

SUPREME COURT OF QUEENSLAND

CITATION: **IN THE MATTER of CENTRAL PETROLEUM LIMITED ACN or ARBN: ACN 083 254 308 [2012] QSC 191**

PARTIES: **PETROLEUM NOMINEES PTY LTD (ACN 156 204 867)**
(applicant)
v
CENTRAL PETROLEUM LIMITED (ACN 083 254 308)
(respondent)

FILE NO/S: BS 4980 of 2012

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 June 2012

DELIVERED AT: Brisbane

HEARING DATE: 12 June 2012

JUDGE: Philippides J

ORDER: **1. The application is refused.**

COUNSEL: P Dunning SC, with N Ferrett, for the applicant
B O'Donnell QC, with A Stumer, for the respondent

SOLICITORS: Hopgood Ganim for the applicant
Allens for the respondent

The application

- [1] Petroleum Nominees Pty Ltd (PNPL) seeks a declaration that a general meeting of the respondent company Central Petroleum Limited (CTP) scheduled to be held at noon on 22 June 2012 (“Noon Meeting”) has been called for an improper purpose in contravention of s 181 of the *Corporation Act 2001* (Cth), that being to defeat the effect of the extraordinary general meeting convened for 2.00 pm on the same day. An injunction is also sought pursuant to s 1324 of the Act restraining CTP from conducting any business at the meeting.

Background

- [2] CTP is an ASX listed company which holds a number of mining tenements around Australia and is engaged in exploration for various resources. The applicant PNPL owns about 4.06 per cent of the total issued shares.
- [3] On 22 March 2012 the directors of CTP were Dr Askin (who was also the chairman), Mr Faull, Mr Dunmore and Mr Heugh. Mr Heugh had until that day also acted as CEO, his position being terminated on 22 March 2012.
- [4] On 3 April 2012, a group of shareholders not associated with the applicant and holding 10.14 per cent of the issued shares served a requisition notice pursuant to s 249D of the Act, requesting that CTP call a general meeting to consider the removal of Dr Askin, Mr Faull and Mr Dunmore as directors of CTP and their replacement by Mr Cockcroft, Mr Goodall and Mr Phillis. That notice was held to be invalid by the directors and therefore not acted upon.
- [5] On 11 April 2012, CTP issued an ASX announcement advising that the directors intended to move a resolution at a general meeting to remove Mr Heugh as a director of CTP.
- [6] On 22 April 2012, CTP received a further requisition notice pursuant to s 249D of the Act from shareholders holding 6.38 per cent of the issued shares in CTP. The shareholders who supported that notice were a sub-set of the shareholders who supported the earlier invalid requisition notice. The requisition notice again requested the directors of CTP to convene a general meeting to consider the removal of the three directors and their replacement by the three directors mentioned.
- [7] On 24 April 2012, CTP issued an ASX announcement advising that it accepted the validity of the requisition notice and would take the necessary action to convene a general meeting of shareholders.
- [8] Effective from 25 April 2012, the board of CTP appointed two new directors, Mr Whittle, a geologist with over 42 years of technical and managerial experience in the petroleum exploration and production industry and Mr Elsholz, a chartered accountant who had been CTP's chief financial officer and a company secretary since August 2009. (Those appointments were made pursuant to clause 13.4 of the Constitution of CTP which provides that the directors of CTP may at anytime appoint a person to be a director, but further specifies that any director so appointed shall hold office only until the next general meeting and will then become eligible for re-election.)
- [9] The board of CTP issued a Notice of Meeting dated 6 May 2012 in response to the requisition notice delivered on 23 April 2012. The general meeting was called for 2.00 pm on 22 June 2012 (the 2.00 pm meeting). The Notice of Meeting advised that 12 resolutions would be put forward as follows:
- (a) Resolutions 1 to 3 – concerning the ratification of share issues and approval for the placement of options;
 - (b) Resolutions 4 and 5 – proposing the re-election of Mr Whittle and Mr Elsholz as directors;
 - (c) Resolution 6 – proposing the removal of Mr Heugh as director;

- (d) Resolution 7 to 9 – proposing the appointment as directors of Mr Phillis, Mr Goodall and Mr Cockcroft;
- (e) Resolutions 10 to 12 – proposing the removal of Mr Dunmore, Mr Faull and Mr Askin.

Resolutions 7 to 12 were included pursuant to the requisition notice issued on 23 April 2012 and the Notice of Meeting advised shareholders that the existing board of CTP (other than Mr Heugh) opposed those resolutions.

- [10] On 15 May 2012, CTP issued an ASX announcement that Mr Richard Cottee was to be appointed a director and CEO of CTP. The ASX announcement included information about Mr Cottee’s background, in particular his involvement in the Australian oil and gas industry with respect to Queensland Gas Company, which had been sold to BG Group for \$5.7 billion and his position as non-executive chairman of Austin Exploration Limited and as a principal in Freestone Energy Partners Pty Ltd (“Freestone”). The ASX announcement also advised that shareholders would be asked to approve the appointment of Mr Cottee as a director of CTP and also the appointment as directors of Mr Herrington and Mr Gasteen.
- [11] The agreement to retain Mr Cottee as director and CEO of CTP is conditional upon:
 - (i) The removal of Mr Heugh as a director of CTP;
 - (ii) The appointment of Mr Herrington and Mr Gasteen as directors of CTP;
 - (iii) The defeat of the resolutions to remove Dr Askin, Mr Faull and Mr Dunmore as directors of CTP;
 - (iv) The defeat of the resolutions to appoint Mr Phillis, Mr Goodall and Mr Cockcroft as directors of CTP; and
 - (v) The issue of an option package to Mr Cottee, or his company Freestone Energy Partners Pty Ltd.¹
- [12] By Notice of Meeting dated 16 May 2012 (and announced on 21 May 2012) CTP called a general meeting for 12 noon on 22 June 2012 (the Noon Meeting) with four resolutions being proposed:
 - (a) Resolution 1 – the re-election of Mr Whittle as a director;
 - (b) Resolution 2 – the removal of Mr Heugh as a director and the appointment of Mr Cottee as a director;
 - (c) Resolutions 3 and 4 – the appointment as directors of Mr Herrington and Mr Gasteen.
- [13] The Noon Meeting is thus to immediately precede the 2.00 pm meeting on 22 June 2012. The second Notice of Meeting (that is for the Noon Meeting) lists the resolutions to be proposed at both meetings and outlines in summary form the recommendations of the directors (other than Mr Heugh) in relation to the resolutions to be proposed at both meetings. It is evident from that Notice of Meeting itself that, in the event that the resolutions for the re-election of Mr Whittle and the removal of Mr Heugh are passed at the Noon Meeting, the chairman of CTP

¹ (That is apparent from the Noon Meeting Notice and I do not read Mr White’s affidavit as being to the contrary as contended by counsel for the applicant.)

will propose that the resolutions in relation to those directors be withdrawn from the 2.00 pm meeting.

- [14] Subsequent to the announcement of the Noon Meeting, Mr Goodall, Mr Cockcroft and Mr Phillis have withdrawn their consent to act as directors of CTP. In a letter to CTP's chairman and disclosed in an ASX announcement by CTP on 22 May 2012, those three stated that they supported the appointment of Mr Cottee, Mr Gasteen and Mr Herrington as CEO and directors respectively.
- [15] CTP can have a maximum of six directors (cl 13.1 of the Constitution of CTP): Following the withdrawal of Mr Goodall, Mr Cockcroft and Mr Phillis as candidates for directorships, the number of candidates for directorships on 22 June 2012 will be equal to or less than the number of vacant directorships. As counsel for CTP pointed out, the following pertains:
- (a) If the proposal to remove Mr Heugh from the board is not accepted, there will be one candidate (Mr Whittle) for two vacancies (the positions vacated by Mr Whittle and Mr Elsholz pursuant to clause 13.4 of the Constitution). There will be only one candidate because Mr Cottee, Mr Gasteen and Mr Herrington have indicated that their willingness to act as directors is dependent the removal of Mr Heugh;
 - (b) If the proposal to remove Mr Heugh from the board is accepted, there will be four candidates (Mr Whittle, Mr Cottee, Mr Gasteen and Mr Herrington) for four vacancies (the positions vacated by Mr Heugh, Mr Faull, Mr Whittle and Mr Elsholz).
- [16] If the resolutions to remove any of Dr Askin, Mr Faull and Mr Dunmore are approved in the 2.00 pm meeting, that will create additional directorship vacancies.
- [17] By further requisition notice dated 29 May 2012, a group of shareholders, including the applicant PNPL, requested pursuant to s 249D of the Act, the convening of a general meeting to consider resolutions for the removal of Dr Askin, Mr Faull, Mr Dunmore, Mr Whittle and Mr Elsholz as directors of CTP and their replacement by Mr Schoch, Mr Singh and Mr Kin.
- [18] It is in that context that the applicant seeks the declaratory and injunctive relief referred to.

Improper purpose?

- [19] It is contended on behalf of the applicant that the calling of the Noon Meeting has "the effect of neutering the attempts by the requisitioning shareholders to remove members of the existing board at the 2.00 pm meeting". It is also contended that, while the ostensible purpose of convening the meeting was to obtain approval of a new package of measures involving the appointment of a new CEO, close scrutiny reveals that the board acted for an ulterior and improper purpose.
- [20] The applicant sought to make something of the fact that the directors of CTP had not put affidavit material before the court as to what motivated them to act as they did in convening the Noon Meeting. It was also asserted that the motivation of the directors and their improper purpose could be inferred from a number of factors including:

- (a) The threat to the directors' position represented by the 2.00 pm meeting;
- (b) The directors' failure to include the business relevant to the Freestone proposal on the agenda for the 2.00 pm meeting;
- (c) The fact that, if the directors were unable to include the business relevant to the Freestone proposal on the agenda for the 2.00 pm meeting, they could nevertheless have chosen the much less confusing path of convening a meeting a reasonable period after the 2.00 pm meeting;
- (d) The directors' decision to bundle the issues of Mr Heugh's removal with the appointment of Mr Cottee when there was no need to do so;
- (e) The directors' failure, despite invitation, to explain their reasons for adopting the approach they have;
- (f) The prospect of confusion among shareholders which it was said must have been obvious to the directors;
- (g) The fact that the directors must have appreciated that some shareholders might not distinguish between the two meetings and consider that they had already cast votes for the meeting to be held on 22 June 2012;
- (h) The directors having allegedly been put on notice of several of the issues in correspondence with a shareholder the day before the directors convened the Noon Meeting;
- (i) The calling of the Noon Meeting despite not having all the Freestone proposal ready for approval.

[21] No submission was made that the conditional agreement entered into by CTP with Mr Cottee was entered into for an improper purpose. The only contention regarding an improper purpose was directed to the calling of the Noon Meeting. The evident purpose of the Noon Meeting is to allow shareholders to vote on the resolutions as already outlined concerning the appointment of Mr Cottee, Mr Herrington and Mr Gasteen. Those appointments are part of an overall proposal which also includes the employment of Mr Cottee as CEO of the company (which has been styled the "Freestone proposal"). The Noon Notice of Meeting addressed the relevant background of those individuals. It also included a statement from the directors (excluding Mr Heugh) in favour of the appointment of Mr Cottee as a director which outlined pertinent matters relating, *inter alia*, to his record in developing QCG. An explanation was also provided for the reason for two general meetings being called and the effect of the two general meetings. It is to be borne in mind that the directors who convened the Noon Meeting (Dr Askin, Mr Faull, Mr Dunmore, Mr Whittle and Mr Elsholz) did not hold sufficient shares in CTP, even as a group, to constitute a substantial voting bloc in general meetings. As counsel for the respondent contended, the success or otherwise of the resolutions proposed for the Noon Meeting depend on a sufficient number of shareholders voting in favour of them. The decision to call the Noon Meeting on its own could not defeat the effect of the 2.00 pm meeting.

[22] I am unable to draw inferences as urged by counsel for the applicant in support of the allegation of improper purpose from the convening of the meeting at a time immediately before the 2.00 pm meeting. That matter was addressed by Mr White in his affidavit in paragraph 11. Objection was taken to that paragraph. The objection was unfounded as Mr White simply deposes to discussions that he had as

group general counsel and company secretary with Dr Askin and Mr Elsholz as to when the second convened general meeting should be held. (The matter is in any event also addressed in the explanatory statement to the Noon Notice of Meeting.) Mr White deposed that the decision to have the Noon Meeting on the same day as the 2.00 pm meeting was to avoid inconvenience to shareholders in being required to attend two meetings only a few days apart. Further, it was more convenient to convene another meeting before the 2.00 pm meeting rather than after the 2.00 pm meeting, given the numbers of matters to be considered at the 2.00 pm meeting. Moreover, it was only subsequent to the despatch of the 2.00 pm Notice of Meeting that CTP entered into a binding conditional agreement with Freestone. Consequently the voting form with the resolutions for that meeting had already been despatched.

- [23] As regards the applicant's submissions concerning any inferences to be drawn from the Noon Meeting being called, notwithstanding that not all of the Freestone proposal was ready for approval, it is pertinent to note that, while no vote on the option package is to occur on 22 June 2012, according to the Noon Notice of Meeting, shareholders will have the details of it before the 22 June meetings.
- [24] In contending that the calling of the Noon Meeting had the effect of neutering the attempts by the requisitioning shareholders to remove members of the existing board at the 2.00 pm meeting, counsel for the applicant acknowledged that was always open to shareholders simply to vote against the resolutions proposed at the Noon Meeting. However, it was argued that that reasoning fails to take into account the following matters:
- (a) Members can vote before the meeting by electronic means;
 - (b) There is no practical way of ensuring that all those who have already cast their votes for the 2.00 pm meeting will see the notice of the Noon Meeting, absorb its import and cast votes in respect of the Noon Meeting;
 - (c) The propensity for confusion among shareholders arising from calling two meetings with overlapping business in close temporal proximity.
- [25] I do not consider that there is any substance to these concerns. The Notice of Meeting made it clear that there was a mechanism for changing a vote if made before the meeting by electronic means. The Noon Meeting Notice included a consolidated list of all the resolutions to be considered at both the Noon Meeting and the 2.00 pm meeting and the board's recommendation (excluding Mr Heugh) on how to vote if the Freestone proposal is to be supported. The summary of the resolutions to be put at the two meetings is repeated in a separate document sent to shareholders with the Notice of Meeting. The Noon Meeting Notice also clarified that Mr Cottee, Mr Gasteen and Mr Herrington would resign as directors if any of resolutions 7 to 12 were passed in the 2.00 pm Meeting. (Resolutions 7 to 12 proposed the appointment of new directors and the removal of Dr Askin, Mr Faull and Mr Dunmore.)
- [26] An allied contention was made that the Noon Meeting Notice did not properly explain how any conflict between votes already cast and future votes over the same resolutions is to be resolved. That contention cannot be sustained given that the Noon Meeting Notice expressly addressed the position of those who had already cast a vote stating (on page 4):

“If you have submitted a Voting Form for the General Meeting to be held at 2pm on 22 June 2012, **YOU SHOULD ALSO COMPLETE** the Voting Form attached to this Notice, or submit your vote at the website outlined above, to ensure that your vote is counted at this General Meeting.

If you have lodged a Voting Form for the meeting to be held at 2pm on 22 June 2012 and as a result of this Notice of meeting you wish to change your vote, please contact the Company Secretary on +61 (0)8 9474 1444 and the Company will arrange for a new Voting Form to be sent to you, alternatively you can log on to www.investorvote.com.au and follow the instructions to update your vote.”

- [27] Objection was taken to the last sentences of paras 10 and 22 of Mr Schoch’s affidavit, those objections were properly taken but in any event, I do not consider that advanced the applicant’s case. The same may be said in respect of the objections to Mr Alcock’s affidavit.
- [28] In the circumstances, I am unable to infer that the Noon Meeting was convened in order to defeat the effect of the 2.00 pm meeting. There is nothing to impede shareholders from voting to remove the three directors Dr Askin, Mr Faull and Mr Dunmore at the 2.00 pm meeting.
- [29] Nor do I consider that injunctive relief should be granted pursuant to s 1324 of the Act. In order to obtain the relief sought the applicant must demonstrate a contravention or proposed contravention of the Act. The only provision relied upon by the applicant is s 181 of the Act. As already stated, I do not accept that an improper purpose has been demonstrated as motivating the convening of the Noon Meeting.
- [30] In the circumstances, the application is refused. I will hear submissions as to costs.