SUPREME COURT OF QUEENSLAND

CITATION:	*Art Vanderlay Pty Ltd v Stewart & Anor* [2008] QSC 88
PARTIES:	**ART VANDERLAY PTY LTD (ACN 097 231 680)** (plaintiff) **v** **MARGARET ELIZABETH STEWART** (first defendant) and **DAVID JOHN O'BRIEN** (second defendant)
FILE NO:	3760/07
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 May 2008
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2008
JUDGE:	Daubney J
ORDER:	**Order that:** **1. The application for summary judgment be dismissed.** **2. The costs of and incidental to the application be reserved.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – Summary judgment – where ownership of a group of shares in a company entitled the holder to a leasehold interest in a residential unit – where the defendants agreed to sell their shares to the plaintiff – where the sale conditions provided that the defendants were to use their 'best endeavours' to obtain the approval of the directors of the company to the transfer of shares – where the transfer of shares to the plaintiff did not proceed – where the defendants seek summary judgment in respect of the plaintiffs claim for, *inter alia*, specific performance – whether the plaintiff has no real prospect of successfully establishing that the defendants failed to use their best endeavours to secure the transfer to the plaintiffs *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR

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Manning River Co-Operative Dairy Co Ltd v Shoesmith (1915) 19 CLR 714
Monardo v Complete Hardware Ltd (1990) 20 NSWLR 489
Ozecom v Hudson Investment Group [2007] NSWSC 719

Corporations Act 2001 (Cth)
Uniform Civil Procedure Rules 1999 (Qld)

COUNSEL: TH Arnold for the applicants
RM Derrington SC with CA Johnstone for the respondents

SOLICITORS: Macdonald & Michel for the applicants
Hickey Lawyers for the respondents

[1] 'Hume Lodge' is a complex of seven residential units at Broadbeach on the Gold Coast. Ownership of units within the complex is effectively derived through a scheme colloquially known as 'company title'. The complex is owned by a company, Hume Lodge Pty Ltd ('the Company'). The issued shares in the Company are divided into groups, one for each of the units in the complex.[1] The holding of a particular group of shares in the Company confers on the holder the rights to the 'exclusive occupation and possession of [the] particular unit'.[2] The defendants jointly own 6,500 shares in the Company. They are also the lessees under registered lease no. 601354732 from the Company of the unit to which their shares relate, namely Unit 4 in the complex. The lease is for a term of 99 years from 1 July 1979, and is expressly subject to a requirement that the lessee thereunder continues to hold the specified shares in the company.

[2] It is not in issue that the shares and the lease entitle the defendants to exclusive possession of Unit 4.

[3] By a written agreement dated 31 January 2007 ('the Agreement'), the defendants agreed to sell the shares and their leasehold interest to the plaintiff for a total of $416,000, with settlement in 30 days. The Sale Conditions to the Agreement included the following:

> '2.1 The Vendor agrees to sell and the Purchaser agrees to buy the Shares for the amount of the Purchase Price apportioned for the Shares in Item 7. The Vendor agrees to transfer its interest in the Lease to the Purchaser for the amount of the Purchase Price apportioned for the Lease in Item 7.
>
> 2.3 The Purchaser will, at the Purchaser's own expense and within a reasonable time prior to Completion prepare and deliver to the Vendor or the Vendor's solicitors for signing by the Vendor, the following:

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1 Article 6(a).
2 Article 6(c).

2.3.1 the appropriate transfer document for the transfer of the Shares;

2.3.2 any documents reasonably required by the Purchaser to transfer any leasehold interest or other occupation right of the Vendor in the Land (including the Lease);

2.3.3 any declarations required for assessment of stamp duty on the share transfer, this Agreement, or any documents submitted to the Vendor pursuant to sub-clause 2.3.2.

2.5 If requested by the Purchaser, the Vendor will provide:-

2.5.1 the signed transfer of the Shares and any declaration required under clause 2.3.3; and

2.5.2 the documents required by the Purchaser under clause 2.3.2,

to the Purchaser's solicitors on their undertaking to use the documents for stamping only and to hold the documents on behalf of the Vendor until Completion.

2.6 The balance of the Purchase Price shall be paid on the Date for Completion in exchange for:

2.6.1 the share certificate in respect of the Shares;

2.6.2 the signed transfer of the Shares with the declaration necessary for stamp duty purposes (if not handed over already);

2.6.3 the Vendor's copy of the Lease;

2.6.4 the appropriate documents to transfer the Vendor's interest in the Lease and any other occupation right the Vendor may have in respect of the Land.'

[4] Further, cl 8 of the Sale Conditions provided:

'8.1 Upon entry into this Agreement, the Vendor will without delay make application to the directors of the Company for its approval in accordance with the article of association of the Company to the proposed transfer of the Shares to the Purchaser and the proposed transfer of the Lease to the Purchaser.

8.2 The Vendor and the Purchaser will use their best endeavours to obtain this approval. If approval is not obtained before the Date for Completion, then either party (provided that party has complied with its obligations under this clause) may rescind this Agreement by notice in writing to the other and upon such notice this Agreement will end and clause 12 will apply.'

[5] Clause 12 provided:

> ‘12 Rescission
>
> If this Agreement is rescinded (as different from terminated) under any express right to rescind (as different from a right to terminate for default) conferred by this Agreement, the rescission will be a total rescission of the Contract and
>
> 12.1.1 the Deposit and all other money paid by the Purchaser will be refunded;
>
> 12.1.2 neither party will be liable to pay the other any sum for damages, costs and expenses;
>
> 12.1.3 if the Purchaser is or has been in occupation or in receipt of the rents or profits of the Property, the Purchaser will account to the Vendor for the net rents and profits received or a fair occupation fee for the Property (whichever is the greater) until the date of rescission, and any resulting balance payable by the Purchaser may be deducted by the Vendor from the Deposit and other moneys before returning the same to the Purchaser.’

[6] By cl 15, time was of the essence in the Agreement.

[7] Consistent with the provisions of cl 2.3, on 13 February 2007, the plaintiff’s solicitors sent the defendants’ solicitors a letter attaching a completed transfer of lease form and share transfer instrument, with a request that these transfer forms be signed by the defendants and returned to the plaintiff’s solicitors for stamping. These forms were not executed and returned by the defendants. No explanation for this is given in the material before me.

[8] It also transpired that the application to the Company for consent to the transfer of shares and lease was not made by the defendants, as contemplated by cl 8.1, but was made by the plaintiff, through its solicitor. Again, no explanation is given for this, but I infer that this was done consensually between the parties. On 6 February 2007, the plaintiff’s solicitors wrote to the secretary of the Company, Mr Buck, in reference to ‘Consent to Transfer of Shares and Lease – Unit 4, Hume Lodge’, stating:

> ‘We act for Art Vandelay Pty Ltd as Trustee, the proposed purchaser of Unit 4 Hume Lodge. The proposed seller is Margaret Elizabeth Stewart and David John O’Brien.
>
> Please confirm to us what (if any) information the Directors of Hume Lodge Pty Ltd will require in relation to the application for consent.
>
> We look forward to hearing from you.’

[9] It would appear that a response was received, because in evidence before me is a copy of an email dated 16 February 2007 from the plaintiff’s solicitor to Mr Buck, in which receipt of an email from him of 14 February 2007 was acknowledged.

That email of 16 February 2007 to Mr Buck enclosed a letter giving details of the plaintiff's incorporation, directors, shareholders, issued capital and status as trustee of a particular trust, together with confirmation that it was intended to use the unit for residential purposes, a letter of financial good standing from the plaintiff's bank, and copies of the proposed share and lease transfer forms. The email continued:

> 'Please note that in relation to your request for a copy of the signed instrument of Transfer in respect of the shares and lease, we advise that as part of the standard conveyance procedure, documentation has been forwarded to the vendor's solicitors for execution purposes. We are awaiting the return of documentation duly executed by the vendor at this stage. We would ask that the directors approve the form of such documentation, which will be signed by all parties on or prior to settlement.'

[10] The Company has seven directors, including each of the defendants. The application for the transfer of the shares and lease relating to Unit 4 was considered at a meeting of directors held on 23 February 2007. The first defendant was in attendance. The second defendant did not attend, but had appointed Mr Peter Stewart as his alternate director.

[11] The second defendant has deposed to the fact that, at the time of the directors' meeting on 23 February 2007, he and the first defendant had received a higher offer for the sale of the shares and lease for Unit 4 from another entity, Mary Avenue Properties Pty Ltd, of which the sole director was Mr Buck, who was also a director and the secretary of the Company.

[12] The minutes of the directors' meeting of 23 February 2007 record the following:

> '**Proposed transfer of the Unit 4 Assets to Art Vandelay Pty Ltd as trustee**
>
> Background
>
> 8 Margaret Elizabeth Stewart and David John O'Brien are the holders of both 6,500 ordinary shares in the Company and the leasehold interest in registered lease number 601354732 (G651633), in respect of Unit 4 Hume Lodge (Unit 4 Assets).
>
> Motion 1
>
> 9 That the Directors consent to the requested application, in respect of the transfer of the 6,500 ordinary shares in the Company and leasehold interest in respect of registered lease number 601354732 (G651633), in relation to Unit 4, held by Margaret Elizabeth Stewart and David John O'Brien as seller, to Art Vandelay Pty Ltd as trustee, as buyer.
>
> 10 Motion moved by P Stewart
> and seconded by M Stewart
>
> 11 For full disclosure reasons, Chris Buck tabled his conditional offer made to Unit 4 to acquire all Unit 4 interests for $480,000.

> Meeting adjourned for 20 minutes while Directors sought updated advice. The meeting resumed.
>
> 12. Result: Motion failed – Consent not granted'

[13] The first defendant and second defendant's alternate and one other director voted in favour of the motion, but clearly lost on the numbers.

[14] The minutes of the meeting then record a series of motions being passed by which the directors gave consent to the transfer to Mary Avenue Properties Pty Ltd of the shares and leasehold interests associated with Units 1, 2, 3, 5 and 7. (By a process of elimination, it is to be inferred that Mr Buck directly or indirectly controlled Unit 6.)

[15] On 22 February 2007, the plaintiff lodged a caveat (subsequently registered as no. 710363380) over the land on which the complex is built in respect of its claimed interest as purchaser of the defendants' leasehold interest.

[16] On 5 March 2007, the plaintiff's solicitors wrote to the defendants' solicitors in the following terms:

> 'We understand that the Board of Directors of Hume Lodge Pty Ltd met on Friday, 23 February 2007. At that meeting the Board refused consent for the transfer of the shares and lease in respect of Unit 4.
>
> We request that you obtain instructions from your clients and advise of the following by close of business this Friday, 9 March 2007:
>
> 1. Which members of the Board voted for the transfer and which ones voted against it.
>
> 2. Reasons for the decision of the Board; and
>
> 3. A copy of the minutes of the meeting.
>
> We thank you for your assistance and await your reply.'

[17] On 8 March 2007, the defendants' solicitors responded, saying that their client was not aware of the information sought, and continuing:

> 'We also point out that the contract of sale provided (see clause 8.2) that if the approval of the Board was not obtained before the date for completion, then either party may rescind the agreement by notice in writing to the other and upon such notice, the agreement will end and clause 12 will apply.
>
> Our client gives notice of rescission.
>
> We note that your client has attempted to extend the completion date to 2 April 2007 in accordance with clause 24.1 of the contract on the basis that the consent of the company was not obtained prior to the original date for

> completion being 28 February 2007. We understand that rather than consent not being obtained the consent was rejected. As a consequence we query extension of the settlement date.
>
> We also inquire as to whether the caveat lodged against our client's interest is intended to be removed or whether we are to bring an application to the court for its removal. If such application is required then costs will be sought from your client.'

[18] On 12 March 2007, the plaintiff's solicitors sent a letter disputing the defendants' interpretation of cl 8.2, stating that 'our client does not accept the decision of the Board of Directors of Hume Lodge Pty Ltd and will be enforcing its rights in this respect', and that:

> 'In the circumstances, your client has no entitlement to rescind the Contract. Your client's purported termination of the Contract constitutes a repudiation of the Contract. Our client reserves its rights in this respect.
>
> Our client maintains its notice in accordance with clause 24.1 of the Contract is valid. Our client does not intend to remove the caveat lodged as our client retains a caveatable interest in the property.'

[19] On 29 March 2007, the defendants' solicitors wrote again to the plaintiff's solicitors, advising that senior counsel retained by them had expressed the view that the directors of the Company had breached their duties in the purported exercise of their discretion in refusing to consent to transfer the shares and lease to the plaintiff. The letter continued:

> 'Pursuant to clause 8.2 of the Agreement for Sale your clients are to use their best endeavours to obtain the approval referred to in clause 8.1 of the Agreement.
>
> Your clients have done nothing more than simply apply for the consent of the directors.
>
> In the circumstances, your clients are in breach of their obligations under clause 8.2 of the Agreement for Sale to use their best endeavours to obtain the approval.'

[20] The defendants' solicitors responded, contending that their clients had followed 'all procedures and the directors of the Company have sought [sic] fit to decline this consent'. They continued:

> 'It would be our opinion that our clients have used their best endeavours to obtain the approval. If you believe that our clients have not you may like to particularise how you allege our clients have not used their best endeavours to obtain the approval pursuant to clause 8.1 of the Contract.
>
> We do not accept that our clients are in breach of clause 8.2 of the Contract and, as the consent has not been obtained and as the extended time frame pursuant to clause 24.1 has now expired, our clients now terminate the Contract.'

[21] On 10 April 2007, the plaintiff's solicitors wrote, stating that the steps which should have been taken by the defendants included:

> '1. Liaising with the directors of the Company to ensure their decision in relation to the application was made in accordance with the requirements of the articles of association of the company;
>
> 2. Making inquiries of the directors of the Company following the refusal of the application, as to the reason for the refusal and taking steps to ascertain whether such refusal was reasonable, with just cause, and in accordance with the articles of association of the Company; and
>
> 3. Taking action against the Company (pursuant to s 1071D of the Corporations Act 2001 or otherwise) to obtain the approval in circumstances where the Company, by its directors, has clearly made its decision otherwise than in accordance with the articles of association of the Company.'

[22] The defendants' solicitors joined issue with those assertions in a letter dated 11 April 2007, in which it was also stated:

> 'Also, for the sake of completeness, we point out that our client has not confirmed that the steps conducted by our client were limited to making the application to the Company.'

Despite that assertion, it is clear, as I have already noted, that the application to the Board was, in fact, made by the plaintiff, not the defendants. There is no evidence before me that the defendants took any steps to seek to procure or obtain the consent of the directors other than proposing and voting for the motion at the meeting on 23 February 2007. It would also appear that the defendants took no steps, either at or after that meeting, to challenge or obtain a statement of reasons for the Boards' refusal of the application for consent.

[23] On 27 April 2007, the defendants filed an originating application in the Rockhampton Registry of the Court, seeking an order for the removal of the caveat.

[24] On 3 May 2007, the plaintiff filed a claim and statement of claim in the Brisbane Registry of the Court seeking the following relief:

> '(A) A declaration that the purported termination of the Agreement by the Defendants is void and the Agreement remains on foot.
>
> (B) An order whereby it is adjudged that the Agreement ought be specifically performed and carried to execution.
>
> (C) An order that the Defendants forthwith deliver to the Plaintiff executed copies of the Transfer Forms and the instrument of transfer delivered to the Defendants on 15 February 2007 as pleaded in paragraph 10 of this pleading.

(D) A declaration that the Plaintiff has an interest as purchaser in relation to the interest contained in Lease No. 601354732.

(E) Costs.'

[25] On 14 May 2007, the then Central Judge adjourned the originating application to a date to be fixed and ordered that the file be transferred to Brisbane, presumably pending the outcome of the plaintiff's proceeding.

[26] In its statement of claim, the plaintiff pleads clauses 15, 2.3, 2.5, 8.1 and 8.2 of the Agreement, and further pleads that it was an implied term 'that the defendants would do all things necessary to give the plaintiff the benefit of the Agreement'. The plaintiff then pleads the failure of the defendants to return the signed share and lease transfer forms, averring that this constituted a breach of cl 2.5.

[27] The statement of claim then asserts:

'13. The Company may not unreasonably withhold its approval of any request by the Defendants for the transfer of the Shares.

Particulars

Article 34 of the Articles of Association of the Company.

14. The Plaintiff applied to the Company for approval of the transfer of the Shares and the Lease to it pursuant to the Agreement.

Particulars

(a) Letter dated 6 February 2007 from Hickey Lawyers to the Company; and

(b) Letter dated 16 February 2007 from Hickey Lawyers to the Company.

15. On 26 February 2007, the Company refused the application of the Plaintiff for the approval to the transfer of Shares and the Lease ("the Refusal").

16. The Refusal was:

(a) without just cause within the meaning of s 1071F(2) of the *Corporations Act* 2001; and

(b) unreasonable within the meaning of Article 34.

17. In breach of the terms of the Agreement the Defendants failed to:

(a) make an application to the Company pursuant to clause 8; or

(b) use their best endeavours to obtain such approval pursuant to clause 8;

(c) take all steps necessary to give the Plaintiff the benefit of the Agreement.

Particulars of (b) and (c)

(i) Failing to take any positive steps to procure the approval of the Company of the transfer of the Shares and the Lease to the Plaintiff;

(ii) Failing to make any enquiry of the Company as to the reason for the refusal of the application of the Plaintiff;

(iii) Failing to take any steps to ascertain whether such refusal was reasonable in accordance with Article 4 of the Articles of Association of the Company;

(iv) Failing to take action pursuant to s 1071D to obtain approval as it was entitled to do.

18. By letter dated 8 March 2007, the defendants purported to rescind the Agreement pursuant to Clause 8.2 of the Agreement.

19. By letter dated 12 March 2007, the Plaintiff did not accept the rescission and demanded the Defendants complete the Agreement.

20. The Plaintiff remains ready, willing and able to complete the Agreement.'

[28] The defendants now seek summary judgment pursuant to UCPR rule 293. In order to obtain summary judgment, the defendants must persuade me both:

(a) that the plaintiff has no real prospect of succeeding on all or part of its claim, and

(b) that there is no need for a trial of the claim.

[29] In considering whether I am satisfied as to either, or both, of these matters, an appropriately careful approach is necessary.

[30] Central to the plaintiff's claim is the assertion that the defendants were obliged, but failed, to use their best endeavours to obtain the directors' approval to the proposed transfers of the shares and the lease.

[31] For their part, the defendants submit that, after the meeting of 23 February 2007, there was nothing more that could be done to coerce the directors into approving the proposed transfers, and that they were 'powerless' in the face of the Board's refusal.

[32] The nature and extent of the obligations imposed by a 'best endeavours' clause were described by Mason J in *Transfield Pty Ltd v Arlo International Ltd*[3] in the following terms:

> 'A "best endeavours" clause thus prescribes a standard of endeavour which is measured by what is reasonable in the circumstances, having regard to the nature, capacity, qualifications and responsibilities of the licensee viewed in the light of the particular contract.'

[33] By reference to long-standing authorities, including *Transfield Pty Ltd v Arlo International Ltd* and *Hospital Products Ltd v United States Surgical Corporation*[4], McDougall J, in *Ozecom v Hudson Investment Group*[5], recently distilled the following useful catalogue of relevant principles:

> '[231] The following principles appear from the authorities to which I have referred and others:
>
> (1) An obligation to use best endeavours to achieve an outcome is neither an unqualified obligation to achieve that outcome nor a warranty that it will be achieved.
>
> (2) The content of the obligation to use "best endeavours" must be measured having regard to the contract as a whole and to the factual context in which the best endeavours fall to be exerted.
>
> (3) In ascertaining whether best endeavours have been exerted, the Court should have regard to the qualifications, abilities and responsibilities of the person obliged to exert them.
>
> (4) Stipulation of an obligation to use "best endeavours" necessarily carries with it an understanding that the outcome, towards the achievement of which the best endeavours are to be directed, may not in fact be achieved.'

[34] In order to ascertain whether it can properly be said at this stage of the proceeding that the plaintiff has no real prospect of successfully establishing that the defendants failed to use their best endeavours in the respects particularised in paragraph 17 of the statement of claim, it is necessary to have regard to the relevant articles of association of the Company relating to share transfers.

[35] I have already referred to article 6(c), which confers the rights of exclusive occupation and use of particular units on the holders of the relevant particular groups of shares. That article concludes:

> 'Under no circumstances shall the whole or any part of the shares of any member be transferable to any person except in association with the transfer of occupancy and rights of the associated unit and (subject to

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3 (1980) 144 CLR 83 at 101.
4 (1985) 156 CLR 41, per Gibbs CJ at 64.
5 [2007] NSWSC 719.

> paragraph (h) hereof) the occupancy of a unit shall not be transferred except in association with a transfer of the corresponding shares.'

[36] Under the heading 'Transfer of Shares', article 30 specifies the form of share transfer instrument, and then provides:

> 'The Directors may however in their discretion accept any form of transfer by instrument in writing signed by the transferor and the transferee. The Directors may refuse to register a transfer of shares to any person who in their opinion is not suitable as an occupant of the unit associated with such shares or who is in their opinion not suited to be a member of the Company but they shall not be required to assign any reason for refusing to register a transfer.'

[37] Article 34 provides:

> 'Subject to the provision hereinbefore contained concerning the transfer of groups of ordinary shares any member may with the approval of the Directors transfer shares held by him provided that such approval shall not be unreasonably withheld in the case of fully paid shares. The Directors may refuse to register any transfer of shares upon which the Company has a lien or any transfer of shares which are not fully paid up without being called upon to assign any reason or ground for such refusal.'

[38] The plaintiff's complaints about the defendants' failures to use their best endeavours to obtain the Board's approval really fall into two categories:

(a) that the defendants did not do enough before and at the meeting to persuade the other Directors to vote in favour of the motion, and

(b) that the defendants failed to challenge, or put the plaintiff in the position of being able to challenge, or seek reasons for the Board's refusal.

[39] In relation to the first of these, and leaving to one side for the moment the issues associated with the defendants' failure to sign and return the transfer forms, it is submitted for the plaintiff that the content of the defendants' 'best endeavours' obligation in the circumstances of this case required, inter alia:

(a) That the defendants, in their capacity as shareholders, express to the directors their desire that the Board give its approval for the exercise of their right of alienation of the shares;

(b) That the second defendant, in his capacity as a director, attend the meeting and express his desire that the Board give its approval;

(c) That the defendants attempt to negotiate or lobby with the other directors to secure their vote in favour of the motion;

(d) That the defendants make inquiries of the other directors as to any legitimate concerns about the proposed transfer for the purpose of allaying or overcoming those concerns;

(e) That if approval was not given on the first occasion on which it was sought, that the defendants seek information as to the basis upon which the other directors had refused to grant approval and, if necessary, make a further application to the Board after providing information to overcome any concerns which the members of the Board may have.

[40] I have omitted from this catalogue a submission made on behalf of the plaintiff that the defendants should have made application to the Board for approval of the transfer of the shares. As I have already noted, the application seems to have been consensually made by the plaintiff, rather than the defendants, and it appears that nothing turns on which side formally lodged the application with the Company.

[41] The other issues raised by the plaintiff about what the defendants allegedly ought to have done prior to and at the meeting do, however, in my view raise matters which are inapposite for determination in a summary way. As is clear from the authorities to which I have referred, the question whether the defendants did, in fact, achieve the standard required of a 'best endeavours' clause calls for an investigation and determination of what is reasonable in the circumstances, having regard to the qualifications, abilities and responsibilities of the defendants. There is presently no evidence before me on which I could make an informed assessment of these matters one way or the other.

[42] In relation to the plaintiff's second category of complaint, it will be recalled that the defendants' submission was that the defendants were 'powerless' in the face of the refusal of consent by the directors. The defendants referred to the terms of Article 30 (as set out in [36] above) and submitted that, by this article, the directors:

(a) Were given a broad discretion to refuse registration of a transfer based on a personal opinion – as to the suitability of the transferee as either an occupant of one of the units in the complex or a member of the company, and

(b) Were further given a right not to assign any reason for refusing to register a transfer.

[43] It was submitted on behalf of the defendants that 'by a plain reading of the Articles the defendant cannot, it seems, seek from the Company what it need not supply – reasons for the refusal'.

[44] Whilst that position may ultimately be vindicated, I am unable to accept it uncritically on an application for summary judgment. There are a number of issues which, in my view, need to be investigated and determined at trial.

[45] It will be noted that there is an apparent tension between the terms of Article 30 and those of Article 34:

(a) Article 30 permits the directors to refuse to register a transfer to a person who is, in their opinion, not suitable as an occupant or not suited to be a member of the Company. The directors are 'not required to assign any reason for refusing to register a transfer';

(b) Article 34, on the other hand, relevantly provides that 'any member may with the approval of the directors transfer shares held by him provided that such approval shall not be unreasonably withheld in the case of fully paid shares'. The reference to this being subject to 'the provisions ... concerning the transfer of groups of ordinary shares' is, I think, a reference to the terms of Article 6(c) which I have set out above at [35].

[46] Even acknowledging that, on its face, Article 30 confers a power to refuse to register a transfer while Article 34 imposes a requirement to obtain approval for a transfer, it would be inappropriate for me on this application to express a concluded view as to how the tension between those articles should be resolved.

[47] It is apparent that the defendants rely on Article 30 to assert that the directors' decision was beyond challenge, and that the defendants were 'powerless'. True it is that Article 30 confers a wide discretion on the directors to refuse to register a transfer and relieves them of an obligation to give reasons. But, as was said by Gibbs J in *Ascot Investments Pty Ltd v Harper*[6] (omitting references):

> 'The directors are bound to exercise their discretion bona fide in what they consider to be the interests of the company, and not for any collateral purpose, but subject to that qualification their discretion is absolute and uncontrolled. ... The cases cited establish that the onus of proving that the directors in refusing registration did not act in good faith in what they considered to be the interests of the company lies on those who challenge their decision.'

[48] Thus, a decision made by directors even under a provision in terms as wide as Article 30 may be judicially reviewed if it be established that the discretion was exercised fraudulently, capriciously, or for a collateral purpose.[7] To the extent, however, that Article 34 prevails, it is clear that a decision by directors to withhold approval of a transfer of shares may be challenged, and judicially reviewed, if it be established that the approval was unreasonably withheld.

[49] It is sufficient to observe that, in my opinion, the circumstances of the meeting on 23 February 2007 and the resolutions passed at that meeting concerning the other units after the defeat of the motion concerning Unit 2 all raise questions for investigation at trial as to whether the directors who voted against the motion concerning Unit 2 did so for a collateral purpose (i.e. to advance the cause of

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6 (1981) 148 CLR 337 at 347.

7 *Manning River Co-Operative Dairy Co Ltd v Shoesmith* (1915) 19 CLR 714 per Griffith CJ at 717.

contracts in which they had an interest) and whether the decision to withhold approval in relation to Unit 2 was reasonable.

[50] Accordingly, it seems to me that there are questions for trial as to whether the defendants were, as they contend, 'powerless' in the face of the Board's decision.

[51] That in turn raises the question as to whether the defendants should have observed their 'best endeavours' obligations either by challenging the Board's decision themselves, or by putting the plaintiff in a position in which it could have challenged the Board's decision. In respect of the latter option, s 1071F of the *Corporations Act* relevantly provides to the effect that if a Board of directors refuses to register or refuses to consent to or approve the registration of a transfer of shares, the transferee may apply to the Court for relief. If the Court is satisfied that the refusal was 'without just cause', the Court may, *inter alia*, order that the transfer be registered. The plaintiff complains, however, that it was precluded from making such an application because of the defendants' failure to execute the share transfer forms. It would appear that, in order for a party to be a 'transferee' for the purposes of s 1071F, an actual transfer needs to be in existence, not merely an agreement to transfer or a proposed transfer.[8] These inquiries as to whether the defendants met their 'best endeavours' obligations necessarily raise questions as to the reasonableness of their conduct in the circumstances, in the sense referred to above, and are inapposite for summary determination on an application such as this.

[52] It follows that I am not satisfied in this case either:

(a) That the plaintiff has no real prospect of success, or

(b) That there is no need for a trial of the claim.

[53] I therefore order:

1. The application for summary judgment be dismissed.

2. The costs of and incidental to the application be reserved.

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8 *Monardo v Complete Hardware Ltd* (1990) 20 NSWLR 489 at 491.