liberty based on security's current schedule of works.
>
> …
>
> Please proceed to determine a 'fair market value'."

[26] In his award the arbitrator made reference to the dispute about his jurisdiction and recorded that the parties appeared before him at preliminary conferences and "agreed they wished me to determine the issue between them".

[27] The arbitrator's decision was in favour of the body corporate.

[28] Batwing advances similar arguments before me as were advanced in the letter dated 18 February 2011.

Written Agreement to Arbitrate

[29] Pursuant to ss 3 and 4 of the *Commercial Arbitration Act* there must be a written agreement to arbitrate for the Act to apply.

[30] It is plain that cl 12.10 of the OMA was never relied upon by either the applicant or the respondent as the agreement for arbitration which was sought from the Queensland Law Society. There are no facts before me which show that the factual prerequisites to an arbitration pursuant to cl 12.10 of the OMA had occurred. I think it is plain that the OMA cannot be relied upon as a written agreement to arbitrate.

[31] Equally plain is that by the emails and letters dated 8 March 2010 (Batwing to body corporate); 27 September 2010 (to Law Society, copied to Batwing), and 7 October 2010 (to body corporate, copied to Batwing, and signed by both Batwing and body corporate), there was a written agreement between the parties to arbitrate.

Body Corporate Not Authorised to Arbitrate

[32] Section 312 of the BCCMA provides that a body corporate "may start a proceeding only if the proceeding is authorised by special resolution of the body corporate".

[33] This matter originally came before me in the applications list on 4 March 2012. It was adjourned to the civil list after some argument. That argument revealed the

respondent's position that there had not been a special resolution in terms of s 312 of the BCCMA. In *ex tempore* reasons given that day, I expressed the view that I would not see it as improper for the applicant to pass a resolution ratifying the referral of the matter to arbitration, even at that stage. The matter came back before me on 24 August 2012. On 3 August 2012 the general meeting of the body corporate had resolved:

> "THAT the Body Corporate is and was authorised to enter into an agreement with Batwing Resorts Pty Ltd to have the Queensland Law Society appoint an arbitrator and sign all necessary documents to give effect to the appointment of the arbitrator, and to pay any fee for the appointment of the arbitrator for the purpose of having determined by the arbitrator the amount of remuneration to be deducted from the OSM Agreement in exchange for the relinquishment of the security obligations to the Body Corporate."

The voting was 99 for, 10 against, and four abstentions.

[34] Batwing accepted that this was sufficient and effective ratification of the initiation of the arbitration by the body corporate. It was assumed by both parties that an arbitration was a "proceeding" within the meaning of s 312 of the BCCMA.

Arbitration Ineffective to Determine Parties' Dispute

[35] An application under s 33 of the *Commercial Arbitration Act* is not one where it is appropriate for the Court to examine the merits of the decision by the arbitrator. A Court may refuse to enforce an award if it is subject to appeal, or if the arbitrator has misconducted himself or herself.[1] No doubt it would be a proper reason to refuse leave to enforce an award if it could be shown that the arbitrator's decision was void.[2]

[36] I find that leave to enforce the arbitration award should be refused because the arbitration was ineffective to resolve the dispute between the applicant and the respondent. This conclusion is based on the provisions of chapter 6 of the BCCMA. The dispute between the body corporate and Batwing was a dispute as defined by s 227(1)(d) of the BCCMA. Section 229 goes on to provide exclusive remedies for disputes which may "be resolved under this chapter by a dispute resolution process". It seems to me that the matter is a "complex dispute", at least within the meaning of s 149B of the BCCMA because it is a dispute about a contractual matter concerning the engagement of Batwing as a caretaking service contractor for a community title scheme. The dispute as to the amount to be paid to Batwing under the OMA, after deletion of the security services from the scope of works in that contract, is within the definition of "contractual matter" in Schedule 6 to the BCCMA, concerning, as it does, Batwing's rights under the terms of the OMA and the body corporate's duties thereunder. Section 229(2) provides exclusive remedies for the resolution of complex disputes. They do not include arbitration by a private arbitrator. While the wording of the section is peculiar, it has been interpreted as

---

1 *Cockatoo Dockyard v Commonwealth of Australia (No 3)* (1994) 35 NSWLR 689, 695-696.

2 *Mark Blake Builders Pty Ltd v Davis & Anor,* BC 9403294, p 4 of 8.

meaning that the only manner in which a dispute caught by the section can be resolved is by the prescribed means.[3]

[37] The fact that the result of the arbitration does not, by law, resolve the dispute between the applicant and the respondent is in my opinion a good reason for refusing to enforce the award of the arbitrator. The applicant did not rely upon any argument based on waiver or estoppel, probably because of s 318 of the BCCMA which provides, "A person can not waive, or limit the exercise of, rights under this Act or contract out of the provisions of this Act."

[38] The applicant argued that the parties were not in dispute at the time of the reference to the arbitrator. The dispute between them had settled: the terms of the settlement being to exclude security services from the scope of works under the OMA at a price to be fixed, with an agreed mechanism (arbitration) to fix that price.[4] In my view, having regard to the facts of this matter, that is not a correct legal interpretation of what has occurred. The parties were in dispute at all material times.

[39] My formal order will therefore be to dismiss the originating application brought by the applicant and to declare that the award of Mr Ross Williams of 19 May 2011 has no effect on the rights and obligations of the applicant and respondent. I cannot see any necessity for the cross-application to have been brought and I dismiss it also.

[40] This may seem an unsatisfactory result having regard to Batwing's clear participation in the arbitration after having initially been the party who suggested the process. Further, having regard to the fact that Batwing raised the very point which has succeeded before me before the arbitration commenced and then, by implication at least, resiled from it. No doubt this approach by Batwing has contributed to delay and expense for both parties and further soured relations between parties who must work together until the OMA expires. The result is however, one compelled by law. In this regard I note that the body corporate seems to have acted for itself, including throughout the duration of the arbitration. The law relating to community title schemes is technical and, as this case illustrates, it is unwise for parties to proceed in disputes of this kind without legal advice, relying merely upon their notions of the justness of their cause.

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

---

3 *James v Body Corporate Aarons Community Title Scheme 11476* [2002] QSC 386, confirmed on appeal at [2004] 1 Qd R 386, 390, followed in *Henderson and Anor v Body Corporate for Merrimac Heights CTS 19563* [2011] QSC 336, [112].

4 cf *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 606.