SUPREME COURT OF QUEENSLAND

CITATION:	*Re United Enterprises* [2004] QSC 373
PARTIES:	**UNITED ENTERPRISES PTY LTD** **ACN 009 909 451** (applicant) v **NORMAN RUSSELL FRYER** (first respondent) and **RAYMOND SAUNDERS** (second respondent)
FILE NO:	7928 of 2004
DIVISION:	Trial
PROCEEDING:	Applications
DELIVERED ON:	13 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2004
JUDGE:	Wilson J
ORDER:	**(1) A declaration that the issue by the applicant on 11 November 2002 of one A class share to Raymond Saunders and one B class share to Norman Russel Fryer was void *ab initio* and is set aside.** **(2) That the resolution of directors dated 24 September 2002 be removed from the register of members.**
CATCHWORDS:	CORPORATE FINANCE - SHARES -ALLOTMENT AND ISSUE – ISSUE – GENERALLY EQUITY – GENERAL PRINCIPLES – MISTAKE – EQUITABLE RELIEF IN CASE OF MISTAKE – GENERALLY - where mistake led to issue of new shares instead of conversion of existing shares – where intention was to convert shares and mistake was as to form and effect of documents executed - whether issue can be declared void *ab initio* – removal of resolution from register of members *Corporations Act* 2001 (Cth) s254H

Commissioner for Stamp Duties (NSW) v Carlenka Pty Ltd (1995) 41 NSWLR 329, referred to
Baird v BCE Holdings Pty Ltd (1996) 40 NSWLR 374, considered

COUNSEL: I Perkins for the applicant

SOLICITORS: Mallesons Stephen Jaques for the applicant

[1] **WILSON J**: This is an application by the company for a declaration that the issue of certain shares is void *ab initio* for mistake and for the removal of a resolution of directors from the register of members.

[2] The principal contention is that the applicant company's intention was always to convert existing shares but that it effected an issue of shares by mistake.

[3] Until 1994 the applicant's share capital was comprised of one A class share with full dividend and distribution rights and one B class share entitling the holder to a return of paid-up capital in any winding up.

[4] On 5 September 1994 four additional B class shares were issued to Neville Cyril Vassella who was the holder of the other shares. At all times material to this application the respondents have been the directors of the applicant company. They are also the executors of the estate of Mr Vassella who died on 28 September 1994.

[5] By the terms of Mr Vassella's will the residue of his estate was to be held on trust for his children, Annabel and Rachel, until they reached the age of 30. Annabel is now aged 30 and Rachel is now aged 26. Part of Mr Vassella's estate comprises the whole of the issued share capital in the applicant company, namely one A class share and five B class shares.

[6] The respondents apprehended some practical difficulties in the administration of the estate. There was a four year difference in the ages of the beneficiaries and so they would become entitled to distribution four years apart. Further, there was an uneven number of shares to be distributed.

[7] In June 2002 the respondents were advised by Stubbs Barbeller and Grant solicitors (a) to convert the single A class share into two A class shares and (b) to convert the five B class shares into 6 B class shares pursuant to s254H of the *Corporations Act* 2001. That would require a resolution passed at a general meeting.

[8] In August 2002 one of the respondents, Mr Fryer, caused a copy of that advice to be provided to Redmond Van de Graaff solicitors with instructions to give effect to it. On 4 September 2002 Redmond Van de Graaff advised the respondents that they were in agreement with the advice of Stubbs Barbeller and Grant. They went on to say *inter alia*:

> "We have prepared a draft form for the issue of shares, draft minutes of the meeting and draft resolution. The drafts are enclosed. The company has one month from the date that the resolution is passed to lodge a copy with ASIC."

[9] A meeting of directors was subsequently held on 24 September 2002, the minutes of which accord with the draft minutes prepared by Redmond Van de Graaff. Curiously, they contain a side heading, "conversion of shares", but the text of the resolution is in these terms:

> "Resolved to issue one additional A class share and one additional B class share to be held beneficially by N R Fryer and R A G Saunders jointly."

[10] On 11 November 2002 the respondents completed the other forms which the solicitors had sent them. These effected the issue of one A class share and one B class share. The respondents have both sworn that at all times the applicant intended to proceed in accordance with the advice to convert the shares rather than issue any new shares and that they believed the documents prepared by Redmond Van de Graaff would give effect to that advice.

[11] On 4 April 2004 Annabel attained 30 years of age and so became entitled to receive a distribution. About that time Mr Fryer became aware that additional shares had been issued rather than the existing shares being converted into different numbers of shares under s254H of the *Corporations Act*.

[12] As a result there is a potential exposure to capital gains tax when the A class shares are distributed. If the advice had been followed there would not have been this potential liability. The share issue documents constitute agreements between the members receiving the shares and the applicant company.

[13] Counsel for the applicant submitted that the documents had been executed by mistake and hence should be declared void *ab initio*. Rectification is sometimes the appropriate remedy for mistake, but as counsel for the applicant submitted, because the conversion of shares requires a resolution of a general meeting and the resolution passed was merely one of the directors, it would not be the appropriate remedy in this case.

[14] It is necessary first to consider whether this is a case of mistake in the relevant sense. In *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 336, Sheller JA observed of rectification for mistake that "the availability of relief depends upon disconformity between the form or effect of the document executed and the intention of the parties or party who executed it", and in *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 at 383 Young J approved the following passage from Kerr on *Fraud and Mistake*, at 562, in relation to rectification because of mistake:

> "The principle will not apply in a case in which a matter has been completely overlooked on both sides or in a case where the instrument is in accordance with the expressed intention of the parties and has been prepared with full knowledge of their rights but has failed only because the parties have been ill-advised as to the way of giving effect to their intention."

[15] Thus *Baird*, a case where the parties intended to enter into a contract for the transfer of shares and where they did so but where in doing so they acted on wrong advice

as to the stamp duty implications of the transaction was not one of mistake in the relevant sense.

[16] On the other hand, *Carlenka*, a case where as a result of a solicitor drafting amendments to a trust deed misinterpreting its provisions, the amended trust deed failed to express the true intention of the parties to permit distribution of income but not capital, was one of mistake which might be rectified.

[17] In the present case I am persuaded that the intention of the parties was always to convert the existing shares and that they were mistaken as to both the form and effect of the documents which they executed. The issue of the shares ought to be declared void *ab initio*.

[18] The evidence establishes that the register of members has been updated merely by placing the resolution of directors as to the issue of shares on the register. There ought to be an order that that resolution be removed from the register of members. The applicant may then convene a general meeting to consider the conversion of the shares as originally advised by Stubbs Barbeller and Grant.

[19] The orders of the Court will be:

(1) A declaration that the issue by the applicant on 11 November 2002 of one A class share to Raymond Saunders and one B class share to Norman Russell Fryer was void *ab initio* and is set aside.

(2) That the resolution of directors dated 24 September 2002 be removed from the register of members.