

SUPREME COURT OF QUEENSLAND

CITATION: *Trojan Equity Ltd v CMI Ltd* [2009] QSC 114

PARTIES: **TROJAN EQUITY LIMITED ACN 113 436 141**
(applicant)

v

CMI LIMITED ACN 050 542 553
(respondent)

FILE NO/S: 13496/08

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 15 May 2009

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 17 February 2009

JUDGE: Douglas J

ORDER: **Application dismissed.**

CATCHWORDS: CORPORATIONS – MANAGEMENT AND ADMINISTRATION – MEETINGS – MEETINGS OF MEMBERS – PROCEEDINGS AT MEETING – VOTING -
Where the applicant holds a number of Class A shares in the respondent, a public listed company limited by shares – Where as holder of those shares it is not entitled to vote them except, relevantly, during a period in which a Dividend or part of a Dividend on the Class A shares is in arrears – Where it has not been paid dividends since 2007– Where the Chairman at a general meeting did not permit the holders of Class A shares to vote on the basis that the Dividend was not in arrears – Whether the applicant is entitled to vote its shares at a general meeting of the respondent.

Corporations Act 2001 (Cth) s 254T, s 254V

Coulson v Austin Motors Company Limited (1927) 43 TLR 493, 494-495 applied

Re Accrington Corporations Steam Tramway Company [1909] 2 Ch 40 referred

Re Bradford Investments plc [1990] BCC 740 referred

Re Springbok Agricultural Estates Limited [1920] 1 Ch 563 referred

Re Wakley [1920] 2 Ch 205, 216-217, 222-223, 225-226

referred
Re William Bedford Ltd (in liq) [1967] VR 490, 494 referred

COUNSEL: DJS Jackson QC for the applicant
 J D McKenna SC for the respondent

SOLICITORS: Mallesons Stephen Jacques for the applicant
 McCullough Robertson for the respondent

- [1] **Douglas J:** The issue in this application is whether the applicant is entitled to vote its shares at a general meeting of the respondent, a public listed company limited by shares. The applicant holds approximately 3 million Class A shares in the respondent. As holder of those shares it is not entitled to vote them except, relevantly, “during a period in which a Dividend or part of a Dividend on the Class A shares is in arrears ...”.¹ It has not been paid dividends since 2007, the directors of the respondent having resolved not to declare a quarterly dividend on those shares since the quarter ending 21 February 2008. At the respondent’s annual general meeting on 26 November 2008 the Chairman did not permit the holders of Class A shares to vote on the basis that the dividend to which they were entitled pursuant to r. 30.2 of the respondent’s constitution was not in arrears.
- [2] A shareholder’s entitlement to a dividend on Class A shares arises quarterly at a rate determined by the directors but, in any event, not less than 14 cents each year.² Payment under r. 30.4 is subject to the directors, at their discretion, declaring the dividend to be payable and there being funds legally available for the payment of dividends.³ Importantly, also, r. 30.5 goes on to provide that, if a dividend is not paid because of the provisions of r. 30.4, the shareholder has no claim in respect of such non-payment.
- [3] Class A shareholders have a preferential right to a dividend in priority to holders of ordinary shares.⁴ Rule 30.13(a) also restricts the respondent’s power to declare or pay dividends on other classes of shares if the “Dividend” payable, apparently to Class A shareholders in “either of the four quarterly periods immediately preceding the cash dividend for distribution has not been paid or otherwise satisfied in full ...”.
- [4] The respondent argued that the dividend on the Class A shares was not in arrears because no payment was overdue, none having been declared to be payable. It argued, through its counsel, Mr McKenna SC, that it was significant that these dividends would properly be described as non-cumulative preference shares.
- [5] Mr D J S Jackson QC for the applicant, submitted that, on the proper construction of the rules, particularly r. 30.13, it was apparent that the preferential entitlement of Class A shareholders was cumulative for a period of up to four quarters and that the dividend was in arrears simply if it had not been paid. He buttressed those submissions by reference to the apparent commercial purpose of r. 30.16, common parlance in the use of the word “arrears” and the meaning and effect of ASX listing rule 6.31 in conjunction with r. 28.2(f) of the respondent’s constitution which

¹ Rule 30.16 (c) of the respondent’s constitution.
² Rule 30.2
³ Rule 30.4.
⁴ Rule 30.8

provided that if any provision of the rules was inconsistent with the listing rules “these rules are deemed not to contain that provision to the extent of the inconsistency”.

The constitution of the respondent

- [6] It is convenient, in addressing those arguments, to set out other relevant rules in detail, particularly r. 29, dealing with convertible preference shares, and r. 30, dealing with the Class A shares:

“29.1 Face value

The face value of the Convertible Preference Shares (“CPS”) will be \$1.20 each (“Face Value”).

29.2 Dividends

(a) Dividends

- (i) Subject to these terms, the holder of each CPS is entitled to a quarterly dividend (“Dividend”) calculated in accordance with the following formula:

$$\text{Dividend} = \frac{\text{Dividend Rate}}{4}$$

...

(b) Payment of Dividend

The payment of a Dividend is subject to:

- (i) the Directors, at their discretion, declaring the Dividend to be payable; and
- (ii) there being funds legally available for the payment of dividends.

(c) Non-Cumulative Dividends

If and to the extent that all or any part of a Dividend is not paid because of the provisions of **rule 29.2(b)** the holder has no claim in respect of such non-payment.

29.3 Conversion

(a) Meaning of Conversion

Each CPS confers the following rights:

- (i) the voting rights outlined in **rule 29.6**;
- (ii) entitlement to a dividend in preference to holders of Ordinary Shares;
- (iii) entitlement to return of capital in preference to holders of Ordinary Shares; and

- (iv) entitlement to the same rights of holders of Ordinary Shares to receive notices, reports and audited accounts and attend meetings.

At 5.00pm Brisbane time on the conversion date determined below each CPS will have all of the rights attaching to one fully paid Ordinary Shares. At that time:

- (v) all other rights or restrictions conferred on the CPS under the terms of issue will no longer have effect (except for rights relating to a Dividend payable on or before the conversion date which will subsist): and”.

...

29.6 Voting rights

A CPS does not entitle its holder to vote at any general meeting of the Company except in the following circumstances:

- (a) on a proposal:
 - (i) to reduce the share capital of the Company;
 - (ii) that affects rights attached to the CPS;
 - (iii) to wind up the Company; or
 - (iv) for the disposal of the whole of the property, business and undertaking of the Company;
- (b) on a resolution to approve the terms of a buy-back agreement;
- (c) during a period in which a Dividend or part of a Dividend on the CPS is in arrears; or
- (d) during the winding up of the Company.

...

29.9 Interpretation

...

‘Dividend Payment Date’ means each date on which a Dividend is payable in accordance with **rule 29.2(d)** whether or not a Dividend is paid on that date;

...

Conversion of all CPS to Class A shares

- 29.10** As from the Effective Date, all Convertible Preference Shares on issue shall be converted into Class A shares and rights attaching to CPS will accordingly be varied so that the rights attaching to a CPS shall, attach to Class A shares in Rule 30 and shall substitute for the present rights of CPS.

Meaning of Effective Date

- 29.11** For the purposes of Rules 29.10, 29.11 and Rule 30, the term “Effective Date” shall mean the date which shall be one month after relevant resolutions have been passed by the company’s members to vary or modify the rights of holders of CPS having regard to subsection 246D(3) of the *Corporations Act 2001*, subject to there being no application made to the Court to have any resolution or resolutions effecting such variation or modification set aside or if an application is made to the Court, the variation or modification shall take effect (subject to the terms of the terms [sic] of the Court order) when the application is withdrawn or finally determined.

From the Effective Date, but without prejudice to any pre-existing dividend entitlement of CPS holders up to the Effective Date, holders of CPS shall no longer have the rights and benefits which apply through rule 29.

30. TERMS OF CLASS A SHARES

Transitional

- 30.1 Each CPS on issue, shall on the Effective Date, be converted into one Class A share and the Directors shall be fully authorised and entitled for that purpose to make all such necessary and consequential amendments to the Company’s register of members, and with respect to all decisions relating to the quotation or trading of CPS on ASX.

Dividends

- 30.2 The holder of each Class A share is entitled to a quarterly dividend (“Dividend”) calculated in accordance with the following formula:

$$\text{Dividend} = \frac{\text{Dividend Rate}}{4}$$

Dividend Rate is for each year, ending on the anniversary of the Allotment Date, at such rate as determined by the Directors, but in any event, not less than 14¢ each year.

Franking of Dividends

- 30.3 If any Dividend is not franked to 100% under Part IIIAA of the Tax Act (or any provisions that revise or replace that Part) ('Applicable Franking Rate'), the Dividend will be calculated in accordance with the following formula:

$$\frac{D}{1 - [T_i \times (1-f)]}$$

Where:

- D is the Dividend calculated under **rule 30.2**;
 T_i is the Australian corporate tax rate applicable to the franking account of the Company from which the Dividend will be franked, expressed as a decimal; and
 f is the Applicable Franking Rate, expressed as a decimal to four decimal places.

Payment of Dividend

- 30.4 The payment of a Dividend is subject to:
- (a) the Directors, at their discretion, declaring the Dividend to be payable; and
 - (b) there being funds legally available for the payment of dividends.

Non-Cumulative Dividends

- 30.5 If and to the extent that all or any part of a Dividend is not paid because of the provisions of rule 30.4, the holder has no claim in respect of such non-payment.

Dividend Payment Dates

- 30.6 Subject to this rule 30.6, Dividends will be payable on the Class A share in arrears on that day being 3 months after the Allotment Date and thereafter quarterly.

Record Dates

- 30.7 A Dividend is only payable to those persons registered as holders of Class A shares at the date on which the books of the Company close for Class A share holders in respect of each relevant Dividend.

No Entitlement to Other Dividends

- 30.8 Class A shares shall have a preferential right to a Dividend determined in accordance with rules 30.2 and 30.3 in priority to holders of Ordinary Shares as to the payment of

dividends but shall, subject to payment of such Dividend under rules 30.2 and 30.3, have no other entitlement to any dividend which may be determined to be paid to holders of Ordinary Shares.

Ranking

- 30.9 Class A shares shall rank equally amongst shares in that class in all respects.

Return of capital

- 30.10 If there is to be a return of capital on a winding up of the Company, holders of Class A shares will be entitled to receive, out of the assets of the Company available for distribution to holders of shares, in respect of each Class A share held, a cash payment equal to the sum of:

- (a) the amount of any Dividend (whether declared or not) calculated on a daily basis (assuming a 365 day year) throughout the period from and including the date of the preceding Dividend Payment Date to the date of commencement of the winding-up; and
- (b) the Face Value,

before any return of capital is made to holders of Ordinary Shares or any other class of shares ranking behind the Class A shares.

Class A shares do not confer on their holders any right to participate in profits or property except as set out in the provisions of Rule 30.

Shortfall on Winding Up

- 30.11 If, upon a return of capital, there are insufficient funds to pay in full the amounts referred to in rule 30.10 and the amounts payable in respect of any other shares in the Company ranking as to such distribution equally with the Class A shares on a winding-up of the Company, the holders of the Class A shares and the holders of any such other shares will share in any distribution of assets of the Company in proportion to the amounts to which they respectively are entitled.

Participation in Surplus Assets

- 30.12 The Class A shares do not confer on their holders any further right to participate in the surplus assets of the Company on a winding-up.

Restrictions on Dividends on Other Issues

- 30.13 The Company must not, without approval of a special resolution passed at a separate meeting of holders of the Class A shares:
- (a) declare or pay a cash dividend or make any distribution on any share capital over which the Class A shares rank in priority for participation in profits if the Dividend payable in either of the four quarterly periods immediately preceding the cash dividend or distribution has not been paid or otherwise satisfied in full; or
 - (b) issue shares ranking in priority to the Class A shares but the Directors are at all times authorised to issue such further Class A shares ranking equally with any existing Class A shares and, subject to required shareholder approvals, to give effect to the conversion or variation of rights to other classes of Company shares on issue which may convert into Class A shares or which may have rights (as varied) identical or similar to Class A shares.

Takeovers and Schemes of Arrangement

- 30.14 If a takeover bid is made for Ordinary Shares, acceptance of which is recommended by the Directors, or the Directors recommend a member's scheme of arrangement, the Directors will use reasonable endeavours to procure that equivalent takeover offers are made to Class A shares holders or that they participate in the scheme of arrangement.

Participation in New Issues

- 30.15 Class A shares will confer rights to subscribe for new securities in the Company or to participate in any bonus issues, to the same extent as Ordinary Shares.

Voting rights for Class A shares

- 30.16 The holder of a Class A Share is not entitled to vote at any general meeting of the Company except in the following circumstances:
- (a) on a proposal:
 - (i) to reduce the share capital of the Company;
 - (ii) that affects rights attached to the Class A shares;

- (iii) to wind up the Company; or
- (iv) for the disposal of the whole of the property, business and undertaking of the Company;
- (b) on a resolution to approve the terms of a buy-back agreement;
- (c) during a period in which a Dividend or part of a Dividend on the Class A shares is in arrears; or
- (d) during the winding up of the Company.

In any circumstance where the holder of Class A shares may vote at a general meeting of the Company, each Class A Share shall entitle the holder to one vote.

Listing

- 30.17 The Company must use all reasonable endeavours and furnish all such documents, information and undertakings as may be reasonably necessary in order to procure, at its own expense, listing of the Class A shares on the ASX and/or on each of the stock exchanges on which the other Ordinary Shares of the Company are listed, following the Effective Date.

Amendments to the terms of issue

- 30.18 Subject to complying with all applicable laws, the Company may without the authority, assent or approval of Class A shareholders amend or add to these terms of issue if such amendment or addition is, in the opinion of the Company:
- (a) of a formal, minor or technical nature;
 - (b) made to correct a manifest error; or
 - (c) not likely (taken as a whole and in conjunction with all other modifications, if any, to be made contemporaneously with that modification) to be materially prejudicial to the interests of the holders of the Class A shares.

Interpretation

- 30.19 The following expressions shall have the following meanings:

‘Allotment Date’ means the date in respect of which a CPS shall have been allotted or have deemed to have been allotted by the Company. In any other instance, 21 August shall be deemed the relevant date and month on which a

Class A Share is allotted (notwithstanding the date of actual allotment) for the purposes of determining the yearly Dividend Rate applicable at the time of allotment;

‘Dividend Payment Date’ means each date on which a Dividend is payable in accordance with rule 30.6 whether or not a Dividend is paid on that date;

‘Face Value’ means \$1.20 per Class A share in respect of a CPS which shall have been converted into a Class A share. In any other instance, where the term ‘Face Value’ is relevant, then, in the absence of any other definition or meaning, it shall mean the issue price paid or payable on the issue of such share;

‘Franking Rate’ in relation to a Dividend, means the franking percentage (within the meaning of Part IIIAA of the Tax Act or any part that replaces or revises that part) of the Dividend, expressed as a decimal;

‘Ordinary Share’ means an ordinary share in the capital of the Company;

‘Tax Act’ means:

- (a) the Income Tax Assessment Act 1936 or the Income Tax Assessment Act 1997 as the case may be as amended and a reference to any section of the Income Tax Assessment Act 1936 includes a reference to that section as rewritten in the Income Tax Assessment Act 1997;
- (b) any other Act setting the rate of income tax payable; and
- (c) any regulation promulgated thereunder.”

Discussion

Arrears and non-cumulative preference shares

- [7] In focusing on the status of the shares as non-cumulative preference shares Mr McKenna SC relied on the discussion in *Coulson v Austin Motors Company Limited*⁵ where such shares were described as ones whose dividend rights in respect of a particular financial period lapse if the relevant preconditions are not satisfied. The usual preconditions would include the existence of sufficient profits during the period to pay the dividend and a declaration of a dividend in respect to the period by the company or its directors.⁶

⁵ (1927) 43 TLR 493.

⁶ *Corporations Act 2001* (Cth) s 254T, s 254V.

- [8] With cumulative preference shares, however, dividend rights accumulate over time so that, whether or not a dividend has been declared for a particular period, the shareholder retains a conditional right to be paid the accumulated amount in a future dividend period, subject to there being sufficient profits and an appropriate declaration of a dividend,⁷ or, in a winding up, if authorised by the company's constitution.⁸ The constitution of this company was drafted with the issue in mind as r. 3.8(d) says: "The preferential dividend may be cumulative if and to the extent the Board decides under the terms of issue." The heading of r. 30.5, "Non-Cumulative Dividends", would also have been an indication of the intention of the rules had r. 2.2(f) not provided that the headings do not affect their construction.
- [9] Mr McKenna also conceded that, in the context of cumulative preference shares, the courts have recognised that the word "arrears" is sometimes used to refer to dividends that are not overdue but which have accumulated after the relevant dividend periods.⁹ He went on to argue, however, that the concept of dividends being "in arrears" has never been applied to refer to dividend rights which have simply lapsed because they are non-cumulative in nature. Such a contention, he submitted, was advanced in *Coulson* but rejected.
- [10] As appears from the rules set out above, the quarterly dividend is prescribed by r. 30.2 at a rate determined by the directors but, in any event, not less than 14 cents per year. Rule 30.4 makes the payment of a dividend subject to the directors at their discretion declaring the dividend to be payable and there being funds legally available for their payment. Rule 30.5 then provides that where a dividend is not paid because of the provisions of rule 30.4 the holder has no claim in respect of such non-payment. A similar regime exists under r. 29.2 for the convertible preference shares dealt with in that rule.
- [11] Prima facie, therefore, where the directors have not declared a dividend to be payable, it is difficult to see how any amount that the Class A shareholders may otherwise have been entitled to could be in arrears. They have no claim to it in the strict meaning of the words "in arrears" used by Tomlin J in *Coulson*¹⁰ to refer to "a sum which had become due and payable and had not been paid". His Lordship referred to a possible use "in a secondary sense to indicate some deficiency which was capable, either certainly or contingently, of being made good" in a context where it is clear he was referring to a cumulative preferential right to dividends.¹¹ He also postulated a third sense of the words, reported in this passage:¹²

"Was there, then, a third sense wide enough to cover the non-payment of something – a non-cumulative Preference dividend payable out of the profits of each year and not paid because no profits were available for the dividend – which never in fact became payable, and never could in the future in any contingency become payable or be made good? It was impossible to say that there might not be a context which would necessarily require some such sense,

⁷ *Re Wakley* [1920] 2 Ch 205, 216-217, 222-223, 225-226.

⁸ *Re Accrington Corporations Steam Tramway Company* [1909] 2 Ch 40 and *Re Springbok Agricultural Estates Limited* [1920] 1 Ch 563.

⁹ *Re Bradford Investments plc* [1990] BCC 740.

¹⁰ See *Coulson* at 494 at the last paragraph on the page.

¹¹ See *Coulson* at 494-495 and *Re Springbok Agricultural Estates Limited* [1920] 1 Ch 563.

¹² See *Coulson* at 494.

but in his (his Lordship's) judgment the words 'in arrear' in article 65 could not, in the context in which they occurred, be so construed."

The effect of r. 30.13(a)

- [12] Mr Jackson QC, in arguing that the constitution's provisions permitted the words "in arrears" to extend to the present situation where a dividend had not been paid drew particular attention to r. 30.13(a) as restricting the ability of the company to declare a dividend to ordinary shareholders unless there had been payment in full of the dividends to which holders of Class A shares were entitled for the preceding four quarters. He argued that the restriction in r. 30.13(a) made it a condition precedent to the payment of dividends on ordinary shares that at least the preceding four quarters' Class A share dividend entitlements had been paid or satisfied in full. He also submitted that, if the Class A shareholders had such an entitlement, that was inconsistent with the view that, absent a declaration of a dividend for a quarter, a Class A shareholder had no right to a dividend in the future in respect of that quarter, with the logical consequence that, for that period, the dividend is in arrears.
- [13] In developing that argument he also drew my attention to the provisions governing entitlements to dividends on convertible preference shares under r. 29 of the constitution such as r. 29.2(a)(i), r. 29.2(b), r. 29.3(a)(ii), r. 29.5(b) and r. 29.6(c). None of those provisions, however, requires the conclusion that Class A shareholders have any entitlement to or necessary expectation of the declaration of a dividend on their shares during any such quarter unless a dividend is declared or paid on the ordinary share capital of the company. Its terms are not inconsistent with those of r. 30.5 nor do they need to be read with it or construed as if they had the meaning that the Class A shareholders had an anticipatory claim in the hope a declaration of a dividend on the ordinary shares would occur.
- [14] As Mr McKenna submitted, if the directors took the step of not declaring a dividend in favour of a preference shareholder then, without those shareholders' consent, they were debarred from declaring or paying dividends to ordinary shareholders until four quarters had elapsed and then they are free to declare and pay them again. There was no implied power, he submitted, to pay the dividends for periods that were past and where no dividend had been declared.
- [15] That seems to me to be correct and I do not believe that the proper construction of r. 30.13(a) requires the conclusion that undeclared dividends are in arrears during that period. Rule 30.5 continues to provide that the holder has no claim in respect of a non-payment; one not paid because of the provisions of r. 30.4.

The commercial purpose of the rules and ASX listing rule 6.3

- [16] The argument that the commercial purpose of the rules is supported by construing "in arrears" as applying to the situation where dividends have not been paid, rather than only where they have been declared and not paid, was developed by reference to ASX listing rule 6.3 which provides that the holder of a preference share must be entitled to a right to vote during a period in which a dividend or part of a dividend is in arrears. That seems to me, however, simply to beg the question. The argument was that the purpose of the rules, where no dividends could be paid because there were no profits, was enhanced by adopting the interpretation that would permit Class A shareholders to vote when dividends had not been paid, regardless of whether there had been a declaration by the directors. The submission was that

those rules have the function of setting requirements for the organisations whose securities are to be publicly traded. The commercial purpose of both the restriction on voting of preference shares and the exceptions from that restriction, as set out in the listing rules, was said to be to leave the voting control of the company in the hands of ordinary shareholders, except when the situations identified in the listing rule arose, when the additional right and protection of being entitled to vote was conferred on the preference shareholder. Mr Jackson QC submitted that nothing about that purpose dictated or suggested that it would be better served by restricting the operation of r. 30.16(c) to dividends declared but not paid.

- [17] He further submitted that common parlance also contained the meaning for the words “in arrears” of “the amount which would have been paid if dividends at the fixed rate had been declared during the period when dividends were passed”.¹³ That was a statement particularly referable to cumulative preference shares, however, and does not, in my view, apply to non-cumulative preference shares.
- [18] Mr McKenna’s response was that the proper focus was the meaning of the words in the constitution and what they revealed about the balance struck between the preference shareholders’ understandable wish to vote at every possible occasion when their shares were at risk, and the general regime which is that they did not have the right to vote at all. He submitted that a particular balance had been struck between the differing groups of shareholders which created a strong incentive for the company to declare dividends because when dividends were not paid to the preference shareholders the ordinary shareholders were not paid either and for a longer period. In drawing attention to the constitution’s use of language he concluded that dividends could not be in arrears in any ordinary use of English if they had never been payable and never would be payable.
- [19] That analysis of the rules seems to me to be correct.

Conclusion

- [20] In essence then the hurdle facing the applicant is the plain language of r. 30.5 that the shareholder has no claim in respect of non-payment where the payment of a dividend has not been declared by the directors. In the circumstances that rule has the effect of making these non-cumulative preference shares. The authorities, particularly the decision in *Coulson*, the normal use of language and the meaning of the rules are against treating the relevant period as one where dividends on those shares are “in arrears”.

Order

- [21] Accordingly it is my view that the applicant is not entitled to the relief sought and the application should be dismissed. I shall hear the parties as to costs.

¹³ *Re: William Bedford Ltd (in liq)* [1967] VR 490, 494.