

# SUPREME COURT OF QUEENSLAND

CITATION: *Coeur De Lion Investments Pty Ltd v The President's Club Limited* [2017] QSC 6

PARTIES: **COEUR DE LION INVESTMENTS PTY LTD**  
(ACN 006 334 872)  
(applicant)  
**v**  
**THE PRESIDENT'S CLUB LIMITED**  
(ACN 010 593 263)  
(respondent)

FILE NO: BS6286 of 2016

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 8 February 2017

DELIVERED AT: Brisbane

HEARING DATE: 20 October 2016

JUDGE: Mullins J

ORDER: **The originating application is dismissed.**

CATCHWORDS: CORPORATIONS – CONSTITUTION AND  
REPLACEABLE RULES – MEMORANDUM AND  
ARTICLES OF ASSOCIATION – ARTICLES OF  
ASSOCIATION – PARTICULAR ARTICLES –  
CONSTRUCTION – where the company operates a timeshare  
scheme in respect of villas in a resort – where a member's  
entitlement to shares in the company depends on the member  
being a co-owner of a villa – where the ownership of each villa  
is divided into quarter interests with each quarter interest  
entitling the co-owner to occupy the villa for 13 weeks each  
year – where the article in the company's constitution deprives  
a member of voting rights at a general meeting of the company,  
if the member owes more than \$500 per quarter share to the  
company – whether "quarter share" refers to a quarter of a  
share in the capital of the company or to a quarter share in the  
ownership of a villa

*Corporations Act* 2001 (Cth), s 249D, s 249N

*Electricity Generation Corporation v Woodside Energy Ltd*  
(2014) 251 CLR 640; [2014] HCA 7, considered  
*Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006)  
156 FCR 1; [2006] FCAFC 144, considered

COUNSEL: K A Barlow QC and D K Fuller for the applicant  
D A Quayle for the respondent

SOLICITORS: Kilmurray Legal for the applicant  
King & Wood Mallesons for the first respondent

- [1] The applicant is a shareholder of the respondent which operates a timeshare scheme in respect of 144 residential villas at the Palmer Coolum Resort. There are 80 villas in the Golf Village and 64 villas in the Tennis Village. Each villa comprises a separate lot on one or other of the two Building Unit Plans that comprise the resort. The applicant holds 3,107 of the respondent's 7,493 shares.
- [2] The applicant has attempted to exercise its rights under s 249D and s 249N of the *Corporations Act* 2001 (Cth) on the basis that it is a member of the respondent with at least five per cent of the votes that may be cast at a general meeting. At a general meeting of the respondent on 23 November 2015, the chairman refused to allow resolutions proposed by the applicant to be considered on the basis that the applicant was not permitted to vote at the general meeting pursuant to article 22(c) of the articles of association of the respondent. The applicant disputes that ruling and applies in this proceeding for a declaration that the words "\$500.00 per quarter share" in article 22(c) mean "\$500 per quarter of a share in the capital of the respondent" which can be expressed as \$2,000 per share. The respondent contends that "quarter share" in article 22(c) refers to a quarter share of the ownership of a villa in the resort.
- [3] If the applicant's construction of article 22(c) were correct, the applicant's debt to the respondent would have fallen below the threshold at which voting rights were suspended, but the position would be otherwise if the respondent's construction were correct. The respondent therefore accepts that there is a real dispute as to the construction of article 22(c) that has consequences for the parties and the court has jurisdiction to consider this application.

### **The nature of the respondent and its business**

- [4] The respondent is an unlisted public company limited by shares. Shares in its capital are "stapled" to ownership interests in each villa lot in the resort. The respondent was not established for profit-making, but for the purpose of regulating the rights of members who occupy villa lots.
- [5] It is common ground that each villa lot has four ownership interests or shares held by the owners as tenants in common in that villa lot. Each villa might be occupied for a maximum of 52 weeks in any one year. The ownership of each lot is divided into four one-quarter interests held as tenants in common with each one-quarter interest in each villa lot representing an entitlement to occupy the villa for a quarter of a year or 13 weeks. The entitlement to occupy a villa for one week equates to one share in the capital of the respondent.

### **The articles of association**

- [6] Relevant definitions for the articles are set out in article 2 which apply unless the context otherwise requires. These include:

“**Annual Outgoings** means:

- (a) rates, taxes, levies, charges, fees, costs, expenses levied or to be levied or incurred by the Body Corporate of the Presidents Site and levied or incurred by the Company; and
- (b) the operational costs and overheads of the Company in relation to its rights and obligations under the Resort Administration Agreement and in relation to the operation of the Resort; and
- (c) levies determined by the Company in its absolute discretion to enable the Company to comply with its obligations under the Resort Administration Agreement, other than its obligation to pay the Total Costs; and
- (d) all amounts payable by the Company to the Resort Administrator under the Resort Administration Agreement, other than Total Costs, but excluding any GST payable by the Company or any amount included either expressly or impliedly in an amount paid or payable by the Company on account of GST (to the extent that the Company is entitled to any Input Tax Credit in relation to that GST or amount).

**Co-Owner** means the registered proprietor or a person who is entitled to be registered as the registered proprietor of a Fractional Interest.

**Entitlement** means the entitlement of a Member to occupy one Residential Apartment including all fixtures, fittings and equipment therein, in the Presidents Site for a Entitlement Week to which his or her share relates and to use the Resort Facilities of the Resort.

**Entitlement Costs** means the annual contribution by each Member to the Company pursuant to Article 13 or, where the context requires, instalments on account of such contributions pursuant to Article 14, together with any special contributions by the Member to the Company pursuant to Article 15.

**Entitlement Week** means any period of one week commencing at 2 p.m. Eastern Standard Time (or Eastern Summer Time if applicable from time to time in determining time in Queensland) on any day of a week and ending at 11 a.m. on the corresponding day in the next week.

**Fractional Interest** means a one-fifty-second (1/52) interest as tenant-in-common in any lot in the Building Units Plans which contain the Presidents Site.

**Member** means a holder (or the joint holder) of a share in the capital of the Company PROVIDED THAT for the purposes of eligibility to be appointed as a member of the Board a natural person who is a duly authorised representative of a corporation, partnership or body of persons which is itself a Member shall be deemed to be a Member.

**Presidents Site** means all of the lots and common property in Building Units Plans 8856 and 8847 registered at the Brisbane Registrar of Titles Office.

**Resort Administration Agreement** means the Agreement entered into or to be entered into by the Company with the Resort Administrator and others for the administration and running of the Resort as a first class international resort.”

- [7] Article 2 also defines “Company” as the respondent and the applicant is identified as the “Developer”. Both the applicant and the respondent were parties to the Resort Administration Agreement.
  
- [8] Article 4 specifies that the maximum number of members of the company shall not exceed 7,493 with persons jointly holding a share being counted as only one member.
  
- [9] Article 6 restricts the qualification for membership of the respondent to a co-owner and whilst remaining a co-owner. It is specified in article 6(b) that a person may not hold a greater number of shares in the capital of the respondent than the number of fractional interests in respect of which the person is a co-owner.
  
- [10] Articles 8 to 11 are grouped under the heading “Rights and Privileges of Company Membership”. It is provided in article 2 that headings are inserted for convenience only and in no way define, limit or describe the scope or extent of the article and shall not affect the construction of the articles, but the heading is a convenient signpost to the group of articles that relate to that topic, without using the heading to constrain or confine the content of the articles following the heading.
  
- [11] Article 8 provides:
 

“Subject to these Articles and the Regulations the holder for the time being of a share in the capital of the Company shall be entitled to exercise his or her Entitlement during the period specified in Schedule One to these Articles and designated by the share number of the particular share in accordance with Articles 82(c) and 82(d).”
  
- [12] Schedule One comprises 72 pages, as it sets out the particulars of the shares (other than the five subscriber shares) by reference to the specified villa and the 13 weeks that the owner of the shares relating to that villa is entitled to occupy that villa. For each villa, there are four groups of 13 shares which for each group relate to the 13 weeks that apply to those 13 shares. (The holders of the five subscriber shares ceased to have any rights and privileges of membership in the circumstances set out in article 5.) It is not stated expressly in the articles that the minimum number of shares that can be held by a member is 13 shares, but that is the effect of the articles (including Schedule One) in conjunction with the ownership interests of the villas which relate directly to the numbers of shares in the respondent to which each member is entitled as a result of being a co-owner of a villa. The articles refer to the Resort Administration Agreement and recital E to the Resort Administration Agreement, as originally made, recorded that there were four title deeds for each villa:
 

“The lots in the Presidents Club Golf Site and the Presidents Club Tennis Site have been offered for sale to the public as fractional interests. Each lot in the Building Units Plans for the Presidents Club Golf Site and the Presidents Club

Tennis Site is divided into up to four (4) Title Deeds, each Title Deed representing thirteen (13) weeks in a calendar year.”

- [13] Article 9 provides that a member’s Entitlement shall enure for the member, his or her family, guests and invitees and that every member may sub-licence his or her Entitlement (or any part thereof) during any year. Article 10 specifies that the Entitlement of any person other than a member to use and occupy a villa and the resort facilities shall be by the right of membership of the member through whom such person is in occupation of the villa. Article 11 specifies that Entitlements cannot be accrued from year to year and that the Entitlement will lapse if it is not used, but even if the Entitlement lapses, the member remains responsible for the Entitlement Costs during that period.
  
- [14] Under article 12 members must pay a share of the annual outgoings calculated in accordance with the formula set out in that article. The formula is that the amount payable equals annual outgoings, divided by the total number of shares (other than subscriber shares), and multiplied by the number of shares held by the member. Under article 13 the share of the annual outgoing payable by each member is levied by notice to members of the respondent.
  
- [15] Article 22 which was amended on 31 May 1996 by the insertion of paragraph (c) provides:
  - “(a) No Member may exercise any rights or privileges of membership (including but without limiting the generality thereof the right to use his or her Entitlement) whilst any Entitlement Costs payable by the Member to the Company are due but unpaid.
  
  - (b) Should a Member’s Entitlement Costs or any part thereof be unpaid two (2) months after they are due and payable the Company shall be entitled to sub-licence the unused portion of the Member’s Entitlement for the year to which the outstanding Entitlement Costs relate for such amount as the Board may in its absolute discretion determine from which the Company shall deduct all moneys owed to it by the Member of whatsoever nature (including interest at the Prescribed Rate) and all costs associated with the sub-licensing of the Entitlement and the Company shall then remit to the Member any balance. The rights of the Company pursuant to this paragraph shall be without prejudice to any other rights the Company may have pursuant to these Articles or at law.
  
  - (c) A member may not vote at general meeting of the Company if the Member owes more than \$500.00 per quarter share to the Company and that amount has been outstanding for more than one month.”
  
- [16] Article 23 provides:
  - “No Member may exercise any rights or privileges of membership (including but without limiting the generality thereof the right to use his or her Entitlement) if the Member has ceased to be a Co-owner in respect of the same number of Fractional Interests as the number of shares the Member holds in the capital of the Company.”

[17] Article 113 (which was introduced by the 1996 amendments) provides:

“Members irrevocably appoint the directors and secretary of the Company severally to be their attorney to:

- (a) If the Member is a natural person and owns all of the quarter interest in a Lot, appoint a proxy to exercise the member’s body corporate voting rights in respect of the Lot;
- (b) If the Member is a corporation and owns all of the quarter interests in a Lot, appoint a company nominee for the Member in respect of the Lot;
- (c) If the Member does not own all of the quarter interests in a Lot, appoint, in common with the other owners of quarter shares in the relevant lot, a proxy to exercise the body corporate voting rights in respect of the Lot.

For the purposes of this article, ‘Lot’ means a lot in BUP8856 or BUP8847.

Members must not in any way exercise body corporate voting rights in respect of lots or appoint or participate in the appointment of a company nominee or proxy (as applicable) for a Lot.”

### **Principles of interpretation**

[18] It is common ground that the general principles that apply to the interpretation of a company’s constitution are the same as those that apply to the interpretation of any commercial contract; but taking into account the nature of a company’s constitution: *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1 at [56]-[59], [123]-[124] and [232]. The general principles that apply to the construction of commercial contracts were summarised in the joint judgment of French CJ and Hayne, Crennan and Kiefel JJ in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]. This confirmed the objective approach, taking into account the language used by the parties, the surrounding circumstances known to them and the commercial purpose of the contract.

[19] The affidavit of Mr Kelly who is a director, secretary and member of the respondent filed on 17 August 2016 set out the history of the articles, the operation of the letting pool of villas and usage of the term “quarter share” or “quarter interest” in sundry documents to which there were numerous objections. These objections were largely resolved by the respondent’s concession that it would not rely on much of the evidence to which objection was taken. One document exhibited to Mr Kelly’s affidavit that was not objected to was the Resort Administration Agreement. Mr Barlow of Queen’s Counsel who appeared with Mr Fuller of counsel for the applicant conceded appropriately that in construing the articles, consideration could be given to the Resort Administration Agreement as a document which was referred to in the articles.

### **The applicant’s submissions**

- [20] The construction promoted by the applicant gives effect to the plain and ordinary meaning of the words used in article 22(c) and is consistent with the use of the word “share” in other articles to refer to a share in the capital of the respondent. It can also be contrasted with the use in article 113 (which was introduced into the articles by amendment made at the same time that article 22(c) was inserted) of other expressions such as “quarter interests in a Lot” or “quarter interest in a Lot” which unambiguously refer to a one-quarter interest in the ownership of a villa. In those phrases, the juxtaposition of “quarter” with a reference to the villa makes it clear that the quarter share relates to the ownership of the villa.
- [21] Apart from the phrase “quarter share” in article 22(c), the phrase “quarter shares” is used in article 113(c), but followed by the words “in the relevant lot”, and the context makes clear that the expression “quarter shares” within the phrase “the other owners of quarter shares in the relevant lot” is being used interchangeably with the phrase “quarter interests in a Lot” that is also used in article 113(c).
- [22] Article 113 also stands alone within the constitution as the only article dealing with body corporate voting rights of a member of the respondent that arise from the member’s proprietary interests in a lot in the resort. The subject matter of article 113 is therefore distinct from that of article 22(c) which is concerned with voting rights attaching to shares in the capital of the respondent.
- [23] The phrases “quarter shares in the relevant Lot” and similar phrases in article 113 should not affect the meaning of the phrase “quarter share” in article 22(c) which should be read consistently with the balance of the articles where the word “share” is used in its ordinary meaning to refer to a share in the capital of the respondent.
- [24] It is also relevant that the primary focus of the articles is on Fractional Interests where a Fractional Interest is 1/52 interest as tenant in common in any of the villa lots which equates with one Entitlement Week and one share in the capital of the respondent. This can be contrasted with the reference in article 22(c) to quarter share which does not reflect the basic Fractional Interest of ownership in a villa lot that is described in the articles.
- [25] The construction of article 22(c) for which the applicant contends is also commercially reasonable, as it would require a member to be indebted to the respondent in a larger amount of \$2,000 per share or \$26,000 per parcel of 13 shares before being deprived of the exercise of the member’s voting rights, rather than \$500 per parcel of 13 shares which would apply under the construction proposed by the respondent. The construction of article 22(c) that results in a higher threshold should be preferred, when the effect of the threshold being reached is to deprive the relevant member of the suite of statutory rights associated with holding shares in the respondent.
- [26] Article 22(c) can be contrasted with article 22(a) which should be read as a reference to articles 8 to 11 which appear under the heading “Rights and Privileges of Company Membership”. Article 22(c) is limited to depriving the member of voting rights and the statutory rights that accrue with the power to exercise voting rights. It is relevant that the reference to the sum of \$500 per quarter share in article 22(c) includes any amount a member owes to the respondent and is not limited to arrears in payment of Entitlement

Costs. It makes sense for article 22(c) to remove a member's voting rights based on the amount owing per share in the capital of the respondent, as voting rights are given by reference to shares and then taken away by reference to shares in the capital of the respondent.

- [27] It is not to the point that "quarter share" does not relate to any interest recognised under the articles as a quarter of a share in the capital of the respondent. The specification of "\$500.00 per quarter share" is a method of calculating the threshold before article 22(c) can be invoked and is not dependent on a quarter of a share being otherwise the subject of any provision of the articles.
- [28] The construction proposed by the applicant does not require words to be read into article 22(c) in order to make sense of the expression "quarter share".

### **How should "quarter share" be construed?**

- [29] It was not conceded on behalf of the applicant that there is any ambiguity in the expression "quarter share" in article 22(c), although the applicant accepts that a share in the capital of the respondent is not divisible into quarters.
- [30] The context in which the constitution is to be construed, however, is where the qualification for membership is being a co-owner of a villa lot in the resort and the minimum parcel of 13 shares that can be acquired by a member equates to one-quarter of the ownership interest in a villa lot which equates to 13 Entitlement Weeks (or one-quarter of a year).
- [31] When the relationship between a member's entitlement to shares with the ownership of a quarter interest in a villa in the resort is taken into account, there is *prima facie* ambiguity in the choice of the words "quarter share" in article 22(c).
- [32] I accept the applicant's submission that the words "quarter share" must be construed within the articles as a whole and, in the normal course, the plain and ordinary meaning of the word "share" when used in the constitution of a company must be a reference to a share in the capital of the company. That starting point for construing the expression "quarter share" hits a stumbling block, as the word "share" is qualified by the description "quarter". As a matter of mathematical logic, a method for calculating the debt of a member of a company as the threshold at which voting rights at a general meeting are deprived can be expressed in terms of "\$X per quarter share", even though there is no such unit as a quarter of a share in respect of the company's capital. The mathematical logic would convert the debt threshold to \$4X per share. But it is difficult to justify construing "quarter share" so literally, when the expression "quarter share" relates to the ownership of a villa which is the qualifying event for a member to own shares in the respondent.
- [33] The quantum of the threshold for depriving a member of voting rights does not assist in determining the proper construction. To the extent the applicant argues that the construction that results in the higher threshold should be preferred, the respondent can counter that it is in the interests of the respondent that there be an incentive in the risk of



loss of voting rights for a member to pay all outgoings and levies that are payable by the member to the respondent to facilitate the operation of the resort that is contemplated by the constitution. Although article 113 shows how easy it would have been for the draftsman of article 22(c) to set out that quarter share was a reference to a quarter share in a villa, the failure to do so does not preclude construction of the expression “quarter share” to mean a quarter share in a villa lot, if that is what construction of the expression within the constitution and in context requires.

- [34] The applicant’s argument based on the nature of the Fractional Interest defined in the articles loses its force when the articles are considered in the context of the creation of quarter interests in each villa lot and that quarter interest became the basic unit for a member to qualify for shares in the respondent.
  
- [35] The context given to the constitution by the creation of quarter interests in each villa lot in the resort and the relationship between co-ownership of a quarter interest and entitlement to shares in the capital of the respondent that are dealt with in the articles, including articles 6, 8, 23 and 82 and Schedule One, determine the objective construction of “quarter share” in article 22(c). This context displaces the plain and ordinary meaning of the word “share” and supports construing “quarter share” consistently with the use of the word “quarter” in respect of a member’s ownership interest in a villa lot.
  
- [36] I have therefore concluded that the construction of “quarter share” in article 22(c) does not mean a quarter of a share in the capital of the respondent, but instead is a reference to a quarter share in the ownership of a villa lot in the resort.

## **Orders**

- [37] It follows as the applicant has not succeeded on its construction of article 22(c) that the originating application must be dismissed. In the usual course, costs should follow the event. I will give the parties an opportunity to consider these reasons, before hearing submissions on the costs of the application. It may be that as much of Mr Kelly’s affidavit filed on 17 August 2016 was irrelevant to the task of construing article 22(c) any costs order in favour of the respondent should exclude the costs of that affidavit, apart from exhibiting the Resort Administration Agreement.