Supreme Court

New South Wales

Case Name:	Chen v Liu
Medium Neutral Citation:	[2015] NSWSC 161
Hearing Date(s):	4 March 2015 and 5 March 2015
Decision Date:	5 March 2015
Jurisdiction:	Equity Division
Before:	McDougall J
Decision:	Conditional relief to be given under s 1322(4) Corporations Act; parties to bring in draft orders.
Catchwords:	REMEDIES – statutory remedies – Corporations Act 2001 – section 1322(4) orders – where association incorporated under the Associations Incorporation Act 2009 (NSW) – where association at deadlock between two factions vying for control – where neither side's evidence satisfactory – orders on the just and equitable ground – where each faction seeks relief under section 1322(4) – whether relief to be granted on condition that the association hold an extraordinary general meeting for the purpose of electing the committee and its office bearers – costs – whether parties entitled to recoup legal costs from accounts of the association CORPORATIONS – associations – applicability of Corporations Act 2001 to associations –fiduciary duties of office bearers – whether expending association funds on litigation to determine control of the association amounts to breach of fiduciary duties
Legislation Cited:	Associations Incorporation Act 2009 (NSW) Associations Incorporation Regulation 2010 (NSW) Corporations Act 2001 (Cth) Corporations (Ancillary Provisions) Act 2001 (Cth)
Cases Cited:	Resource Equities v Carr [2009] NSWSC 1385

Carr v Resource Equities Limited [2010] ACSR 247

Category:	Principal judgment
Parties:	Weijie Chen (First Plaintiff) Hong Xie (Second Plaintiff) Yan Liu (First Defendant) Yugan Chen (Second Defendant) Hailun Meng (Third Defendant) Australia Fuzhou Community Alliance Incorporated (Fourth Defendant)
Representation:	Counsel: I J King (Plaintiffs) S A Lees (First, Second and Third Defendants) Solicitors: Ralph Doughty (Plaintiffs) Machiao Lawyers (First, Second and Third Defendants)
File Number(s):	2014/263622

JUDGMENT (EX TEMPORE – REVISED 5 MARCH 2015)

1 **HIS HONOUR:** The fourth defendant, the Australian Fuzhou Community Alliance Incorporated (the Alliance), is an incorporated association. It was formed for the laudable purpose of enabling people born in Fuzhou or the province of Fujian in the People's Republic of China, or relatives or friends of such persons, who live in Australia to have some form of social association. Another laudable objective was to promote cultural and business ties between this country and people from that region of China.

2 Unfortunately, the affairs of the Alliance have been conducted in a way that displays either total ignorance of or contempt for the requirements of the law. There appear to be two rival factions, each of which wishes to control, and claims to control, the affairs of the Alliance. One of those factions is represented by the natural plaintiffs, Mr W J Chen and Mr Hong Xie. The other faction is represented by the first three defendants, Mr Yan Liu, Mr Y G Chen and Mr Hailun Meng.

3 The Alliance was incorporated under the *Associations Incorporation Act* 2009 (NSW) (the Act) on 17 September 2012. In the events that have happened, it is

common ground that the only effective constitution of the Alliance is, and has always been, the model constitution set out in Sch 1 to the *Associations Incorporation Regulation* 2010 (NSW) (the Regulation).

4 It is crystal clear on the evidence that the requirements of the model constitution have been disregarded in some respects. For example, there has been no annual general meeting ever conducted in accordance with the requirements of Pt 4 of the Regulation.

5 Each of the warring parties has purported to conduct at least one annual general meeting. Each of those parties accepts that the meeting on which it relies was not conducted in accordance with the requirements of the model constitution.

6 There is some reason to think that the warring parties may have been engaged in membership drives, perhaps in an attempt to shore up their respective positions. Regardless, it is either common ground, or accepted for the purposes of this dispute, that the current members of the Alliance are (in each case to the extent that they are alive) those persons identified at pp 294 to 303 inclusive of exhibit PX3, and those persons identified at pp 650 to 663 inclusive of exhibit PX4.

7 Each of the warring parties claims, in effect, relief under s 1322 of the *Corporations Act* 2001 (Cth). It is common ground that s 1322 applies to the Association through the mechanism of s 96 of the Act, cl 16 of the Regulation and (through cl 16) Pt 3 of the *Corporations (Ancillary Provisions) Act* 2001 (Cth). It is not necessary to give further detail of that tortuous chain of title.

8 It is also common ground that, under s 1322(4), the Court has powers that would extend to validating one or other of the meetings that the warring parties have conducted if, among other things, it appeared to the Court to be just and equitable to do so, and subject to conditions.

9 The discretion to make validating orders and to impose conditions comes from s 1322(4). The power to do so, if it is just and equitable, comes from s 1322(6)(a)(iii).

10 The Court is faced with a number of unpalatable alternatives, in circumstances where the evidence is woefully deficient. One is to leave matters as they are, and in doing so dismiss the claim and the cross-claim. Another is to order that the Alliance be wound up. Another is to make a validating order on condition that elections be held on proper notice to all members of the Alliance, so that (perhaps) the question of control can be determined in a conclusive way, one that complies with the requirements of the model constitution.

11 The first of those alternatives is unsatisfactory. It would mean that the hearing over today and yesterday in effect has been wasted. It would leave the parties at war. It would leave the affairs of the Alliance in limbo.

12 The second alternative has some considerable appeal. However, the result would be that moneys contributed by members of the Alliance over its short life would be devoted in substance to the benefit of the liquidator.

13 The third alternative seems to me to be the one that is desirable. It may be that, once the question of control is resolved, the Alliance can continue to function in accordance with the law (including the requirements of the model constitution, unless and until that constitution is validly replaced) and for the benefit of members in the execution of the objects of the Alliance.

14 It appears to be common ground that the Court could grant relief under s 1322(4) on condition that whichever party were “vindicated” was required to hold an extraordinary general meeting as soon as possible (consistent with the requirements of due notice) for the purpose of electing a committee. Even if that were not common ground, I see no reason why the plenary powers in s 1322(4), which subsection clearly is intended to be remedial and to afford a wide discretion to the Court, should be looked at in such a limited way as to exclude that outcome.

15 Further, the ability of the Court to make an order where it is just and equitable to do so, seems to me, as well as providing a threshold to or trigger for the availability of the discretion, to confirm the width of the discretion.

16 In my view, it is just and equitable that an order of the kind to which I have referred should be made. That will mean that the members of the Association,

having been given proper notice, can decide who should be the committee that, for the time being, runs the Association's affairs. It does not seem to me to be either just or equitable to allow to exist an outcome that one of the two warring factions should arrogate to itself, otherwise than in accordance with the requirements of the model constitution, the right to exercise control over the affairs of the Alliance.

17 Each of the warring parties says that I should validate, in the limited sense just referred to, the meeting on which it relies as the source of its power. There are real problems in each case. As to the plaintiffs, it is clear that the notice given of the meeting was woefully inadequate as to time. I am simply not satisfied that the very short notice period gave members of the Association any real opportunity to attend the meeting. I see no reason why the Court should countenance that state of affairs.

18 As to the defendants (other than the Alliance), the notice given was also inadequate. However, it was somewhat longer, and given in a way which is somewhat more likely to have alerted at least some members of the Alliance to the fact that a meeting was to be held.

19 There are undoubtedly inadequacies in what the first to third defendants did. Specifically, Mr YG Chen, who ultimately accepted that he was chairman of the meeting on which those defendants rely, refused, on a basis which, having regard to the provisions of the model constitution, was entirely spurious, to accept the nomination for president of Mr WJ Chen.

20 That is a serious matter. However, so long as the confirmation, or validation, of the meeting is done on the limited and conditional basis to which I have referred, the reality seems to me to be that not a great deal turns on it. Mr WJ Chen will have the opportunity to be nominated for office, and to accept that nomination. So, too, will any other member of the Association who wishes to take to himself or herself the poisoned chalice.

21 In those circumstances, but very much on the basis that is the lesser of the two evils rather than in a positive sense the more appropriate course, I have come to the conclusion that the validating order should be made in respect of the

meeting that the first to third defendants conducted, or claim to have conducted, on 6 September 2014.

22 If that is to be done, it will be done on condition that there be called, as soon as is practicable having regard to the need to notify members and the requirements of the model constitution, a meeting of all members at which the business to be transacted will include the election of office bearers and the election of a committee.

23 For obvious reasons, the mechanics of that are likely of themselves to lead to dispute. I do not think that it would be desirable to leave the calling and conduct of the meeting in the hands of one or other of the warring parties. For that reason, I suggested that the parties should give consideration to identifying someone who might be called an "honest broker", who could effectively chair a committee composed of equal representatives of the warring parties, which committee would have oversight and conduct of the process of calling the extraordinary general meeting and calling for nominations.

24 The Court has been informed that the parties have identified such a person. That person is the Honourable Ernest Wong MLC. Mr Wong has the very great advantage of being known to and accepted by the warring parties. He has the further advantage, almost as great, of being fluent in the Mandarin language, which I understand to be the language spoken by the members of the Alliance, and indeed more generally people from Fuzhou.

25 Mr Wong wanted the membership list to be clarified. I have done that by indicating that it is to comprise (to the extent that they are alive) all those people identified in the pages of exhibits PX3 and PX4 to which I have referred already.

26 In those circumstances, I think that in outline (and I am not stating the precise form of the orders), the way to move forward is to make an order under s 1322(4) of the *Corporations Act*, on condition that an extraordinary general meeting be called as soon as is practicable and that the business of the meeting is either to be or to include the election of office bearers and the election of a committee.

27 Those matters should be overseen by a subcommittee which, as I see it at present, should include two persons nominated by the plaintiffs and two nominated by the natural defendants, and chaired by Mr Wong. The machinery of fixing the time, date and venue, and giving notice and calling for nominations, should be left in the hands of the committee but with liberty to apply in the event that there is some dispute.

28 There were a number of peripheral matters raised. One was that, at a time when the Alliance was itself a plaintiff, it appears that the funds of the Alliance were utilised for the purpose of advancing the position for which the natural plaintiffs now contend. On the face of things, that would appear to be an improper use of the funds of the Alliance, for the reasons that Spigelman CJ (with whom Macfarlan JA and Sackville AJA agreed) indicated in *Carr v Resource Equities Limited* [2010] ACSR 247 [58]. I mention, perhaps immodestly, that I had come to the same view at first instance (*Resource Equities v Carr* [2009] NSWSC 1385 [286]).

29 It appeared at one stage that the solicitor who had been instructed, who held in his trust account the funds paid by the Alliance, might be prepared to submit to an order that the balance should be paid into Court to abide the outcome of these proceedings and the will of members of the Alliance.

[Counsel addressed]

30 I order that the sum of $39,000 paid by the Australia Fuzhou Community Alliance Incorporated to Mr Hao Ran Shen and held by Mr Shen in trust, be paid by him into Court within seven days of receipt of a copy of this order. I direct that this order be entered forthwith.

31 Having indicated, I hope clearly, the view to which I have come, the appropriate course is to direct the parties to bring in short minutes of order to give effect to what I have said. I stand the matter over to 10am, Monday 9 March, for the making of orders.

[Counsel addressed further]

32 I order the plaintiffs and the first three defendants each to bear their own costs to date of the proceedings. I reserve for further consideration the costs of the

fourth defendant, Australia Fuzhou Community Alliance Incorporated. I reserve liberty to apply generally.

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