RECENT DEVELOPMENTS

COMMONWEALTH

PRE-EMPTIVE RIGHTS ISSUES*

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (2006) FCR 1[1]

Corporations – Share buy-back provisions – Effect on pre-emptive rights – Construction – Interpretation

Background

At first instance, Lion Nathan Australia Pty Ltd (Lion Nathan) had argued that a three tiered pre-emptive rights regime, which had previously been inserted into the constitution of Coopers Brewery Ltd (Coopers) subsequent to the settlement of certain proceedings in the mid-1990s, and which had involved both Lion Nathan and Coopers, constituted an express restriction on Coopers exercising its power to affect a share buy-back in accordance with Pt 2 J.1 of the *Corporations Act*.

Accordingly, a share buy-back which occurred in late September 2003 breached Article 38 of Coopers' Articles of Association (Articles) which provided as follows: 'No member may make any transfer of shares and the Directors must not register any transfer of shares without complying with Articles 40-53.' Articles 40-53 established the three tiered pre-emptive rights regime.[2]

Coopers argued that the pre-emptive rights regime was not an express restriction on the right to exercise its buy-back power. Further, the 'transfer of shares' envisaged by Article 38 did not extend to a transfer in respect of a buy-back under the *Corporations Act*.

At first instance, Finn J ruled that the pre-emptive rights regime contained in the Articles was neither intended to apply, nor on its proper construction did apply to a share buy-back effected under Pt 2J.1 of the *Corporations Act.*

Appeal

In three separate judgments, Weinberg, Kenny and Lander JJ dismissed the appeal and for the most part, confirmed that the judgment of Finn J was correct. Weinberg J did express some disagreement with part of the judgment at first instance. This is discussed in more detail below.

The central question arising out of Lion Nathan's appeal was whether or not Article 38 of the Articles applied to a share buy-back conducted under the *Corporations Act*. This in turn raised the issue of how a corporate constitution should be construed. Lion Nathan contended that the High Court's recent flexible approach to the construction of contracts, as evidenced in *Pacific Carriers*

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1 The facts of the matter out of which this appeal arose are set out in the case note 'Pre-Emptive Rights Issues' (2006) 25 ARELJ 18.

2 Ibid.

Ltd v BNP Paribas,[3] had no application to the construction of corporate constitutions. Coopers contended that the principles to be used for the construction of contracts were identical to those to be used for the construction of corporate constitutions.

Weinberg J indicated that neither of the above approaches was entirely correct. Lander J stated that the meaning of a company's constitution, like other commercial contracts must be determined objectively and, whilst accepting the argument that a court's consideration of surrounding circumstances is necessarily more constrained in the case of a corporate constitution, his Honour indicated that he could not see any error in the judgment at first instance.

Weinberg J noted that formerly, when construing ordinary contracts, courts had been reluctant to imply terms or permit extrinsic evidence to be led. Further, they were even more reluctant to do so when it came to construing the memorandum and articles of association of a company. The reason for this approach was that, unlike ordinary contracts, the memorandum and articles of association were seen as instruments on which a third party might rely.

Weinberg J was of the opinion that the traditional view that surrounding circumstances are never to be taken into account in construing a company's memorandum and articles of association can no longer be sustained. The various legislative changes to company law, in particular ss 124 and 125 of the *Corporations Act*, had significantly weakened the case for a company's objects to be stated with total precision. These changes had removed a central plank on which the traditional view rested.

Kenny J indicated that the constitution of a company is a commercial contract with special characteristics. It has a public dimension, serves a public purpose, third parties rely on it from time to time and it has statutory force. Whilst these considerations cannot be disregarded, they did not provide a sufficient justification to remove corporate constitutions entirely from the range of commercial documents governed by the principles for construction outlined in cases such as *Pacific Carriers*.

Lander J was of a similar opinion, indicating that it was clear and settled law that the meaning of commercial contracts and documents was to be determined objectively and to determine objective intention, regard must be had, as well as the words in the relevant documents themselves, to the surrounding circumstances which were known to the contracting parties at the time the document was created including the underlying purpose and object of the commercial transaction.

It was clear to Weinberg J that even without ambiguity or uncertainty, the context of the document in question will always be relevant. Further, 'surrounding circumstances', especially those which are likely to be well known to members of a company, as well as relevant third parties, will be very much part of that context.

The question for consideration was whether Finn J had, at first instance, applied the appropriate constraints upon the use that can be made of 'surrounding circumstances'.

At first instance, Finn J had regard to four types of surrounding circumstances in construing Article 38.

Firstly, the form of the 'transfer and transmission of shares' of the Articles both before and after certain amendments had been made in 1995, in ascertaining those provisions. In particular, the fact that under the old Articles, reference to 'any person' excluded any share buy-back under the pre-emptive rights regime.

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[3] (2004) 218 CLR 451.

Secondly, the fact that under the old Articles not only was there no provision authorising a share buy-back, but that the old Articles expressly prohibited the use of company funds for that purpose.

Thirdly, the well-publicised meeting of the members of Coopers who approved the alterations to the old Articles in 1995, against the background of the documents prepared for that meeting.

Fourthly, the small, closely held and relatively static membership of Coopers.

Weinberg J noted that if Article 38 was to be read in isolation then Lion Nathan's arguments may have some force. However, established authority indicated that the Articles could not be read in such a manner. Instead, they had to be read in conjunction with the remaining articles and when done so, it became tolerably clear that Article 38 did not encompass a share buy-back. Kenny and Lander JJ were of the same opinion.

Weinberg J indicated that Finn J was entitled to have regard to the surrounding circumstances present in the first, second and fourth points, however, he had serious misgivings about Finn J's use of the material referred to in the third point. His Honour submitted that a third party would hardly be likely to be aware of the background of the terms in those particular documents and disagreed with Finn J on that point.

Kenny and Lander JJ did not agree with Weinberg J on this issue. Lander J noted that in ordinary circumstances it would be impermissible to resort to an explanatory memorandum to explain changes to a company's articles of association or constitution. However in this case, Finn J was correct to do so because of the special features of Coopers. His Honour noted that Coopers was a very tightly held company and the pre-emptive rights regime placed serious limits on who could become a shareholder. Further, the dispute which had led to the amendment of the Articles was well know to the then current members of Coopers as well as those who held rights under the pre-emptive rights regime. This was a case where the information contained in the information memorandum was well known to the parties whose interests may have been affected and there was no reason why it could not be relied upon in these circumstances.

A SIGN OF THE REFORMED GAS MARKET – THE PROPOSED NATIONAL GAS BULLETIN BOARD*

In June 2007, the Bulletin Board Working Group (BBWG) of the Gas Market Leaders Group released its consultation paper on the proposed national gas bulletin board.[1] Closing date for public submissions was 6 July 2007 with the bulletin board to commence operation in May 2008.

The consultation paper sets out draft business and data requirements for the proposed bulletin board including key legal issues which must be addressed before the board is operational.

Key Features of the Proposed Bulletin Board

The bulletin board is proposed to be a website that covers all major gas production fields, major demand centres and transmission pipelines. The bulletin board will provide information on the following matters.

- Production capacities by producers. At this stage, it is proposed that maximum daily capacity will be provided by producers, including three-day capacity outlook for each production

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1 Gas Market Leaders Group, *Bulletin Board Business and Data Requirements*, June 2007.