Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia - [2016] FCAFC 80

FEDERAL COURT OF AUSTRALIA

Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2016] FCAFC 80

Appeal from:	*Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785
File number:	VID 442 of 2015
Judges:	**ALLSOP CJ, FOSTER AND GLEESON JJ**
Date of judgment:	10 June 2016
Catchwords:	**CORPORATIONS** – power of shareholders in general meeting to pass resolutions about the management of the company – distinction between an act of the company and the interests of shareholders in the management of the company – appeal dismissed
Legislation:	*Company Law Review Bill 1997* (Cth) *Corporations Act 2001* (Cth) ss 124, 135, 136, 198A, 203D, 249N, 249O, 249P, 250N, 250R, 250S *Federal Court of Australia Act 1976* (Cth) s 43
Cases cited:	

Auer v Dressel 306 NY 427; 118 N.E.2d 590 (1954)

Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2015] FCA 785

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34

Aveo Group Limited v State Street Australia Ltd in its capacity as custodian for the Retail Employees Superannuation Pty Limited as trustee of the Retail Employees Superannuation Trust [2015] FCA 1019

Clifton v Mount Morgan Limited (1940) 40 SR (NSW) 31

Coco v The Queen [1994] HCA 15; 179 CLR 427

Commissioner of Taxation (Cth) v Commonwealth Aluminium Corporation Ltd [1980] HCA 28; 143 CLR 646

Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; 251 CLR 640

ENT Pty Ltd v Sunraysia [2007] NSWSC 270; 61 ACSR 626

Ex parte Bond; Re Junee District Hospital (1940) 40 SR (NSW) 420

Harben v Phillips (1883) 23 Ch D 14

Howard Smith Ltd v Ampol Petroleum Ltd [1974] 1 NSWLR 68 ; AC 821

Isle of Wight Railway Co v Tahourdin (1883) 25 Ch D 320

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd [2006] FCAFC 144; 156 FCR 1

Minister for Planning v Walker (No 2) [2008] NSWCA 334

National Roads & Motorists' Association v Parker (1986) 6 NSWLR 517

Northern Inland Council for the Environment Inc v Minister for the Environment [2014] FCA 216

Oshlack v Richmond River Council [1998] HCA 11; 193 CLR 72

Plaintiff B9/2014 v Minister for Immigration and Border Protection (No 2) [2015] FCAFC 27

PNC Telecom Plc v Thomas [2002] EWHC 2848 (Ch); [2003] B.C.C. 202

Potter v Minahan [1908] HCA 63; 7 CLR 277

Qantas Airways Limited v Cameron (No 3) [1996] FCA 765; 68 FCR 387

Qantas Airways Ltd v Lustig (No 2) [2015] FCA 782

Queensland Press Ltd v Academy Investments No 3 Pty Ltd (19 87) 11 ACLR 419; [1988] 2 Qd R 575

Re Winlyn Developments Pty Ltd [2011] NSWSC 1218; 86 ACSR 197

Rose v McGivern [1998] 2 BCLC 593

Ruddock v Vadarlis (No 2) [2001] FCA 1865; 115 FCR 229

Stanham v The National Trust of Australia (New South Wales) (1989) 15 ACLR 87

Sumiseki Materials Co Ltd v Wambo Coal Pty Ltd [2013] NSWSC 235

Thompson v Australian Capital Television Pty Ltd [1994] FCA 1042; 54 FCR 513

Turner v Berner [1978] 1 NSWLR 66

Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd [2014] NSWCA 326; 88 NSWLR 689

Windsor v National Mutual Life Association of Australasia Limited [1992] FCA 139; 34 FCR 580

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Cordes M, Pugh-Smith, J, Caulfield, G, Burton, J and Waghorn, R *Shackleton on the Law and Practice of Meetings* (13th ed, Sweet & Maxwell, 2014)

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Date of hearing:	12 February 2016
Registry:	Victoria
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	76
Counsel for the Appellant:	Ms C M Kenny QC with Mr D B Clough and Mr A F Solomon-Bridge
Solicitor for the Appellant:	Environmental Justice Australia
Counsel for the Respondent:	Mr C M Caleo QC and Dr C G Button
Solicitor for the Respondent:	Herbert Smith Freehills

ORDERS

VID 442 of 2015

BETWEEN: **AUSTRALASIAN CENTRE FOR CORPORATE RESPONSIBILITY (ABN 95 102 677 417)**
Appellant

AND: **COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)**
Respondent

JUDGES: **ALLSOP CJ, FOSTER AND GLEESON JJ**

DATE OF ORDER: **10 JUNE 2016**

THE COURT ORDERS THAT:

The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. This appeal primarily concerns the power of shareholders in general meeting to pass resolutions about the management of the company.

2. The appellant represents over 100 members of the respondent (**the Bank**) entitled to vote at a general meeting of the Bank. Relevantly, s 249N(1) of the *Corporations Act 2001* (Cth) (**the Act**)

provides that at least 100 members who are entitled to vote at a general meeting may give a company notice of a resolution that they propose to move at a general meeting.

3. By letter dated 4 September 2014, the appellant purported to give notice pursuant to s 249N(1) of the Act of three resolutions which were proposed to be moved at the Bank's annual general meeting on 12 November 2014 (**the 2014 AGM**). The letter was, relevantly, in the following terms:

> **1. Notice of proposed resolution**
>
> We the undersigned and attached comprise in excess of 100 members of the company entitled to vote at a general meeting (collectively known as the ACCR CBA shareholders group).
>
> We are writing to give the company notice that we propose to move a resolution as set out in section 4 of this letter below at the next general meeting of the company, which we assume will be the 2014 AGM.
>
> **2. Company to give notice to all members**
>
> Could you please confirm the company has received this notice in time for the AGM scheduled for Thursday, 12 November 2014 (ie more than two months from the date this notice was given). Please note it is our preference to put this resolution to the AGM. In the event an EGM is planned or called in the intervening period please contact us to let us know.
>
> Could you please also confirm that in accordance with section 249O(2) of the Corporations Act the company will give all members notice of this proposed resolution? We note that the company dispatched the notice of the 2013 AGM a little over one month prior to the meeting. Could you please confirm that the company has received this letter in time to include notice of our resolution with the notice of meeting for the 2014 AGM? If the company has received this letter within 2 months of the annual general meeting there has been some mistake or misunderstanding as to dates, in that event please treat this letter as withdrawn and contact us immediately.
>
> **3. Distribution of our statement**
>
> We are also writing to request that the company give all members the statement set out in Attachment A. Could you please:
>
> > ensure this statement (which both deals with a resolution proposed to be moved and deals with matters that may be properly considered at the meeting) is included in the notice of meeting without any editing or amendment. Let us know if you would like us to provide an electronic version if that assists you; and
> >
> > immediately inform us if the statement contains any factual inaccuracy. We will endeavour to take corrective steps in that event.
>
> We further note that in accordance with ss 249P(6) and (7) of the Corporations Act the statement is required to be distributed together with the notice of meeting and the company will be responsible for the cost of the distribution.

4. Resolutions

Please include one of the following resolutions we propose to move on the notice of meeting.

4.1 First preference [footnote 1: This option is number 5 in the signed 'Notice to company pursuant to ss 249N & P of the *Corporations Act 2001* (Cth) ' documents attached at D.]

"That, in the opinion of the shareholders it is in the best interests of the company that the Directors provide to the shareholders by the time of the release of the 2015 Annual Report, a report prepared at reasonable cost and omitting any proprietary information outlining: (a) the quantum of greenhouse gas emissions that the company is responsible for financing calculated, for example, in accordance with the Greenhouse Gas (GHG) Protocol guidance; (b) the current level and nature of risks to the company from 'unburnable carbon'; and (c) current approaches that have been adopted by the company to mitigate those risks."

4.2 Second preference option for inclusion in the absence of the preferred option [footnote 2: This option is number 2 in the signed 'Notice to company pursuant to ss 249N & P of the *Corporations Act 2001* (Cth) ' documents attached at D]

In the event that for whatever reason our preferred option immediately above at 4.1 is not included in the final notice of meeting please include the following resolution by way of alternative.

"That, in consideration of the annual directors' report the shareholders express their concern at the absence in the report of: (a) an assessment of the quantum of greenhouse gas emissions that our bank is responsible for financing calculated, for example, in accordance with Greenhouse Gas (GHG) Protocol guidance; (b) an adequate assessment of the current level and nature of the risks climate change and particularly 'unburnable carbon' pose to our bank; (c) sufficient description of the strategies our bank has adopted to mitigate these risks."

4.3 Alternative option for inclusion in the absence of either of the preferred options above at 4.1 and 4.2 [footnote 3: This option is number 8 in the signed 'Notice to company pursuant to ss 249N & P of the *Corporations Act 2001* (Cth) ' documents attached at D.]

In the event that for whatever reason our preferred options immediately above at 4.1 and 4.2 are not included in the final notice of meeting please then include the following special resolution by way of alternative.

"Special Resolution to amend the constitution: At the end of the Clause 9 'General Meetings' insert the following new sub-clause: "That, each year at about the time of the release of the Annual Report, at reasonable cost and omitting any proprietary information , the Directors report to shareholders their assessment of the quantum of greenhouse gas emissions we are responsible for financing calculated, for example, in accordance with Greenhouse Gas (GHG) Protocol guidance."

4.4 For noting

Please note:

in the event, for whatever reason, it is proposed by the board that our preferred options should not be included in the notice of meeting we may seek an urgent court injunction dealing with this matter;

to avoid unnecessary cost for all shareholders, the necessity for a revised notice, confusion amongst shareholders etc please advise us immediately of any issue or concern the board has with the validity of our preferred options.

...

4. Section 249O of the Act provides:

(1) If a company has been given notice of a resolution under s 249N , the resolution is to be considered at the next general meeting that occurs more than 2 months after the notice is given.

(2) The company must give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.

(3) The company is responsible for the cost of giving members notice of the resolution if the company receives the notice in time to send it out to members with the notice of meeting.

(4) The members requesting the meeting are jointly and individually liable for the expenses reasonably incurred by the company in giving members notice of the resolution if the company does not receive the members' notice in time to send it out with the notice of meeting. At a general meeting, the company may resolve to meet the expenses itself.

(5) The company need not give notice of the resolution:

(a) if it is more than 1,000 words long or defamatory; or

(b) if the members making the request are to bear the expenses of sending the notice out--unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in giving the notice.

5. The Bank included the appellant's third proposed resolution (a proposed special resolution to amend the Bank's constitution) in the notice of meeting for the 2014 AGM, but declined to include the other two proposed resolutions. By letter dated 23 September 2014 to the appellant, the Bank's Group Company Secretary stated:

As you would be aware, the first and second alternative proposals referred to in the letter dated 4 September 2014 from the [appellant] are matters within the purview of the Board and management of the Bank. The third alternative is the only alternative resolution that is valid and capable of being legally effective. Accordingly the third alternative, proposing that the Bank's constitution be amended, has been included in the Bank's Notice of Meeting.

6. The primary judge rejected the appellant's application for relief including a declaration that the disputed resolutions were resolutions that "could validly be moved" at an annual general meeting of the Bank: See *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785.

7. The primary judge concluded (at [33]) that the Bank was not required to put the proposed resolutions to the shareholders at the 2014 AGM, notwithstanding the terms of s 249O of the Act , unless the resolutions were referable to a power vested in the shareholders in general meeting, and not referable to the power of management vested exclusively in the Bank's directors. Her Honour also concluded that the powers of the shareholders in general meeting did not include a power to pass resolutions of the kind sought to be proposed.

8. The primary judge applied the decision of McLelland J in *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517 in which his Honour said (at 522):

> ...it is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that other body or person. ... The members of the plaintiff no doubt have a legitimate interest in how these powers are exercised, but in their organic capacity in general meeting they have no part to play in the actual exercise of the powers.

9. Other issues (with which we deal below) were decided adversely to the appellant's application. (See [34]-[43] of the primary judge's reasons.)

Appellant's contentions

10. The appellant made the following contentions on the appeal:

    (1) The passage set out above from *Parker* is wrong and should not be followed. The primary judge erred in concluding that it was necessary to identify a source of power in the shareholders at general meeting to pass the proposed resolutions. Alternatively, if it was necessary to identify a source of power, then the shareholders in general meeting did have the requisite power by reason of their "plenary" or implied power to express opinions concerning the management of the company.

    (2) For the second proposed resolution, if it is necessary to identify a source of power, the primary judge erred in rejecting the appellant's argument that s 250R(1) of the Act was such a source.

    (3) The primary judge erred in finding that, for the purposes of s 249N of the Act , the appellant did not give proper notice of the two disputed resolutions.

    (4) The primary judge erred in failing to find that statements made by the Board concerning the third resolution were ultra vires the Board's powers.

11. For the following reasons, the appeal should be dismissed.

Statutory context

12. Section 124(1) of the Act provides, relevantly, that a company has the legal capacity and powers of an individual both in and outside this jurisdiction.

13. Section 198A of the Act , which is a replaceable rule under s 135 , is in the following terms:

> (1) The business of a company is to be managed by or under the direction of the directors.
>
> Note: See section 198E for special rules about the powers of directors who are the single director/shareholder of proprietary companies.
>
> (2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting.
>
> Note: For example, the directors may issue shares, borrow money and issue debentures.

14. Part 2G.2, Div 4 of the Act is entitled "Members' rights to put resolutions etc". It contains ss 249N and 249O (referred to earlier) and s 249P . Section 249P obliges the company to distribute to all members a statement, in accordance with a request from members intending to move one or more resolutions at a general meeting, at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of that general meeting.

15. Part 2G.2, Div 8 of the Act provides for AGMs of public companies. By s 250N , every public company (other than a public company that has only one member) must have an annual general meeting to be held at least once in every calendar year, and within the period of five months after the end of the company's financial year.

16. Relevantly, s 250R provides that:

> (1) The business of an AGM may include any of the following, even if not referred to in the notice of meeting:
>
> (a) the consideration of the annual financial report, directors' report, and auditor's report;
>
> ...
>
> *Advisory resolution for adoption of remuneration report*
>
> (2) At a listed company's AGM, a resolution that the remuneration report be adopted must be put to the vote.
>
> Note: Under paragraph 249L(2)(a), the notice of the AGM must inform members that this resolution will be put at the AGM.
>
> (3) The vote on the resolution is advisory only and does not bind the directors or the company.

...

17. Section 250S provides that:

> (1) The chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company.
>
> (2) An offence based on subsection (1) is an offence of strict liability.

Bank's constitution

18. Clause 12.1(a) of the Bank's constitution provides:

> **Directors to manage company**
>
> The business of the company shall be managed by or under the direction of the directors, who may exercise all such powers of the company as are not, by the Corporations Act or this constitution, required to be exercised by the company in general meeting.

19. The Act specifies powers that are required to be exercised by the shareholders in general meeting, for example, ss 136(2) (amendment or repeal of constitution) and 203D (removal of directors).

20. **Following paragraph cited by:**

> In the matter of Bogasi Pty Limited (19 August 2020) (Rees J)
>
> > The plaintiff did not suggest that the memorandum and articles of association of Bogasi provided otherwise. As a general proposition, the shareholders in general meeting are not entitled to control, usurp or exercise the powers of the directors; the shareholders in general meeting have no authority to speak or act on behalf of the company except to the extent and in the manner authorised by the company's constitution or any relevant statute and to an extent and in a manner consistent with the constitution or statute: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 113 ACSR 600; [2016] FCAFC 80 at [20] , [37]-[38] . Further, the general meeting is not the proper forum to determine matters of management as the area of management is one in which the shareholders have no direct effective will: *Winthrop Investments Limited v Winns Limited* (1975) 1 ACLR 222; [1975] 2 NSWLR 666 at 684 per Samuels JA, followed in *Australasian Centre for Corporate Responsibility* at [43] .
>
> MWYS and Commissioner of Taxation (Taxation) (22 December 2017) (The Hon Justice J A Logan Rfd, Deputy President)
>
> > 38. Ltd submitted that votes cast by Ltd or Plc ordinary shareholders on Joint Electorate Actions and Class Rights Actions could not be characterised as "directions, instructions or wishes" of Ltd or Plc (as applicable) as to how the other entity should act. It submitted that the characterisation test was objective. I agree. That was the view of Morritt LJ (with whom Potter and

> Morrison JJ agreed) in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 at 354 in relation to the test for the application of the extended, "shadow director" definition and the analogy is compelling. It is a company law given both in Australia and in the United Kingdom that, within the limits of applicable statute law and the company's constitution, shareholders, collectively, control a company by casting votes at a general meeting. That does not mean that the shareholders of Ltd or Plc have any legal ability to "control, usurp or exercise", the powers of the directors of the company in which they are a shareholder: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280 at [20] (and the authorities there cited). To this one must add for present purposes, much less do they have any such legal ability in respect of the directors of a company in which they are not a shareholder. It is not within the remit of their shareholders to control the business or acts of either entity.

The appellant acknowledged that cl 12.1(a) is materially indistinguishable from s 198A . The appellant accepted that, by virtue of cl 12.1(a), the shareholders in general meeting were not entitled to control, usurp or exercise the powers of the directors: *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 NSWLR 68 at 79 ; AC 821 at 837, citing *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34; *Commissioner of Taxation (Cth) v Commonwealth Aluminium Corporation Ltd* [1980] HCA 28; 143 CLR 646 at 660-661 ; and *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134 ; Aickin K, "Division of Power Between Directors and General Meeting as a Matter of Fact and Policy" (1967) 5 MULR 448.

The nature of resolutions

21. The word "resolution" is not defined in the Act . As noted above, in *Parker,* McLelland J described a resolution as a "formal act of the company".

22. Lang AD, *Horsley's Meetings: Procedure, Law and Practice* (7th ed, LexisNexis, 2015) [10.3] and [10.5], states relevantly:

> **10.3** ... A resolution – that is, the result of something being resolved – is a motion that has been carried by the requisite majority voting in its favour. It is possible (though not usual, nor normally desirable) for a meeting to decide to pass a resolution that by the use of suitable words has the effect of affirming the motion was not carried, and thus recording this in a positive way in the minutes.
>
> Until and unless a resolution is passed, a meeting does not accomplish anything that has a real effect, that is, does not produce a result that has any potency at all, nor, of course, any legal significance; but when a resolution has been passed, a legally binding decision has thereby been made. In summary, a resolution records a decision taken by the meeting and a motion sets out a decision proposed to be taken.
>
> The Corporations Act , the various state Associations Incorporation Acts and many other statutes use the term 'resolution' loosely to refer both to 'motion' and 'resolution'. They rarely use the word 'motion'. The failure of the legislature to maintain a useful terminological distinction is unfortunate.

...

> **10.5** A motion is the basis of a potential decision. If it becomes a resolution, it has legal effect, possibly long range. ...

23. Cordes M et al, *Shackleton on the Law and Practice of Meetings* (13th ed, Sweet & Maxwell, 2014), describes an ordinary resolution (that is, one requiring only a simple majority) as "the basic way in which the sense of a company general meeting is given specific and formal shape" (at [15-02]). Renton NE, *Guide for Meetings and Organisations* (8th ed, Thomson Reuters, 2005), defines a resolution at [4.1] as "a formal determination by an organised meeting" and a motion as "a proposed resolution before it has been adopted" (although notes that the words are frequently used interchangeably). Brown SR, *Company Resolutions: Precedents For Use in Drafting Resolutions at Meetings of Members and Directors (*4th ed, Lawbook, 1982), states at p 3: "A resolution is a decision or an expression of opinion or intention by a meeting".

24. The Bank did not contend that all advisory resolutions are *ipso facto* invalid because they are advisory. As it acknowledged, ss 250R(2) and (3) of the Act would contradict any such contention. However, the Bank contended, an advisory resolution under ss 250R(2) and (3) is valid because it has a discernible statutory basis.

The business of an AGM

25. As noted above, the precise relief sought by the appellant was, relevantly, a declaration that the proposed resolutions "could validly be moved" at an AGM. In oral submissions, Ms Kenny QC, senior counsel for the appellant, accepted that the appellant sought, in effect, a declaration that the disputed resolutions should have been put to the meeting in the circumstances of this case: See appeal transcript p 6. Despite this concession, Ms Kenny QC maintained that the declaration should be made even if the appellant failed on its appeal from the primary judge's finding that the purported notice under s 249N was not effective: appeal transcript p 7.

26. The appellant's submissions did not seek to explain the meaning of the phrase "could have been validly moved", although Ms Kenny QC noted that lack of validity was a reason given by the Bank for not including the disputed resolutions in the notice for the 2014 AGM. The appellant was at pains to emphasise that the proposed resolutions were not binding on the directors, and that the resolutions would have no legal effect. The appellant contended that McLelland J, in *Parker* , had erred by equating an expression of opinion with an exercise of power. Ultimately, the submission was that the shareholders have power to pass ineffective resolutions unless that power is expressly taken from them. The purposes of such resolutions were said to include increasing the participation of shareholders in their companies, and informing directors and other shareholders of shareholder opinions. In support of the practical efficacy of the disputed resolutions, the appellant referred to the decision of *Auer v Dressel* (1954) 306 NY 427; 118 N.E.2d 590. In that case, the shareholders proposed a resolution to reinstate the chairman. At 432, Desmond J said:

> The stockholders, by expressing their approval of Mr. Auer's conduct as president and their demand that he be put back in that office, will not be able, directly, to effect that change in officers, but there is nothing invalid in their so expressing themselves and thus putting on notice the directors who will stand for election at the annual meeting.

27. Putting aside the decision in *Parker* , the following two cases tend against the existence of a "power" vested in shareholders in general meeting to pass an ineffective resolution. For the reasons that follow, we do not consider that the approach in *Auer v Dressel* obtains in Australia.

Isle of Wight Railway Co

28. In *Isle of Wight Railway Co v Tahourdin* (1883) 25 Ch D 320 at 334, Fry LJ said:

> If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it.

29. The principle stated by Fry LJ has been applied on many occasions. In *Windsor v National Mutual Life Association of Australasia Limited* [1992] FCA 139; 34 FCR 580 at 590, Black CJ and Beaumont J (Ryan J agreeing), followed Fry LJ's statement in concluding that the relevant requisition was wholly ineffective and imposed no obligation on the company to convene a meeting. The principle was also referred to with apparent approval by Jordan CJ in *Ex parte Bond; Re Junee District Hospital* (1940) 40 SR (NSW) 420 at 424 . It was applied in *Turner v Berner* [1978] 1 NSWLR 66 at 72 (shareholders had no power to determine that director had breached company law); *Parker* at 521 ; *Stanham v The National Trust of Australia (New South Wales)* (1989) 15 ACLR 87 at 91 (no power to pass a motion of no confidence); *Queensland Press Ltd v Academy Investments No 3 Pty Ltd* (1987) 11 ACLR 419; [1988] 2 Qd R 575 at 578 (no power to require directors to refer management matter to shareholders for approval); and, in the United Kingdom, in *Rose v McGivern* [1998] 2 BCLC 593 at 605 (shareholders did not have power to authorise the board to proceed with demutualisation, which was a matter within the exclusive powers of board) and *PNC Telecom Plc v Thomas* [2002] EWHC 2848 (Ch); [2003] B.C.C. 202 at 208 (requisition did not state an object incapable of being effectively achieved).

30. In *Re Winlyn Developments Pty Ltd* [2011] NSWSC 1218; 86 ACSR 197, Barrett J granted interlocutory injunctions to restrain the holding of a general meeting convened for the purpose of passing resolutions which his Honour found the meeting could not meaningfully pass. In deciding to grant injunctions, his Honour referred (at [30]) to "the undesirability of allowing legally meaningless resolutions to go forward lest those who have proposed them rely on them, once passed, as if they were legally meaningful."

31. The appellant accepted that a company may omit from a notice of general meeting a resolution which seeks impermissibly to control the exercise of powers vested exclusively in the directors.

32. However, Fry LJ did not express the relevant principle so narrowly. Rather, at 334, his Lordship expressed it as the converse of the following proposition:

> But if the object stated in the requisition be such that by any form of resolution or by any machinery sanctioned by the [Companies Clauses] Act, it can be carried into effect, then it is the bounden duty of the directors to call the meeting.

33. Thus, Fry LJ was drawing a distinction between effective and ineffective resolutions, rather than between resolutions that did or did not seek to usurp the powers of the directors. If the

distinction made by Fry LJ is the relevant distinction, then the appellant's case must fail because it is expressly predicated upon the fact that the disputed resolutions, if passed, would be ineffective in any legal sense.

Clifton v Mount Morgan Limited

34. In *Clifton v Mount Morgan Limited* (1940) 40 SR (NSW) 31, there was a dispute concerning the election of the directors of the company. It was submitted that the Court should direct a general meeting of the shareholders to be held, and if the shareholders who attended passed an ordinary resolution expressing a desire that the plaintiffs should not act as directors, then the Court should decline to grant the plaintiffs relief, notwithstanding that an extraordinary resolution was necessary, under the company's articles, to remove a director from office.

35. At 44 to 45, Jordan CJ said:

> As a general rule, the shareholders assembled in general meeting may by ordinary resolution validly act on behalf of the company so as to bind the company with respect to all matters as to which no special provision is made or as to which any special provision if made is unavailable. But there is no universal rule that shareholders in general meeting may by ordinary resolution bind or represent the company with respect to anything and everything.
>
> ...
>
> In order that anything may be effectively done on behalf of the company, or so as to bind or affect the company, it is necessary that it should be done by some person or persons authorised in that behalf and in the manner prescribed as necessary.
>
> ...
>
> [A] general meeting is not the company, and has no authority to speak or act on behalf of the company except to the extent and in the manner authorised by the Articles of Association or to an extent and in a manner consistent with the Articles of Association.

36. At 49 to 50, the Chief Justice continued:

> The general principle upon which Cotton LJ [in *Harben v Phillips* (1883) 23 Ch D 14 at 39] based his observations appears to be contained in the sentence "No one can doubt that the wish of a corporation that certain person should not be directors may effectually be expressed by any meeting of the shareholders duly called for such purpose, although such wish may not be effectual to remove the persons appointed to the office of directors." This proposition is opposed both to principle and to authority. It confuses the corporation with the persons who are its members; and it is directly in conflict with the later decisions of the Court of Appeal and the House of Lords in 1909 and 1935 which are above referred to. It is adversely criticised by leading text books: Buckley, 11th ed, 747: Stiebel, 3rd ed, 297–8; and in my opinion it should be neither following nor applied.
>
> In my opinion, if it is once clearly established that persons are legally entitled to act as directors and that other persons are wrongfully preventing them from so acting, then *prima facie* it is the duty of the Court to intervene by injunction to restrain the misconduct of the

> wrongdoers. ... the fact that the shareholders in general meeting have expressed a wish that the complainants should be deprived of their legal rights, such a meeting having no legal authority to represent or control the company in the matter, is of itself an irrelevant circumstance. In such a case it is for the Court to assist the complainants by declaring and enforcing their rights, and not to condone the act of wrongdoers because their wrongdoing happens to possess irrelevant support.

37. The appellant did not argue that Jordan CJ's statement of the law in *Clifton* was incorrect. In our view, *Clifton* is authority for the fundamental proposition that the shareholders in general meeting have no authority to speak or act on behalf of the company except to the extent and in the manner authorised by the company's constitution or any relevant statute, and to an extent and in a manner consistent with the constitution or statute. This proposition extends to the expression of a "wish" on behalf of the company, unless it is demonstrated that the meeting has legal authority to represent the company on the relevant subject matter.

38. The correctness of the proposition arises from the fact that, if the shareholders in general meeting are to take any action on behalf of the company rather than as individuals (whether alone or collectively), they must be authorised by the company to do so. Any source of authority must be found in the constitution of the company or in statute.

Members' rights to put resolutions pursuant to s 249O

39. Section 249O was part of a package of amendments by the *Company Law Review Bill 1997* (Cth) to the then Corporations Law , which rewrote the provisions on meetings. The appellant did not contend that s 249O should be read as altering common law doctrine: cf *Potter v Minahan* [1908] HCA 63; 7 CLR 277 at 304 ; *Thompson v Australian Capital Television Pty Ltd* [1994] FCA 1042; 54 FCR 513 at 526 ; *Coco v The Queen* [1994] HCA 15; 179 CLR 427 at 437 .

40. Rather, the appellant's case seemed to assume that the proposed resolutions could be "required to be considered" within the meaning of s 249O provided that they were resolutions that could be "validly put".

Resolutions based on legitimate interest

41. The appellant argued that the proposed resolutions could be "validly put" because the shareholders in general meeting had a legitimate interest in their subject matter.

42. The appellant's submission misunderstands the nature of the company as an entity distinct from its shareholders and directors. An act of the company (of which a resolution of its members is an example) must necessarily be an act which the company has the capacity or power to undertake. The legitimate interests of the various shareholders in the management of a company are distinct interests which cannot be aggregated to provide a justification for a resolution of the shareholders in general meeting, because the powers and capacities of the company arise from its constitution and statute and not from the legitimate interests of its shareholders.

43. **Following paragraph cited by:**

In the matter of Bogasi Pty Limited (19 August 2020) (Rees J)

> The plaintiff did not suggest that the memorandum and articles of association of Bogasi provided otherwise. As a general proposition, the shareholders in general meeting are not entitled to control, usurp or exercise the powers of the directors; the shareholders in general meeting have no authority to speak or act on behalf of the company except to the extent and in the manner authorised by the company's constitution or any relevant statute and to an extent and in a manner consistent with the constitution or statute: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 113 ACSR 600; [2016] FCAFC 80 at [20], [37]-[38] . Further, the general meeting is not the proper forum to determine matters of management as the area of management is one in which the shareholders have no direct effective will: *Winthrop Investments Limited v Winns Limited* (1975) 1 ACLR 222; [1975] 2 NSWLR 666 at 684 per Samuels JA, followed in *Australasian Centre for Corporate Responsibility* at [43] .

The appellant contended that the judgment of Samuels JA in *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 supported the proposition that a resolution that did not involve the exercise of a power could be put to the shareholders in general meeting. In that case, the question was whether the shareholders could ratify an exercise of power by the directors involving a breach of fiduciary duty, or give advance authority for an exercise of power which would otherwise involve such a breach. In holding that the shareholders did have the requisite power, Samuels JA said (at 683 to 684):

> Here, of course, there was no question of any explicit contest between the directors and shareholders. The directors themselves referred the matter to the general meeting. They sought the shareholders' approval of the course which the directors had otherwise determined to follow. They asked for the shareholders' advice; and undertook to act in accordance with the shareholders' opinion. But that advice did not represent any exercise of power, because the directors were not bound to take it. They said that they would; but voluntary acquiescence is not the same as submission. If, therefore, these resolutions are regarded as the expression by the shareholders of their approval of the transaction which the directors contemplated, they do not involve the exercise of power at all. They were not acts in the law, and could have no effect.
>
> It is not sufficient, therefore, if I may respectfully say so, to regard these resolutions as effective, merely because they may be said to have expressed the will of the general meeting. The general meeting is not, I think, the proper forum to determine matters of management, however critical they may be. The area of management is one in which the shareholders have no directly effective will.

44. But Samuels JA did not conclude that the resolutions were permissible or valid despite not involving an exercise of power. He concluded that the resolutions should be regarded "as an exercise of the shareholders' power to authorize the directors to do an act in breach of fiduciary duty; in other words the power to waive the rights which such an act would vest in the company" (at 684).

45. Accordingly, we reject the submission that the resolutions could be put (or at least required to be put) to the meeting in the absence of a power vested in the shareholders in general meeting to pass the resolution as an act of the company.

Resolutions based on "plenary" power

46. The appellant also argued that the resolutions could be made in the exercise of the Bank's "plenary" power. The starting point for this argument seemed to be the proposition, stated by Mahoney JA in *Winthrop* at 699, that "[i]n the absence of some provision to the contrary, the shareholders in general meeting may exercise any power which the company is legally competent to exercise."

47. The power which the company was said to be legally competent to exercise is a power to do anything which was not expressly prohibited by the Bank's constitution.

48. At common law, before the advent of the doctrine of ultra vires, a corporation had the same legal capacity as a human being: Morse G, *Charlesworth's Company Law* (17th ed, Thomson Sweet & Maxwell, 2005) at p 62. That capacity is "an ability or fitness to receive: in law, it signifies when a man or body politick is able to give, or take, lands or other things, or to sue actions": Cowell J, *The Interpreter: or Booke Containing the Signification of Words* (Lawbook Exchange, 2002 (1607)).

49. In oral submissions, Ms Kenny sought to rely on s 124(1) in support of a proposition that, if an individual can express an opinion, so can a company.

50. We see nothing in the legal powers and capacities of an individual which would support the existence of a legal power or capacity in the company in general meeting to express an opinion, by resolution, on a matter concerning the company's management. An individual's expression of an opinion, even an opinion concerning him or herself, ordinarily does not involve the exercise of any legal power or capacity. The appellant's submission confuses legal powers and capacities with physical powers (in this case, the power of speech). The shareholders of a company are, of course, free to express their opinions concerning the management of the company, individually and collectively.

51. The appellant also argued that the disputed resolutions "are not dealing with the business of the company" and thereby did not offend cl 12.1 of the constitution.

52. We accept that the disputed resolutions do not, in terms, require the directors of the Bank to exercise the power of management in any particular way. However, that circumstance is not sufficient to make them resolutions that members are entitled to propose to the shareholders in general meeting. Once it is accepted that a resolution requires some constitutional or statutory basis, it is necessary to find a power that the shareholders may exercise to justify the resolution. The appellant failed to identify any aspect of any "plenary" or "reserve" power vested in the shareholders in general meeting to provide that justification.

Resolutions based on implied power

53. The implication of a power involves the application of the principles concerning the implication of contractual terms: *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 at 656-657 [35] (French CJ, Hayne, Crennan and Kiefel JJ); *Sumiseki Materials Co Ltd v Wambo Coal Pty Ltd* [2013] NSWSC 235 at [135] (Hammerschlag J), approved on appeal in *Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd* [2014] NSWCA 326; 88 NSWLR 689 at 702 [40] ; see also *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2006] FCAFC 144; 156 FCR 1.

54. The appellant did not identify a principled basis for the implication of the asserted power.

55. There is no relevant implied power.

56. We also accept the submission made on behalf of the Bank that the right conferred by s 250S of the Act (which requires the chair of an AGM to allow a reasonable opportunity for members as a whole to ask questions about or make comments on the management of the company) is a matter telling against any implied power because there is no lacuna which must be fulfilled to permit shareholders to convey their views about management matters.

57. It is not necessary to consider whether the directors of a company may choose to put a resolution of the kinds proposed to the AGM if they considered it to be a proper exercise of their functions as directors. That is not this case.

Section 250R

58. Ms Kenny QC described s 250R as an "express power" to put resolutions relating to management of the company. Section 250R(1) is not expressed as a conferral of power on the shareholders in general meeting to pass resolutions. The "business of an AGM" is the subject matter of the meeting. These words do not confer any power of the shareholders. To the contrary, the inclusion of ss 250R(2) and (3) reflects the absence of power otherwise to pass the resolution that is the subject of ss 250R(2) and (3). Further, there is no reason to imply such a power from its language. In particular, the power to make a statement under s 249P says nothing about the power to pass a resolution.

The decision in Parker

59. In our respectful view, *Parker* correctly applies the principle stated by Fry LJ in *Isle of Wight Railway*.

60. In particular, we reject the submission that, by stating that "in their organic capacity in general meeting [shareholders] have no part to play in the actual exercise of the powers [of management of the company]", McLelland J intended to state that the expression of an opinion necessarily involves the exercise of power. In our view, his Honour was saying, correctly, that the shareholders in general meeting did not have a role to play in the exercise of powers vested exclusively in the board by passing a resolution which would express an opinion on the exercise of those powers. That general proposition may be affected by the particular constitution of a company, but it applies in this case.

Conclusions

61. The appellant fails on its first two contentions.

Notice of proposed resolutions

62. The letter dated 4 September 2014, is set out above.

63. The primary judge expressed the view (at [40]) that it was open to the Bank to include only the third proposed resolution on the basis of its view (rightly or wrongly) that the first and second proposed resolutions could not be validly put.

64. In our view, by expressing the 4 September 2014 letter in the way that it did in para 4, the appellant was not entitled to the inclusion of the first or second proposed resolutions in the notice of meeting. To the contrary, the letter clearly conveyed that the inclusion of those resolutions was a matter for the judgement of the directors in the preparation of the notice of general meeting. Consequently, we would not interpret the letter as notice of a resolution that the appellant proposed to move at the 2014 AGM, within the meaning of s 249N , except for the third resolution. Rather, the letter gave the Bank notice that the appellant proposed to move one of three resolutions, depending upon the directors' decision as to which resolution they decided to include in the notice of meeting.

65. There was no error in the primary judge's reasoning on this point.

Statements accompanying notice of members' resolution

66. In the notice of meeting for the 2014 AGM, the Bank included a statement provided by the appellant in support of its proposed resolution. The Bank also included a statement from the Board that the Board did not consider the resolution to be in the best interests of the company and recommending that shareholders vote against the resolution, with reasons for the Board's recommendation.

67. At [42] the primary judge accepted the Bank's submissions that the directors' power to include the statement was derived from cll 9.4 and 12.1(a) of the Bank's constitution and from the directors' duty to provide such material as will fully and fairly inform shareholders of the matters to be considered at a meeting to enable them to make a properly informed decision: *ENT Pty Ltd v Sunraysia* [2007] NSWSC 270; 61 ACSR 626 at [14] to [22] .

68. In written submissions, the appellant argued that the Bank's statement was beyond what was required to fully and fairly inform shareholders because it included opinions. In oral submissions, it was submitted that the Bank should equally not have published its statement as an ASX announcement entitled "Resolution under section 249N of the Corporations Act for consideration at AGM".

69. This argument has no legal foundation. *Parker* says nothing about the expression of opinions other than by the passage of a resolution of the company in general meeting. The primary judge was correct for the reasons given by her Honour.

Costs

70. The respondent sought an order that the appellant pay its costs of the appeal, in the event that the appeal is dismissed.

71. The usual rule is that costs follow the event: cf. *Plaintiff B9/2014 v Minister for Immigration and Border Protection (No 2)* [2015] FCAFC 27 at [5], [9] ; *Qantas Airways Ltd v Lustig (No 2)* [2015] FCA 782 at [7] ; *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; 115 FCR 229 at 234 [11] (Black CJ and French J).

72. The appellant argued that, in the exercise of its broad discretion under s 43 of the *Federal Court of Australia Act 1976* (Cth) , the Court should not make a costs order against the appellant where the proceedings have been brought in the public interest: cf. *Minister for Planning v Walker (No 2)* [2008

] NSWCA 334 at [6] ; *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72; *Northern Inland Council for the Environment Inc v Minister for the Environment* [2014] FCA 216 at [8] .

73. The following circumstances weigh in favour of an unsuccessful appellant, on the question of costs:

    (a) the appeal concerns novel or difficult questions of law that are of general importance;

    (b) the appellant has no personal or financial interest in the outcome of the appeal;

    (c) the appeal was arguable; and

    (d) there is public interest in, and practical implications of, the outcome of the appeal on a relevant section of the public.

74. We do not consider that the circumstances of this case warrant a departure from the usual rule. In particular:

    (1) As appears from our reasons, the appeal did not raise any question of law that could be regarded as novel or difficult. The decision under appeal was, if we may respectfully say, well-reasoned and supported by ample authority. We reject the submission that the relevant principles were "squarely brought into doubt" by *Aveo Group Limited v State Street Australia* [2015] FCA 1019, which was a case which turned on its own particular facts, and, in particular, the documents in question in that case.

    (2) As a corollary, we do not agree that the appeal had or has the potential to have far-reaching impact on shareholder participation or corporate governance. In our view, the case involved the straightforward application of well-established principles.

75. The fact that proceedings are "brought otherwise than for the personal or financial gain of the applicant, and in that sense in the public interest, does not detract from the general proposition that ordinarily costs follow the event and that the primary factor in deciding on the award of costs is the outcome of the litigation": *Ruddock v Vadarlis (No 2)* 115 FCR at [18] (Black CJ and French J (as he then was). Further, we respectfully adopt the statement of Lindgren and Lehane JJ in *Qantas Airways Ltd v Cameron (No 3)* [1996] FCA 765; 68 FCR 387 at 389 that:

> [W]here the applicant is a body established to pursue or safeguard a particular public interest, and to do so by litigation if appropriate, it should not be exempted from the usual adverse costs order where it has failed in a proceeding brought by it for that purpose.

Orders

76. The order of the Court will be that the appeal be dismissed with costs.

I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and the Honourable Justices Foster and Gleeson.

Associate:

Dated: 10 June 2016

Cited by:

In the matter of Bogasi Pty Limited [2020] NSWSC 1118 (19 August 2020) (Rees J)

> The plaintiff did not suggest that the memorandum and articles of association of Bogasi provided otherwise. As a general proposition, the shareholders in general meeting are not entitled to control, usurp or exercise the powers of the directors; the shareholders in general meeting have no authority to speak or act on behalf of the company except to the extent and in the manner authorised by the company's constitution or any relevant statute and to an extent and in a manner consistent with the constitution or statute: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 113 ACSR 600; [2016] FCAFC 80 at [20] , [37]-[38] . Further, the general meeting is not the proper forum to determine matters of management as the area of management is one in which the shareholders have no direct effective will: *Winthrop Investments Limited v Winns Limited* (1975) 1 ACLR 222; [1975] 2 NSWLR 666 at 684 per Samuels JA, followed in *Au stralasian Centre for Corporate Responsibility* at [43] .

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MWYS and Commissioner of Taxation (Taxation) [2017] AATA 3037 (22 December 2017) (The Hon Justice J A Logan Rfd, Deputy President)

> *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation*

MWYS and Commissioner of Taxation (Taxation) [2017] AATA 3037 (22 December 2017) (The Hon Justice J A Logan Rfd, Deputy President)

> 38. Ltd submitted that votes cast by Ltd or Plc ordinary shareholders on Joint Electorate Actions and Class Rights Actions could not be characterised as "directions, instructions or wishes" of Ltd or Plc (as applicable) as to how the other entity should act. It submitted that the

characterisation test was objective. I agree. That was the view of Morritt LJ (with whom Potter and Morrison JJ agreed) in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 at 354 in relation to the test for the application of the extended, "shadow director" definition and the analogy is compelling. It is a company law given both in Australia and in the United Kingdom that, within the limits of applicable statute law and the company's constitution, shareholders, collectively, control a company by casting votes at a general meeting. That does not mean that the shareholders of Ltd or Plc have any legal ability to "control, usurp or exercise", the powers of the directors of the company in which they are a shareholder: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280 at [20] (and the authorities there cited). To this one must add for present purposes, much less do they have any such legal ability in respect of the directors of a company in which they are not a shareholder. It is not within the remit of their shareholders to control the business or acts of either entity.

MWYS and Commissioner of Taxation (Taxation) [2017] AATA 3037 (22 December 2017) (The Hon Justice J A Logan Rfd, Deputy President)

40. Another company law given is that an incorporated company is a legal entity separate from its shareholders: *Salomon v A Salomon and Co Ltd* [1897] AC 22. It necessarily follows that, when the shareholders of Ltd or, as the case may be, Plc cast their votes at a general meeting they are exercising a personal right but Ltd and Plc remain separate legal entities. Further, save to the extent that either statute or the governing constitution or articles of association permit, and none is relevant here, the shareholders of each of these companies in general meetings had no power even to express a "wish" in respect of matters consigned to the board of that company: *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* at [37] – [38].

Aveo Group Limited v State Street Australia Ltd in its capacity as Custodian for Retail Employees Superannuation Pty Ltd (Trustee) [2016] FCAFC 81 (10 June 2016) (Allsop CJ, Foster and Gleeson JJ)

Australian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2016] FCAFC 80
John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113
Molopo Energy Ltd v Keybridge Capital Ltd [2014] NSWSC 1864; 104 ACSR 46
National Roads & Motorists' Association v Parker (1986) 6 NSWLR 517
Queensland Press Ltd v Academy Investments No 3 Pty Ltd [1988] 2 Qd R 575; 11 ACLR 419

Aveo Group Limited v State Street Australia Ltd in its capacity as Custodian for Retail Employees Superannuation Pty Ltd (Trustee) [2016] FCAFC 81 (10 June 2016) (Allsop CJ, Foster and Gleeson JJ)

48. In *Australian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2016] FCAFC 80, we considered the case law which establishes the basic proposition that the members of a corporate entity may only act pursuant to such powers as are conferred upon them by the constitution of the entity, or by statute. It is the vesting of power in the shareholders by the Act or constitution which provides the necessary foundation for a resolution by shareholders in respect of a particular matter. The shareholders may pass a resolution which expresses an opinion or an intention, provided that the resolution is authorised by the company's constitution (or by statute).