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In the Courts 2015: Company and Partnership Law

Constitutional documents

Principles for the construction of the articles of association of companies were examined by the Isle of Man High Court in *Origo v. Brooks Macdonald & Otr* (CHP 2014/49, 9 July 2015, unreported). This was an application by Origo Partners for a declaration as to the interpretation of certain provisions relevant to the voting threshold in its articles of association. Detailed guidance in the form of 19 principles relevant to the construction of company articles is provided in this considered judgment.

Also on the subject of interpreting constitutional documents, the long running dispute in the BVI between the limited partners of Value Discovery Partners LP found its way to the Privy Council, where Lord Mance, in his dissenting judgment, described the articles of partnership in question as “convoluted.” In a decision delivered on 19 November 2015 in *Krys & Others v. KBC Partners LP* [2015] UKPC 46, the Privy Council upheld the Court of Appeal’s decision, noting that underlying the special limited partners’ arguments on construction was the consistent theme that any other construction was extraordinary, since it left them with nothing other than their nominal contributions. The majority considered that this was an unusual partnership, made against an unusual background and that it was unclear against which sense of commercial normality they were to be measured.

Rectification of registers

In a judgment delivered at the end of 2014, which escaped the last edition of this report, Bannister, J. considered an application for rectification of the register of members to reflect the terms of a share certificate issued by the Company. In *Comodo Holdings Limited v. Renaissance Ventures Limited and another* Claim No. BVIHC (Com) 45 of 2013, 15 December 2014, unreported, the Company contended that the applicant failed to plead that it had paid consideration for the shares. Bannister, J. took the view that this was a bad point, because the holder of the share certificate was *prima facie* entitled to be registered as, and for all purposes treated as, the owner of the shares. The Judge also held that a limitation defence was not available to an application for rectification.

The statutory jurisdiction of rectification was the subject of the other appeal to the Privy Council from the British Virgin Islands during the year. On 21 January 2015, the Board handed down its decision in *Nilon Limited and another v. Royal Westminster Investments S.A. and others* [2015] UKPC 2. The Board restored the judgment of Bannister, J., who took a narrow construction of the jurisdiction at Section 43 of the BVI Business Companies Act 2004 to rectify the register of members. Section 43 empowers the Court to rectify the register where it contains an error or where there has been some delay in updating the Register; the Privy Council held that this did not extend to determining underlying contractual disputes in relation to the beneficial ownership of

the shares. Significantly, the Privy Council held that the BVI was not the appropriate forum for the determination of those disputes.

In Bermuda, the Supreme Court considered in *M Pulido v. UST Holdings Ltd et al* [2015] SC (Bda) 67 Com, 25 September 2015, unreported, whether the Plaintiff, who was a beneficial owner of shares not yet entered on the register of members, had standing to seek an injunction restraining the Company from holding a meeting to consider a resolution to approve and adopt amended and restated bye-laws. The Plaintiff's application was dismissed. Only members, the court held, could vote at a general meeting and therefore only members had standing to challenge a vote at a general meeting. The Plaintiff was not a member of the Company because his name had not yet been entered on the register of members and he was therefore unable to petition for an order under s. 111 of the Companies Act. He was also not able to bring an application to rectify the register of members under s. 67 because he did not have an *immediate* right to registration. The Court confirmed that the material distinction was not between legal and beneficial ownership but between members and non-members.

Directors

In February, we received the long-awaited decision of the Cayman Islands Court of Appeal in the *Weaving* case. Readers may recall that the trial judge had found the defendants/appellants (directors of the company) guilty of "wilful neglect or default" which had the effect of defeating the indemnity protection given to directors under the company's articles of association. The Court of Appeal however allowed the directors' appeal, holding that in order to establish wilful neglect or default for this purpose, it is necessary for the company to prove to the satisfaction of the court that the director made a deliberate and conscious decision to act or to fail to act in knowing breach of his duty: negligence, however gross, is not enough. *Weaving Macro Fixed Income Fund Limited (in liquidation) v. Peterson (Stefan) and Ekstrom (Hans)* (CICA 33/2013, 12 February 2015, unreported). Appleby's [eAlert](#) on the case goes into the issues in more detail. It is understood that a further appeal to the Privy Council is pending.

Share capital

The Cayman Islands Court of Appeal in *DD Growth Premium 2X Fund (in official liquidation) v. RMF Market Neutral Strategies (Master) Limited* (CICA 24/2014, 20 November 2016, unreported), was faced with the question whether a payment made by the company out of its share premium account to redeem its own redeemable shares was a payment out of 'capital' under section 37(6) of the Companies Law. It held that it was not.

Mergers

The Cayman Islands, in common with several other jurisdictions, has provisions in company law allowing for mergers between companies, a feature of which is a process by which shareholders can dissent and elect to be bought out at a 'fair value'. *In the matter of Integra Group*, (Grand Court, FSD 92/2014, 28 August 2015, unreported) is the first decision of a Cayman court to provide guidance on the meaning of the fair value of shares in this context. The ruling serves to narrow the valuation issues which can reasonably be in dispute and ensures that the expert valuation evidence to be relied upon in the proceedings can be prepared with a certain definition of fair value in mind. In *Integra*, Jones, J. determined the fair value of the shares to be higher than the value assigned to the shares in the merger transaction. He quoted with approval from "Dissenting Shareholders' Appraisal Rights in Cayman Islands Mergers and Consolidations" by Tony Heaver-Wren and

Andrew Jackson, published in The M&A Lawyer in 2014. For a more in-depth review, see our [eAlert](#) on the case.

Appleby represented the joint official liquidators in DD Growth.

Key Contacts

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