SUPREME COURT OF QUEENSLAND

CITATION:	*Coeur de Lion Investments Pty Limited v The President's Club Limited* [2017] QCA 309
PARTIES:	**COEUR DE LION INVESTMENTS PTY LIMITED** ACN 006 334 872 (appellant) **v** **THE PRESIDENT'S CLUB LIMITED** ACN 010 593 263 (respondent)
FILE NO/S:	Appeal No 2165 of 2017 SC No 6286 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 6 (Mullins J)
DELIVERED ON:	18 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2017
JUDGES:	Morrison and Philippides JJA and McMeekin J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CORPORATIONS – CONSTITUTION AND REPLACEABLE RULES – MEMORANDUM AND ARTICLES OF ASSOCIATION – ARTICLES OF ASSOCIATION – PARTICULAR ARTICLES – CONSTRUCTION – OTHER CASES – where the appellant was a shareholder in the respondent who operated a timeshare scheme in respect of residential villas – where the appellant attempted to exercise its rights under ss 249D and 249N of the *Corporations Act* 2001 (Cth) prior to the respondent's Annual General Meeting – where art 22(c) of the Articles of Association precluded the exercise of the right to vote at a general meeting of the respondent "if the member owes more than $500.00 per quarter share to the Company and that amount has been outstanding for more than one month" – where the Chairman ruled that the appellant was disentitled to vote on the basis that the appellant owed more than $500.00 per quarter share in the ownership of a villa – where the appellant sought a declaration that "quarter share" was a reference to a quarter of a share in the respondent's capital – whether the primary judge failed to have regard to the principles applicable to the construction of a company's constitutive document – whether the primary judge erred by having inappropriate regard to the

factual matrix – whether the term "quarter share" was a reference to a quarter of a share in the respondent's capital or to a quarter of a share in the ownership of a villa

Corporations Act 2001 (Cth), s 249D , s 249N

Aveo Group Ltd v State Street Australia Ltd [2015] FCA 1019, cited
Donaldson v Natural Springs Australia Ltd [2015] FCA 498, considered
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, considered
Eureka Funds Management Ltd v Freehills Services Pty Ltd (2008) 19 VR 676; [2008] VSCA 156, cited
Gilmore v AMP General Insurance Co Ltd (1996) 67 SASR 387, cited
HNA Irish Nominee Ltd v Kinghorn (2010) 78 ACSR 553; [2010] FCAFC 57, considered
Kelly v The Queen (2004) 218 CLR 216; [2004] HCA 12, cited
Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (2006) 156 FCR 1; [2006] FCAFC 144, considered
Peters' American Delicacy Company Ltd v Heath (1939) 61 CLR 457; [1939] HCA 2, considered
Walsh v Alexander (1913) 16 CLR 293; [1913] HCA 24, cited

COUNSEL: D F Jackson AM QC, with L T Livingstone, for the appellant
D Quayle for the respondent

SOLICITORS: Coeur de Lion Investments Pty Ltd for the appellant
King & Wood Mallesons for the respondent

[1] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the order her Honour proposes.

[2] **PHILIPPIDES JA:**

Background

The appellant, Coeur De Lion Investments Pty Ltd, is a shareholder of the respondent, The President's Club Limited, an unlisted public company limited by shares who operated a timeshare scheme in respect of 144 residential villas at the Palmer Coolum Resort at Coolum Beach.

[3] Prior to the respondent's Annual General Meeting on 23 November 2015 (AGM), the appellant (who holds 3,107 of the 7,493 issued shares in the respondent) attempted to exercise its rights under s 249D and s 249N of the *Corporations Act* 2001 (Cth) (the Act)[1] on the basis that it was a member of the respondent with at least five per cent of the votes that may be cast at a general meeting of the respondent. At the AGM, the Chairman refused to allow the resolutions to be considered,[2] on the

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1 Sections 249D and 249N of the Act relevantly entitled a member (or members) with at least five per cent of the votes that may be cast at a general meeting to cause such a meeting to be called and held and to give notice of a resolution proposed to be moved at such a meeting.

2 The appellant's written request of 16 November 2015, pursuant to s 249D of the Act requesting an extraordinary general meeting to consider further resolutions proposed by it was also refused by the respondent on the same basis: AB at 33.

ground that the appellant was not permitted to vote by reason of art 22(c) of the Memorandum and Articles of Association (Articles) of the respondent (being defined as the "Company" in the Articles).

[4] The respondent (also referred to as the developer in the Articles) was the company established for the purpose of regulating the rights of a Member in respect of the occupation of villa lots (a "Member" being defined in the Articles to mean a holder (or the joint holder) of a share in the capital of the Company): art 3.[3]

[5] Article 22 is concerned with the cessation of company membership rights and privileges. Article 22(c) precludes the exercise of the right to vote at a general meeting of the respondent "if the Member owes more than $500.00 per quarter share to the Company and that amount has been outstanding for more than one month".

[6] The Chairman ruled that the appellant was disentitled to vote by art 22(c), on the basis that "quarter share" in that Article meant a quarter interest in a villa and that the appellant owed the respondent more than $500 per quarter share.[4] The appellant's representative had asserted that the phrase "quarter share" meant a quarter of a share in the respondent's capital. The appellant subsequently brought an application in the Supreme Court seeking a declaration to that effect.

[7] As the primary judge observed, if the appellant's contention were correct, it would follow that a Member was disentitled from voting by reason of art 22(c) only if the Member owed more than $2,000 per share in the capital to the respondent which had been outstanding for more than one month. In that event, the appellant's debt to the respondent would have been below the threshold at which voting rights were suspended. The position would be otherwise if the respondent's construction were correct.[5]

[8] In dismissing the application, the primary judge rejected the appellant's contention that "quarter share" in art 22(c) meant a quarter of a share in the capital of the respondent and instead found that "quarter share" was to be understood as meaning a quarter share in the ownership of a villa lot in the resort.[6]

[9] The issue on the appeal thus concerns whether the proper construction of the expression "quarter share" in art 22(c) identifies:

(a) a quarter share in the capital of the respondent (as the appellant contended); or

(b) a quarter share in the ownership of a villa (as the primary judge found).

Grounds of appeal

[10] Ground 1(a) asserted that the primary judge erred by failing to have regard to the specific principle of construction pertinent to the interpretation of a company's constitutive document. Grounds 1(b), 1(c) and 1(d) asserted that the primary judge erred in failing to have sufficient regard to textual considerations in relation to the words "share", "quarter" and "Member" in the Articles. Ground 2 asserted errors in

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3 Reasons at [4].
4 Reasons at [2].
5 See Reasons at [2]-[3].
6 Reasons at [36].

failing to have regard to contextual considerations. Ground 3 contended that the primary judge erred in concluding that the term "quarter share" in art 22(c) did not mean a quarter of a share in the respondent's capital by reference to the textual and contextual indicators asserted in grounds 1 and 2 as informing the proper construction of art 22(c).

The Articles

[11] Before turning to the reasoning of the primary judge and dealing with the grounds of appeal, it is convenient to have regard to the Articles, including the definitions contained in art 2 in some detail as the primary judge did.

[12] Article 6 prescribes the requirements for "qualification" for membership. Qualification for membership of the respondent is limited to a "Co-Owner" so long as that status is retained: art 6(a). "Co-owner" is defined to mean "the registered proprietor or a person who is entitled to be registered as the registered proprietor of a Fractional Interest". "Fractional Interest" is in turn defined to mean "a one-fifty-second (1/52) interest as tenant-in-common in any lot in the Building Units Plans which contain the Presidents Site". A person may not hold a greater number of shares in the capital of the respondent than the number of Fractional Interests in respect of which the person is a Co-Owner in a lot: art 6(b).

[13] Article 8, which is concerned with the rights and privileges of membership, entitles "the holder for the time being of a share in the capital of the Company" to exercise his or her "Entitlement". "Entitlement" is defined to mean "the entitlement of a Member to occupy one Residential Apartment … in the Presidents Site for an Entitlement Week to which his or her share relates". "Entitlement Week" means any period of one week. "Presidents Site" means all the lots in the common property in Building Units Plans 8856 and 8847.

[14] Schedule 1 to the Articles specifies the week during which the owner of a particular share is entitled to occupy the Residential Apartment designated by the share number of the particular share in accordance with art 82(c) and art 82(d). As the primary judge observed, and the appellant accepted,[7] the Articles divide the shares associated with each villa into four groups of 13 shares, corresponding to 13 Fractional Interests and an entitlement to occupy the villa for 13 defined weeks in a year (sch 1).[8] There was also no dispute[9] with the primary judge's observation[10] that sch 1 sets outs the particulars of the shares[11] by reference to the specified villa and the 13 weeks that the owner of the shares relating to that villa is entitled to occupy that villa, each villa having four groups of 13 shares, with each group relating to the 13 weeks that apply to those 13 shares.

[15] Nor was it disputed that the Articles associate each Fractional Interest as tenant in common in a lot with a share in the capital of the respondent (art 82(c)(i) and sch 1) and that a person is not eligible to hold a share in the capital, and thus become a Member, of the respondent unless the Member is a registered proprietor (either individually or jointly) of the Fractional Interest in a lot associated with that share (art 6(a)-(c)). On that basis, the appellant did not dispute that her Honour correctly described[12] the

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7 Appellant's Amended Outline at [7].
8 See Reasons at [5] and [12].
9 Appellant's Amended Outline at [6].
10 Reasons at [12].
11 Other than the five subscriber shares.
12 Reasons at [4].

shares in the capital of the respondent as being "stapled" to ownership interests in each villa lot.

[16] Both the appellant and the respondent were parties to the Resort Administration Agreement referred to in the Articles. Her Honour also had regard[13] to the Resort Administration Agreement, to which, understandably, no objection was taken, since it was clearly admissible and available (because it is referred to within the Articles themselves) for consideration. Recital E to the Resort Administration Agreement recorded that there were four title deeds for each villa, with each title deed representing 13 weeks:

> "The lots in the Presidents Club Golf Site and the Presidents Club Tennis Site have been offered for sale to the public as fractional interests. Each lot in the Building Units Plans for the Presidents Club Golf Site and the Presidents Club Tennis Site is divided into up to four (4) Title Deeds, each Title Deed representing thirteen (13) weeks in a calendar year."

[17] In the Resort Administration Agreement, "Owner" was defined as meaning "the registered proprietor from time to time of a one quarter (1/4) or greater interest in a Residential Apartment or apartments in the Resort", a quarter interest referring to 13 shares.

[18] As her Honour observed,[14] by art 23, a Member of the respondent loses the entitlement to use the villa associated with the member's share if the member ceases to hold the corresponding Fractional Interest in a lot which provides:

> "No Member may exercise any rights or privileges of membership (including but without limiting the generality thereof the right to use his or her Entitlement) if the Member has ceased to be a Co-owner in respect of the same number of Fractional Interests as the number of shares the Member holds in the capital of the Company."

[19] Likewise, by art 22(a), a Member's rights and privileges (including the right to use his or her Entitlement) are lost if Entitlement Costs[15] payable by a Member to the respondent are due but unpaid.

[20] The ordinary position under the Articles is that each member has "one vote for each share held by the Member" on a poll at a general meeting of the respondent: art 38.[16] Returning to art 22(c), which is concerned with the cessation of rights and privileges of Members in relation to voting rights, it provides:

> "A member may not vote at general meeting of the Company if the Member owes more than $500.00 *per quarter share* to the Company and that amount has been outstanding for more than one month."

[21] Article 113 is concerned with body corporate voting rights and provides:

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13 Reasons at [19].

14 See Reasons at [5], [11] and [16].

15 "Entitlement Costs" means "the annual contribution by each Member to the Company pursuant to Article 13 or, where the context requires, instalments on account of such contributions pursuant to Article 14, together with any special contributions by the Member to the Company pursuant to Article 15"; AB at 44.

16 Article 38.

> "Members irrevocably appoint the directors and secretary of the Company severally to be their attorney to:
>
> (a) If the Member is a natural person and owns all of the *quarter interest in a Lot*, appoint a proxy to exercise the member's body corporate voting rights *in respect of the Lot*;
>
> (b) If the Member is a corporation and owns all of the *quarter interests in a Lot*, appoint a company nominee for the Member *in respect of the Lot*;
>
> (c) If the Member does not own all of the quarter interests in a Lot, appoint, in common with the other owners of *quarter shares in the relevant lot*, a proxy to exercise the body corporate voting rights *in respect of the Lot*. (emphasis added)
>
> For the purposes of this article, 'Lot' means a lot in BUP8856 or BUP8847.
>
> Members must not in any way exercise body corporate voting rights in respect of lots or appoint or participate in the appointment of a company nominee or proxy (as applicable) for a Lot."

The primary judge's reasons as to the proper construction of art 22(c)

[22] In approaching the issue of the proper construction of art 22(c), her Honour stated the relevant principles of interpretation as follows:[17]

> "It is common ground that the general principles that apply to the interpretation of a company's constitution are the same as those that apply to the interpretation of any commercial contract; but taking into account the nature of a company's constitution: *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1 at [56]-[59], [123]-[124] and [232]. The general principles that apply to the construction of commercial contracts were summarised in the joint judgment of French CJ and Hayne, Crennan and Kiefel JJ in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]. This confirmed the objective approach, taking into account the language used by the parties, the surrounding circumstances known to them and the commercial purpose of the contract."

[23] Having set out and considered relevant clauses of the Articles, her Honour observed that the shares in the capital of the respondent were "stapled" to ownership interests in each villa lot.[18] The appellant did not dispute the correctness of that description[19] given that the Articles associate each Fractional Interest as tenant in common in a lot with a share in the capital of the respondent (art 82(c)(i) and sch 1) and that a person is not eligible to hold a share in the capital, and thus become a Member, of the respondent unless the Member is a registered proprietor (either individually or jointly) of the Fractional Interest in a lot associated with that share (art 6(a)-(c)).

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17 Reasons at [18].
18 Reasons at [4].
19 Appellant's Amended Outline at [5].

[24] The primary judge observed[20] that it was common ground at first instance that each villa lot has four ownership interests or shares held by the owners as tenants in common in that villa lot. Her Honour also noted that each villa might be occupied for a maximum of 52 weeks in any one year and that ownership of each lot is divided into four one quarter interests held as tenants in common, with each one quarter interest in each villa lot representing an entitlement to occupy the villa for a quarter of a year, being 13 weeks. Significantly, her Honour observed that the entitlement to occupy a villa for one week equates to one share in the capital of the respondent.

[25] Her Honour concluded[21] that, while it is not stated *expressly* in the Articles that the minimum number of shares that can be held by a member is 13 shares, that is the "effect of the articles (including Schedule One) in conjunction with the ownership interests of the villas which relate directly to the numbers of shares in the respondent to which each member is entitled as a result of being a co-owner of a villa".

[26] Her Honour expressed[22] the context in which the constitution was to be construed as one where "the qualification for membership" is being a "co-owner of a villa lot" and where "the minimum parcel of 13 shares that can be acquired by a member equates to one-quarter of the ownership interest in a villa lot which equates to 13 Entitlement Weeks (or one-quarter of a year)".

[27] Her Honour was of the view[23] that, when "the relationship between a member's entitlement to shares with the ownership of a quarter interest in a villa" was taken into account, there was a "*prima facie* ambiguity" in the choice of the words "quarter share" in art 22(c).

[28] The primary judge accepted[24] the appellant's submission that, in the normal course, the plain and ordinary meaning of the word "share" when used in the constitution of a company "must be a reference to a share in the capital of the company". However, her Honour considered[25] that that "starting point" for the construing the expression "quarter share" hit a stumbling block as the word "share" was qualified by the description "quarter". In that regard, her Honour observed:[26]

> "…As a matter of mathematical logic, a method for calculating the debt of a member of a company as the threshold at which voting rights at a general meeting are deprived can be expressed in terms of '$X per quarter share', even though there is no such unit as a quarter of a share in respect of the company's capital. The mathematical logic would convert the debt threshold to $4X per share. But it is difficult to justify construing 'quarter share' so literally, when the expression 'quarter share' relates to the ownership of a villa which is the qualifying event for a member to own shares in the respondent."

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20 Reasons at [5].
21 Reasons at [12].
22 Reasons at [30].
23 Reasons at [31].
24 Reasons at [32].
25 Reasons at [32].
26 Reasons at [32].

[29] Her Honour also commented that:[27]

> "The quantum of the threshold for depriving a member of voting rights does not assist in determining the proper construction. To the extent the applicant argues that the construction that results in the higher threshold should be preferred, the respondent can counter that it is in the interests of the respondent that there be an incentive in the risk of loss of voting rights for a member to pay all outgoings and levies that are payable by the member to the respondent to facilitate the operation of the resort that is contemplated by the constitution. Although article 113 shows how easy it would have been for the draftsperson of article 22(c) to set out that quarter share was a reference to a quarter share in a villa, the failure to do so does not preclude construction of the expression "quarter share" to mean a quarter share in a villa lot, if that is what construction of the expression within the constitution and in context requires."

[30] Additionally, her Honour identified[28] a further difficulty arising from the appellant's argument as to the nature of the Fractional Interest. The appellant argued that the reference in art 22(c) to "quarter share" did not reflect the basic Fractional Interest of ownership in a villa which was defined in the Articles as a 1/52 interest as tenant in common in any villa lot (equating with an Entitlement Week and one share in the respondent's capital). Her Honour concluded that that argument lost its force when the Articles were considered "in the context of the creation of quarter interests in each villa lot and that quarter interest became the basic unit for a member to qualify for shares in the respondent".[29] In that regard, her Honour stated:[30]

> "The context given to the constitution by the creation of quarter interests in each villa lot in the resort and the relationship between co-ownership of a quarter interest and entitlement to shares in the capital of the respondent that are dealt with in the articles, including articles 6, 8, 23 and 82 and Schedule One, determine the objective construction of 'quarter share' in article 22(c). This context **displaces the plain and ordinary meaning of the word 'share' and supports construing 'quarter share' consistently with the use of the word 'quarter' in respect of a member's ownership interest in a villa lot**."

Failure to have regard to the principles applicable to the construction of a company's constitutive document: grounds 1(a)

The appellant's submissions

[31] The appellant submits that the primary judge erred by failing to apply an important principle concerning the construction of the constitution or articles of association of a company identified in ground 1(a), being that primacy is to be given to the objective intention ascertainable from the language in which the constitutive document is expressed, rather than to other features of the surrounding matrix of fact in which its provisions may have been made. In support of that principle

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27 Reasons at [33].
28 Reasons at [34]-[35].
29 Reasons at [34] (emphasis added).
30 Reasons at [35].

reference was made to *HNA Irish Nominee Ltd v Kinghorn*[31] and *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd*.[32]

[32] It was submitted that, although the primary judge referred[33] to *Lion Nathan*,[34] her Honour did not identify, or give effect to, the principle discussed in that case which applies specifically to the interpretation of a corporate constitution. It was argued that her Honour referred only to the principles which are applicable generally to the construction of commercial contracts, as set out in *Electricity Generation Corporation v Woodside Energy Ltd*,[35] but not to subsequent authorities, which confirm that the general principles expressed in *Woodside* remain subject to the specific principle applicable to the construction of a company's constitution, by which primacy is given to the language used in the document. In advancing this submission, the appellant relied on *HNA Irish*, where Keane CJ, Jacobson and Rares JJ said:[36]

> "… A corporate constitution has the effect of a contract between the company and each of its members, the company and each director and secretary, as well as the members amongst themselves (s 140(1) of the Act). The range of surrounding circumstances available as aids to the construction of such a contract is perhaps more limited than in other cases. This is because constitutions, and replaceable rules, can be amended at different times and in different circumstances. In addition, the members who are the corporators at particular times may change. These factors suggest that ordinarily primacy must be given to the objective intention discernible from the language in which the constitution is expressed rather than to other features of the surrounding matrix of fact in which its provisions may have been made."

[33] Reference was also made to *Donaldson v Natural Springs Australia Ltd*,[37] where Beach J made the following observation in relation to the general principles stated in *Woodside* as to the interpretation of a commercial contract:

> "Notwithstanding the generality of the principles just expressed, in construing a Constitution 'ordinarily primacy must be given to the objective intention discernible from the language in which the [C]onstitution is expressed rather than to other features of the surrounding matrix of fact in which its provisions may have been made' (*HNA Irish Nominee Ltd v Kinghorn* (2010) 78 ACSR 553; [2010] FCAFC 57 at [42]). This is because the range of surrounding circumstances available as aids to construction is a more unstable (or at least changeable) foundation than that available for construing contracts generally. Constitutions and replaceable rules can be amended at different times and in different circumstances. Further, the members are likely to change. Further, and more generally, a Constitution

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31 (2010) 78 ACSR 553; [2010] FCAFC 57 at [42] (Keane CJ, Jacobson J and Rares J).
32 (2006) 156 FCR 1 at [55], [56], [59], [63] (Weinberg J); [102], [124] (Kenny J); [226], [236], [254], [255] and [259] (Lander J).
33 Reasons at [18].
34 (2006) 156 FCR 1.
35 (2014) 251 CLR 640 at [35].
36 (2010) 78 ACSR 553; [2010] FCAFC 57 at [42].
37 [2015] FCA 498 at [150]. See also *Aveo Group Ltd v State Street Australia Ltd* [2015] FCA 1019 at [61] (affirmed on appeal in (2016) 113 ACSR 615; [2016] FCAFC 81).

> serves a public purpose; it is not merely an embodiment of a private bargain. Surrounding circumstances can be taken into account in construing the provisions of a Constitution, but restraint needs to be exercised (*Lion Nathan* at [55], [56], [59], [63], [102], [124], [226], [236], [254], [255] and [259]).”

Consideration

[34] I do not consider that the primary judge proceeded on an incorrect appreciation of the specific principle of construction concerning a constitutive document such as the Articles. As the respondent submitted, the primary judge set out the authorities that the parties agreed should guide the interpretive exercise,[38] commencing with a reference to the sub-set of cases concerning the interpretation of corporate constitutions. The relevant dicta in *Lion Nathan* did not materially differ in emphasis or effect from those in *HNA Irish* and other authorities relied on by the appellant. The reference in *HNA Irish* to the principle that “ordinarily primacy must be given to the objective intention discernible from the language” of the document, quoted by Beach J in *Donaldson*, is but an expression of the practical effect of the restraint spoken of in *Lion Nathan*. Moreover, as the respondent pointed out, her Honour specifically referred to the following passage of Weinberg J in *Lion Nathan*:[39]

> “Nonetheless, as Lion Nathan submitted, the case for restraint in using surrounding circumstances as an aid to the construction of a corporate constitution remains a powerful one... [t]he correctness of this approach has never, so far as I am aware, been doubted. There is nothing in any of the recent authorities dealing with the rules of interpretation of ordinary contracts which suggests that the broader and more flexible approach now favoured by the High Court in relation to such contracts, can be applied without qualification to the interpretation of corporate constitutions.”

[35] There is no basis to conclude that her Honour failed to appreciate that the general principles expounded in *Woodside* were to be read subject to the specific cautions discussed in *Lion Nathan*. As the respondent submitted, it is not to the point that her Honour did not make reference to later authorities that state and restate that proposition because she had already recognised that reality without needing to do so.

[36] A further argument, raised by the appellant, that the primary judge erred in her application of this principle of construction when interpreting art 22(c), is the subject of the remaining grounds of appeal:

(a) that her Honour erred in placing insufficient weight upon the textual considerations which indicated that the construction for which the appellant contended was the correct construction (grounds 1 (b), (c), (d)); and

(b) that her Honour erred in too readily permitting the surrounding factual matrix to influence her view as to the proper construction of art 22(c) (ground 2).

Failure to have regard to three textual considerations (grounds 1(b)(c)(d))

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38 Reasons at [18].

39 (2006) 156 FCR 1 at [56].

[37] As will be apparent from what follows, I do not consider that, in construing art 22(c), the primary judge misapplied the relevant principles by failing to give due primacy to the words of the Articles, specifically three textual considerations that the appellant argued indicated that, on its proper construction, the phrase "quarter share" in art 22(c) referred to a quarter share of the respondent's capital.

The textual consideration arising from the interpolation of the definition of Member

[38] One textual consideration which, it was submitted, the primary judge did not sufficiently have regard to, was raised in ground 1(d) and said to be:

> "… that the prohibition on voting created by article 22(c) is expressed to apply to '[a] member' if 'the Member owes more than $500 per quarter share to the Company', where 'Member' is defined in the Articles as 'a holder (or the joint holder) of a share in the capital of the Company'...."

[39] The appellant submitted that, applying a principle of construction applicable to contracts and statutes, that where a term is defined, the Court construes the contract or statute by reading the words of the definition into the operative text,[40] by importing the definition of "Member" into art 22(c), resulted in art 22(c) reading as follows:

> "A member may not vote at general meeting of the Company if the Member [being the holder (or the joint holder) of a share in the capital of the Company] owes more than $500.00 per quarter share to the Company and that amount has been outstanding for more than one month."

[40] It was argued that, read in that way, in art 22(c) there emerged a plain manifestation of an objective intention that the expression "quarter share" referred to quarter of a share in the capital of the respondent, which the opening words of cl 2, "unless the context otherwise requires" did not alter. It was also submitted as being of significance that the word "member" was used twice in art 22(c), but with the difference that on the second occasion the word specified was "Member" as opposed to "member". That difference was said to be meaningful given the presumption that a different concept was intended by the different uses of the word.[41] The appellant argued that the objective intention manifested by the distinction between "member" and "Member" was that the definition in art 2 was to be imported where the word appeared a second time in art 22(c). That submission may be accepted. However, there is no reason to suppose that in reaching her conclusion, the primary judge failed to appreciate that the word in at least the second, if not both, instances in art 22(c) was referring to a shareholder of the respondent. The primary judge was clearly aware of the relevance of the definition of "Member".[42]

[41] What is problematic is the appellant's submission that, in the absence of any qualification of the word "share" in art 22(c), the better construction was that it bore the same meaning as the word "share" in the incorporated definition of "Member", namely, a "share in the capital of the Company". I am unable to accept that argument. The interpolation of the definition of "Member" into art 22(c) assists in the meaning of

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40 *Gilmore v AMP General Insurance Co Ltd* (1996) 67 SASR 387 at 391 (Cox J, Matheson and Duggan JJ relevantly agreeing); *Kelly v The Queen* (2004) 218 CLR 216 at [103] (McHugh J).

41 *Eureka Funds Management Ltd v Freehills Services Pty Ltd* (2008) 19 VR 676 at [52] (Cavanough AJA).

42 Reasons at [16].

that term but does not assist in the construction of the term "share" used therein, which is to be seen as a composite phrase "quarter share" or, at the very least, as qualified by the word "quarter". As the respondent contended, even with the interpolation of the definition of "Member" into art 22(c), the notion of a "quarter share" remains as a significant signpost as to the true meaning of "share" and the appellant is wrong in its assertion that there is an absence of words qualifying the word "share".

The textual consideration arising from the uses of the word "share" in the Articles

[42] A further textual consideration relied on by the appellant as favouring its construction of art 22(c) concerned the use of the word "share" in the Articles, which was raised in ground 1(b) as follows:

> "… each time the word 'share' is used in other provisions of the Articles, it almost always refers to a share in the capital of the first respondent, and when it is used to refer to anything other than a share in the capital of the first respondent this is made clear by express words in the provision."

[43] It was submitted that, where "share" was used in other provisions of the Articles, it generally referred to a share in "the capital of the Company"[43] or "share in the Company",[44] or was used by itself but in a context that made it evident that it was being used interchangeably with those phrases.[45] Reference was made to art 82(a) which refers to the "capital of the Company" being "divided into shares and arts 84 to 87 where the word "share" is used to refer to share certificates being issued and to shareholdings registered under the *Corporations Law*. Reference was also made to art 92 where it was said the word "share" was juxtaposed with the concept of a property interest in a villa by permitting the respondent not to register a "share" transfer if the transferee is not also an owner of the corresponding "Fractional Interest" in the relevant villa.

[44] It was also submitted that, when the word was used in any other sense, that was made clear by the *express* words of the Article, which qualified the word so as to make it plain the term was *not* referring to a share in the respondent's capital. Examples given were arts 12 and 13, where the word "share" was qualified by the phrase "of the Annual Outgoings" and art 113(c), where "share" was qualified by the words "in the relevant lot". The appellant submitted that, on each occasion, other than art 22(c), where the word "share" appeared without qualification, it meant a share in the respondent's capital. In that regard, reliance was placed on the use of the word "share" in arts 21 and 23. It was contended that "share" should be read in the same way in art 22(c) and to do otherwise would be inconsistent with the textual use of the word and contrary to the principle expressed in *Walsh v Alexander*.[46] In that case, in the context of considering an ambiguous phrase, Isaacs J stated:[47]

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43 For example, arts 6(b)-(c), 11(c), 15(b), 78(b) and 84.

44 For example, arts 77 and 81.

45 For example, art 4 (dealing with membership of the respondent), art 5 (referring to the "allot[ment]" of shares), art 12 (describing "subscriber shares" as a subset of "shares"), art 38 (allocating voting rights to joint holders of "shares" in order of names appearing on the "Register of Members"), arts 79-81 (referring to dividends and other moneys to registered holders of "shares"), art 108 (referring to "registered shares"). See AB at 46-47, 51, 58, and 62.

46 (1913) 16 CLR 293.

47 (1913) 16 CLR 293 at 311.

> "… if you find in the one part of a document – whether an Act or other instrument – a word or phrase used in a manner that leaves no doubt as to its definite meaning, there is a presumption that it is so used elsewhere, where, by itself, its meaning is not clear. The immediate context may, of course, alter that; but the presumption is a fair one to start with."

[45] It must be noted firstly, that the submission that "share" appears in arts 21 and 23 without any textual indication as to its meaning overlooks that, in art 21, reference is made to the "holder" of a share which is "registered" and that art 23 refers to the "shares the Member holds in the capital of the Company".

[46] The respondent submitted that, while the word "share" appears many times in the constitution, there is but a low level of ambiguity about its meaning wherever it appears. Articles 12 and 13 aside (in which it is expressly used in the context of "Annual Outgoings") the word is used either as a reference to a share in the capital of the respondent or as a reference to a quarter interest in the villa lots. The central indicator is its association with the word "quarter". That submission has merit. It reflects the real difficulty with the appellant's contention, which was correctly identified by the primary judge. As her Honour put it,[48] while in the "normal course" the plain and ordinary meaning of the word "share" when used in the constitution of a company must be a reference to a share in the "capital of the company", that starting point for the construing of the expression "quarter share" hit a stumbling block, as the word "share" was qualified by the description "quarter".

The textual consideration arising from the use of the word "quarter" in the Articles

[47] The appellant raised a further textual consideration (ground 1(c)) relying on the use of the word "quarter" in the Articles. The appellant submitted that unlike art 22(c), which refers only to a "quarter share", where "quarter" was used elsewhere, it was followed by the qualifying words "interests in a Lot" or "interest in a Lot" or "shares in the relevant Lot" which gave the term its contextual meaning. It was said that (other than in art 22(c)) the phrase "quarter shares" only appears in art 113(c) where it is followed by the words "in the relevant lot", a context which also makes it plain that it is being used interchangeably with the phrase "quarter interests in a Lot". The appellant sought to contrast that position with the word "quarter" as used in art 22(c) in the phrase "quarter share", where it was argued there was no indication that required that phrase to be understood as referring to anything other than a quarter share in the respondent's capital.

[48] I am unable to accept the appellant's submissions. Apart from art 22(c), the only use of the word "quarter" is, as her Honour observed, where it is used referring to a quarter share or interest in the villa lots. The notion of "quarter interests" or "quarter shares" may rationally be understood as referring to "a lot", whereas a share in the capital is an artificial concept. Significantly, as the respondent argued, only one of the two species of "shares" is ever contemplated to be fractional in the Articles and the Resort Administration Agreement referred to in them. The "share" in ownership of the villa lots is fractional, the Fractional Interest being identified as a 1/52 interest held as tenant in common in any lot. Further, ownership is fractional in the

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48 Reasons at [32].

sense that the title to each villa has four quarter proprietary interests held as tenants in common (see recital E of the Resort Administration Agreement). On the other hand, as the respondent submitted, "the shares in the capital of the respondent are not ever, even notionally or colloquially, fractional." The introduction of a concept of quarter interests of shares in the capital of the respondent has no textual support. The absence of words such as "in a Lot" or "in the relevant Lot" in article 22(c) after the words "$500.00 per quarter share" does not account for its construction but is the basis of the ambiguity the primary judge was required to resolve.

Failure to have sufficient regard to contextual considerations

Ground 2(a)

[49] Ground 2 raised three contextual considerations. Firstly, it was submitted that the language in art 22(c) and the language in art 113 were inserted into the Articles by the same amendment dated 31 May 1996. The appellant relied on its previous submission that each time the word "quarter" was used in art 113, it was followed by the words "interests in a Lot", "interest in a Lot" or "shares in the relevant Lot", or it was otherwise plain that the word referred to a proprietary interest in a lot, whereas the language of art 22(c) referred only to a "quarter share". The different terminology used in the same amendment was said to support the proposition that the different terminology used in arts 113 and 22(c) was intended to give rise to a difference in meaning.

[50] The respondent submitted that, while art 22(c) and art 113 are expressed differently, that difference would not be the rational focus of a reasonable member aware of the surrounding circumstances of the arrangement under the Resort Administration Agreement; the rational focus would be on the presence of the word "quarter". The inquiry is objective. The plain meaning of the words of art 22(c) support the construction upheld by the primary judge and count strongly against that advanced by the appellant, for the reasons explained by her Honour.

[51] I do not consider that the fact that both arts 22(c) and 113, which are concerned with voting rights, were inserted by the same amendment is of great moment. Its effect can be seen as neutral as the primary judge found.[49] It simply reveals, as her Honour observed,[50] how easy it would have been for the draftsperson of art 22(c) to set out that quarter share was a reference to a quarter share in a villa, but the failure to do so did not preclude construction of the expression "quarter share" to mean a quarter share in a villa lot, "if that were the construction required by the constitution and the surrounding context".

Grounds 2(b) and (c)

[52] The second contextual consideration raised by the appellant was that voting rights are a fundamental feature of membership, an incident of property in shares, and a matter upon which a number of statutory rights under the Act are dependent. In that regard, reliance was placed on Dixon J's observation in *Peters' American Delicacy Company Ltd v Heath*[51] that shareholders of a company "vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an

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49 Reasons at [33].
50 Reasons at [33].
51 (1939) 61 CLR 457 at 504.

incident of property to be enjoyed and exercised for the owner's personal advantage." It was submitted that these are matters which must be taken to have been known to all parties at the time of the formation of the Articles, and each subsequent amendment to them, and can, therefore, be taken into account as an aid to construction. The appellant submitted that the construction for which it contended had the beneficial effect (likely to have been intended by the incorporators) of confining the circumstances in which art 22(c) would operate to deprive a shareholder of their right to vote and other rights under the Act.

[53] The third contextual consideration relied on was that the document in which art 22(c) appears is a company's constitutive document, having effect as a contract between the company and its shareholders, a matter the subject of ground 1. As recognised by the primary judge, a corporate constitution affects a person by virtue of the share capital they hold in the company to which the constitution relates, a proposition relied on as significant to the question of construction.[52]

[54] The second and third contextual considerations draw on the nature of the right being circumscribed and the quantum of the threshold beyond which a Member of the respondent may not vote at a general meeting. Clearly, the right of a Member of a company to be able to vote at a general meeting is an important one. Nevertheless, as the respondent submitted, that factor does not assist in the constructional inquiry, especially when regard is had to the respondent's purpose of regulating the rights of members to occupy villa lots and the clear intention to preclude voting rights being exercised by a Member owing material sums to the respondent. Her Honour addressed that consideration by observing that, to the extent that the appellant argued that the construction that resulted in a higher threshold was to be preferred, the respondent was able to counter argue that it was in its interests that there be an incentive, in the form of the risk of loss of voting rights, for a member to pay all outgoings and levies that are payable by a Member to the respondent to facilitate the operation of the resort in the manner contemplated by the constitution.[53]

[55] As the respondent submitted, the more significant question was how the disentitlement was intended to operate. There is merit in the contention put forward by the respondent that referring to a readily recognisable integer (a quarter interest in a villa lot) as preventing voting at a lower (but still material) threshold ($119,500 for the appellant[54]), than by reference to an integer (a quarter share in the respondent's share capital) otherwise unknown in the document that resulted in a fifty-two-fold higher threshold ($6,214,000 for the appellant[55]).

Error in having inappropriate regard to the factual matrix

[56] In oral submissions, the appellant raised an additional argument in relation to the ground that the primary judge erred by too readily permitting the surrounding factual matrix to influence her view as to the proper construction of art 22(c). The complaint concerned the primary judge's conclusion that, while it is "not stated expressly" in the Articles that "the minimum number of shares that can be held by a member is 13 shares", that "was the effect of the Articles (including Schedule One) in

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52 Reasons at [32].
53 Reasons at [25], [33].
54 Calculated as $500 x 239.
55 Calculated as $500 x 3107 x 4.

conjunction with the ownership interests of the villas, which relate directly to the numbers of shares in the respondent to which each member is entitled as a result of being a co-owner of a villa". The criticism was made that her Honour's conclusion was not derived from the terms of the Articles but by having regard to the established practice concerning the holding of a particle of shares, as addressed in the affidavit of Kelly. It was thus argued that her Honour erred in failing to apply the relevant principles of construction that gave primacy to the words of the Articles as a constitutive document.

[57] That submission must be rejected. It failed to appreciate, as the primary judge did, the interrelationship (arising from the terms of the Articles) between a Member in the sense of a holder of "a share in the capital of the company" and the express requirement in the Articles that the Member simultaneously be a "Co-owner" of a lot, as defined in the Articles, being a registered owner of a Fractional Interest and the further expressed requirement that the share held corresponded to the Fractional Interest in the lot.

[58] The source of her Honour's conclusion that a minimum parcel of 13 shares was required to be held, representing a quarter share in the lot, was not said to be based on what was stated in the affidavit of Kelly as being the operation adopted by the respondent. Rather, her Honour's conclusion was derived from the terms of the Articles in conjunction with the Resort Administration Agreement. As mentioned, each lot was divided into four title deeds, representing 13 weeks occupation of the lot, and that the lots were to be offered for sale to the public as Fractional Interests. Since each lot is divided into four title deeds, with each representing a period of 13 weeks, it follows that the Fractional Interest represented by each title deed is to 13 weeks entitlement. Further, since there must be a correlation between the shares held in the respondent and the Co-ownership of the Fractional Interests, it follows that a minimum of 13 shares were to be held by a Member. Far from the primary judge proceeding on an erroneous approach, her Honour gave primacy to the Articles identified – that is, arts 6, 8, 23, 82 and sch 1. Article 6(a) requires a Member to also be a Co-owner and art 23 precluded the exercise of the rights and privileges of membership if the member has ceased to be a Co-owner in respect of the same number of Fractional Interests as the number of shares held in the capital of the respondent. Those rights and privileges included the entitlement to occupy an apartment as specified in art 8 by reference to art 82 and sch 1. The conclusion reached by the primary judge as to the minimum number of shares required to be held arose from the terms of the Articles, albeit implicitly, but did not result in her Honour failing to give those terms the required primacy.

Order

[59] For the reasons given, the appeal should be dismissed with costs.

[60] **McMEEKIN J:** I agree with Philippides JA.