Supreme Court

New South Wales

Case Name:	Re Ryde Ex-Services Memorial & Community Club Limited (Administrator appointed)
Medium Neutral Citation:	[2015] NSWSC 226
Hearing Date(s):	5 February 2015
Date of Orders:	17 March 2015
Decision Date:	17 March 2015
Jurisdiction:	Equity Division
Before:	Lindsay J
Decision:	Determination: (1) that a purported resolution of a meeting of members of the plaintiff was invalid; and (2) that an application for validation of the resolution, under the Corporations Act 2012 Cth, section 1322 (4)(a), be dismissed.
Catchwords:	CORPORATIONS – Membership, rights and remedies – Members' remedies and internal disputes – Management and administration – Meetings – Meetings of members – Proceedings at meeting – Voting – Company limited by guarantee – Registered club – Registered Clubs Act 1976 NSW, s 41J – Corporations Act 2001 Cth, s 1322
Legislation Cited:	Corporations Act 2001 Cth) Registered Clubs Act 1976 NSW
Cases Cited:	Ahmed v Chowdhury [2012] NSWSC1452 at [47] Alliance Craton Explorer Pty Ltd v Quasar Resources Ltd [2010] SASC 266 at [81] Australian Olives Limited v Stout (No 2) [2007] FCA 2090 at [19]) Ball v Persall (1987) 10 NSWLR 700 Broadway Motors Holdings Pty Ltd (in liquidation) and the Companies (New South Wales) Code (1986) 6

NSWLR 45 at 56B
Byng v London Life Association Ltd [1990] CH 170 at 188H
Caruth v Imperial Chemical Industries Ltd [1937] AC 707
Const v Harris (1824) T & R 496
Cook v Cook (1986) 162 CLR 376 at 390 and 394
Cuthbertson v Hobart Corporation (1921) 30 CLR 16 at 24-25
Direct Acceptance Corporation Limited (1987) 5 ACLC 1,037 at 1,041
Federation Insurance Ltd v W Wasson (1987) 163 CLR 303 at 313-314
Flynn v University of Sydney [1971] 1 NSWLR 857 at 859
Fraser v NRMA Holdings Ltd (1995) 55 FCR 452 at 466B-C
Gordon v Carroll (1975) 6 ALR 579 at 622-623
In re Indian Zoedone Company (1884) 26 CHD 70 at 77.
John v Rees [1970] CH 345 at 380E and 382D-E
Link Agricultural Pty Ltd v Shanahan [1999] 1 VR 466 at 475 [23], 480 [40]-481[41]
McKerlie v Drill Search Energy Ltd (2009) 72 ACSR 288; [2009] NSWSC 488 at [27]-[35])
National Dwellings Society v Sykes [1894] 3 CH 159 at 162
Re Adams International Food Traders Pty Ltd and the Companies Code (1988) 13 NSWLR 282 at 283 E-F
Re Direct Acceptance Corporation Ltd (1987) 5 ACLC 1,037
Re John v Rees [1970] Ch 345 at 369H-374E
Re Telford Inns Pty Ltd (1985) 10 ACLR 312Re Walker and Anor (in their capacity as the joint liquidators of One.Tell Limited (2009) 262 ALR 150; [2009] NSWSC 1172 at [27]
Talbot v NRMA Holdings Ltd (1996) 21 ACSR 577 at 580)
The Second Consolidated Trust Limited v Ceylon Amalgamated Tea & Rubber Estates Ltd [1943] is 2 All ER 567 at 569
Wall v London and Northern Assets Corporation [1898] 2 Ch 469

	Wasson v Commercial & General Acceptance Ltd (1985) 2 NSWLR 206 at 228B-C)
Texts Cited:	Joske's Law and Procedure at Meetings in Australia (11th edition, Law Book Co, 2012)
Category:	Principal judgment
Parties:	Plaintiff: Ryde Ex Services Memorial & Community Club Limited (Administrator appointed) ACN 001 057 585 First Defendant: Anthony Bonvino Second Defendant: The Gateway at Ryde Pty Limited ACN 601 442 773
Representation:	Counsel: C Birch SC, Plaintiff MW Young SC, First Defendant F Lever SC, Second Defendant Solicitors: Pigott Stinson Solicitors, Plaintiff Bransgroves Solicitors, First Defendant Etienne Lawyers, Second Defendant
File Number(s):	2014/00362068

JUDGMENT

INTRODUCTION

1 The plaintiff, Ryde Ex-Services Memorial & Community Club Ltd ("the Club"), is a company limited by guarantee (registered under the *Corporations Act* 2001 Cth) and licensed under the *Registered Clubs Act* 1976 NSW. It instituted these proceedings to have the Court determine the validity of a resolution controversially passed at a meeting of its ordinary members.

2 The members are deeply divided about a proposal, promoted by its Board of Directors, to sell off land, upon which club premises stand, to pay down the Club's debts.

3 On 23 November 2014 the members of the Club, in general meeting, purported to pass a resolution necessary, under section 41J of the *Registered Clubs* Act, to give effect to that proposal.

4 Members opposed to the proposal have continued their agitation in opposition to it. In doing so, they have contended that the resolution, purportedly passed on 23 November 2014, was invalid.

5 That contention is based, essentially, on the fact (agreed and established by evidence, particularly Exhibit 1D1) that, upon the motion that became the resolution being moved and seconded, the chairman of the meeting announced that:

(a) members were able thereafter to cast their votes on the motion at any time during the meeting; and

(b) should they wish to do so, members could cast their vote and leave the meeting without waiting for debate on the motion to conclude.

6 Opponents of the Board's proposal (represented, as yet without a representative order, by the first defendant as the Club's contradictor) maintain that:

(a) members of a company attending a general meeting have a right which goes beyond merely voting but extends also to participation in relevant debate and a proper opportunity to speak on a substantive motion that is before the meeting;

(b) if debate on a motion is altogether suppressed, even by means of a procedural motion that "the vote now be put", then the motion will not be validly passed;

(c) the chairman of a meeting should not put a substantive motion to the vote, or accept a procedural motion that it be put to the vote, unless sufficient opportunity for debate on the motion has occurred; and

(d) the chairman's announcement at the beginning of the meeting of 23 November 2014 that members were thereafter free to cast a vote and leave was tantamount to a denial of a proper opportunity for all members to be heard on the motion, with the consequence that the ballot taken upon it and the resultant "resolution" were invalid.

7 The first defendant contends that the invalidity he attributes to the resolution is reinforced by (but not dependent upon) the following additional facts, which I take as established by evidence before the Court:

(a) "Notes to Members" circulated by the Board with the Notice of General Meeting pursuant to which the meeting at which the contentious resolution was passed included (under a heading

entitled “Procedural Matters”) statements to the effect that: (i) members attending the meeting would have an opportunity to speak for or against the motion; and (ii) each vote would be first decided by a show of hands, with a ballot conducted if a show of hands did not provide a clear result;

(b) Some members of the Club (members of a sporting club, the “Ryde Bulls”, associated with the Club), but not all members of the Club, had prior notice of the voting procedure the subject of the chairman’s announcement because: (i) on 21 November 2014 the Club’s Board of Directors agreed, as between themselves, that such a voting procedure should be adopted; (ii) a director of the Club associated with the Ryde Bulls was privy to that decision; and (iii) on 21 November 2014 the Ryde Bulls’ webpage posted a notice encouraging all Ryde Bulls members to attend the general meeting on the basis that it would be open to them to vote and leave without having to stay for the whole meeting;

(c) The course of the meeting after the chairman’s announcement about voting procedure on the motion did not follow the chairman’s prescription (that there would be an information session, followed by a question and answer session, before debate with speakers for and against the motion in turn) but, having commenced with an information session, proceeded in a less structured way (without speakers for and against the motion being formally called upon alternately) until, after about one hour 45 minutes, the chairman drew discussion to an end by announcing that everyone who had not voted needed to vote because the ballot would close at an appointed time shortly thereafter; and

(d) At or about the time appointed for the closure of voting, opponents of the motion moved and seconded a procedural motion that votes cast before that time be declared invalid.

8 The draft minutes of the meeting record that the procedural motion moved upon closure of voting was declared by the chairman to have been “not carried”, but the mover of the motion deposes that the chairman, after conferring with the chief executive officer of the Club, refused to accept the motion on the basis that it “would not be legally viable”. I accept that evidence. I proceed on the basis that the chairman did not accept the formal procedural motion advanced at the end of voting.

9 The chairman’s initial announcement about voting procedure was not the subject of any vote, by way of a show of hands or otherwise.

10 The draft minutes of the meeting suggest that the chairman announced that "[the] Board (consisting of seven members of the Club) have requested a ballot, mainly due to it being 38° with no air conditioning, with the voting process being more manageable than a show of hands."

11 A transcript of the opening phase of the meeting (Exhibit 1D1) records nothing of the sort. The chairman simply made the following announcement before calling for a mover and seconder of the motion:

> "As noted in the Notice to Members, information will be given to this meeting. This will happen after there is a mover and seconder. It's a hot day and we don't want to be here too much longer. So once the motion has been moved and seconded members may either, ah, sorry, members may either not wish to, nor feel comfortable in having to wait for the debate to be concluded before they have the opportunity to vote.
>
> Also, a number of members have informed the board they do not wish to be present for the whole meeting before voting. Accordingly, after the resolution when the resolution has been moved and seconded members can cast their vote at any time during the course of the meeting so if they want to do so if they want to do so they can vote them leave."

12 After the motion was moved and seconded, the chairman made the following further announcement:

> "At any time after the motion has been moved and seconded members can cast your ballot paper in the ballot boxes provided at the back of the room. Alternatively you can stay and listen to the questions and discussion at the end of the information session. After the information session has been given I will then call for questions from the members present. During this question time I will restrict the speaking purely to questions. Discussion on the resolution and the merits of the proposal will happen after the questions. During the question and answer sessions you will be allowed to ask questions on the proposal.…
>
> After the question and answer sessions I will then call for speakers for and against the resolution in turn.
>
> At the end of the discussion I will ask all members who have by then not yet voted to complete their ballot papers and submit them to the ballot boxes."

13 At about the same time as this further announcement was made the process of voting commenced, with members moving into and out of the hall.

14 The transcript of the meeting records no demand for a poll by any member of the Club.

15 An agreement by directors of the Club outside, and indeed before, the meeting that a (secret) ballot be conducted in lieu of a show of hands is not a substitute

for a voting procedure “by a show of hands” or a “demand” for a poll, in lieu of a show of hands, at the meeting.

16 Although the evidence indicates that the Club’s’ Board of directors had agreed, two days before the meeting, upon the form of the voting procedure announced by the chairman at the commencement of the meeting, given that his *bona fides* is not in dispute in these proceedings, I pay him the courtesy of proceeding on the assumption that the voting procedure he announced was announced by him acting on his own authority, not as a delegate of the Board.

17 There *were* complaints from the floor of the meeting about the chairman’s announced procedure, coupled with an assertion that any votes cast before “both sides of the story” had been heard in formal debate would be invalid. However, the voting procedure announced by the chairman was implemented *without* anybody moving a procedural motion that the chairman’s decision, embodied in the announcement, be dissented from: *cf,* ES Magner, *Joske’s Law and Procedure at Meetings in Australia* (11th ed, Law Book Co, Sydney, 2012), paragraph [6.75]; *Wishart v Henneberry* (1962) 3 FLR 171 at 173.

18 Whether his decision would have been upheld, or overturned, had it been tested in that manner cannot now be known. Nor can one confidently know why a motion of dissent was not moved. Members in attendance may have been ignorant about meeting procedure. Just as plausibly, opponents of the Board’s proposal may not have had the numbers to challenge the chairman. They may have thought their best strategy to be to use the Chairman’s decision as a debating point against, or as a ground for a prospective challenge to, the substantive motion under consideration. One cannot know their individual, or collective, subjective states of mind, though inferences may have to be drawn, objectively, from the whole of the evidence available.

19 Had a motion of dissent been put and rejected by the Chairman it may have been arguable that there was a lack of *bona fides* on his part*: Corpique (No 20) Pty Limited v Eastcourt Limited* (1989) 15 ACLR 586 at 597; 7 ACLC 794 at 803.

20 Nevertheless, despite the disappointment with the outcome of the meeting amongst those who have opposed the Board’s proposal, these proceedings fall

be determined on the basis that nobody has challenged the *bona fides* of the chairman of the meeting.

21 Whether technically permissible or not, his decision about the voting procedure adopted was, in the abstract, plausible; not manifestly unreasonable having regard to the welfare of members of the Club in attendance. It is common ground that: (a) the venue for the meeting was uncongenial during hot weather that prevailed at the time of the meeting; and (b) that factor was said to be a factor taken into account by the Chairman.

22 Likewise, whether or not the voting procedure adopted was technically permissible, the chairman had plausible grounds for believing, as he evidently did, that, by the time the contested motion had been moved and seconded, all members of the Club had had ample opportunity to be informed about the general nature of the business to be transacted.

23 The meeting at which the contested resolution was passed was immediately preceded by another meeting (of about one hour's duration) which brought to an end an earlier meeting (held on 10 August 2014) that had been the subject of an adjournment. Supporters and opponents of the Board's proposal appear largely (but I cannot say completely) to have joined issue by the time of the chairman's announcement about voting procedure at the second of the two meetings held on 23 November 2014. The combined notices of the meetings distributed to members of the Club incorporated "Notes to Members" that summarise the Board's proposal and record that the Club had held "information sessions" for the benefit of members since the meeting of 10 August 2014.

24 The chairman's decision about voting procedure is susceptible of different colours depending upon whether regard is, or is not, had to the broader context in which the decision was made.

25 If regard is had to the fact of the meeting held on 10 August 2014, the fact of systematic information sessions being held for the benefit of members subsequent to that meeting, the fact of the adjourned meeting being held immediately before the meeting at which the contested resolution was passed, the fact that the notices of meeting for the meetings of 23 November 2014 were accompanied by explanatory notes and the fact that the physical welfare of

members attending those meetings would not have been assisted by exposure to prolonged attendance, the chairman's decision appears, in the abstract, to have been reasonable.

26 If, on the other hand, regard is not had to those factors, the decision can more readily be seen as curtailment of debate on a controversial motion, limiting an opportunity otherwise available to its opponents to be heard against it and to persuade other members to their cause.

THE REGISTERED CLUBS ACT 1976 NSW:

Restrictions on Disposal of Core Property

27 Section 41J of the *Registered Clubs Act* prevents disposal by a registered club of any "core property" of the club (section 41J (3)) unless:

(a) the disposal has been approved at a general meeting of the ordinary members of the club at which a majority of the votes cast supported the proposal (section 41J (3) (b)); or

(b) the property has been declared, by a resolution passed by a majority of the members present at a general meeting of the ordinary members of the club, not to be core property of the club (section 41J (1)).

28 "Core property" is defined by section 41J (1). That definition empowers club members to "declare" that particular property is, or is not, "core property". Subject to any such declaration, "core property" of a registered club is defined to mean "any real property owned or occupied by the club" that comprises:

(a) the premises of the club (section 41J (1) (a)); and

(b) any facility provided by the club for the use of its members and their guests (section 41J (1) (b)).

29 Section 41J (1) defines not only "core property", but also the converse concept of "non-core property". Non-core property of a registered club is "any real property owned or occupied by the club that is not core property".

30 Section 41J (2) mandates that each annual report of a registered club specify the core property and non-core property of the club as at the end of the financial year to which the report relates.

THE NATURE OF THE RESOLUTION UNDER CHALLENGE

31 The resolution under challenge in the current proceedings purported, by declarations under section 41J(1), to redefine the "core property" and the "non-core property" of the Club.

32 It did so for the purpose (identified in paragraphs 6-8 of the "Notes to Members" published as an integral part of the Notice of Meeting pursuant to which the meetings of 23 November 2014 were convened) of empowering the Club's Board of Directors, on conditions:

(a) to retain a parcel of land on the current site of the Club's premises, on which new premises and facilities can be built; and

(b) to receive money (from a prospective sale of non-core property) to fund the construction of new premises, eliminate the Club's debt, and provide cash reserves.

33 The parties before the Court agree that it is not necessary, in these proceedings, to review the state of the Club's finances or to question the *bona fides* of the Club's directors. Nor is it necessary to consider wider questions relating to management of the Club.

34 Suffice to say that there are genuine concerns about Club's finances, and equally genuine concerns about any prospective sale of club property as a means of addressing concerns about the Club's solvency.

35 The focus of the current proceedings is on the validity, or otherwise, of the resolution under challenge.

THE EARLIER GENERAL MEETING

36 The general meeting held on 23 November 2014, at which the contested resolution was passed, was not the first to be convened to discuss whether there should be a sell-off of club property.

37 As has been noticed already, a general meeting held on 10 August 2014 considered a proposed resolution on the same topic.

38 It was less discriminating than the one purportedly passed on 23 November 2014. It did not specifically identify property proposed to be declared non-core property, as did the resolution ultimately passed.

39 The earlier, proposed resolution was to the following effect:

(1) Moved (and seconded) that, pursuant to section 41J(1) of the *Registered Clubs Act*, the members hereby declare all of the Club's land to be non-core property of the Club.

(2) Moved (and seconded) that the Club cannot transfer title to any part of the land until:

(a) the Club occupies and has commenced trading from new licensed club premises;

(b) the Club is the registered proprietor of the land on which the new licensed premises are located; and

(c) the land on which the new licensed club premises are to be constructed is declared to be core property.

40 The meeting of 10 August 2014 had become mired in controversy, evidently with fairly evenly balanced voting blocks, as a result of which the meeting was (after contested debate) "adjourned to a date to be confirmed in writing so that members can gather and receive further information on the proposal" for the sale of club property.

41 The notice of meeting pursuant to which the second meeting of 23 November 2014 was convened was accompanied by a separate notice that the adjourned meeting of 10 August 2014 would be held, first, on that date.

42 The two notices of meeting, incorporated in the one document, provided for (as happened) a resumption of the adjourned meeting on 23 November 2014, followed immediately by the freshly convened meeting.

43 No complaint is made about this procedure or the combined notices of meeting.

44 On 23 November 2014 the adjourned meeting resumed at about 10:30am. The President of the Club (who chaired both meetings that day) immediately proposed that the meeting close so that the fresh meeting could commence. After about an hour of debate, indicative of ongoing controversy, the meeting was closed. The motion moved and seconded on 10 August 2014, upon closure of the adjourned meeting, lapsed unpassed.

45 Uncertainty attends the precise timing of the closure of the first (adjourned) meeting and the commencement of the second (fresh) meeting held on 23 November 2014. The draft minutes of the former record that it closed at 11:30am. The draft minutes of the latter record that it opened at 11:20 am.

Nothing is said to turn on the discrepancy, however. There is no controversy about the sequence of events in this respect. The adjourned meeting closed, the fresh meeting commenced immediately thereafter.

THE RELIEF SOUGHT BY THE PLAINTIFF CLUB

46 Conscious of continuing opposition to the Board's proposal to sell off property, and of continuing complaints that the contested resolution of 23 November 2014 was invalid because of the voting procedure adopted, the Club commenced the present proceedings (by an Originating Process filed on 9 December 2014) seeking relief under the *Corporations Act*, section 1322 (4).

47 Section 1322 is in the following terms (with emphasis added):

> "**Irregularities**
>
> (1) In this section, unless the contrary intention appears:
>
> (a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and
>
> (b) a reference to **a procedural irregularity** includes a reference to:
>
> (i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and
>
> (ii) a defect, irregularity or deficiency of notice or time.
>
> (2) **A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.**
>
> (3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.
>
> (3AA) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the inability of a person to access the notice of meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.
>
> (3A) If a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at 2 or more venues, the meeting will only be invalid on that ground if:

(a) the Court is of the opinion that:

(i) a substantial injustice has been caused or may be caused; and

(ii) the injustice cannot be remedied by any order of the Court; and

(b) the Court declares the meeting or proceeding (or that part of it) invalid.

(3B) If voting rights are exercised in contravention of subsection 259D(3) (company controlling entity that holds shares in it), the meeting or the resolution on which the voting rights were exercised will only be invalid on that ground if:

(a) the court is of the opinion that:

(i) a substantial injustice has been caused or may be caused; and

(ii) the injustice cannot be remedied by any order of the court; and

(b) the court declares the meeting or resolution invalid.

(4) **Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:**

(a) **an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;**

(b) an order directing the rectification of any register kept by ASIC under this Act;

(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

(5) An order may be made under paragraph (4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.

(6) **The Court must not make an order under this section unless it is satisfied:**

(a) **in the case of an order referred to in paragraph (4)(a):**

(i) **that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;**

(ii) **that the person or persons concerned in or party to the contravention or failure acted honestly; or**

(iii) **that it is just and equitable that the order be made; and**

(b) in the case of an order referred to in paragraph (4)(c)--that the person subject to the civil liability concerned acted honestly; and

(c) **in every case - that no substantial injustice has been or is likely to be caused to any person**."

48 The Club's Originating Process claimed relief to the following effect:

(1) an order declaring that the resolution passed at the general meeting of the Club held on 23 November 2014 is valid.

(2) alternatively, an order declaring that, pursuant to section 1322(4) of the *Corporations Act*, the resolution is not invalid, notwithstanding:

(a) that the chairman of the meeting informed members shortly after the commencement of the meeting that, if they did not wish to stay for the duration of the meeting, members could vote on the resolution by marking their ballot papers and placing them in the ballot box;

(b) that members entered the meeting after it had formally commenced;

(c) that many members voted on the resolution by marking their ballot papers and placing them in the ballot box during the course of the meeting, thereafter leaving the meeting before questions and debate on the resolution had been completed; and

(d) that some members were informed prior to the meeting that they could attend and vote at the meeting without having to be present throughout the meeting.

49 The Originating Process named two defendants.

50 The first is a former director of the Club who, in fact, is representative of those members of the Club opposed to the resolution under challenge. No order has yet been made for him formally to represent those members but, subject to allowing the parties an opportunity be heard, such an order would appear to be appropriate for an orderly determination of the proceedings: *John v Rees* [1970] Ch 345 at 369H-374E (especially at 369H-370H, 371G-372A and 373H-374C); *Ahmed v Chowdhury* [2012] NSWSC1452 at [47]; *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at 475 [23], applying *Cuthbertson v Hobart Corporation* (1921) 30 CLR 16 at 24-25. The first defendant served as the Club's contradictor with the benefit of affidavits sworn by like-minded members of the Club.

51 If representative orders are to be effective to bind all members of the Club, procedurally, all persons who have a material interest in the outcome of the proceedings (that is, all members of the Club) should be either joined or represented in the proceedings. Given that full argument has been had, for and against validity of the resolution purportedly passed on 23 November 2014 (with the plaintiff and the first defendant, respectively, having carriage of the argument on either side), it may be appropriate to make representative orders appointing the plaintiff to represent the case for validity and the first defendant to represent the case for invalidity, and those undecided, to cover the field.

52 The second defendant is a land developer with a prospective interest in development of the Club's property should the Club be at liberty to sell part of its land. Although represented at the hearing of the proceedings, it limited its submissions to a formal adoption of those made on behalf of the Club.

THE CLUB UNDER VOLUNTARY ADMINISTRATION

53 On 21 January 2015 the directors of the Club appointed an administrator pursuant to the *Corporations Act*, section 436A.

54 I assume that any necessity, under section 41 of the *Registered Clubs Act*, for the appointment to be approved by the Independent Liquor and Gaming Authority has been satisfied.

55 The validity of the administrator's appointment was under challenge in the days leading to the date appointed for the hearing of the current proceedings. That challenge dissipated in due course. However, in aid of an orderly determination of the current proceedings, on 4 February 2015 (the day before the date appointed for the hearing of the proceedings) I made the following orders with the consent of all parties to the proceedings and the administrator:

(1) Declare, under section 447A of the *Corporations Act*, that part 5.3A of the Act is to operate so as to entitle the administrator to give instructions in these proceedings on behalf of the Club on the basis that he was validly appointed under section 436A of the Act as administrator on 21 January 2015.

(2) Declare, under section 447A of the *Corporations Act*, that part 5.3A of the Act is to operate so as to entitle the administrator to be indemnified from the Club's property in respect of his proper remuneration and payment of his costs and expenses of and associated with these

proceedings, and to hold a lien over the Club's property to secure that indemnity, on the basis that he was validly appointed under section 436A of the Act administrator of the Club on 21 January 2015. ...

(4) Order that leave be granted under section 440D (1)(b) of the *Corporations Act* for the proceedings to continue.

THE QUESTIONS FOR DETERMINATION

56 The proceedings give rise to three questions for determination:

(a) First: Whether the contested resolution of 23 November 2014 was validly passed.

(b) Secondly, if the resolution was not validly passed: Is it open to the Court to make, and should it make, an order under section 1322 (4)(a) of the *Corporations Act* (having regard to sections 1322 (2) and 1322 (6)) that the resolution was "valid"?

(c) Thirdly, if the Court finds that the resolution was not valid and should not be validated by an order made under section 1322: Whether the Court can, and should give directions for the conduct of a further general meeting of members of the Club to address the business that was before the meeting(s) on 23 November 2014.

57 On the hearing of the Club's Originating Process the parties joined in requesting (and I agreed) that, should the third question arise, consideration of it be deferred so as to allow the Club's administrator time to consider how best to proceed with administration of the Club's affairs.

THE VALIDITY OF THE CONTESTED RESOLUTION

Parameters of Debate

58 As acknowledged by senior counsel for the Club, the primary objection that could be taken to the validity of the contested resolution is that the voting process (by a poll in the form of a secret ballot) commenced before debate on the motion under consideration had concluded or, indeed, before it had commenced.

59 Counsel agree that no provision of the *Corporations Act* or the Constitution of the Club deals explicitly with the issue whether a poll may commence to be taken during discussion, or debate, on a motion proposed for consideration.

60 Counsel also agree that there is a dearth of authority bearing specifically upon the issue.

61 The apparent absence of any case directly in point reflects the infinite variety of factual settings in which questions about meeting procedure may arise; the fact-sensitive character of particular cases; the importance of identification of principles governing a determination of the proceedings; and the purposive character of the law.

The Club's case

62 Senior counsel for the Club referred in argument to the following statement made by the late Dr Eilis Magner in the latest edition of *Joske's Law and Procedure at Meetings in Australia* (11th edition, 2012) at paragraph [7.15]:

> [7.15]: Debate can be limited, extended or adjourned by agreement of [a] meeting. Debate is limited when, by agreement of the meeting, the rules are altered to limit the time allotted to each speaker. Alternatively, the meeting may agree that debate will only continue until a certain time; thereafter the matter may be put to a vote or the debate may be adjourned to be taken up at a later time or meeting. …"

63 Senior counsel for the Club also referred to observations of Young J in *Re Adams International Food Traders Pty Ltd and the Companies Code* (1988) 13 NSWLR 282 at 283 E-F:

> "The chairman [of a formal meeting of the creditors of a company for the purpose of considering a scheme of arrangement] has a significant role including the role of impartially determining the persons qualified to vote at the meeting (*Re Telford Inns Pty Ltd* (1985) 10 ACLR 312) and to keep order at the meeting, to adjudicate on proxies and to make sure that those who wish to speak at the meeting are given a fair opportunity to do so: *Re Direct Acceptance Corporation Ltd (1987) 5 ACLC 1037* [Emphasis added].

64 These observations led counsel to the judgment of McLelland J in *Re Direct Acceptance Corporation Ltd* (1987) 5 ACLC 1,037. There, at 1,041-1,042, his Honour made the following observations (with emphasis added) about the conduct of a meeting of shareholders convened to consider a scheme of arrangement:

> "So far as the actual conduct of the meeting is concerned, there is I think considerable substance in the complaint… that insufficient opportunity was allowed for the merits of the scheme to be debated by those present, and in particular by those opposed to it. This was a meeting at which members by themselves their proxies or representatives had a right to attend and in which they had a right to participate, for the purpose of dealing with the proposed resolution which would potentially affect their legal rights. The chairman of such a meeting should not terminate debate on a substantive resolution over objection, unless he is satisfied that there has been a reasonable opportunity for the arguments on each side of the question to be put. The chairman is not

> bound to accept a motion for the closure of debate unless he is so satisfied. It does not matter that a majority at the meeting may wish to act in a particular way regardless of what might be said by the minority: the latter are nevertheless entitled to a reasonable opportunity to have their points of view ventilated. Having regard to the evidence before me of the course of this meeting, in particular the transcription of the tape recording of the proceedings (albeit with some gaps and inaccuracies), I consider that it would have been far preferable if the chairman had permitted further debate on the substantive resolution. Indeed from a technical point of view it appears that the closure was moved and passed before there had been an actual motion to adopt the substantive resolution, although some discussion had already taken place on the merits of the scheme. However on such a matter as this the chairman as a matter of law has a wide discretion with which the court will not interfere, unless the exercise of that discretion can be shown to be invalid, e.g. on the ground that it was exercised in bad faith. It is not sufficient that the court may conclude that it would have exercised the chairman's discretion in some other way. The law recognises that in a purely procedural matter such as the control of debate, the chairman must of necessity have considerable latitude of action in making decisions which will bind those present, particularly when his decision has the support of a majority of the meeting (see *Wall v London & Northern Assets Corporation* [1898] 2 Ch 469 and *Carruth v Imperial Chemical Industries* [1937] AC 707.…
>
> In my opinion the decision of the chairman to terminate the debate and put the substantive resolution did not invalidate the passage of that resolution. However the circumstance that there was not in my view an adequate opportunity for debate reinforces the desirability of the Court giving close and careful scrutiny to the question of the merits of the scheme so far as it may affect those who have not agreed to it. …"

65 In contending for the validity of the contested resolution senior counsel for the Club accepted, on the basis of these authorities, that in determining the general parameters within which a chairman must operate in controlling debate, there is at least some entitlement on the part of those opposing a motion to be heard.

66 However, he submitted that the current proceedings involve a subtly different question: namely, whether participants in a meeting have an entitlement to demand that those voting listen to all the arguments prior to casting their vote. He noted that business conducted at a meeting is not invalidated because those present and voting do not pay attention to speakers, or attend the meeting with their minds made up, prepared to vote without regard to what may be said in debate. He submitted that speakers at a meeting of a company are not entitled to demand of members in attendance that they give dispassionate consideration to arguments that the speakers might wish to present.

67 Absent special arrangements, he submitted (correctly and uncontroversially), the members of a company do not hold their voting powers pursuant to any fiduciary obligation, but are entitled to exercise their voting rights on the basis of whatever private motivations or interests they may have: *North-West Transportation Company Ltd v Beatty* (1887) 12 App Cas 589 at 593-594.

68 The Club accepted that what occurred at the meeting at which the contested resolution was passed was unusual. However, it contended that permitting voting almost as soon as the contested motion was moved and seconded did not, in this particular case, curtail debate, as: (a) debate was allowed to continue; and (b) any member who wished could have stayed throughout the whole of the discussion before voting, as an unquantified number of members did.

The Contradictor's Case

69 Senior counsel for the first defendant joined issue with the Club in submissions summarised in paragraphs [6]-[7] above.

70 In support of those submissions he cited, *inter alia*:

(a) *Flynn v University of Sydney* [1971] 1 NSWLR 857 at 859, in support of a proposition that a failure to observe proper procedures at a meeting can potentially vitiate business transacted at the meeting; and

(b) *Gordon v Carroll* (1975) 6 ALR 579 at 622-623 and *Re Direct Acceptance Corporation Limited* (1987) 5 ACLC 1,037 at 1,041-1,042, in support of propositions to the effect that participants at a meeting are entitled to a reasonable opportunity for arguments on each side of a motion to be ventilated, a denial of which opportunity may carry the consequence that a decision made by reference to the motion is invalid.

Case Law in Common

71 Given that both sides of the present argument take *Re Direct Acceptance Corporation Limited* (1987) 5 ACLC 1,037 at 1,041-1,042 as foundational, insight into the observations made by McLelland J may be obtained from a consideration of the two authorities his Honour cited.

72 So far as is material, the headnote to *Wall v London and Northern Assets Corporation* [1898] 2 Ch 469 records the following:

> "…at a meeting of shareholders [of a company] it is not competent to the majority to come determined to vote in a particular way on any question, and to refuse to hear any arguments to the contrary; but when the views of the minority have been heard, it is competent to the chairman with the sanction of a vote of the meeting to declare the discussion closed and to put the question to the vote."

73 This summation is based upon observations respectively made by Lindley MR at 480-481 and by Chitty LJ at 483.

74 Lord Lindley's observations (with emphasis added) were as follows:

> "… Mr Cozens-Hardy [counsel for the appellant] raised various points of irregularity [about a meeting of shareholders], which I shall dispose of very shortly, because I think they mostly are not points with which this Court [the English Court of Appeal] has anything to do. The only new one is the point about the closure [of the meeting]. It appears that there was a discussion about [affairs of the company under consideration in the proceedings] at a meeting of shareholders of the Assets Company, and, after having heard the views – I do not say of all those who opposed, but of one or two of them – the meeting came to the conclusion that they had heard enough, and did not want to hear any more, and thereupon the chairman declared the discussion closed. That is said to be a matter calling for the interference of this Court. I do not think so. I think it would be a very bad precedent that we should interfere in such a case. I am aware of the importance of the observations made by Lord Eldon in *Const v Harris* (1824) T & R 496 in which he said (at 525), 'I call that the act of all' (he was speaking of the meeting of large companies), 'which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting, not for the purpose of negativing, what any one may have to offer, but for the purpose of negativing, what, when they are met together, they may, after due consideration, think proper to negative: For a majority of partners to say, We do not care what one partner may say, we, being the majority, will do what we please, is, I apprehend, what this Court will not allow.' I think that principle is as important, and, perhaps, more important, to bear in mind now than it was 60 or 70 years ago; but Lord Eldon does not mean that a minority who are bent on obstructing business and resolved on talking forever should not be put down. He means that the majority are not to be tyrannical. After hearing what is to be said, they may say, 'We have heard enough. We are not bound to listen 'till everybody is tired of talking and has sat down.' There is no reason for supposing that there was any terrorism in this matter, and this appeal must be dismissed with costs."

75 Chitty LJ's observations were as follows:

> "As to Mr Cozens-Hardy's 'irregularities', which he put to us very strongly, it appears to me that this Court ought not to interfere in the internal affairs of this or any other company on any such ground as he suggested. As to the closure, I think if we laid it down that the chairman, supported by a majority, could not put a termination to the speeches of those who were desirous of addressing the meeting, we should allow a small minority, or even a member or two, to tyrannise over the majority. The case has been put by Mr Cozens-Hardy as to the terrorism of the majority. If we accepted his proposition we should put this weapon into the hands of the minority, which might involve the company in all-night sittings. That seems to me to be an extravagant proposition, and in this

> particular case there seems to have been nothing arbitrary or vexatious on the part of the chairman or of the majority. I am not, of course, saying that the majority must not listen to reasonable arguments for a reasonable time...."

76 In *Caruth v Imperial Chemical Industries Ltd* [1937] AC 707 the House of Lords had to consider the validity of a resolution purportedly passed at a meeting of a class of shareholders (holders of deferred shares), held in the midst of other (ordinary) shareholders attending a general meeting of the company, in favour of a reduction of the company's capital. The leading judgment was that of Lord Maugham. Lord Russell of Killowen delivered a concurring judgment, with additional reasons. Lord Blanesburgh delivered a separate judgment, with contrary reasoning but concurring in the result.

77 Lord Maugham made the following observations about meeting procedure at [1937] AC 766-768 (with emphasis added):

> :… according to the ordinary notions of commercial men and investors a meeting (to take that case) of deferred shareholders in a hall where there are an equal or greater number of holders of ordinary shares would not be described as a separate meeting of deferred shareholders, even if the ordinary shareholders were told by the chairman that they must neither speak nor vote. It is not difficult to imagine a case where the presence of a number of persons with conflicting interests would render it impossible for members of the class adequately to discuss the matter from their point of view. Meetings of members of companies are not always conducted in an orderly fashion. There is often a hubbub of sound which drowns a speech which might otherwise have a great effect. Members of another class by merely indulging in coughs or groans or neighbourly conversation might seriously prejudice speakers who were supporting a view which did not commend itself to that class. Other objections will readily occur to any one who knows how meetings of this kind are frequently conducted. In my opinion the better and the wiser course is to make provision for the holding of truly separate meetings in the ordinary way, even at the risk of some inconvenience. It does not, however, follow in the circumstances of this case that the extraordinary resolutions [purportedly passed at the meeting of deferred shareholders] were void. It is necessary in the first place to distinguish between the summoning of a meeting and its conduct when the shareholders meet. In the present case I can see no ground for the suggestion that separate meetings of the ordinary and deferred shareholders were not duly summoned. As regards the conduct of such a meeting that is a matter largely in the hands of the chairman with the assent of the persons properly present. Just as documents which have to be presented to a meeting can be taken as read, and just as a meeting can decide either that an untiring speaker shall be no longer heard, or that a much debated question shall be put to the vote without further discussion, so in my opinion the holders of deferred shares were entitled to waive the objection to the presence of strangers, including holders of ordinary shares, and if they chose to do so it would not, I think, be open to any one to assert that the meeting was not being properly held within the meaning [of an article in the constitution of the company requiring the passage of an extraordinary resolution of a class of shareholders]. To this the important fact should be added that the chairman

was in a position to demand a poll, that he had already determined to do so, and that he held sufficient proxies to carry the resolution. In such a case the speeches and the voting on a show of hands become little more than formalities; all that is necessary is that there should be a class meeting duly constituted at which a poll can properly be demanded. The conclusion at which I arrive is that in the circumstances the meeting of deferred shareholders was properly convened, that the objection which might have been raised to the presence of holders of shares of another class was waived, that the poll was duly demanded and that the extraordinary resolution was passed by the requisite majority. It might have been better if the chairman had told the holders of deferred shares that the matter of the exclusion of others rested with them and if he had invited an expression of their views; but in the circumstances and in the absence of any audible protest I think he was justified in taking their assent for granted."

78 Having agreed with the opinion of Lord Maugham (at [1937) AC 759), Lord Russell of Killowen made the following observations about meeting procedure at 760-762:

"The meeting having been properly convened, can it be said that the circumstances attending its holding were such as to invalidate its acts, or in other words, such as to justify us in holding that there was no resolution of the deferred shareholders? I have come to the conclusion that the answer should be in the negative. There are many matters relating to the conduct of a meeting which lie entirely in the hands of those persons who are present and constitute the meeting. Thus it rests with the meeting to decide whether notices, resolutions, minutes, accounts, and such like shall be read to the meeting will be taken as read; whether representatives of the Press, or any other person is not qualified to be summoned to the meeting, shall be permitted to be present, or if present shall be permitted to remain; whether and when discussion shall be terminated and a vote taken; whether the meeting shall be adjourned. In all these matters, and they are only instances, the meeting decides, and if necessary a vote must be taken to ascertain the wishes of the majority. If no objection is taken by any constituent of the meeting, the meeting must be taken to be assenting to the course adopted. It is not a case, as was suggested in argument, of those present at a meeting waiving rights of those who have elected not to attend; it is a case of those who have elected to attend regulating the conduct of the meeting, a question in which those who have chosen to stay away have no voice. I am, however, far from assenting to the view that all that is necessary to constitute a valid resolution by a separate class of shareholders, or a valid separate meeting of a class of shareholders, is that a separate vote of the class be taken in such circumstances as to ensure that all members of the class shall have an opportunity of voting, and that no one who was not a member of the class shall vote. *Prima facie* a separate meeting of the class should be a meeting attended only by members of the class, in order that the discussion of the matters which the meeting has to consider may be carried on unhampered by the presence of those who are not interested to view those matters from the same angle as that of the class; and if the presence of outsiders was retained in spite of the ascertained wish of the constituents of the meeting for their exclusion, it would not, I think, be possible to say that a separate meeting of the class had been duly held. In the present case, however, the deferred shareholders were present, with knowledge that many were in the room who held no deferred shares, and that it was proposed that no further discussion

> should take place, but that a vote on the resolution should be taken, raise no objection, or at all events no audible objection, of any kind. In these circumstances they must be taken to have assented to the meeting being so conducted, and the resolution was accordingly a valid extraordinary resolution passed at a meeting of the deferred shareholders within the meaning of [the company's Articles of Association]. I would like to add that in my opinion the question of convenience or inconvenience should not enter into consideration. Those responsible for convening a series of class meetings may find it the more prudent course to summon such meetings at longer intervals or in different rooms, or even on different dates. The inconvenience and extra expense involved are an unfortunate result of the modern phenomenon of colossal companies with phalanxes of shareholders."

79 In the headnote to the case (at [1937] AC 709-710) Lord Blanesburgh's reasoning is summarised thus:

> "…although, if the question had been open, the meeting of the deferred shareholders was not a separate meeting, the resolution must for the purposes of [the proceedings before the Court] be taken to have been duly passed, as it had not been challenged [in the court proceedings) by the appropriate procedure."

80 Lord Blanesburgh counsels perfection in meeting procedure against a risk of abuse. He favours strict adherence to formalities.

Analysis

81 **Organisational Framework for a Corporate Decision.** The Club, as a company limited by guarantee and a registered club, is governed by the C*orporations Act* 2001 Cth, the *Registered Clubs Act* 1976 NSW and its Constitution.

82 Broadly defined, and dependent on context, a "company" is an association of persons with a common object.

83 Its character as an association of persons *recognised by law*, as a body corporate (*Corporations Act*, sections 119 and 124), carries the consequence that the law must provide, *inter alia*, a principled structure for regulation of the affairs (including decision-making processes) of the association.

84 Allowance must be made for the context in which a particular association operates, including the nature of the association and the purpose, or purposes, for which it was formed. What may be essential to the effective operation of a commercial association (in which each member holds a share in a property-holding, profit-driven entity) may not work for a social, political or religious

association in which members hold no proprietary right: eg, *Cameron v Hogan* (1934) 51 CLR 358 at 370-371.

85 Under the *Corporations Act*:

(a) unless a contrary intention appears in the Act, the expression "company" means a company registered under the *Corporations Act*: section 9;

(b) a company, within the meaning of the *Corporations Act*, comes into existence as a body corporate upon registration: section 119;

(c) a company registered under the Act has the legal capacity and powers of an individual: section 124 (1);

(d) the constitution of a company has effect as a contract:

(i) between the company and each member of the company;

(ii) between the company and each director and secretary of the company; and

(iii) between each member and each other member of the company: section 140 (1);

(e) a "company limited by guarantee" is a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound-up: section 9.

(f) a person is a "member" of a company if, *inter alia*, they agree to become a member of the company and their name is entered on the company's register of members: sections 9, 120 (1) and 231.

(g) a company limited by guarantee is a "public company": section 9.

86 The *Corporations Act* contains provisions governing meetings of members of a company (Part 2G .2), including provisions relating to:

(a) the giving of formal notice of a meeting of members to members: e.g., sections 249H, 249J, 249L, 249LA and 249M.

(b) the rights of members to put resolutions to a general meeting of members: sections 249N-249P.

(c) the holding of a meeting of members: sections 249Q-249W.

(d) the manner of voting at meetings of members: sections 250E-250M.

87 The requirement in section 250J of the *Corporations Act* that "[a] resolution put to the vote at a meeting of a company's members must be decided on a show of hands unless a poll is demanded" is a "replaceable rule" within the meaning

of section 135 (1) of the Act. It is, accordingly, able to be "displaced or modified" by a company's constitution: section 135 (2). This is what the Club has done. Article 4 of its Articles of Association provides that "[pursuant] to section 135 (2) of the [Corporations] Act, all replaceable Rules referred to in the Act are hereby displaced or modified as provided in these Articles". Articles 65-66 substantially cover the field traversed by section 250J. They do so in a way which, for the purpose of these proceedings, leads to a substantially similar legal requirement: "Every question submitted to a meeting shall be decided by a show of hands (unless a poll is demanded by a five (5) members) …".

88 The *Corporations Act* requires that a meeting of a company's members must be held for a *proper purpose* (section 249Q) and at a *reasonable* time and place (section 249R).

89 Section 249S has no material application to the current proceedings, but its terms are instructive as to what is required in the holding of a meeting of members. It provides that a company may hold a meeting of its members at two or more venues using any technology "that gives the members *as a whole* a *reasonable opportunity to participate*".

90 Under the *Registered Clubs Act*:

(a) the requirements to be met by a club include:

(i) a requirement that the club be conducted in good faith *as a club*: section 10 (1) (a).

(ii) relevantly, a requirement that the club be a company within the meaning of the *Corporations Act* 2001 Cth: section 10 (1) (b) (i).

(iii) a requirement that the club be established, first, for social, literary, political, sporting or athletic purposes or for any other lawful purposes and, secondly, for the purpose of providing accommodation for its members and their guests: section 10 (1) (e).

(iv) a requirement that a member of the club, whether or not he or she is a member of the governing body, or of any committee, of the club, shall not be entitled, under the rules of the club or otherwise, to derive, directly or indirectly, any profit, benefit or advantage from the club

that is not offered equally to every full member of the club: section 10 (1) (i).

(v) relevantly, a requirement that only the club and its members be entitled under the rules of the club or otherwise to derive, directly or indirectly, any profit, benefit or advantage from the ownership or occupation of the premises of the club: section 10 (1) (j).

(b) the expression “registered club” means a club that holds a “club licence”, that being a club licence granted under the *Liquor Act* 2007 NSW: section 4 (1).

(c) the rules of a registered club are deemed to include particular rules, including:

(i) a rule that a person shall not, first, attend or vote at any meeting of the club or on the governing body or any committee of the club or, secondly, vote at any election of, or a member of, the governing body of the club, as the proxy of another person: section 30 (1) (d).

(ii) a person shall not be admitted to membership of the club except as an ordinary member (whether or not persons may be admitted as different classes of ordinary members), a provisional member, life member, honorary member or temporary member: section 30 (1) (f).

(iii) a rule that a person shall not be admitted as a member of the club, other than as a provisional member, honorary member or temporary member, unless the person is elected to membership at a meeting of the full members of the club or at a duly convened meeting of the governing body or election committee of the club, the names of whose members present and voting at that meeting shall be recorded by the secretary of the club: section 30 (1) (g).

(iv) a rule that any profits or other income of the club shall be applied only to the promotion of the purposes of the club and shall not be paid to or distributed among the members of the club: section 30 (1) (i).

(v) a rule that a register of persons who are “full members” of the club shall be kept: sections (30) (1) (i) and 31.

(d) the expression “full member” means a person who is an “ordinary member” or a “life member” of the club: section 4 (1).

91 Under the Constitution (Articles of Association) of the Club:

(a) the expression “ordinary member” means a member of the Club other than a life, honorary or temporary member of the Club: Article 1 (a).

(b) the Club is established for the purposes set out in the Memorandum of Association: Article 6.

(c) unless and until otherwise determined by the Club's Board of Directors, ordinary membership of the Club consists of three classes (namely, RSL members, social members and junior sports members): Article 13.

(d) subject to qualifications not presently material, financial ordinary members and life members are the only members of the Club entitled to attend and to vote at annual general meetings or general meetings of members of the Club, and each such member has one vote: Article 15.

(e) the Board consists of seven directors comprising a president, a vice president and five ordinary directors: Articles 41-41B.

(f) the Board is responsible for the management of the business and affairs of the Club: Articles 44-45.

(g) a general meeting called the Annual General Meeting must be held once at least in every calendar year, and all meetings other than annual general meetings are called general meetings: Article 58.

(h) general meetings may be called and arranged by the Board whenever it considers fit, and must be called and arranged by the board if requisitioned by members with at least 5% of the votes that may be cast at the general meeting or at least 20 members who are entitled to vote at the general meeting: Article 59.

(i) neither an accidental omission to give notice of meeting or non-receipt by any person of notice of a meeting of members of the Club invalidates any proceedings at such meeting unless pursuant to section 1322 of the *Corporations Act* 2001 Cth such proceedings are declared to be void: Article 60 (c).

(j) a general meeting of members of the Club must be held for a proper purpose: Article 60A.

(k) no business is to be conducted at a general meeting of members unless a quorum (generally defined as 20 members) is present at the time when the meeting proceeds to business: Article 62.

(l) the president is entitled to take the chair at every general meeting. If the President is not present within 15 minutes after the time appointed for holding such meeting or is unwilling or unable to act then the vice president shall be chairman, but if the vice president is not present or is unwilling to act then the members of the Club present shall elect a member of the Board or one of their number to be chairman of the meeting: Article 64.

(m) every question submitted to a meeting is to be decided by a show of hands (unless a poll is demanded by five members) and

in the case of an equality of votes whether on a show of hands or on a poll the chairman of the meeting has a second or casting vote: Article 65 (a).

(n) at any general meeting (unless a poll is demanded) a declaration by the chairman that a resolution has been carried or carried by a particular majority or lost or not carried by a particular majority and an entry to that effect in the books containing the minutes of the proceedings of the Club is conclusive evidence of the fact without proof of the number or proportion of votes recorded in favour of or against such resolution: Article 66.

(o) if a poll is demanded (and not, as it may be, withdrawn) it is to be taken in such manner and either at once or after the interval or adjournment or otherwise as the chairman directs and the result of the poll is the resolution of the meeting at which the poll was demanded, but a poll demanded on the election of the chairman or on a question of adjournment is to be taken forthwith: Article 67.

(p) the chairman of a meeting may with the consent of the meeting at which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time and from place to place, but no business is to be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place: Article 68.

(q) the Articles of Association are to be read and construed subject to the provisions of the *Registered Clubs Act* 1976 NSW and to the extent that any of the provisions in the Articles are inconsistent therewith, and might prevent the Club being registered under the provisions of that Act, they are inoperative and have no effect: Article 80.

92 Under the Constitution (Memorandum of Association) of the Club, the objects for which the Club is established include:

(a) to provide for members and for members' guests a social and sporting club with all the usual facilities of a club: clause 3 (a).

(b) to promote all or any of the objects of the Returned Services League of Australia (New South Wales branch) Incorporated: clause 3(c).

93 Although management of the business and affairs of the Club is the responsibility of its Board of Directors under its Constitution (Article 44), there is in this case no necessity to consider the distribution of decision-making responsibility between the Board and the membership of the Club (along the lines considered in *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517 at 521C-E) because:

(a) the general meeting of members under review in these proceedings was convened by the Board.

(b) the business sought to be transacted at the meeting, as recorded in the Notice of Meeting given to members, was confined to a subject matter within the purview of the *Registered Clubs Act*, section 41J.

(c) section 41J specifically requires, for the object sought to be advanced by the Board, "a resolution passed by a majority of the members present at a general meeting of the ordinary members of the club".

(d) the parties are agreed that the meeting was duly convened.

(e) there is no dispute about the identity of the ordinary members of the Club entitled to be present, and to vote, at the meeting.

(f) there is no dispute about the identity of the chairman of the meeting or his authority to preside as chairman.

94 **The Role of the Chairman and Regularity of his Decision.** The validity or otherwise of the resolution under challenge in these proceedings depends, in large measure if not necessarily, upon whether the Chairman's decision about voting procedure was within power or, at least, is now beyond challenge.

95 It was a decision easily characterised as "irregular" because:

(a) the norm, for which articles 65(a), 66 and 67 of the Club's Articles of Association provide, is that a resolution put to the vote at a meeting of the Club's members in general meeting must be decided on a show of hands unless a poll is demanded.

(b) the notice of meeting by which the meeting was convened advised members (in paragraph 58, under the heading "Procedural Matters") that "[each] vote will first be decided by a show of hands. If a show of hands does not provide a clear result a ballot will be conducted for the Ordinary Resolution" proposed for consideration.

(c) the Chairman announced his decision without inviting the meeting to vote upon the question whether it was the will of the meeting that such a voting procedure be adopted in lieu of the usual, advertised procedure.

(d) the announced voting procedure was not preceded by: (i) unanimous agreement, dispensing with any need for debate; (ii) a summary of views, for and against the motion to be debated, accommodating the views of prospective speakers; or (iii) a structured debate, with at least one speaker nominated by each side of the controversy.

96 Had the chairman invited the meeting to vote upon the voting procedure the subject of his announcement (by a show of hands and, if demanded, a poll) and had that voting procedure been adopted by a vote of members present at the meeting, then, absent some other vitiating factor, strong grounds would have existed for a determination either that the resolution subsequently passed *via* that procedure was valid or, at least, that it could be saved from invalidity by operation of the *Corporations Act*, section 1322. A properly convened meeting has an inherent power to regulate its own affairs (including matters which are incidental to the manner in which the meeting is conducted) in the absence of express provisions to the contrary: *Alliance Craton Explorer Pty Ltd v Quasar Resources Ltd* [2010] SASC 266 at [81].

97 Despite apparently audible complaints from the floor of the meeting, no member moved a motion of dissent from the Chairman's decision and, apparently, at least some members took the opportunity to cast a vote and leave the meeting before debate on the substantive business of the meeting concluded.

98 As illustrated by a *Caruth v Imperial Chemical Industries Ltd* [1937] AC 707 at 760-762 and 766-768, attendees at a meeting may waive an objection that they might otherwise have to a meeting procedure, and be taken to have assented to a procedural course adopted at a meeting.

99 The absence of a motion of dissent from a procedural decision announced by a chairman cannot necessarily be taken as a waiver of objection to, or acquiescence in, the decision.

100 Where there has been a comprehensive crystallisation of members into camps of those for, and against, the substantive business under consideration, and those opposed to the resolution ultimately passed concerning that business have had an opportunity to marshal their forces, it may be open to a court to hold that, notwithstanding complaints articulated as debating points, members who have allowed a meeting to proceed without moving a formal motion of dissent may be taken to have acquiesced in a decision taken by the chairman. I am not confident that that degree of cyrstallisation of opinion can be found in the present case.

101 Upon a review of the course of the meeting under consideration in these proceedings, kept to the fore must be the purpose for which the meeting was convened: in substance, to ascertain the preparedness of ordinary members of the Club to authorise the Club's Board of Directors to dispose of part of the Club's property in a redevelopment of Club premises designed to strengthen the Club financially.

102 At the hearing of the proceedings no challenge was made to the efficacy of the Notice of Meeting pursuant to which the meeting under review was convened. In the absence of such a challenge, the Court can proceed on the basis that it duly served its purpose; namely: (a) to give sufficient information so as to enable ordinary members of the Club to determine whether or not to attend the meeting; and (b) to provide to ordinary members such information, within due time, that they might arrange their affairs so as to attend the meeting if so inclined: *Ryan v Edna May Junction Gold Mining Company No Liability* (1916) 21 CLR 487 at 496 and 500.

103 It may be accepted that, in convening the meeting, the Club's Board members discharged their fiduciary duty to provide such information as fully and fairly informed ordinary members of the Club of what was to be considered at the meeting, enabling them to judge for themselves whether to attend the meeting and vote for or against the Board's proposal or whether to leave the foreshadowed business to be determined by the majority attending and voting at the meeting: *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 466B-C.

104 Various formulations of the duties of a chairman (all subject to express provisions governing the particular company) are commonplace:

(a) a chairman has a duty to preserve order, and to take care that the meeting under his or her control is conducted in a proper manner, in order to facilitate the sense of the meeting being properly ascertained on any question properly before the meeting: *National Dwellings Society v Sykes* [1894] 3 Ch 159 at 162; *The Second Consolidated Trust Limited v Ceylon Amalgamated Tea & Rubber Estates Ltd* [1943] 2 All ER 567 at 569; *John v Rees* [1970] Ch 345 at 380E and 382D-E; *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at 480 [40]-481 [41].

(b) a chairman has a duty to regulate proceedings, so as to give all persons entitled a reasonable opportunity of voting: *Byng v London Life Association Ltd* [1990] Ch 170 at 186E-G.

(c) a chairman has a duty to act in a way calculated to ensure that the true will of the meeting is ascertained, rather than in pursuit of some personal desire or preference or in a manner designed to achieve some policy objective of another body (such as the Club's Board of Directors), taking care to create a convenient forum in which the relevant constituency can consult together and exercise their voting rights in an orderly and constructive way: *McKerlie v Drill Search Energy Ltd* (2009) 72 ACSR 288; [2009] NSWSC 488 at [27]-[39]; *Re Walker and Anor (in their capacity as the joint liquidators of One.Tell Limited* (2009) 262 ALR 150; [2009] NSWSC 1172 at [27].

105 Subject to any express provision governing him or her, the chairman of a meeting has *prima facie* authority to decide all incidental questions which arise at the meeting, and necessarily require decision at the time: *In re Indian Zoedone Company* (1884) 26 ChD 70 at 77. Nevertheless, a chairman remains a servant, not the master, of the meeting. Any mastery a chairman may exercise over a meeting depends on his or her due recognition of that truth.

106 The powers exercisable by a chairman are not unfettered: *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at 480 [39]:

(a) they must be exercised in good faith and for a proper purpose (*McKerlie v Drill Search Energy Ltd* (2009) 72 ACSR 288; [2009] NSWSC 488 at [29]-[35]), acting reasonably (*Alliance Craton Explorer Pty Ltd v Quasar Resources Ltd* [2010] SASC 266 at [67]; *Australian Olives Limited v Stout (No 2)* [2007] FCA 2090 at [19]).

(b) the validity of a chairman's decision about the conduct of a meeting depends, *inter alia*, upon whether it facilitated the purpose for which the chairman was empowered to make decisions relating to conduct of the meeting: *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at 482 [42]-[43].

(c) a chairman's powers cannot be exercised so as unlawfully to deprive members of their votes: *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at 480 [39].

(d) the purpose of powers conferred upon a chairman with respect to conduct of a meeting is to facilitate consideration of business properly before the meeting in order that the will of the majority of members present and entitled to vote can be reliably ascertained: *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at 480 [40].

107 At a company meeting a member is generally entitled, not only to vote, but also to hear and to be heard in debate - powers conferred on a chairman in the conduct of a meeting being designed to facilitate the presence of those entitled to debate and vote on a resolution at a meeting where such debate and voting is possible: *Byng v London Life Association Ltd* [1990] Ch 170 at 188H.

108 Although different formulations can be found of the grounds upon which the Court will interfere with an exercise of a chairman's broad discretionary powers in the conduct of a meeting (some of which are noticed in *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at 480 [40]-482[42]; *Australian Olives Ltd v Stout (No 2)* [2007] FCA 2090 at [20]; *and McKerlie v Drill Search Energy Ltd* (2009) 72 ACSR 288; [2009] NSWSC 488 at [27]-[35]), each formulation has at its core, first, recognition that any exercise of discretion by a chairman must be *bona fide* in exercise of the purpose for which the discretion was conferred and, secondly, the chairman's decision must be measured against that standard.

109 In so measuring the decision of the Club's Chairman under review in these proceedings, I put to one side a vice that might be thought to be inherent in the decision.

110 Although the number of members in attendance at the subject meeting appears never, in fact, to have fallen below that required for a quorum, the voting procedure announced by the Chairman invites the question whether attendees at the meeting were exposed to a risk that, if they did not vote early but other members did vote and depart from the meeting early, they might lose their opportunity to vote for want of a quorum: ES Magner, *Joske's Law and Procedure at Meetings in Australia* (11th ed, 2012), paragraph [5.05]; *Ball v Persall* (1987) 10 NSWLR 700.

111 That risk can be discounted, however, on the authority of *In re Hartley Baird Ltd* [1955] Ch 143. There, as found here in article 62 of the Club's Articles of Association, the constitution of a company provided that "[no] business shall be transacted at any general meeting… unless a quorum… is present **when the meeting proceeds to business**". That was held sufficient to sustain a meeting's conduct of business provided that a quorum was present **at the**

beginning of the meeting, even if those in attendance fell below the quorum thereafter.

112 No party to these proceedings has suggested that the validity of the resolution under challenge was affected by the absence, or a risk of absence, of a quorum.

113 **The Disputed Resolution was Invalid.** Nevertheless, subject to the operation of section 1322 of the *Corporations Act*, the resolution must be held invalid.

114 That is because:

(a) the voting procedure that led to its passage did not conform to the requirement in article 65(a) of the Club's Articles of Association that "[every] question submitted to a meeting shall be decided by a show of hands (unless a poll is demanded by five (5) members)...".

(b) by reason of that article, the Constitution of the Club must be taken to have denied the chairman of a general meeting authority, on his own responsibility, to direct that there be a different form of voting procedure.

(c) there was no vote by members at the meeting, by a show of hands or otherwise, on the question whether the meeting should adopt the voting procedure announced by the chairman.

(d) implementation of the chairman's announced voting procedure, without any form of vote by the meeting, precluded there being any opportunity for a vote by way of a show of hands on the resolution under challenge.

(e) notwithstanding the absence of any motion of dissent from the chairman's announcement, there is insufficient factual foundation for a finding that the meeting acquiesced in the announced voting procedure.

(f) on the contrary, the course of the meeting was attended by loud and persistent objections to the procedure.

(g) although the chairman acted with *bona fides* the voting procedure he announced, and implemented, on his own authority, deprived members, at least, of an opportunity to have a vote by a show of hands (considered, by the terms of article 65(a), important), if not a vote after debate.

(h) denial of that opportunity, in the context of the meeting as a whole, to a significant degree deprived members of the Club of a reasonable opportunity to exercise their voting rights in an orderly and constructive way and, thereby, to participate in a

process of decision-making in which they were entitled to participate.

(i) in the absence of a regular voting procedure, conforming to the Constitution of the Club or, at least, a voting procedure adopted, in a regular manner, by a resolution of the members of the Club, the will of the meeting cannot be taken to have been reliably ascertained on the disputed resolution purportedly passed by the meeting.

115 **Unauthorised Voting Procedure Not a Procedural Irregularity.** The validity of the resolution under challenge is not saved by section 1322(2) of the *Corporations Act* because:

(a) although the passing of a resolution designed to have legal consequences for which section 41J of the *Registered Clubs Act* provided may be characterised as a "proceeding" under the *Corporations Act*, within the meaning of section 1322(2) (*Broadway Motors Holdings Pty Ltd (in liquidation) and the Companies (New South Wales) Code* (1986) 6 NSWLR 45 at 56B; *Talbot v NRMA Holdings Ltd* (1996) 21 ACSR 577 at 580), the irregularity attending the voting procedure that culminated in the purported passage of the contested resolution was not "procedural" in character.

(b) there was no "procedural irregularity" because the chairman's voting procedure denied members their right (a substantive entitlement) to have a vote taken in the manner prescribed by the Club's Constitution: *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005; 55 ACSR 185 at [94]-[97] and [103]-[107].

116 Experience teaches that a right to vote is such a precious thing (so easily denied, and rendered nugatory, by manipulative departures from a course chartered for orderly, informed decision making) that the law must lean towards characterisation of it as a thing of substance, not merely adjectival, not merely a matter of procedure.

117 An unauthorised, unilateral decision taken by the chairman of a meeting of members of a company (governed by rules) to invite, and to treat as formal, votes cast in an unorthodox manner and outside the sequence of events advertised before the meeting as a parameter of debate leading to an orderly decision, on a question of vital importance, to bind all members entitled to vote (and, indeed, others involved in the company), is capable of operating (and, in this case, must be taken to have operated) as a denial of a right to have a vote

taken at the appointed time and according to known rules. With apologies to Shakespeare (*Romeo and Juliet*, Act 2 Scene 2), *a rose by any other name may smell as sweet*, but not so a "vote" irregularly taken. A method of voting to which members are entitled cannot readily be displaced by another method of voting imposed on them in denial of that entitlement.

118 **Validation Order Not Available.** An order validating the resolution under challenge cannot be made under section 1322(4)(a) of the *Corporations Act* because the nature of the invalidity attaching to the resolution is such that the Court cannot be satisfied (as it must, under section 1322(6), be satisfied) "that no substantial injustice has been or is likely to be caused to any person".

119 Whether a different result would have been produced at the meeting had a regular form of voting procedure been adopted cannot be known with certainty; but it cannot be excluded as a real possibility in light of the course of the meeting and the course of the adjourned meeting preceding it. The business under consideration by the meeting was, on any view, foundational to the continuing operation of the Club. The notice of meeting invited members to attend, and to participate in proceedings, on the basis of a voting procedure for which the Club's Constitution provided.

120 Caution is required in attributing any significance to the fact that some, but not all, members anticipated a different voting procedure because of inside knowledge of discussion at a meeting of the Club's Board. Nevertheless it is a factor that members dissatisfied with the outcome of the meeting are entitled to have taken into account, and not counted for nothing, upon a consideration whether "substantial injustice" has been or is likely to be caused to any person. Proponents of the resolution may have had an unfair advantage in securing the attendance of less committed, but politically aligned, members who might not have attended the meeting at all, or might have left without voting, had the course of the meeting followed that foreshadowed in the notice of meeting served on everybody.

121 Implicit in denial of a right to vote – even so fleeting a right as a right to a show of hands – is a denial of a right to a reasonable opportunity to participate in the process of corporate decision making. A show of hands (or a poll called for in

lieu of a show of hands) may provide a litmus test of voting intentions on larger questions yet to be debated or put to a vote, an opportunity for participants in a meeting to test numbers, a measure of whether real opportunities for persuasion to one view or another are present.

122 It is not necessary, or prudent, for a judge to lay down rules, about whether (and, if so, how much) structured debate is a pre-requisite for there to be a valid expression of corporate will. A unanimous meeting of minds might proceed, unhindered by debate, to immediate decision. There can be no absolute rule that all members of a constituency have a right to speak, *or* a right to be heard. Nor can there be an absolute rule that every other member has an obligation to listen or, more importantly, to hear. It is not for no reason that patience is generally described as a virtue.

123 There are too many variables for the law to pretend to anything other than principled pragmatism, leaving much to the discretion (practical wisdom) of a chairman, on the spot. A primary object of a meeting is to ascertain, reliably, the corporate will on a question, fairly stated, for decision. On the whole, the law is vigilant in its preference for substance over form. However, there are occasions when insistence on form is a prerequisite for revelation of underlying substance. For those inclined to think a right to vote is merely a matter of form, this must be one of those occasions.

124 Although the requirements of section 1322(6)(a) may be taken to have been satisfied because, as I find, the chairman of the meeting and those acting under his supervision in the conduct of the meeting acted honestly, the inability of the Court to make a finding of an absence of "substantial injustice" required by section 1322(6)(c) is fatal to the Club's claim for relief under section 1322(4).

125 For completeness, I record that, had I thought that section 1322(2) was otherwise available to save the disputed resolution from invalidity, I would have been disposed to express the opinion (contemplated by section 1322(2)) that the chairman's irregular voting procedure "has caused or may cause substantial injustice that cannot be remedied by any order of the Court" and, accordingly, declared that the resolution was invalid on that account.

PROPOSED ORDERS

126 For these reasons, subject to allowing the parties an opportunity to be heard on the form of the orders, I propose to make the following orders and notations:

(1) ORDER that the plaintiff be appointed to represent in these proceedings itself and all members of the plaintiff who contend that the resolution purportedly passed by a general meeting of members of the plaintiff on 23 November 2014 is valid.

(2) ORDER that the first defendant be appointed to represent in these proceedings himself and all other members of the plaintiff.

(3) DECLARE that the resolution purportedly passed by a general meeting of members of the plaintiff on 23 November 2014 was not valid.

(4) ORDER that the plaintiff's application for an order under section 1322 of the *Corporations Act* 2001 Cth, that the resolution purportedly passed by a general meeting of members of the plaintiff on 23 November 2014 be validated, be dismissed.

(5) RESERVE for further consideration the question whether the Court can, and should, give directions for the conduct of a further general meeting of members of the plaintiff to address the business that was before the meeting at which the disputed resolution was passed.

(6) ORDER that any application for directions pursuant to that reservation be made by a notice of motion filed no later than 28 days after the making of these orders or such other time as the Court may allow.

(7) RESERVE liberty to apply on three days' notice.

(8) ORDER that the costs of all parties of these proceedings to date be paid by the plaintiff or out of its assets.

127 [Note: after allowing the parties an opportunity to be heard as to the form of orders to be made, Lindsay J made orders and notations in accordance with paragraph 126 of these Reasons.]

Amendments

25 March 2015 - corrected numbering in paragraphs 48 and 55