



The Court of Appeal for Bermuda
CIVIL APPEAL No. 10 of 2018

B E T W E E N:

HG (BERMUDA) LIMITED

Appellant

- v -

MICHAEL KUCZKIEWICZ

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Christian Luthi and Rhys Williams, Conyers Dill & Pearman Ltd., for the Appellant;
Jayson Wood and Mark Burrows, Zuill & Co., for the Respondent

Date of Hearing: **15 November 2018**

Date of Judgment: **4 December 2018**

J U D G M E N T

Construction of company bye-laws – meaning of ‘anniversary’.

BELL, JA

Introduction

1. This appeal concerns the interpretation of a bye-law in the Appellant company, HG (Bermuda) Limited (“the Company”), pursuant to which, on one interpretation, the Respondent (“Mr Kuczkiwicz”) claims to be entitled to a share in the proceeds of the sale of the Company, based on an entitlement arising from the grant of a warrant contained in bye-law 3.7 of the Company’s bye-laws. The Company maintains that the warrant had expired before the triggering event and that Mr Kuczkiwicz had no entitlement to a share in the sale proceeds.

2. The material part of the relevant bye-law, bye-law 3.7 of the Company's bye-laws, is in the following terms:

“Effective beginning October 1, 2012, a Previous Shareholder who has not elected to exercise any Retirement Option under the grace period transition rule set forth in Bye-law 3.11 and who has not received his or her Final Redemption payment shall have a warrant to convert his or her unpaid redemption payments into the consideration that such Previous Shareholder would have received as a holder of Preferred Shares of the Company in any sale transaction (as defined below) on a pro rata basis, as of September 30 following the year of his or her Employment Cessation, provided that such warrant may only be exercised upon the sale or other disposition by sale, amalgamation, merger, consolidation or otherwise, of more than 50% of the shares or assets of the HG Group taken as a whole to an (entity) that is not part of the HG Group (any such transaction, a “Sale Transaction”), the closing of which transaction occurs by September 30 of the third anniversary of the Previous Shareholder’s effective date of Employment Cessation.”

3. Mr Kuczkiewicz’s employment with the Company ended on 31 December 2012, and the sale of the Company closed on 1 December 2015, just less than three years later. Mr Kuczkiewicz’s case was that the warrant period specified in the bye-law commenced on 30 September 2013, and ended three years later on 30 September 2016. Accordingly, the closing date of the Company’s sale on 1 December 2015 fell within the life of the warrant. The Company’s case is that the warrant was operative from the actual date of cessation of Mr Kuczkiewicz’s employment, 31 December 2012, through to 30 September 2015. The judge had stated in paragraph 8 of her judgment that the Company’s case was that the warrant ran from 30 September 2012 through to 30 September 2015, but the Company maintains that the judge erred in this regard. The learned judge at trial (which was a trial on liability only) found that the starting date on which Mr Kuczkiewicz was entitled to the warrant was 30 September, 2013, that is to say

30 September in the year following the cessation of his employment. She further found that the warrant continued in existence until 30 September 2016. Thus she found in terms for the position contended for by Mr Kuczkiewicz, which is no doubt why Mr Wood opened his submission by saying that the judge had “got it right”.

Overview

4. The termination date for the exercise of the warrant is in one sense calculable with reference to the warrant’s starting date, but it is of course the latter date which is the critical date for the purposes of this litigation, and this was something on which both counsel were agreed. In my view, the key words of the bye-law are those appearing at the end, in relation to the date of the Company’s sale, and specifically the words “the closing of which transaction occurs by September 30 of the third anniversary of the Previous Shareholder’s effective date of Employment Cessation”.

5. Stepping aside from the respective arguments for a moment, let me try to look at the nub of the problem which arises in construing the bye-law, namely the problem flowing from the presence of the word “of” after “September 30” in bye-law 3.7 set out above. The actual date of Mr Kuczkiewicz’s employment cessation is, as I have said, 31 December 2012. This date is not in issue. An anniversary is, according to my dictionary, the yearly recurrence of the date of a past event. So the first anniversary of an event occurs one year after the particular event which is being remembered, the second anniversary two years after, and so on. Not before and not after. It follows that the third anniversary of Mr Kuczkiewicz’s “effective date of Employment Cessation” is therefore 31 December 2015, unless it can be said that the word “effective” somehow leads to a different interpretation than if it were not present.

Construction of the Bye-law

6. Let me digress at this stage and deal with the issue of whether the addition of the word “effective” does lead to a different interpretation. The words “Employment Cessation” appear first in that part of bye-law 3.7 (that part set out at paragraph 6 of the learned judge’s judgment and in paragraph 2 above) without any reference to “effective”. Then in the last sentence of the quoted section, when dealing with the closing date of any sale transaction, the words “effective date of Employment Cessation” are used. But subsequently (in a part of the bye-law not set out in the judgment or above) the words “Employment Cessation” are used without being preceded by “effective”. The words “Employment Cessation” are themselves defined in bye-law 3.3(a) (to which the definition contained in bye-law 1.1 refers) to be the last day of full time employment of the relevant person. The phrase “effective date of Employment Cessation” is not defined in the bye-laws. Neither does it seem to have been a matter at issue before the judge, because it was not the subject of comment in either side’s skeleton argument before the judge. It appears to have become an issue on the basis of an argument made by Mr Luthi regarding bye-law 3.4 and the meaning of the words “the date of Withdrawal by the Previous Shareholder” which appear in that bye-law. This led the judge to equate “deemed date of withdrawal” in bye-law 3.4 with “effective date of Employment Cessation” in bye-law 3.7 – see paragraph 78 of the judgment. I am far from sure that it is necessary to establish the date of withdrawal for the purposes of construing what effect, if any, the word “effective” has on “Employment Cessation”, and leaving the issue of withdrawal to one side, I am satisfied that the word “effective” adds nothing to the date of Employment Cessation, and that date, as both counsel agree, is 31 December 2012. And the third anniversary of that event therefore occurs on 31 December 2015. Nevertheless, Mr Wood did in his written submissions contend that the position was indeed as the judge had found it to be, equating Employment Cessation and Withdrawal. I do not believe that this is the correct route to the bye-law’s interpretation. And ascertaining the date of the third anniversary of Employment Cessation, without more, is a very simple exercise. Just add three years to the starting date, in this case 31 December 2012. I would

just add that Mr Luthi for the Company submitted that there was no rational basis upon which to find that the use of the word “effective” in the bye-laws requires a date that is different from the date which would otherwise apply. I agree.

The Commencement Date of the Warrant

7. This too is a relatively simple question. The right to convert unpaid redemption payments arises under bye-law 3.7 “as of September 30 following the year of (the relevant employee’s) Employment Cessation”. Thus for Mr Kuczkiewicz, the date is 30 September 2013. This fits in entirely logically with the scheme created by bye-laws 3.3 and 3.4. Bye-law 3.3 provides that a shareholder shall cease to be a shareholder as of the last day of full time employment, but the share is not actually cancelled until “the last day of that financial year”, per bye-law 3.4. That can only mean the end of the financial year following the Employment Cessation of the particular employee. For Mr Kuczkiewicz, the date is 30 September 2013, so that the warrant comes into existence on the same day that the relevant share is cancelled. All entirely logical.

The Expiration Date of the Warrant

8. Bye-law 3.7 deals with the life of the warrant by reference to the sale of the Company, and provides that the warrant may only be exercised upon the sale, “the closing of which transaction occurs by September 30 of the third anniversary of (the relevant shareholder’s) effective date of Employment Cessation.”
9. Reverting to the primary construction issue of bye-law 3.7, whatever date the words “30 September of” were intended to apply to, when followed by the words “the third anniversary” they cannot properly reference any date before that third anniversary. That is the meaning of the word, as the judge found, in my view correctly, at paragraph 56 of her judgment, and as I have found it to be at paragraph 5 above. If one then substitutes the actual date of Mr Kuczkiewicz’s

Cessation of Employment for the words “the third anniversary of the Previous Shareholder’s effective date of Employment Cessation”, the relevant part of the bye-law becomes “occurs by September 30 of 31 December 2015”. The wording does not then make any sense, as Mr Luthi conceded. The task for the judge was, therefore, to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean” – see Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101. The learned judge set out in her judgment all of the well-known authorities on interpretation of contractual documents, and since I do not understand her statements to be in contention, there is no need for me to recite them in this judgment. They are well known to all commercial law practitioners. Counsel relied on the case of *Arnold v Britton* [2015] AC 1619, and we were referred only to the well-known passage from the judgment of Lord Neuberger set out in paragraphs 15 to 23, which includes the quotation from Lord Hoffmann referred to above.

10. For the Company, it was submitted that the word “of” appearing in the bye-law most naturally referred to the year in which the anniversary falls. It was submitted that the 30 September date for the expiration of the warrant must fall within the same year as the third anniversary of employment cessation. The consequence of this interpretation is that the period during which the warrant is capable of exercise comes to an end before the third anniversary of employment cessation. To my mind, such an interpretation ignores the fact that an anniversary does not occur until a year has passed from the date being remembered. It strains the meaning of the words that appear in the bye-law to conclude that an anniversary occurs before the requisite period has passed.
11. The alternative meaning, contended for on behalf of Mr Kuczkiewicz, and which found favour with the judge, turned on her interpretation of the words “effective date of Employment Cessation”. She found that Mr Kuczkiewicz’s deemed date

of withdrawal was 30 September 2013, and the learned judge took this to be the effective date of Mr Kuczkiewicz's cessation of employment with the Company, noting that it was clear that the starting point of the warrant was intended to be the same date as the effective date of employment cessation. The learned judge then moved on to find that Mr Kuczkiewicz's end date in regard to his entitlement to exercise the warrant was 30 September 2016, her reasoning being that this was the third anniversary of the effective date of employment cessation. Since it was common ground between the parties that the closing date of the sale occurred on 1 December 2015, it followed, and the judge found, that the transaction occurred before the third anniversary of the effective date of employment cessation, with the consequence that Mr Kuczkiewicz was indeed entitled to exercise his warrant and so participate in the proceeds of sale of the Company. I would comment at this stage that I agree with Mr Wood that the judge did indeed get it right, but for my part I am not sure I would have reached the result by reference to the date of withdrawal from bye-law 3.4, but rather would prefer to reach the same result simply by construing bye-law 3.7 to mean what I understand it to say.

12. While Mr Luthi accepted that the words "30 September of 31 December" (the consequence of replacing the relevant words from the bye-law with the relevant date) made no sense, he sought to put the bye-law in context by reference to other parts of the bye-laws, and he submitted that the judge had fallen into error in her finding that the effective date of employment cessation was 30 September 2013 (paragraph 78 of the judgment). Mr Luthi maintained that the consequence of this finding was that there was a nine month period between 31 December 2012 and 30 September 2013 when Mr Kuczkiewicz would not have had the benefit of the warrant, something which he submitted could not have been the draftsman's intention. He sought to bolster his case that other provisions of the bye-laws supported his interpretation by reference to the provisions of bye-law 3.11, which covered the position where an employee had retired, unlike Mr Kuczkiewicz, who had resigned. The problem with that reference is that while

the draftsman on occasion seems to have treated the word “anniversary” in the same way in that bye-law as I would understand it, that rather asks the question why bye-law 3.7 was not also drafted so as to use the word “anniversary” in accordance with such meaning.

13. Mr Luthi also relied upon bye-law 3.3, which sets the date when a shareholder becomes a Previous Shareholder for the purpose of the bye-laws. Under 3.3(a), this occurs as of the last day of full time employment of the shareholder, at which time the shareholder “ceases” to be a shareholder, even though his shares have not at that point been cancelled, something which occurs pursuant to bye-law 3.4 as of the last day of the relevant financial year.
14. In my view, none of this helps Mr Luthi with the fundamental difficulty of trying to make sense of the bye-law as drafted. On the other hand, Mr Wood gave a comparison of the positions when taking the construction contended for by each of the two sides. On his (and the judge’s) interpretation, starting from the resignation on 31 December 2012, Mr Kuczkiewicz continues as a shareholder until 30 September 2013, at which time he secures the benefit of the warrant, which in turn gives a period of three years within which the Company may make the redemption payments. That three year period comes from the “Schedule of Distribution” period contained in bye-law 3.7. On the Appellant’s interpretation, says Mr Wood, following the resignation on 31 December 2012, the warrant commences on the same day, but is of no effect (what he referred to as a useless warrant) until 30 September 2013. There are then three years within which to pay the redemption amount, that is until 30 September 2016, which would have the effect of permitting payments to be made for a year after Mr Kuczkiewicz had ceased to be an unpaid redemption creditor.
15. In regard to the critical part of bye-law 3.7, Mr Wood submits that the bye-law means something akin to “by 30 September of the third year after the effective date of Employment Cessation”. He made a short but telling point as to the

appropriate word to be substituted for “of” on the basis that the use of that word was clearly an aberration, and the draftsman must have intended some other word. His example, in support of a submission that it is appropriate to substitute the word “after” for “of”, was that if someone is asked to do something within seven days of a particular date, it means that they are being asked to do that thing after seven further days have elapsed; so, he submitted, “of” can be replaced by “after” without straining the meaning. And, as he concluded his written submissions, it would be most odd if a limit calculated by reference to the third anniversary of employment cessation could expire before the person had actually stopped work for three years.

Conclusion

16. I agree with those submissions, and accordingly would reject the argument for the Company that the warrant expired on 30 September 2015, that is to say less than three years from the date on which Mr Kuczkiewicz’s employment came to an end. In my judgment the warrant existed, per bye-law 3.7, for the period provided for in the Schedule of Distribution in relation to the redemption amount payable to a previous shareholder, namely “up to three years from the end of the fiscal year of departure of the Shareholder”. The fiscal year during which Mr Kuczkiewicz resigned his employment was that running from 1 October 2012 to 30 September 2013, so the end of the relevant fiscal year is clearly 30 September 2013, and the period of three years from that date brings the warrant to an end on 30 September 2016, and I so find. This finding demonstrates consistency between all aspects of these parts of the bye-laws. It follows in my view that the judge was right to conclude that the sale of the Company occurred before the expiration of the warrant.

Contra Proferentem

17. This subject attracted some attention in the judgment, and indeed in the written submissions, though it has to be accepted that those for the Company were in

response to the submissions made at first instance. In the event, Mr Wood in his written submissions said that the significance of the issue should not be overstated. In oral argument, Mr Wood said that in practical terms the judge did not rely upon the doctrine, and did not address the Court on the subject. I agree that the doctrine is of no assistance in the construction of this bye-law. In view of my finding above, I would therefore dismiss the appeal.

Costs


- 18. I would expect costs to follow the event, and would so order in the absence of an application to be heard on costs made within 14 days. Both sides having been represented by two counsel, I would certify the case appropriately.

KAY, JA

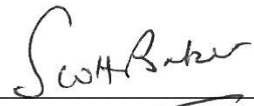
- 19. I agree and would only emphasise that, in my view, it is highly improbable that a benefit triggered by an event defined by reference to the “third anniversary of the...effective date of Employment Cessation” might be intended to endure for less than three years after the employment ceased.

BAKER, P

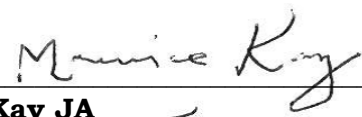
- 20. I also agree.



Bell JA



Baker P



Kay JA