SUPREME COURT OF QUEENSLAND

CITATION:	*Pauls Trading Pty Ltd & Anor v Norco Co-Operative Ltd* [2006] QSC 015
PARTIES:	**PAULS TRADING PTY LTD** **ACN 009 804 077** (first plaintiff) and **DAIRYFIELDS PTY LTD** **ACN 054 701 623** (second plaintiff) v **NORCO CO-OPERATIVE LTD** **ARBN 009 717 417** (defendant)
FILE NO:	9327 of 2005
DIVISION:	Trial
PROCEEDING:	Application for declaration
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	8 February 2006
DELIVERED AT:	Brisbane
HEARING DATE:	2 February 2006
JUDGE:	Chesterman J
ORDER:	**1. The plaintiffs' application is dismissed; and** **2. A declaration that on or about 22 October 2005 each plaintiff became a defaulting participant within the meaning of the joint venture agreement dated 27 June 1996 between the plaintiffs and the defendant by reason of the transfer of shares in Dalmata SrL and Parmalat Belgium SA to Parmalat SpA by Parmalat Finanziania SpA on or about 1 October 2005.**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the parties entered into a joint venture agreement - under the agreement, a participant may become a "Defaulting Participant" if effective control of the participant is altered without the other participants' consent – where there was an option for other participants may acquire defaulting participants' interest in the joint venture agreement – issues of construction – whether on proper construction of

the agreement there could only be one effective change of control to enliven the option – whether there was an effective change of control in the plaintiffs

CORPORATIONS – HOLDING, SUBSIDIARY AND ASSOCIATED COMPANIES – ASSOCIATED COMPANIES – operation of ss 46B(1) and 49 of the *Corporations Act* – whether a company at least four steps removed in the corporate hierarchy is an associate

Corporations Act 2001 (Cth), ss 46B(1) and 49

Walker v Wimborne (1976) 137 CLR 1, considered

COUNSEL: Mr K Wilson SC with Mr D de Jersey
Mr H Fraser QC with Ms K Dawson

SOLICITORS: Biggs & Biggs for the applicants
Clayton Utz for the respondents

[1] As at June 1996 the defendant operated a business principally involving the processing, packaging and marketing of milk in parts of Queensland and New South Wales. At the same time, the first plaintiff ('PT') and the second plaintiff ('DF') also carried on a business principally involving the processing, packaging and marketing of milk in parts of Queensland and New South Wales. The business of the plaintiffs was conducted by them under lease from a company called Gold Coast Milk Pty Ltd ('GCM'). GCM was owned by PT and DF.

[2] By a Joint Venture Agreement (the 'JVA') dated 27 June 1996 each of the defendant ('Norco'), PT and DF agreed to associate themselves in an unincorporated joint venture, among other things, to jointly operate and expand each of their existing businesses involving the processing, packaging and marketing of milk.

[3] Clause 9 of the JVA defines the circumstances in which a participant under the JVA becomes a 'Defaulting Participant'. It provides a procedure under clauses 9.2 and 9.3 whereby the remaining participant, or participants, have an option to acquire the interest of Defaulting Participants.

[4] Clauses 9.1(a)(15) and 9.1(a)(20) relevantly provide, *inter alia*:-

> *"If, for any reason:*
>
> *(15) Effective control of a Participant or GCM is altered without the prior written consent of the other Participants from that subsisting at the Commencement Date and in this paragraph effective control alters where any person or any person together with their Associates:*
>
> *(a) becomes entitled to exercise (directly or indirectly) voting power at any general meeting of a Participant or GCM in excess of 50% of the votes which may be cast thereat; or*

(b) acquires the capacity to appoint at least half of the number of directors of a Participant or GCM…

THEN that Participant will become a Defaulting Participant …

(20) if the default or occurrence is other than a Cash Call Default and such default or occurrence is not capable of remedy, on the expiry of 21 days after the default or occurrence."

[5] The 'Commencement Date' under the JVA was 1 July 1996.

[6] Since 1 July 1996 all of the shares of PT were held by Pauls Limited which subsequently changed its name to Parmalat Australia Limited ('PA').

[7] In August 1998 all of the shares in PA were acquired by Parmalat Australia Pty Ltd which subsequently changed its name to Parmalat Pacific Holdings Pty Ltd ('PPH').

[8] At all times since August 1998, PPH has held all of the shares in PA.

[9] At all times since August 1998, all of the ordinary shares in PPH have been held by a company known as Parmalat Belgium SA.

[10] There are also non-voting redeemable preference shares issued by PPH. At all times from August 1998 to 1 October 2005 they have been held by a company called Parmalat Finanziaria SpA. It is accepted by the plaintiffs and the defendant that because of the non-voting character of those shares, the ownership of them is irrelevant to the issues that have to be determined.

[11] Since August 1998 very nearly all of the shares of Parmalat Belgium SA have been held by a company called Dalmata SrL. (Parmalat Finanziaria SpA held the remaining shares in Parmalat Belgium SA, which it later transferred to Parmalat SpA, as the plaintiffs acknowledge in their submissions. However, that parcel of shares is so small that it may be disregarded for present purposes.)

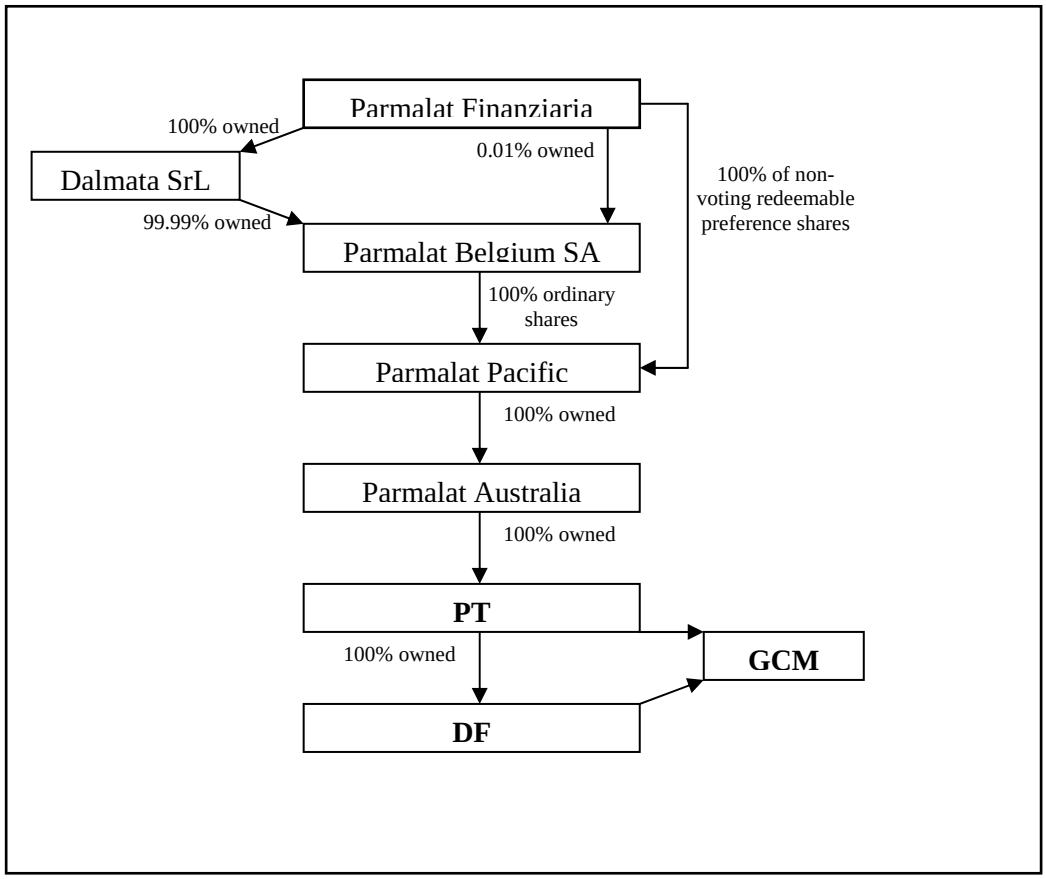
[12] At all times from August 1998 to 1 October 2005 all of the shares of Dalmata SrL were held by Parmalat Finanziaria SpA.

[13] In December 2003 the Italian Government issued Letters of Decree 347 of 2003. Pursuant to the Decree, Dr Enrico Bondi was appointed as the Extraordinary Administrator of Parmalat Finanziaria SpA.

[14] On 1 October 2005, the Civil and Criminal Court of Parma in Italy gave effect to a composition proposal for Parmalat Finanziaria SpA.

[15] On and after 1 October 2005, and pursuant to the composition which had been approved and then given effect by the Court, the assets of Parmalat Finanziaria SpA (including its shares in Dalmata SrL and Parmalat Belgium SA) were transferred to a new and separate company, Parmalat SpA. Parmalat SpA thereupon replaced Parmalat Finanziaria SpA as the ultimate holding company of PA, PT, and DF.

[16] The corporate structure of what might be called the Parmalat companies including the plaintiffs may be seen from the helpful diagram attached to the defendant's submissions:



[17] As a result of the order made by the Civil and Court of Parma the ultimate holding company shown in the diagram, Parmalat Finanziaria SpA was replaced by a new company, Parmalat SpA to which was transferred the shares owned formerly by Parmalat Finanziaria in Dalmata SrL and Parmalat Belgium SA.

[18] The plaintiffs seek a declaration that neither of them is 'a defaulting participant within the meaning of the … joint venture agreement …'. It is accepted that the declaration sought is too wide and that what is wanted is a declaration that neither applicant became a defaulting participant within the meaning of cl 9.1(a)(15) of the JVA by reason of the transfer, on 1 October 2005, of the shares held by Parmalat Finanziaria SpA in Dalmata SrL and Parmalat Belgium SA to Parmalat SpA. The defendant counter-claims for a declaration in converse terms.

[19] The core issues raised by the pleadings are:

(a) whether, on the proper construction of clause 9.1(a)(15) of the JVA, in respect of each joint venture participant, there could only be one effective change of control from that subsisting at the commencement date, with the result that there could only be one opportunity to exercise the option created by clause 9.2 of the JVA, for an event falling within clause 9.1(a)(15);

(b) whether effective control of either of the plaintiffs was altered by the change in control of a company at least 4 steps (in the case of PT) or 5 steps (in the case of DF) removed in the corporate hierarchy; and

(c) if the answer to (b) is in the affirmative, when was the effective control of each plaintiff altered. This issue relates to the time limit within which the default option could be effectively exercised by Norco.

[20] Before turning to consider these questions it would be helpful to recite some further facts which concern the events in 1998 when Pauls Limited was taken over by PA.

[21] At the same time PT intended to acquire all of the shares in DF. To give effect to these arrangements:

(a) on 7 August 1998 PT and Norco executed a "Norco Pauls Agreement;"

(b) on 7 August 1998 PT DF and Norco executed an "NDM Agreement;"

(c) on 21 December, 1998 each of the parties executed a "Deed Varying Joint Venture Agreement;"

(d) on 30 November, 1998 each of the parties, together with Pauls Limited and Pauls Ice Cream and Milk Limited executed a "Trade Mark Licence Agreement."

[22] Pursuant to the Norco Pauls Agreement, Norco was paid $5 million by PT, upon the acquisition of all of the shares in DF. The interests of the parties in the joint venture agreement were then adjusted such that each of the Pauls group of companies and Norco respectively held 50%. The name of the joint venture was changed. It should be noted that as part of this rearrangement of the joint venture and amendments to the joint venture agreement cl 9.1(a)(15) was left untouched.

[23] Clause 9.1(a)(15) of the JVA describes one of a number of different events which can give rise to a default by a participant. Should a default occur the non-defaulting participants have an option to buy out the defaulter's 'interest' in the joint venture pursuant to cl 9.2 and cl 9.3 of the JVA. Clause 9.2 provides that:

> 'Each Defaulting Participant upon becoming a Defaulting Participant grants to the other Participants an option to purchase its Interest … which may be exercised ... on the occurrence of an event set out in [clause] 9.1(a) … (20) and will be on the terms and conditions set out in Clause 9.3.'

That clause sets out how the price for the defaulting participant's interest is to be determined and the manner in which the transfer of the interest is to occur.

[24] The commercial purpose of cl 9.1(a)(15) is, I think, clear. I accept the defendant's submissions in this regard. It is to protect a participant in the joint venture against the risk that its partners might change, against its wish, by the acquisition of their shares by a third party, or by a third party acquiring control over the joint venturer by acquiring the shares in its holding company. The continuing participant is not obliged to accept its new partner. It is given the option of acquiring the defaulting participant's interest in the joint venture.

[25] The defendant submits that in the present case, from 1 October 2005 the new company, Parmalat SpA as the ultimate holding company of a series of wholly

owned subsidiaries including PA, PT and DF, became entitled to exercise indirectly a voting power in excess of 50% of the votes which may be cast at any general meeting of both PT and DF. For the same reason, from 1 October 2005 Parmalat SpA as the new ultimate holding company in the group acquired the capacity to appoint at least half of the number of directors of both PT and DF.

[26] They further submit that this alteration in effective control occurred without Norco's written consent. The new effective control differed from that which had subsisted at the commencement of the JVA.

[27] Norco therefore submits that, upon the natural construction of clause 9.1(a)(15), and consistently with its obvious commercial purpose, PT and DF became defaulting participants on 1 October 2005.

[28] The first point which arises for determination is whether on its proper construction cl 9.1(a)(15) can only operate once in the case of each joint venture participant. The plaintiffs contend that it can operate only once, and it is exhausted by reason of the corporate and contractual changes which occurred in August 1998, which I described.

[29] The plaintiffs' submission is that the phrase 'from that subsisting at the Commencement Date' has the effect of imposing this limitation. It is said, pithily, that 'there could only ever be one alteration "from that (state of control) subsisting at the Commencement Date" '. The argument is that after the first alteration in the state of control of a corporate participant any subsequent alteration would not be from that state of control which subsisted at the commencement date but from the state of control which subsisted immediately before the second and subsequent alterations.

[30] It is said, in support of the submission, that 'from' is used as a preposition of time, and reference was made to each of the Oxford English Dictionary, the Australian Oxford Dictionary and the Macquarie Dictionary. It must be pointed out, however, that the preposition is more versatile: according to the Oxford English Dictionary, as well as 'indicating a starting point in time or the beginning of a period', it denotes 'distance, absence or remoteness' and indicates 'a state, condition etc. which is abandoned or which is changed for another'.

[31] According to the Australian Oxford Dictionary 'from' is a preposition expressing separation followed by:

> '6. A thing distinguished or unlike …
> 8. A state changed for another'.

The Macquarie Dictionary says more simply that the word is 'a particle specifying a starting point and hence is used to express removal or separation in … order, discrimination or distinction …'.

[32] These extended uses to which the word 'from' may properly be put show that the plaintiffs' submission unduly restricts its meaning. It is apt to distinguish between conditions or states of affairs as well as to indicate a progression of time. It is true that an alteration in the state of the corporate control of a joint venture participant after the commencement date will obliterate the original state of control and that any subsequent alteration will be to that existing immediately before the second alteration. The same is true of each subsequent alteration. But it remains true, also,

that (with one exception) each subsequent alteration after the first will result in a state of control which is different 'from that subsisting at the commencement date'. The exception will occur in the unlikely event that a change of control resulted in a reversion to the state which did subsist at the commencement date.

[33] The plaintiffs' submission is, as I have said, that there can only ever be one alteration from that state of control which subsisted at the commencement date. The submission went on that 'any alteration to control thereafter would be to that subsisting immediately before the change, and not to the original state of affairs.' The logic is, in my opinion, flawed. With the exception I have mentioned any alteration to the state of control after the first would be to the state of control subsisting immediately before the change *and* to the original state of affairs.

[34] In my opinion the phrase 'from that subsisting at the Commencement Date' does not have the meaning or effect the plaintiffs ascribe to it. I accept the defendant's submission that the phrase identifies 'the state of effective control against which any subsequent alteration is to be compared. In respect of each occasion when the effective control of a participant alters, the new state is to be compared with the state which (subsisted) at the commencement date.' The submission goes on, again I think correctly:-

> 'Such a construction is consistent with the evident purpose of the clause. The JVA does not have any finite term. Over a potentially long period of operation effective control of a participant (as that is understood by clause 9.1(a)(15)) may change on a number of occasions. After the first change in control, the continuing presence of the clause reflected the parties' continuing interest in the identity of the controller of each other participant: the commercial reason for the clause remained equally important after the first change in control, as it will after all subsequent changes in control.'

[35] The exception to the operation of the clause does not detract from this rationale. The exception would operate only where a change in control resulted in the static joint venturer having to remain in partnership with the participant it originally accepted as a joint venturer. There is nothing startling about this result. It does not embarrass what appears to be the evident commercial purpose behind the clause.

[36] If, however, one accepted the plaintiffs' contention that a continuing joint venturer would have only one occasion on which it could object to a change in the identity (because of a change in control) of its joint venturer. On subsequent changes a continuing joint venturer would be obliged to do business with an incompatible joint venturer. The plaintiffs' contention would deprive it of any redress in the event that the replacement was objectionable to it.

[37] The principles governing the construction of commercial contracts are clear. One starts with the words chosen by the parties to express their bargain and gives them their ordinary, grammatical, natural meaning. If the words, giving that meaning, produce a result that is unreasonable in a business sense some adjustment to the meaning must be made. To determine whether the result is unreasonable in a business sense the court may have regard to the commercial purpose of the contract, and the purpose to be served by the particular clause.

[38] Considerations of both grammar and purpose favour the defendant's submission. There is no tension between the ordinary natural meaning of the words found in cl 9.1(a)(15) and the evident commercial purpose they were meant to serve. A participant in the joint venture becomes a defaulting participant if 'effective control of (the) Participant … is altered … from that subsisting at the Commencement Date …'. The plain meaning of these words is that a change in the condition or state of control of the participant which makes it different from that state or condition of control in existence at the commencement date makes the participant in question a defaulting participant. The clause intelligibly describes the state of fact which precipitates its operation. There must be a change in the effective control of a participant so that the new state of affairs is different from that known state which subsisted at the commencement date. There is no warrant to be found in the rules of grammar or syntax which requires one to read the phrase as limited to one operation. Indeed to achieve the plaintiffs' desired meaning one would have to add substantially to the phrase so that it read 'from that subsisting at the commencement date or immediately before the alteration if there has been an alteration in effective control subsequent to the commencement date.'

[39] The defendant's submission also accords with the commercial purpose of the clause. The plaintiffs' contention would limit the operation of the clause to one occasion only when, as has been pointed out, there may be a number of occasions in the life of the joint venture when the identity of the controller of a participant might change. There is no compelling reason to construe the clause in such a restrictive way. To limit it to one operation would be to deprive it of much of its utility. Clear words would be required to so restrict its operation. In my opinion the words actually found in the clause contradict the existence of the restriction.

[40] It is now necessary to consider whether, within the meaning of cl 9.1(a)(15), there has been an alteration in the effective control of the plaintiffs. It is not necessary to consider them separately. It is accepted that if there has been such a change in the effective control of PT there has been such a change in DF. The clause itself describes what is meant by 'effective control'. Effective control exists where any person alone, or together with its associates:

> '(a) becomes entitled to exercise (directly or indirectly) voting power at any general meeting of a Participant ... in excess of 50% of the votes which may be cast thereat; or
>
> (b) acquires the capacity to appoint at least half of the number of directors of a Participant...'

[41] As I have recounted, and as appears from the diagrammatic corporate structure, both PT and DF were subsidiaries of an ultimate holding company, Parmalat Finanziaria SpA, below which there were a number of subsidiary companies.

[42] On 1 October 2005 Parmalat Finanziaria SpA transferred its assets, including the shares it held in its immediate subsidiaries, to a new company, Parmalat SpA.

[43] The defendant's submission is that by those events on 1 October 2005 Parmalat SpA became the new ultimate holding company of the plaintiffs and became indirectly entitled to exercise more than 50 per cent of the voting power at any general meeting of PT and DF. The defendant concedes that the direct entitlement to exercise more than 50 per cent of the voting power at any general meeting of

those companies would reside in the company which actually owned the shares of the participants.

[44] The key to the question whether Parmalat Finanziaria SpA had effective control of PT and DF, and whether that effective control passed to Parmalat SpA, depends upon the meaning of the expression 'any person together with their Associates'. PA held, and holds, all the shares in PT which in turn holds all the shares in DF. PA therefore directly controls more than 50 per cent of the voting power at any general meeting of PT which in turn directly controls all the voting power in DF. Was Parmalat Finanziaria SpA, and is Parmalat SpA, an associate of PA so that it can be said that Parmalat SpA, together with its associate PA, became entitled to exercise more than 50 per cent of the votes at a general meeting of PT?

[45] It is agreed that if PT is a defaulting participant so is DF. It is therefore only necessary to consider whether PT is a defaulting participant by reason of the operation of cl 9.1(a)(15).

[46] The plaintiffs submit that the substitution of Parmalat SpA for Parmalat Finanziaria SpA as the ultimate holding company did not make it an associate of PT. The submission points out that there was no change in the shareholding of any of PA, PPH, Parmalat Belgium SA or Dalmata SrL. The submission goes on that 'in considering how far one could go up the corporate hierarchy, in determining which company has effective control of either plaintiff, one should look no further than those corporations which are "associates" of the corporation with direct effective control of each joint venture participant … In the case of PT the voting power … was held by PA'.

[47] 'Associates' is defined in the JVA as having the meaning which is ascribed to it under the *Corporations Act* (which has superseded the *Corporations Law*). Section 9 of that Act gives the word the meaning provided by ss 10-17. Section 11 defines 'associate', to include a reference to a 'related body corporate'. Section 50 provides that a subsidiary of a body corporate is related to that body corporate. Section 46B(1) of the Act provides that a body corporate is a subsidiary of another body corporate if it is a subsidiary of a subsidiary of that other body corporation.

[48] From these provisions the plaintiffs submit that the concept of related body corporate does not extend beyond two degrees of separation. Thus they submit:

(i) holding company and its subsidiary are related; and

(ii) a subsidiary of a subsidiary of a holding company is related to the holding company; but

(iii) companies further removed in a corporate chain are not related.

[49] It is submitted that the only companies related to the first plaintiff, which are therefore its associates, were PA and PPH. Likewise it is said that the related companies to PA, and therefore its associates, were PT (its subsidiary); PPH (its holding company); and Parmalat Belgium SA by virtue of s 46B. The consequence is that neither Parmalat Finanziaria SpA nor Parmalat SpA was an associate of PA or PT.

[50] This limitation on the relationship is, I think, arbitrary and indeed a little surprising. One would tend to think that all of the companies in the Parmalat corporate chain were related. With one insignificant exception all of them are wholly owned subsidiaries of another.

[51] The defendant's answer to the plaintiffs' submission is that the literal application of s 46B to the corporate structure is that:

(a) PA (the 'first body') is a subsidiary of Parmalat Belgium SA (as 'the other body').

(b) Parmalat Belgium SA (as the 'first body') is a subsidiary of Parmalat SpA and was a subsidiary of Parmalat Finanziaria SpA (as 'the other body').

Therefore

(c) PA (as 'the first body') is a subsidiary of Parmalat SpA because PA is a subsidiary of a subsidiary (Parmalat Belgium SA) of Parmalat SpA.

[52] This view, which I accept, has the support of Professor Ford in Ford's Principles of Corporations Law para 4.330:

> 'Where P corporation itself is a subsidiary of G(rand) P(arent) corporation and S corporation is a subsidiary of P, S is also a subsidiary of GP and also of any holding company of GP and so on; s 49. Section 49 provides for the process being repeated.'

Section 49 provides:

> 'A reference in paragraph 46(b) … to a subsidiary of a body corporate includes a reference to being a subsidiary, or to a body corporate that is a subsidiary, as the case may be, of the first mentioned body by virtue of any other application or applications of this Division.'

[53] Repeated application of 46B does bring about the consequence for which the defendant contends. I therefore accept that all of the companies in the Parmalat corporate structure are associates each of the other and, in particular, that PA is an associate of Parmalat SpA, and was an associate of Parmalat Finanziaria SpA.

[54] The plaintiffs submit that the corporate change of 10 October 2005 did not come within the ambit of cl 9.1(a)(15)(b) because there was no alteration in the identity of the person who has the capacity to appoint directors to PT or DF. Only PA could appoint directors to PT and only PT could appoint directors to DF. These companies were the only ones with 'the actual capacity to appoint directors' and nothing changed in this regard on 1 October 2005.

[55] The short answer is that Parmalat SpA is an associate of PA, as is PT. Parmalat SpA, *together with its associate PT*, has the capacity to appoint the directors of PT and Parmalat SpA, *together with its associate PT*, has the capacity to appoint directors to DF. In each case Parmalat SpA acquired that capacity on 1 October 2005. Accordingly I conclude that there was an alteration in the effective control of both PT and DF when Parmalat SpA replaced Parmalat Finanziaria SpA as the ultimate holding company and became an associate of PA.

[56] The same conclusion is inevitable with respect of cl 9.1(a)(15)(a). PA, as the sole shareholder in PT, was entitled to exercise voting power at any general meeting of PT. On 1 October 2005 Parmalat SpA became an associate of PA. It then, together with its associate, became entitled to exercise voting power at a general meeting of PT.

[57] The plaintiffs object that the legal mechanism by which Parmalat SpA could direct its associate PA how to vote at a general meeting demonstrates that 'the relationship between Parmalat Finanziaria SpA and the plaintiffs was too remote to conclude that Parmalat Finanziaria SpA could exercise even 'indirect' voting power in respect to either plaintiff.' The complicated mechanism is that:

(a) Parmalat Finanziaria SpA would direct Dalmata SrL how to vote at a general meeting of Parmalat Belgium SA and also direct that company how to vote at a general meeting of PPH;

(b) Dalmata SrL would accordingly direct Parmalat Belgium SA how to vote at a general meeting of PPH and also direct that company how to vote at a general meeting of PA;

(c) Parmalat Belgium SA would direct PPH how to vote at a general meeting of PA and direct that company how to vote at a general meeting of PT;

(d) PPH would direct PA how to vote at a meeting of PT and also direct PT how to vote at a general meeting of DF;

(e) PA would then direct PT how to vote at a meeting of DF.

[58] This is not, of course, how the matter would be handled in practice. The direction to PA as to how to vote at a general meeting of PT would be conveyed by telecommunication from Parmalat SpA's office in Parma. Having regard only to legal context one is left with the fact that Parmalat SpA controls or is able to control all of the companies subsidiary to it down to DF and can convene general meetings, pass special resolutions, abridge or dispense with notices, replace and appoint directors and, subject to the rights of creditors, do all things necessary to have its subsidiaries, or subsidiaries of its subsidiaries, act in accordance with its directions.

[59] The plaintiffs object that the directors of a particular company, PA for example, could not be compelled by the director of PPH on a general meeting of that company, to behave with respect to its subsidiary PT by appointing directors to it or voting at a general meeting. The reason is said to be that each company in the corporate structure is a separate legal entity and the directors of each company must, in deciding what course of action they should follow or what transactions their corporations should undertake, act in the best interests of that company rather than the interests of the group as a whole. Support for the submission depends principally upon *Walker v Wimborne* (1976) 137 CLR 1 at 6-7.

[60] The plaintiffs' observation is no doubt correct but in a corporate structure like Parmalat's, where there is a vertical structure of wholly owned subsidiaries, there will be few occasions when the interests of the subsidiary company will differ from the interests of the group as a whole, or the interests of the ultimate holding company. That there may be such occasions, presumably most commonly where

the directors of a subsidiary may have to have regard to the interests of their company's creditors, does not mean that the ultimate holding company does not have effective control over its subsidiaries. Nor does it mean that there is no workable mechanism by which it can exercise that control. After all, the plaintiffs' reservation applies only to occasions on which the directors of a subsidiary company might be commanded to act in breach of their statutory and/or fiduciary duties to the company.

[61] The real answer to the plaintiffs' submission is that cl 9.1(a)(15)(a) is not concerned with the mechanism by which a person became entitled to exercise voting power. The clause becomes effective once a person, alone or together with an associate or associates, becomes entitled to exercise voting power at a general meeting of PT. As I have said Parmalat SpA, together with its associate PA, did become entitled to exercise that power on 1 October 2005.

[62] The plaintiffs' last point concerns the date on which there was an alteration in the effective control of PT and DF and therefore the date on which they became defaulting participants. The date is relevant because cl 9.6 provides that:

> 'If:
>
> (a) a Participant is a Defaulting Participant;
>
> (b) the options referred to in clause 9 have not been exercised by any Non-Defaulting Participant; and
>
> (c) … a period of six ... months has elapsed since the Participant became a Defaulting Participant pursuant to and in the case of clause 9.1(15),
>
> **THEN** the Defaulting Participant will no longer be a Defaulting Participant …'

[63] The plaintiffs' point is that the appointment of Dr Bondi as the extraordinary administrator of Parmalat Finanziaria SpA in December 2003 had the effect that each of the plaintiffs became a defaulting participant. This much is admitted by the defendant. It, however, did not exercise the option to acquire the plaintiffs' interest in the joint venture. The plaintiffs submit it lost the right to do so when, by a combination of cl 9.1(a)(20) and 9.6 the plaintiffs ceased to be defaulting participants without, in the meantime, the defendant exercising the option.

[64] It will be appreciated that the submission depends for its efficacy upon there being only one alteration in effective control, that constituted by Dr Bondi's appointment. The plaintiffs accept this condition and submit that the events of 1 October 2005 were 'a culmination of a process' which commenced with Dr Bondi's appointment. The substitution of Parmalat SpA for Parmalat Finanziaria SpA on 1 October 2005 followed the approval of the composition by creditors and the approval, on that date, of the court in Parma. This was said to be the last step in the process of restructuring the Parmalat companies in order to provide some return to creditors. The process was said to have commenced, as I mentioned, with Dr Bondi's appointment.

[65] The defendant's answer is that cl 9.1(a)(15) operates whenever there is an alteration in the effective control of a participant as defined by the clause. There was such an alteration on 1 October 2005 when Parmalat SpA became the transferee of shares in Dalmata SrL and became the ultimate holding company in the group. The fact that on an earlier occasion, when Dr Bondi was appointed, there had also been an alteration in the effective control of the plaintiffs is of no relevance. The defendant could have exercised the option but chose not to. That inaction has no consequence. It does not prevent the defendant exercising the option in the event of a separate subsequent alteration in effective control which brings the clause into operation.

[66] The point to resolve is whether there has been one or two alterations in effective control. If there was only one and it occurred in December 2003 the plaintiffs ceased to be defaulting participants almost two years ago. If there was a change in effective control in October 2005 they remain defaulting participants.

[67] All that is known about Dr Bondi's appointment and his subsequent efforts to restructure the Parmalat companies is contained in the translation of the judgment of the Civil and Criminal Court of Parma. According to that 'the composition proposal (was) formulated on the 21st June 2004 by the extraordinary administrator'. The proposal was followed by authorising ministerial decrees of 23 July 2004 and 1 March 2005. The proposal was apparently put to a meeting of creditors for their approval. A number of meetings, ministerial authorisations and applications to court appear to have been necessary to determine who was eligible to vote and for what proportion of the total votes cast at the creditors' meeting. It was only when the process had been examined and amended that the creditors' vote was obtained and the court's sanction sought to the transfer of assets from Parmalat Finanziaria SpA to Parmalat SpA was approved.

[68] It would seem to follow that it was not inevitable when Dr Bondi was appointed that the restructure in the form it eventually took would occur. The creditors might not have voted for the restructure but might instead have opted for the liquidation of the companies. It cannot, I think, be said that Dr Bondi's appointment merged seamlessly into the transfer of shares and substitution of the ultimate holding company which occurred on 1 October 2005. I think there were two separate events each constituting an alteration in the effective control of the plaintiffs.

[69] I conclude therefore that the plaintiffs are defaulting participants within the meaning of the JVA. Accordingly I dismiss the plaintiffs' application and instead declare that on or about 22 October 2005 each plaintiff became a defaulting participant within the meaning of cl 9.1(a) of the JVA dated 27 June 1996 between the plaintiffs and the defendant by reason of the transfer of shares in Dalmata SrL and Parmalat Belgium SA to Parmalat SpA by Parmalat Finanziaria SpA on or about 1 October 2005.