

which, in the opinion of the Minister in the exercise of his discretion in s 102 (3) of the Act, would be sufficient to justify the granting of the exemption.

DUTIES OF DIRECTORS AND SHAREHOLDERS OF A JOINT VENTURE COMPANY*

Japan Abrasive Materials Pty v Australian Fused Materials Pty Ltd & Ors
(1998) 16 ACLC 1, 172)

corporations Law - true construction of agreement between shareholders in joint venture company - agreement provides for shareholders to nominate directors - dispute as to whether resolution approved by directors - whether duty of directors is to act in accordance with best interests of company or appointing shareholders - whether fiduciary duties of directors attenuated by agreement - whether conduct of directors or shareholders constituted breach of shareholders agreement - whether directors breached their fiduciary duties and the Corporations Law - whether directors acted in bad faith.

Facts

Australian Fused Materials Pty Ltd ("AFM"), a joint venture company, was established to operate an industrial plant in Western Australia. AFM's shares are equally held by three joint venturers. Each joint venture party appointed two directors to the Board of the company.

The relationship between the joint venturers was governed by a Shareholders Agreement ("Agreement").

Pursuant to clause 4.10 of the Agreement, a resolution of the Board or of a general meeting of the company required a unanimous vote if the resolution concerned a major expansion of the production capacity of the plant or a major modification to the plant.

A dispute arose between the plaintiff, Japan Abrasive Materials Pty ("JAMP") and the other joint venturers (the second and third defendants, respectively Doral Advanced Materials Pty Ltd ("DAMP") and ACAP Australia Pty Ltd ("ACAP")) as to whether unanimous approval had been given by the Board to a proposal to expand the company's activities and plant.

JAMP sought a declaration that unanimous approval had not been given to the proposal. It also argued that its two directors had not approved the proposal, a permanent injunction to restrain the company from taking any further action to implement the expansion project should be granted.

DAMP and ACAP contended that the Board had as a fact, given its unanimous approval to the proposal. They counter-claimed that the conduct of JAMP:

- amounted to a breach of certain provisions of the Agreement, the Corporations Law of Australia ("Law") and the directors' fiduciary duties; and
- was motivated by bad faith.

* Juliet Biggs, Solicitor, Mallesons Stephen Jaques, Perth.

Decision

Templeman J held that AFM's directors were entitled to take into account the interests of their appointers when voting on clause 4.10 resolutions. He also held that on the facts, unanimous approval had not been given. Further, JAMP's failure to approve a resolution of this nature did not amount to a breach of the Agreement, the Law or the directors' fiduciary duties. Nor was JAMP's failure to approve the proposal motivated by bad faith.

Reasoning

Templeman J held clause 4.10 required a unanimous vote on matters which would effect substantial changes to the relationship between the joint venture parties. He reasoned that because the clause equated directors and shareholders, the clause permitted nominee directors to vote in accordance with the wishes of their appointing joint venturer so that the same result was achieved as if the joint venturer had voted as a shareholder at a general meeting.

His Honour rejected DAMP and ACAP's submission (which was based on a reading of sections 60 and 232 of the Law) that when exercising their voting powers, the nominee directors should have regard to both the wishes of their appointing joint venture parties and the interests of the company as a whole. He saw the submission as flawed because it assumed that there was a distinction between the interests of a company and the interests of its members. According to His Honour, no such distinction could be drawn.

In any event, Templeman J was of the view that if unanimous approval was not given to a clause 4.10 proposal, the resolution was not in the best interests of the company as a whole. This meant that the duty to exercise voting powers in the interests of the company did not arise until *after* unanimous approval had been given to commit the company to a particular proposal. For this reason there was no conflict (at least in relation to clause 4.10 matters) between the right of a nominee director to act in the interest of the appointing joint venturer and the duties imposed by the Agreement and the Law.

Templeman J was also of the view that JAMP had not acted in bad faith because the directors could reasonably have believed that it was not in the company's interest to proceed with the project. However, it was not for the court to decide what was in the company's interest.

Order

Orders were made in favour of JAMP for the declaration and injunction it had requested. DAMP's and ACAP's counter-claim was dismissed.

Implications

The terms of the Agreement in this case were construed by the court to achieve a result where joint venturers are entitled to take into account their own individual interests, over and above the duties owed to the company.

The decision is on appeal to the Full Court of the Supreme Court of Western Australia.