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Supreme Court Decision Highlights Importance of Clearly Drafted Company Constitutions

A recent decision of the New South Wales Supreme Court of Appeal has confirmed that provisions in company constitutions should be given a broad and business-like interpretation. In the event of a dispute concerning an unclear term, the court is likely to reject arguments based on a strict or narrow reading of the document.

Facts

In 1998 Mr Silver was appointed a director of Dome Resources NL. The following year, Mr Silver and Dome entered into a deed to provide Mr Silver with benefits upon his retirement. Upon his retirement in 2000, Mr Silver claimed a retirement benefit, pursuant to the deed, of approximately \$474,000 payable to his services company, Fair Choice Ltd (“FCL”). Dome denied liability to pay the amount, challenging the validity of the retirement deed. Dome claimed that the deed was not validly entered into under clause 11.5 of its constitution which set out rules concerning the payment of retirement benefits of directors. Clause 11.5 relevantly provided:

“The Directors may at any time adopt any scheme or plan which they consider to be in the interests of the Company and which is designed to provide retiring or superannuation benefits for both present and future non-executive Directors, and they may from time to time vary any such scheme or plan. Any scheme or plan may be effected by agreements entered into by the Company with individual Directors, or by the establishment of a separate trust or fund, or in such other manner as the Directors consider proper...”

Interpretation of Constitution

Dome argued that clause 11.5 should be read so that no agreement or deed could be entered into without a previous “scheme or plan” being adopted. Given that no such scheme or plan had been adopted, Dome claimed that the deed entered into with Mr Silver was invalid and not within the powers of its board of directors. The court rejected this strict interpretation of the language of clause 11.5. The court followed previous authorities which held that a constitution should be given a “*businesslike interpretation*”, with regard to “*the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure*”: *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65. The court also made the point that even if a constitution uses terms used in the

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Corporations Act 2001 (Cth) (“Act”), its interpretation should not be limited to that statutory context.

In interpreting clause 11.5, the court held that: “*a provision conferring power on the directors should be given as broad an operation as is reasonably available on the language and without imposing procedural constraints on the board, absent some contextual indication or purpose requiring the language to be so construed*”. Accordingly, the deed was found to be valid and binding on the company.

Calculating Remuneration

There was also a dispute concerning the amount of remuneration Mr Silver was entitled to under the retirement deed pursuant to the Corporations Law. At the relevant time of Mr Silver’s resignation, the Corporations Law provided that a director’s retirement payments could not be more than three times that director’s remuneration over the last three years. Dome argued that payments that it made to FCL and Goldspark Pty Ltd (being the companies through which Mr Silver provided his services to Dome) should not be included in calculating his allowable retirement benefit because those payments were not made *directly* to Mr Silver.

Again, the court rejected Dome’s literal interpretation of the law and took a purposive approach to the legislation. The court stated:

“In a practical and commercial sense, Dome was not managed by the corporate entities, Goldspark or FCL: rather, it obtained from those companies the skills, expertise and time of Mr Silver. It was Mr Silver who was the person responsible for managing Dome, in relevant respects. The payment in a practical and commercial sense was made for his services. Neither he nor Dome expected that he would obtain no financial benefit for his time. Nor should the scope of the term “remuneration” be governed by ascribing a literal meaning to the introductory words of the definition, namely a benefit “given to” an officer, or one “received by” a director.

For the purposes of disclosure provisions, it would make a mockery of the Corporations Law if directors had been able to avoid disclosure of their remuneration by having companies contract with their family trusts or other entities and make payment to those trusts or other entities, which did not constitute remuneration payable “to” the director. The statutory requirements, as in other fields, may require that conduct be traced through corporate entities, not stopping the analysis at the point where a new entity is introduced.”

Dome was ordered to pay Mr Silver’s costs.

The case emphasises that the court will not interpret a company’s constitution or the Act narrowly in a manner that it not consistent with its purpose or intent. If a particular provision in a constitution is meant to be construed narrowly it should be drafted in a precise and unambiguous manner such that it only allows one interpretation.



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