SUPREME COURT OF QUEENSLAND

CITATION:	*Mowatt & ors v White Horses Pty Ltd* [2017] QSC 292
PARTIES:	**SONJA MARIE MOWATT** (first applicant) **PETER LEIGHTON SNARE** (second applicant) **TREVOR CARL JOHNSTON AND CAROLINE ANN JOHNSTON** (third applicant) **RODERICK HYND AND LINDA SUSAN HYND** (fourth applicant) **MATTHEW STEPHEN AND CAROLYNNE JANE DEWAR** (fifth applicant) **PHILIP PERCIVAL KIDD AND COLLEEN FRANCIS KIDD** (sixth applicant) **v** **WHITE HORSES PTY LTD** ACN 009 696 637 (respondent)
FILE NO/S:	SC No 12543 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	1 December 2017 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2017
JUDGE:	Bond J
ORDER:	**The orders of the Court are that:** **1. The application for interlocutory injunction is dismissed.** **2. The applicants must pay the respondent's costs to be assessed on the standard basis.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – GENERALLY – where the respondent company proposes to hold an extraordinary general meeting for the purpose of resolving to voluntarily wind up the company and to appoint the board of directors as

liquidators – where the applicants allege that that course would be contrary to law or would otherwise infringe the applicants' rights – whether there is a serious question to be tried – whether an interlocutory injunction should be granted

Corporations Act 2001 (Cth)

Catto v Hampton Australia Limited (in liq) (No 3) (2004) 89 SASR 234, cited
Re White Horses Pty Ltd (No 2) (2016) 121 ACSR 300, related

COUNSEL: P O'Higgins for the applicants
A Morris QC, with L Jurth, for the respondent

SOLICITORS: Shane Grant Legal for the applicants
Merthyr Law for the respondent

[1] I have before me an application for an interlocutory injunction restraining the respondent company (**White Horses**) from:

(a) proceeding on 2 December 2017 or otherwise with the extraordinary general meeting of White Horses as described in the notice of extraordinary general meeting dated 7 November 2017;

(b) considering or passing any resolution for an appointment of voluntary liquidators; or

(c) selling or taking any steps to affect a sale of the certain land.

[2] For the reasons which follow, my conclusion is that the application must fail.

[3] The background to the application for interlocutory injunction before me today is set out in *Re White Horses Pty Ltd (No 2)* (2016) 121 ACSR 300. It was common ground that for the purposes of disposition of the present application, I could treat the facts as found in that judgment as facts for the purposes of resolution of the present application. Accordingly, these reasons are to be read against the background of the facts found in that judgment.

[4] For the sake of brevity of these *ex tempore* reasons, it will suffice to summarise those facts as follows.

[5] White Horses was a home unit company that owned the land and buildings of a development at Burleigh Heads known as White Horses. The complex contained 49 units. Each unit was associated with a parcel of shares and a lease from White Horses to the owner of the shares with respect to that unit. (Each of the six applicants before me today are owners of shares and have those rights.)

[6] The board of directors of White Horses formed the view that the building was at serious risk of dilapidation, had reached the end of its commercial life, and that substantial expenditure would be required to return the building to a safe state.

[7] In light of this, the directors proposed a scheme of arrangement under which White Horses would be authorised to sell the land to a developer and to surrender the leases attached to each home unit owner's shares in White Horses. In exchange, the purchase price paid to White Horses by the developer would be distributed among the unit owners with White Horses to be subsequently wound up. Orders were made convening a scheme meeting and the scheme of arrangement obtained the requisite majorities and was passed.

[8] White Horses sought an order from me pursuant to s 411 of the *Corporations Act* 2001 (Cth) (**the Act**) approving the scheme of arrangement. Six of the shareholders who had voted against the scheme appeared before me and objected to my granting approval. My reasons revealed that I refused to approve the scheme essentially because:

(a) various provisions of White Horses' constitution (**the Constitution**) gave each holder of defined parcels of shares the right to occupy a particular unit within the building pursuant to a particular lease, as I have already described;

(b) cl 22.3 of the Constitution prohibited White Horses from changing its share capital in any manner which would permit change of the association between the share parcel and a particular home unit;

(c) cl 28.5(4) of the Constitution provided that a resolution regarding the sale of the land was required to be approved by resolution passed without dissent;

(d) I concluded that the Constitution created class rights, thereby engaging the application of s 246B of the Act;

(e) the proposed scheme would affect a variation or cancellation of class rights contrary to the procedure mandated by s 246B by subjecting the shares to a process authorising the directors to transfer all of the shares in the class and to surrender the lease attached to the shares notwithstanding the opposition of the class rights holder, thereby abrogating the rights completely; and

(f) such a scheme was incapable of being approved under the Act as a matter of law.

[9] My judgment also went on to express my view that if I was wrong in the view that the scheme was incapable of being approved under the Act as a matter of law, then I would have made an order approving the scheme. Amongst other things, I found that:

(a) the scheme was fair and reasonable in the sense contemplated by the scheme of arrangement authorities; and

(b) the minority shareholders would not be oppressed by the scheme.

[10] There was no appeal from my decision to refuse approval of the scheme of arrangement and the scheme of arrangement proposal went no further.

[11] However, in what may be regarded as a sequel, in some respects, to the proposal for a scheme of arrangement, the material before me now reveals that the board of White Horses still apparently has the view that a sale of the whole property and distribution of proceeds and eventual winding up of White Horses is the best solution to the problems facing White Horses, but this time they approached that outcome more directly.

[12] White Horse proposes to hold an extraordinary general meeting tomorrow at which the following resolutions will be put to the shareholders:

(a) Resolve by special resolution to voluntarily wind up White Horses.

(b) Resolve to appoint each of the following as liquidators for the purpose of winding up the affairs and distributing the property of White Horses, namely, Daniel Weule, Dale Stretten, Barry Scott, Bob Wild and Kenneth Beech.

[13] I observe parenthetically that the proposed liquidators are the directors of White Horses. However, in light of the fact that the proposal is for a members' voluntary winding up, that does not contravene s 532 of the Act.

[14] Anticipating that the resolutions might succeed, the six unit holders who I have earlier described come before me today seeking an interlocutory injunction to prevent that possibility.

[15] There was no dispute before me as to the approach which I should take to such an application. It is well known, referred to sufficiently by both sets of written submissions before me, and I will not rehearse it here.

[16] I turn first to consider the various arguments that there was a serious question to be tried that White Horses' proposed conduct would be contrary to law or would otherwise infringe the applicants' rights.

[17] Section 491(1) of the Act provides:

> Subject to section 490, a company may be wound up voluntarily if the company so resolves by special resolution.

[18] The rights conferred by that section are conferred by the statute and could not be constrained by provision to the contrary in a company's constitution notwithstanding the fact that the constitution operates as a statutory contract in the way provided by s 140 of the Act.

[19] But even if I am wrong in that conclusion, the particular constitution in this case does not contain any provision which suggests that White Horses could not resolve that it be wound up voluntarily by special resolution.

[20] I observe:

(a) Clause 4 of the Constitution provides:

> Unless limited at Law or by The Corporations Law the company shall have the rights powers and privileges of a natural person and those specified at Law or by the Corporations Law.

(b) There are no provisions in the Constitution which refer to or regulate the means by which winding up might occur. The only provision touching on the subject is cl 10(3) which recognises that shares gave the rights to repayment of capital and the right to participate in the distribution of surplus assets of the company.

(c) True it is that cl 28.5(4) provided that any resolution "regarding the sale of the Land" must be approved by resolution without dissent, but, on its proper construction, that clause applies to a resolution made in the context of White Horses continuing to conduct its business.

(d) In any event, cl 28.5 also contemplated that statute might require certain resolutions to be ratified by more than a simple majority and, if so, that statutory requirement would prevail over the ordinary rule that resolutions be passed by a simple majority: see cl 28.5(a).

[21] The result is that the continued capacity of White Horses to do that for which s 491 provides must be regarded as having been contemplated by the Constitution and not constrained in any way.

[22] The position which I reach is similar to that expressed by Vanstone J in *Catto v Hampton Australia Limited (in liq) (No 3)* (2004) 89 SASR 234, in which her Honour made these observations after quoting s 491:

> [86] Those rights may be treated as incorporated into the contract between the parties or, alternatively, as conferred by statute (See *Byrne v Australian Airways Ltd* [1995] HCA 24; (1995) 185 CLR 410 at 420; see also *Nicron Resources Ltd v Catto* (1992) 8 ACSR 219 at 229-230). Whether the rights afforded by s 491 are seen as incorporated into the terms of the contract, or stand alongside it is, in this case, immaterial. Accordingly Mr Angyal's attempt to align the utilisation of s 491 in this case with the alteration of the Articles in *Gambotto*, is in my view, not valid. That is so because the right to vote for a winding up was always a feature of the corporate relationship in issue. The source of the right is here of no consequence. Seen in this way it is impossible to see commercial unfairness in the decision to move for and vote for a winding up.

> [87] A majority shareholder, as much as a minority shareholder, has rights and interests which are entitled to protection, and it is legitimate for the majority shareholder to exert and enjoy them. "The Court is not the protector of underdogs exclusively": *Nicron Resources* at 231.

[23] Ultimately, the proposition advanced by the applicants boils down to the proposition that given the centrality of the continued holding of the land by White Horses (which centrality is demonstrated by cl 28.5(4)), it must be implicit in the case of this company that the members have agreed to remain bound together by incorporation at least until there was a resolution without dissent that the land must be sold.

[24] I do not think that there is a serious question to be tried regarding this proposition, because it is inconsistent with the conclusion that I have earlier reached that the rights conferred by s 491 continued to exist and were not constrained, but, in any event, I would not reach that construction of the Constitution.

[25] The applicants also argued that even if they could not constrain White Horses from entertaining and possibly passing the proposed resolution that White Horses be wound up voluntarily, I should, nevertheless, grant the injunction sought, because the only purpose of the winding up was to have the liquidators sell the land and the liquidators could not do so without first getting the approval of a resolution of the members without dissent.

[26] I do not think that there is a serious question to be tried concerning this proposition either.

[27] If the resolution passes and liquidators are appointed, then s 501 applies to identify what the liquidators must do. That section provides:

> Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally and, subject to that application, must, unless the company's constitution otherwise provides, be distributed among the members according to their rights and interests in the company.

[28] To this end, the liquidators have the powers conferred by s 506(1)(b) and s 477 of the Act. In order to fulfil their duty, the liquidators would have to sell the property. The provisions of the Constitution regarding resolution without dissent could not operate to constrain the liquidators' ability to fulfil their statutory obligation and, even if they could, cl 28.5(4) does not in terms apply to liquidators, because the source of their power to act does not depend upon the existence of a resolution.

[29] The applicants sought to develop the proposition that resolving to wind up White Horses was contrary to cl 28.5(4) of the Constitution and to the class rights entrenched by s 246B of the Act.

[30] I do not think that there is a serious question to be tried as to this proposition.

[31] A resolution to wind up the company voluntarily is not a resolution for the variation or cancellation of the class rights. It is a resolution which sets in train a process for the termination of the life of the company which will fully recognise the rights that all shareholders have in the context of that termination (including shareholders who have class rights). Notably, it is a process which, in the approach I have taken to the construction of the Constitution, all shareholders must be taken to have contemplated. The class rights were always subject to the possibility of being affected by a members' voluntary winding up pursuant to s 491 of the Act.

[32] The final argument advanced by the applicants was that the proposed conduct of White Horses ought be characterised as seeking to override the minority shareholders' rights. The contention was that there was a serious question as to whether that conduct was oppressive, or unfairly prejudicial or unfairly discriminatory against the minority members within the meaning of s 232 of the Act.

[33] I reject that submission. I think the answer to it is to be found in the reasoning I have already expressed. It was neatly encapsulated by Vanstone J in *Catto v Hampton Australia Limited (in liq) (No 3)* in this way:

> [93] In light of the principles and rights identified above, it seems to me that the plaintiffs' case of oppression fails at the first hurdle. There is no foundation for their claim. The passing of the resolutions could not be said to be oppressive because KLV was entitled to follow the course it did in moving for a voluntary winding up; the company in general meeting was entitled to determine to wind itself up and return its capital to its contributories.
>
> [94] The very nature of the winding up procedure and liquidation is such that s 232 cannot be applied to it. The resolution to wind up the company could not be characterised as "contrary to the interests of the members as a whole" or "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members" of the company. The plaintiffs have not and could not demonstrate commercial unfairness in relation to the resolutions. The concept of winding up is not susceptible of being labelled "fair" or "unfair". The exercise of the right to wind up the company does not involve the destruction of one interest to the advantage of another. Any desire of the minority to keep the company afloat is, no doubt, frustrated by the majority voting to wind up. But the rights attached to the shares of the minority are not discriminated against in any way. Rather, the legal consequences of the resolution to wind up apply, in like manner, to all shares and shareholders.

[34] Insofar as broader consideration of the merits of what is proposed are relevant to the question of whether there is a serious question to be tried as to oppression, I make the following observations:

(a) I described in my previous judgment the considerations which informed the decision of the board to respond to the situation confronting White Horses by selling the company's undertaking, discharging its liabilities and distributing the surplus rather than attempting to continue and to remediate the structural issues in the subject building.

(b) I explained that I would not consider the proposal as described in the scheme, had it been capable of being approved, to be oppressive of the minority shareholders.

(c) The same analysis would apply to justify the rejection of the contention that there is any serious question that the presently proposed conduct might amount to oppression.

[35] The result is that I do not think that the applicants have established that there is a serious question to be tried that the threatened conduct is contrary to the law or will otherwise infringe their rights. The application for interlocutory injunction must be dismissed.

[36] It seems to me that costs must follow the event. The applicants must pay the respondent's costs to be assessed on the standard basis.