WHAT CONSTITUTES A QUORUM?

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In *Re Austplat Minerals NL* (1990) 8 ACLC 720 Master White of the Supreme Court of Western Australia refused to allow a director, who was prohibited by the company's articles from voting on a matter in which he had an interest, to be counted towards a quorum.

A company's articles barred directors from voting on a matter in which they had an interest. The quorum for a directors' meeting was two. At one meeting there were three directors present. Two abstained from voting on a resolution in which they had an interest. The minutes recorded the resolution as having been passed.

Master White held the resolution to be invalid on the ground that where a company's articles bar a director from voting in relation to a matter in which he has a material interest, and a resolution is purportedly passed regarding that matter, that director cannot be counted towards quorum. He relied on a number of authorities to support this conclusion: *A.M. Spicer & Son Pty Ltd (in liq)* v *Spicer* (1931) 47 CLR 151; *In Re Greymouth Point & Co* (1904) 1 Ch 32; *Neil* v *Quinn* (1916) WN 223; *In Re North Eastern Insurance Company* (1919) 1 Ch 198.

The Master also expressed the view that where the articles of a company do *not* prohibit a director from voting on a matter in which he has an interest, that director, even where he abstains from voting, may still be considered as forming part of the quorum.

The effect of this decision therefore is to place an obligation on directors to ensure that sufficient of their number are present so that the number of directors able to vote in relation to any particular matter could themselves constitute a quorum. This may come as a surprise to a large number of company directors and their professional advisers alike who have in the past adhered to the widely accepted view that a director may be counted towards a quorum regardless of whether or not he is prohibited from voting on the matter in issue.

In reaching his decision the Master, while relying on the above cited decisions, also distinguished them on the ground that in each case the interested director was not forbidden by the articles from voting on a matter in which he had an interest. Of particular interest is that the Master distinguished the decision of Foster J of the Supreme Court of New South Wales in *Anaray Pty Ltd* v *Sydney Futures Exchange* (1988) 6 ACLC 271 on the same grounds. With respect to the learned Master it is suggested that this interpretation of Foster J's decision is questionable. A reading of the facts of that case as reported reveals that the directors were in fact prohibited by the articles from voting on the matter in question, the contention put forward by the plaintiffs being that the disqualification from voting imposed on 5 directors by the articles meant that they could not be counted towards quorum. In stark contrast to the decision of Master White in *Austplat*, Foster J held that a quorum had been present at the meeting on the ground that there was no provision in the articles expressly excluding from a quorum directors who were disqualified from voting on a particular issue.

This divergence of judicial opinion is likely to be of some concern to company directors and their professional advisers. Unfortunately, until the point is clarified by a more superior Court it is not possible to give any definite guidance as to which view should be preferred. In this uncertain climate it may be that the safest course for directors and advisers to take is to put the matter beyond doubt. This, it is suggested, may be done in one of two ways. The first option is to appoint a sufficient number of additional directors so as to ensure that a "voting quorum" will always be present. This, however, will not be an attractive alternative where the company does not require, or indeed can not afford, the appointment of additional directors. Furthermore, in the case of large public companies it will, in many cases (see Table A, Regulation 57(2) in Schedule 3 to the Companies Code), involve the inconvenience and expense associated with calling a general meeting to pass a resolution to make the new appointment.

The second alternative is to amend the company's articles so as to provide that notwithstanding the existence of a prohibition on a director's right to vote on a particular matter, he may still be counted toward quorum. It is suggested that if a court is willing to interpret articles, which do not prohibit a director from voting on a matter in which he has an interest, as allowing that director to still be counted towards quorum, it is unlikely to ignore a provision expressly providing that a director is to be counted towards quorum regardless of whether or not he is entitled to vote in relation to a particular matter. This course of action will of course require compliance with section 76 of the Companies Code and any relevant provisions of the company's Memorandum of Association.

Despite the difficulties and concerns caused by the decision in *Austplat* directors can take some comfort from one aspect of the decision. It would appear that if a resolution is challenged on the grounds put forward in *Austplat* reliance may in some circumstances be placed on the company's equivalent to Table A Regulation 78 - the effect of which is that directors' acts shall not be invalidated notwithstanding the later discovery that a director was disqualified from voting - to validate an irregularly passed resolution. Thus as Master White stated at page 723 in reference to Article 108, *Austplat*'s equivalent to Regulation 78:

> Counsel for the petitioner argued that the fact that the directors in question attended the meeting affords proof that they were unaware that their interest in the transaction rendered them disqualified from comprising part of a quorum of directors, so that the benefits of Article 108 are available to them.
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> In my opinion, in a matter of such importance, the directors should have proffered direct evidence of their bona fides and not left it to be inferred that while they knew that they were disqualified from voting - and, therefore, refrained from doing so, they did not know that such disqualification meant that they could not form part of a valid quorum of directors of the company. I am not to be taken as suggesting any lack of bona fides but only lack of evidence on the point.

Furthermore, there would appear to be no reason why this statement of principle is not equally applicable in those situations where a company's articles do not contain a Regulation 78 equivalent, section 224(1) of the Companies Code providing:

> The acts of a director or secretary are valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

Therefore, assuming it can be established by affidavit evidence or oral testimony that the directors disqualified from voting honestly believed that they formed part of the quorum, it would appear that a resolution passed, even where the Court decides that a quorum is not present, may still be valid and effective.