JOHN J STARR (REAL ESTATE) PTY LTD v ROBERT R ANDREW (A'ASIA) PTY LTD and OTHERS

SUPREME COURT OF NEW SOUTH WALES — EQUITY DIVISION

YOUNG J

22–26, 29–31 July, 1, 2, 5–, 8 August 1991 — Sydney

Members — Oppression — Meetings — Rights of minority shareholders — Oppression alleged to arise from cumulative effect of a series of incidents — Powers of managing director vis-a-vis board — Conduct of meetings — Imposition of time limits on speeches — Minutes — What details should be recorded — Appropriate relief in cases of oppression or irreconcilable conflict — Companies (NSW) Code ss 320, 364

Specific performance — Agreement — Partnership or franchise — Claim for specific performance of agreement to extend franchise agreement.

The first defendant (RRA) conducted a business as a franchisor of real estate agencies. The plaintiff (JJS), a minority shareholder and also a franchisee of RRA, sought orders for the winding up of RRA on the grounds of oppression and on the just and equitable ground. JJS held 22% of the issued capital of RRA. The second defendant, Robert Andrew (Andrew) and the third defendant, Andrew's wife, together controlled 63% of the issued capital of RRA.

JJS alleged that the affairs of RRA were conducted oppressively and listed 16 alleged instances of oppressive conduct. JJS alleged that Andrew ran RRA in an overbearing manner, claiming that it was "his company" and behaving as though that was the fact. This was demonstrated in particular by Andrew's control of board meetings, which included bringing forward matters which concerned the interests of franchisees, some of whom were represented on the board, without sufficient notice of the subject matter of the proposed motion; refusing to provide the board with a budget on the ground that planning and budgets were a matter for management. On one occasion Andrew purported to restrict the speaking time available to members of the board at a meeting considering a proposed merger. There was also a practice of mini- board meetings prior to actual meetings at which the "Andrew faction" would decide its view on matters to be dealt with at the next meeting of the full board.

RRA had also purported to terminate JJS's franchise, effective from 14 November 1990, and sought a declaration that the franchise was validly terminated from that date and an injunction restraining JJS from holding itself out as one of RRA's franchisees. JJS sought a declaration that the termination was null and void and specific performance of an agreement to renew the franchise until August 1992.

Held: (i) On the sum total of the events in the case, there was actual oppression.

Re H R Harmer Ltd [1959] 1 WLR 62; *McWilliam v L J McWilliam Estate Pty Ltd* (1990) 20 NSWLR 703; 2 ACSR 757, applied.

Re Jermyn Street Turkish Baths Ltd [1971] 1 WLR 1042; *Re Tivoli Freeholds Ltd* [1972] VR 445, followed.

(ii) It is essential in company law that all persons who are entitled to participate in meetings are able to participate in them to the extent to which the law allows. There must be proper notice of meetings; there must be proper time for discussion at meetings; everybody's views must be respected before the vote is taken, on which the majority will

succeed, if they wish, but only after they have listened. Where the rights of the minority are affected by persistent conduct at the board, so that they are not able fully to participate in meetings, there will be actual oppression.

(iii) Decisions of the company which affected the plaintiff as a franchisee of the company were not relevant to the question of whether the plaintiff was oppressed as a member or person otherwise involved in the company.

(iv) It is open to a court under s 320 to find that the affairs of a company are being conducted in a manner oppressive to the interests of the members as a whole where there is irreconcilable conflict between certain directors and the tactics employed in that conflict impede the proper conduct of the affairs of the company.

(v) If orders are sought in winding up proceedings on the just and equitable ground that the majority shareholders sell their shares to the minority interests, the beneficial holders of the majority shareholding should be joined as parties to the proceedings in sufficient time before the hearing of the application.

(vi) In the circumstances, and because the court should avoid winding up a viable company if any other alternative can be found, it was appropriate that the majority purchase the plaintiff's shares at a fair value, to be determined by agreement or, in default, by the court.

> *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 2 ACLR 307, followed.
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> *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; *Re Bird Precision Bellows Ltd* [1984] Ch 419; *Vujnovich v Vujnovich* [1988] 2 NZLR 129, considered.

(vii) The court will not, otherwise than in exceptional circumstances, grant a decree of specific performance of an agreement to enter into a franchise agreement.

> *Scott v Rayment* (1868) LR 7 Eq 112, followed.

Application

The plaintiff sought to wind up a company which operated real estate franchises on the ground of oppression and on the just and equitable ground because of the allegedly overbearing conduct of the managing director as particularly manifested in the conduct of meetings of the board.

Young J. These are proceedings to wind up the first defendant either pursuant to s 320 of the Companies Code 1981 or under the "just and equitable" ground contained in s 364 of the Code.

The first defendant was incorporated in about June 1983. Since August 1983 the first defendant has been the franchisor of real estate agencies in the Sydney metropolitan area, especially in the west and south-west of Sydney. The first defendant's articles of association divide its shares into A and B class shares. The principal protagonists hold the bulk of the A class shares. The 12 B class shares are held as to three each by four persons with minor roles. The plaintiff owns 22% of the issued capital. The company associated with the second defendant holds 41% of the issued capital and the third defendant, together with his wife, holds 22%. The plaintiff and companies in which the second and third defendants are interested are or have been also franchise real estate agents of the first defendant.

The plaintiff says that since about 1987 the affairs of the first defendant have been conducted oppressively, and gives 16 particular sets of allegations, which the statement of claim calls "counts". Although in this sort of case one needs to have an overview, and sometimes a series of relatively minor matters can add up to oppressive conduct, I think the way to deal with the evidence is, after making some general remarks, to deal with each of the 16 counts and then draw the various threads together.

There is one other item of relief which should be mentioned at this stage. The plaintiff was, on any view, a franchisee of the first defendant up until August 1989. The first defendant purported to terminate the franchise relationship, which in the ordinary course of events would have become effective in November 1990. By its cross-claim the first defendant seeks a declaration that the franchise was validly terminated as at 14 November 1990, and an injunction to prevent the plaintiff from holding itself out as one of the first defendant's franchisees. The plaintiff seeks a declaration that the purported termination of its franchise was null and void, and for specific performance of an agreement to renew the franchise through to August 1992. I will refer to that matter in these reasons as "the cross-claim".

These proceedings commenced on 5 November 1990 and were expedited by the Chief Judge because of the fact that the case itself concerns a trading corporation which is being paralysed by the existing litigation and the effect of the Corporations Law on a company against which a winding up summons is pending. The case has taken 13 hearing days, during which 26 witnesses have been heard (15 from the plaintiff's camp, and 11 from the defendants). There were about 4000 pages of exhibits and 700 pages of transcript. Despite this the proceedings have moved forward smoothly and I congratulate all counsel and solicitors concerned for their efficiency in presenting the material. Indeed, thanks to the clear way in which the material was presented I am able to give judgment at the conclusion of the evidence.

Although the case basically is a case which will be decided on the facts and the discretion of the court under s 320 will have to be exercised on the peculiar circumstances of this case, it is, I think, convenient to first set out a series of propositions from the authorities which are more or less undisputed, and which can be referred to later as to why I have taken the course I have.

[1] General principles

A. Section 320(4) of the Companies Code 1981 provides that the court should not make a winding up order if an application under the section is successful if that would unfairly prejudice the oppressed member. Section 367(3) of the Code similarly provides that the court shall not wind up a company on the just and equitable ground or on the ground that the directors have acted unjustly if there is some other available remedy.

B. Traditionally in an application under s 320 the plaintiff must establish that he or she has been oppressed as a member, not in some other capacity, such as in the capacity of a director: see for example *Re H R Harmer Ltd* [1959] 1 WLR 62. A recent amendment to the Code includes s 320(4 A)(b), which makes it clear that oppressive conduct may include conduct which affects a member whether in that person's capacity as a member or in any other capacity. Although there are some dicta as to the extent of the operation of this new subsection, in *Re Dernacourt Investments Pty Ltd* (1990) 20 NSWLR 588 at 620; 2 ACSR 553 at 566 the ambit of the section has not been fully discussed in any reported case, so far as I am aware. So far as this instant case is concerned, it would seem to me clearly the position that if the only effect of the conduct complained about is against the plaintiff in its capacity as a franchisee, then normally the court would decline to give relief: see *Re Five Minute Car Wash Service Ltd* [1966] 1 WLR 745 at 751–2.

C. Ordinarily the court is very slow to order the winding up of a successful solvent company: *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 2 ACLR 307.

D. It is oppressive for a member of a board of directors using his or her tactical skills to secure an advantage, at least beyond a certain limit. This is so whether the director concerned is in the majority or in the minority: *McWilliam v L J R McWilliam Estate Pty Ltd* (1990) 20 NSWLR 703; 2 ACSR 757 but see *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at 1011 and *Re Spargos Mining NL* (1990) 3 ACSR 1 at 45.

E. A majority shareholder is not under any obligation to choose as a representative director the most suitable person for the position. A majority shareholder may appoint his friend or a person whom he might reasonably expect usually to vote in a certain way: *Harmer's* case at 82 and 90.

F. "If a person, relying on majority control in point of voting power, dispenses with the proper procedure for producing the result he desires to achieve, and simply insists on this or that being done or omitted, his conduct is oppressive because it deprives the minority of shareholders of their right as members of the company to have its affairs conducted in accordance with its articles of association": *Harmer's* case at 84.

G. The mere subordination of the wishes of the minority by the exercise of the voting power of the majority is not of itself oppressive: *Harmer's* case at 87.

H. It is not oppressive for those in control of a company to insist upon the adoption of a policy on a matter of business on which there are legitimate differences of opinion: *Re Broadcasting Station 2GB Pty Ltd* [1964–5] NSWR 1648.

I. Oppression is something done against a person's will and in his despite. It is not something done with the acquiescence or consent, and still less is something done with his cooperation: *Irvin & Johnson Ltd v Oelofes Fisheries Ltd* (1954) 1 South African Law Reports 231 at 243.

J. If a fair offer is made by the defendants to purchase the plaintiff's shares, prima facie no order for winding up ought to be made: *Re A Company* [1987] BCLC 562 at 573 and see also *Re A Company* [1983] 2 All ER 854.

K. The discretion as to what remedy to give under s 324 is extremely wide. Section 320(2) of the Act is wider than the corresponding provisions in New Zealand. In an appropriate case the court may even order the majority to transfer its shares to the minority: see *Re A Company;*; *Ex parte Shooter (No 2)* [1991] BCLC 267 at 271.

L. The acts of oppression must result from "some overbearing act or attitude on the part of the oppressor": *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at 1060; *Re Tivoli Freeholds Ltd* [1972] VR 445 at 453.

M. "Oppression may occur even though all members of a company are treated equally…. The unfairness may arise for example by reason of an advantage to a parent company": *Re Tivoli Freeholds* at 453.

N. "The mere fact that a member of a company has lost confidence in the manner in which a company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed": *Re Five Minute Car Wash* at 751.

O. Courts must be slow to interfere with the responsibility of management of a company committed to its board of directors. The mere fact that decisions made adversely affect the applicant is insufficient. It should normally be shown that there is a lack of good faith or that no reasonable board could have come to the decision reached: *Re Broadcasting Station 2GB* at 1662; *Wayde v NSW Rugby League Ltd* (1985) 61 ALR 225.

P. In *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 at 704, I said that the critical test is commercial unfairness. However, I agree with the comment of Patterson Ednie & Ford in their third edition at para 320/18, that circumstances could arise where unfairness within the meaning of the section might result from conduct which amounts to unfairness which is not necessarily of a commercial nature. An example appears to be *Re Stewarts (Brixton) Ltd* [1985] BCLC 4.

Before turning to the facts, I should repeat what I said during the hearing that in this sort of a case a judge, as a tribunal of fact sitting in the Equity or Commercial jurisdictions of this court, is entitled to evaluate the evidence in the light of his own experience as a member of boards of directors, so long as he fairly alerts counsel as to the general content of that experience. I indicated the general views that my experience had given me as to what happens on boards of directors, and indicated that I would proceed on that experience, unless someone successfully argued that that approach was not a valid one to take. None of the three advocates presented argument on the matter at all, so I have proceeded on that basis.

As the case progressed, it became apparent that it might be merciful relief to the defendants, as well as to the plaintiff, if Mr Andrew, the chief protagonist in the defendants' camp, and Mr Starr, the chief protagonist in the plaintiff's camp, were separated as business colleagues on the board of the first defendant. When I remarked during addresses that if I found no oppression at all the result would be that these gentlemen would be commercially linked together for perhaps a significant time in the future, Mr Tuckfield QC, who appeared for the second and third defendants, submitted that even if it was not proved that the plaintiff had been oppressed the court could still reach the opinion that because of the poor relations between the key directors, and the tactics on both sides, the affairs of the company were being conducted in a manner which was unfairly prejudicial to the members generally, and an order could be made. I will deal with that submission in due course.

I will now proceed to deal with the evidence on each of the counts. It is not, however, a case where one can say at the end of each count "Verdict for the plaintiff" or "Verdict for the defendant" because some of these counts, as I think all counsel recognise, are very very trivial matters and would be laughed out of court were it not for the fact that sometimes it is the last straw that breaks the camel's back and one has to bear in mind the cumulative effect of all the matters raised by the plaintiff.

thursday 8 august 1991 [Judgment continued]

It is more satisfactory for everybody to deliver reasons at the end of the evidence. The notes that I have made in discussing the factual issues on the first to sixteenth counts occupy approximately 60 handwritten pages, which I will have to embellish with a little ad-libbing. By consent I will include the discussion of the factual matters that arise on counts one to sixteen as sch 1 to the judgment, which I will simply refer to as "the schedule".

I will now deal with the cross-claim. I have discussed the matters arising on the cross-claim in the schedule when dealing with the eleventh count. I there pointed out that it was not incumbent on the first defendant to give any reasons for putting an end to the holding over period under the plaintiff's 1986 franchise agreement. The fact that it gave a reason, even an unavailable reason, did not affect the validity at law of the termination.

The plaintiff has brought a claim for specific performance of the alleged agreement to grant a new franchise for 3 years from the termination of the former one. Although I allowed this amendment on the thirteenth day, it does not seem to me that I can grant the application, for the following basic reasons:

(1) The whole of the conduct between the parties and terms of the 1986 agreement itself, particularly cl 2.6, make it clear that until the new agreement was signed the relationship was a holding over under the 1986 agreement. The condition precedent to a new agreement coming into force did not occur. It is the type of situation examined by the High Court in the first of the categories under *Masters v Cameron* (1954) 91 CLR 353.

(2) Although had the plaintiff exercised its option on the facts, as I have found them, the map annexed to the 1986 Merrylands Residential agreement would have been appropriate, on the negotiations of a fresh agreement there was no obligation on the parties to keep to that 1986 map. Accordingly, the point was at issue and there was never any concluded agreement on the exact area to be held under the Merrylands Residential franchise.

(3) There is respectable precedent for holding that the court will not or perhaps will only in exceptional situations grant a decree of specific performance of an agreement to enter into a franchise agreement: cf Jones and Goodhart, *Specific Performance* at p 136. In the closely analogous situation of a partnership or joint venture the authorities are clear that apart from exceptional situations the court does not make an order: see for example *Scott v Rayment* (1868) LR 7 Eq 112. Perhaps the clearest statement of the law on the matter comes from the judgment of the Court of Appeal in Madras, India in (1862) 1 Madras High Court Reports 341 at 347. Fortunately this material is now accessible through the National Library. The court there said:

> Specific performance is a branch of the jurisdiction of the English Courts of Equity not taken from Roman law and its application to partnerships is governed by precisely the same rules as those which govern in other transactions. As stated in a book of authority [the judge referred to *Lindley on Partnership*] the natural remedy for a breach of an agreement to enter into a partnership is an action for damages; and there exist only two classes of cases in which the specific performance of such an agreement has been decreed.
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> 1. Where the parties have agreed to execute some formal instrument which would confer rights which would not exist unless it was executed. *England v Curling* (1844) 8 Beav 129; 50 ER 51 is a case of this kind.
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> 2. Where there has been an agreement which has come to an end to carry on a joint adventure, and the decree that the agreement is a valid agreement, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account. *Dale v Hamilton* (1846) 3 Ha 369; 67 ER 955 and on appeal (1847) 2 Ph 266; 41 ER 945 is an instance of this class of case. From the earliest to the latest cases upon the subject it will be found, we believe, that a Court of Equity has never made a decree for the specific performance generally of a partnership.

See also *Renowden v Hurley* [1951] VLR 13.

(4) There may not be any power to make orders akin to specific performance decrees under s 320 of the Companies Code. Mr Tamberlin QC put this proposition generally. I think it has a lot of validity, but it is not completely true. It must be remembered that art 65, which I have already referred to in the schedule, does in this case tie in the holding of a real estate agency business with the structure of this company, and I believe there is sufficient power to make an injunction, for instance, that the majority not insist on their legal rights as to determination at law of the 1986 agreement for a limited period while the company is being wound up, or while one person is buying the other person's shares in the company. However, I would agree that the section is not the basis for making a decree of specific performance of the 1989 alleged agreement to renew the Merrylands franchise to 1992.

[2] Summary of finding of facts

I have covered in detail in the schedule, the 16 counts of the cross-claim. However, as all counsel have submitted, it is not appropriate merely to deal with each point on its own or each count on its own, but it is necessary to get an overall picture because incidents, which of themselves may be relatively trivial, when added to like incidents and superadded to the significant incidents may add up to a picture of oppression.

There seems to be little doubt that the first defendant was a company in which the second defendant was the dominant figure. Not only did he through his company control 41% of the A shares, and an entitlement to nominate two directors, he also had moral ascendancy. The other shareholders and franchisees were for the most part people who were very much younger than Mr Andrew, and who had come up through the organisation. It is a fact of life that a person who has been a pupil or employee, or a person who later becomes his partner or quasi-partner still often will give to the former master the position of moral ascendancy that the earlier relationship created. I think this is what occurred with this company.

I have related many occasions in the schedule where Mr Andrew has told various directors and franchisees that he virtually was the board or that the board was "my board" or the company was "my company". While when people use this language they are often talking figuratively, for instance, when a person talks about "my church", even if he is the minister, he really means no more than the "church which I attend", but I think in this case the context shows that very often Mr Andrew thought that it was his company and the people like Mr Starr, who were putting forward contrary points of view to his, were just a nuisance and an unwelcome interference with the smooth running of the company.

It is clear that some of the directors and executives, while they had great respect for Mr Andrew, found him perhaps overbearing. Sometimes these people, who had very good will towards Mr Andrew, said in their affidavits that he would get so overbearing he would not listen.

I need not refer to many instances in particular in this context as illustrations because I have dealt with many of these statements in the schedule. However, I would mention Mrs Starr's affidavit, where she says that in February 1990 she called on Mr Andrew and told him that she was concerned about the effect the constant conflict was having on Mr Starr's health. Mr Andrew told Mrs Starr "I don't trust him and he doesn't trust me". She also said: "Why have you suddenly decided to put your head on all the letterheads, office windows and even billboards on freeways?"

Mr Andrew allegedly replied: "I am the franchisor and can do whatever I like".

Mr Andrew denied that he told Mrs Starr that he did not trust Mr Starr, but he admits talking about the display of his image and saying that that was what the advertising agency advised. He denied making the statement "I am the franchisor and can do whatever I like".

Mrs Starr was cross-examined: she did not depart from her statement. I prefer her evidence on these matters to that of Mr Andrew. Mrs Starr seemed to be a sober reliable woman, who only entered this drama on odd occasions. I prefer her recollection to that of Mr Andrew, whom I am satisfied did from time to time get excited and made comments that he would not have made unless in emotional moments and then tended to forget these comments afterwards.

Mr Johnson said that Mr Andrew told him that he, Andrew, was the company and controlled it and that he had made up his mind on the matter. Mr Johnson said Mr Andrew told him, "You are not in a court of law now. It is my decision". In his affidavit Mr Johnson said that in about March 1988 Mr Andrew said to him: "I control the board, though my family are shareholders. I don't run a democratic company. John Starr cannot discuss board matters with you and he cannot get involved in principals' problems because they have to be handled by me and management".

Mr Andrew denied that he made the remark about an undemocratic company, but did not deny the balance. Although some adverse comments could be made about Mr Johnson's evidence, I accept his evidence on this particular point.

Again, when speaking to Mr Douglas, the then franchise manager of the first defendant, Mr Johnson said, "What is happening to my franchise?" Mr Douglas replied, "I cannot help you. Mr Andrew is dealing with the matter". Mr Johnson said, "Well, why can't you? You are the franchise manager, aren't you?" The reply was, "Do you know what it is like up in Queensland, Keith? He is like Joh Bjelke- Petersen". I took this evidence to mean that Mr Douglas was saying that Mr Andrew was a man full of opinions, but behind the times, who would impose his will on the board and the head office staff. There was no cross-examination of either Mr Douglas or Mr Johnson on this.

I should say, however, that going the other way Mr Andrew was cross-examined for 4 days. I would have thought that a man who did fly off the handle as often as he is alleged to have done would have reacted angrily to many of the questions that were asked. However, I think that during the 4 days Mr Andrew did get the better of the cross-examination. Indeed, if anyone got upset, it would have been Mr Rundle, and then only to a mild degree, and certainly the thesis that Mr Andrew was the Joh Bjelke-Petersen of the organisation was never established by the evidence. However, despite this, it did seem to me that there is ample evidence to show that Mr Andrew did, when pressed, make the statement on more than one occasion that he virtually was the company and he acted in that way as well.

Indeed, a strong argument for the plaintiff was the way in which opposing senior counsel put their questions to the plaintiff's witnesses, obviously on instructions, especially in the case of Mr Tamberlin QC. Time and again it was put that the only entity which could make policy was the board (which, of course, was controlled by Mr Andrew) or that that matter was purely within the province of the managing director, and that the views of actual franchisees had little impact. Again, it was put time and time again that really Mr Starr should not think that anything was awry so long as there was power to do it and it had been done by the defendants.

In *Harmer's* case at 82 it was made clear that while one must be conscious of the legal rights of the majority holders, there comes a point, especially if there is a consistent pattern of preference of self-interest, where the line between legitimate governing of the company and oppression is crossed.

Again, it must be said that just because a policy may be justified on certain grounds does not necessarily mean that it was in fact justified on that ground. Very often people make decisions for purely emotional reasons and think of the argument which might have supported them, had they been rational decisions in the first place, at a later point in time.

The question here is really one of degree. It is quite clear that there is no love lost between Messrs Andrew and Starr, on either side. This is illustrated, among other ways, from the way they employed tactics at company meetings, which I have covered in the schedule. I have set out at the commencement of these reasons a list of the applicable principles together with extracts from the cases, and it is not necessary to repeat these here. Essentially the question is whether on the facts, as have been related in these reasons and contained in the schedule, the majority went beyond a subordination of the wishes of the minority by exercise of voting power, and into the area of persistent violation of fair play, and thus oppression.

Mr Tamberlin QC has rightly submitted that there is no allegation of lack of honesty or probity on the part of the majority, or that the company has ever made any actual loss because of the majority's conduct. He also correctly submitted that to succeed the plaintiff must demonstrate actual and not merely potential oppression.

However, with respect, Mr Tamberlin QC put his sights too high. It is essential in company law that all persons who are entitled to participate in meetings are able to participate in them to the extent which the law allows. There must be proper notices of meetings; there must be proper time for discussion at meetings; everybody's views must be respected before the vote is taken, on which the majority will succeed, if they wish, but only after they have listened. Where the rights of the minority are affected by persistent conduct at the board, so that they are not able fully to participate in meetings, then there is, in my view actual oppression and, in my view, there is actual oppression on the sum total of the events in this case.

As to credit, I should note that I am sure that each of Mr Andrew and Mr Starr endeavoured to tell the truth as he remembered it. Each of their evidence may have been affected from time to time by their subjective impressions, and by the fact that some heat was generated at many long board meetings. However, in general I am sure that each told me the truth as they remembered it. I have already referred to the way in which Mr Andrew successfully survived a long penetrating cross-examination, and Mr Starr did equally well against Mr Tamberlin.

It was, I think, significant that Mr Tony Andrew was not called by the defendants. He was clearly alive and well and living in Sydney. The inference must be drawn that his performance at the only board meeting he did attend as his sister's alternate, and his more or less even-handed stance at that meeting, was so resented by Mr Andrew that he was never called in to bat again.

Again, as Mr Rundle pointed out, one must be careful and suspicious about Mr Cohen's evidence in view of the slide in his evidence on the matter of mini board meetings, which I have already referred to. Where Mr Cohen was in conflict with other witnesses, I would tend to discount Mr Cohen's evidence.

Mr Beasley said that he would accept any information from any executive decision that Mr Andrew had made, within reason, because he had confidence in him. Mr Beasley's cross-examination, however, showed that he had no real idea at all of what was the actual problem within the company. He just could not get out of his mind some immutable concept of a company where the managing director and other directors deal rationally with each other and actually speak with each other. It never seemed to have occurred to Mr Beasley that the first defendant was not such a company. It never seemed to occur to Mr Beasley that Mr Starr could not get his point of view across to the managing director outside board meetings, and so the only occasion he had to put his point of view forward was at meetings. This made the board meetings long boring affairs, so far as Mr Beasley was concerned, and he wholly blamed Mr Starr and thought that the smooth running of the company was frustrated by the time taken at board meetings to debate relatively trivial matters. I think his evidence must be discounted to some degree by his rather theoretical approach to company meetings. Again, it must be remarked that Mr Beasley appeared to be a regular attender of the mini board meetings.

Mrs Hannon, Mr Andrew's daughter, was a very impressive person as a witness. She was a university graduate and presented herself in court as a mature, thoughtful, intelligent woman. She was very articulate and well able to combat counsel's questions, though she was obviously very nervous when she commenced to give her evidence. I do not think she would ever be a token director or a yes-woman, but her history of involvement in board meetings suggested never once did she vote against her father. Indeed, the evidence was that relations improved a little when she departed the board and Mr Beasley returned. I think, however, that far from being led by Mr Andrew, she was probably a co-leader in the Andrew faction, rather than a follower. Her evidence was affected by the fact that she and her father gave different evidence as to the degree of her involvement in formulating motions on the company policy items which I have dealt with in the schedule.

I thought I should make those comments on the evidence of the main witnesses in case the matter goes further. It does seem to me, however, that in general there was no great conflict of evidence. What was occurring at meetings is thoroughly recorded in the minutes or in the statements made by the principal protagonists, about which there is little dispute as to the primary facts. In my view, the cumulative effect of the conduct of the first defendant, inspired mainly by the second defendant, is sufficiently serious to amount to oppression within s 320 of the Code, and I find the plaintiff's primary case established.

As I said earlier, Mr Tuckfield QC submitted that I need not go that far, but that it would be open for me to find on the facts that the affairs of the company were being conducted in a manner oppressive to the interests of the members as a whole by the combined effect of the conduct of Mr Andrew and Mr Starr. As far as I can see, that submission has never been put before a court previously, but on reflection my view is that it may well be right. There is no real reason why a person who is suffering oppression has to actually identify the villain, and we all know that in many situations it is a combination of factors which leads to oppression, rather than the action of one particular person. Indeed, when one sees the relationship between s 320 and the just and equitable ground for winding up, in my view, Mr Tuckfield QC's submission is correct.

However, it is necessary in this case to identify the real cause of oppression because that is relevant on the question of costs. Thus my primary finding is that there has been oppression on the part of the majority. If, however, I am wrong on this I would find that the whole of the circumstances of the company were oppressive, so that the alternative ground suggested by Mr Tuckfield QC is made out.

[3] Remedies

Commercially speaking, there are about six possible solutions to the problems that have arisen in the company. These are:

(1) that the Andrew interests and minority holders purchase the plaintiff's shares;
(2) that the plaintiff's interest purchase the other shares, or some of them;
(3) that there be a winding up and (a) the liquidator sell the business to the highest internal bidder, or (b) the liquidator realise the company's assets in the usual way;
(4) that the board be restructured;
(5) that there be a reduction of capital; or
(6) that the status quo be maintained.

As far as order (2) is concerned, it seems to me that this order is precluded because of the constitution of the proceedings. A O-Marama Pty Ltd, which holds 41% of the A class shares, is not a party; nor are many of the minor shareholders. Although Mr Andrew may morally control A O-Marama, he does not beneficially hold the shares, unless the trustees of the discretionary trust exercise their discretion in a particular way. Accordingly, I do not think that the absence of A O-Marama as a party can be lightly cast aside. I cannot see how I can order a non-party to sell its property to the plaintiff.

I should add that prima facie in this sort of case where such an order is sought every shareholder should be joined in the application: see *Re A Company* [1987] BCLC 593. I should note that an application to amend was made to add A O-Marama during one of the pretrial hearings, but for the reasons I then gave I held it was too late and would delay the expeditious trial of the proceedings, so I refused the application. However, without such joinder, orders such as order (2) cannot be made.

Order (4), that is, the restructuring of the board, appealed to me for a while. Indeed, I will set out as a second schedule to these reasons a scheme that did go through my mind, in case the case should go further. As can be seen from sch 2, the proposal would be to put in a supervisory board of directors so that there would be an internal appeal by the minority should there be a debatable question, but ordinarily decisions would be made by the board as currently constituted. I am reinforced in the view that this might be a successful way of proceeding by the way in which the ACDC conciliator seemed to approach the problem.

There is no doubt at all that the court is empowered to make such an order and the real question is whether it is a viable order.

It is incumbent upon the court when making an order under s 320 to endeavour to find a scheme, short of winding up, if possible, which will "put the company back on the rails" and avoid the causes of conflict and oppression, yet will as far as possible allow all members to participate in the business. Amendment of the articles, as per sch 2, would go some way towards this.

However, in the end I was convinced by the submission of Mr Tamberlin QC that this was not the solution. Mr Tamberlin QC submitted that almost insurmountable problems would arise under this scheme as to how the board of supervisors would acquaint themselves with the relevant issues; who would elect them; how they would be paid, and the effect that such a structure would have on the right of the majority to run the company in what they perceived to be the best interest of the company. I should make it quite clear that Mr Tamberlin QC did not have in his hands sch 2 when he made those submissions, so he may not have been directing his mind to the particular way I fleshed out the idea of a two-tier board, but his submissions were directed to a two-tier board and most of them, I think, do have sufficient weight in them that I should not pursue the amendment to the articles.

I should note that in *Harmer's* case Roxborough J did at 66 make orders similar to some of the matters in sch 2, such as making sure that the founder of the company retained status in the company by making him president, but by modifying his power so as to ease conflict.

Accordingly, one is really left with three possibilities: (a) winding up; (b) a purchase of the plaintiff's shares; and (c) a reduction of capital. The sixth possible solution of leaving everybody as they are does not attract anybody in this case.

Mr Tamberlin QC submits that the primary remedy in this sort of case is that the majority buy out the minority. This is illustrated by the cases that I referred to in principle J at the commencement of these reasons. It appears that this view has been built on dicta of Lord Cross in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 385 where his Lordship said: "What the minority shareholder in cases of this sort really wants is not to have the company wound up—…but to be paid a proper price for his shareholding."

The plaintiff points out that in this case he does wish to continue to participate in the company. The company has risen from being a relatively small one to one with over 25 franchisees, partly as a result of Mr Starr's efforts, and it is acknowledged by everybody that Mr Starr is a very competent operator in the real estate business. Mr Starr says that the only proper order is winding up in this sort of case because that does allow everybody to have the right to buy the company from the liquidator after an auction at the highest possible price, so that those who are unsuccessful get the very highest price for their shares, and those that are successful can continue to carry on the company free from the influence of conflicting views.

There is some support for both points of view in the authorities. In *Re Bird Precision Bellows Ltd* [1984] Ch 419, Nourse J at 430 affirmed the view that ordinarily compulsory sale of the minority's shareholding was the norm, and his approach was affirmed on appeal: [1986] Ch 658. There are other English cases in the same line.

However, in *Vujnovich v Vujnovich* [1988] 2 NZLR 129, Henry J in the Commercial List of the High Court of New Zealand, and a five man Court of Appeal held that where there is a three man company and each have been involved with the running of the company, the only appropriate order is winding up, though the winding up order should be postponed to allow there to be an out of court auction at which someone can buy the others out at the best possible price.

I have reflected quite considerably on this matter during the latter part of the case and during addresses, and in particular I am concerned with these matters:

(1) the valuation exercise if there is to be a sale will be a very difficult one indeed;

(2) if there is to be a reduction of capital, or if there is to be a buy out by one faction or the other, especially in view of the large amounts that will have been spent on legal costs, neither party nor the company will really have sufficient funds to buy out the other, so that if an order for buy out or reduction is made it may be frustrated;

(3) the company is a trading company and the commercial realities reinforced by s 468 of the Corporations Law is that one should not leave a winding up summons adjourned for any period of time in the case of a trading company;

(4) if there is a winding up order and the parties are short of cash, what appears to be a sensible move of an auction to the highest bidder will be frustrated in like manner as a compulsory sale; and

(5) the Code does contain strictures which tell the court not to wind up a solvent company unless there is no other alternative.

As to point (1) the valuation indeed will be a very tricky matter. The company is one which owns its own premises at Burwood, subject to a mortgage, but I would have thought, from what I have seen, that its other assets will be very hard to value because they consist mainly of the goodwill of the franchise agreements. The revenue being produced by the agreements will be affected if Mr Starr's franchise comes to an end. The Merrylands franchise has been the greatest revenue producer, and while it is theoretically possible for a new franchisee to be set up at Merrylands, I would have thought on the evidence that lacking Mr Starr's ability, and having probably Mr Starr as a competitor in the area will mean that nowhere near the revenue will be produced. Obviously the next step if a sale is ordered is for each party to get a valuation and for the court then to determine what is the proper value. There would doubtless be debates as to whether the valuation should be on a going concern basis or on an assets backing basis or capitalisation of dividend basis, and whether any premium should be brought in because Mr Starr, if his shares are compulsorily sold, will be giving up the expectation that his shares would have produced greatly increased revenue in the future. Just how far one can include such a premium or compensation in an order is a very awkward matter, as can be seen from the discussion in *Vujnovich's* case at 148–9, and the authorities there cited. I think if I do order a sale it is wise to leave those matters until the short minutes stage, or perhaps even later.

As to points (2) and (4), I have had assuring comments made from the Bar table that the money is there to effect the buy out. I think I should accept those assurances as minimising the possibility that the orders will be frustrated.

I think I should leave open the possibility, if there is a compulsory purchase, that in lieu of that purchase there be a reduction of capital. I can leave this to the short minutes stage. Doubtless the parties will wish to look at the fiscal implications for all concerned, and the parties, and the court itself, will need to consider whether there are creditors, and whether those creditors consent or whether it is necessary for the court to take steps to find out their attitude: *Quinlan v Fiboze Pty Ltd* (1988) 14 ACLR 312; 6 ACLC 993.

In the ultimate it really does come down to my exercise of judicial discretion after considering all the factors involved. Although there are good arguments for both sides, it does seem to me that the court should turn against a winding up if there is any viable way forward. The plaintiff's franchise has finished as a matter

of law, and there is no specific performance available to resuscitate it. The majority say they are willing to buy out the plaintiff at a fair value, and it seems to me that in the light of the authorities that is the primary remedy. Accordingly, it seems to me that the proper order is that the majority (and I definitely use that word loosely) must purchase and the plaintiff must sell its shares in the first defendant at a fair value, to be determined by agreement or, in default, by the court. I will stand the matter over for short minutes so this can be investigated, and I will not be at all offended if the parties consider that a reduction of capital is a better way forward.

[4] Costs

This only leaves the question of costs. Again, there have been no submissions on this matter because counsel did not know which way I would decide the issues. I will make some comments on this matter, but leave it for the matter to be debated when the short minutes are brought in.

A complicating factor is that both Mr Andrew and Mr Starr have shares in the first defendant. If an order were made, for instance, that Mr Andrew pay 40% of the plaintiff's costs personally, and the company the balance of the costs, this would have the effect that because of his 41% holding in the first defendant Mr Andrew would effectively bear 66.4% of the plaintiff's costs. It would also mean that effectively Mr Starr would be paying 13.2% of his own costs. I only use these figures as an example and, indeed, my arithmetic may be open to question, but it illustrates the problem that there is. I should say that I do not think it would be unfair that effectively Mr Starr bear something like 13% of his own costs, in view of the fact that his general attitude, I am quite sure, contributed to the company's problems.

The defendants will, of course, have to pay their own costs, unless counsel can be far more imaginative than I currently give them credit for. Again, Mr Starr will have to contribute to the costs which the corporate defendant will have to pay its own lawyers. It may be that he can do something about this within the company, but at the moment I would think that Mr Rundle would have to show more skill than, with respect, I currently give him credit for to induce me to make a special order. However, I do not wish to preclude counsel from developing any of these matters at the short minutes stage. I merely give some indication as to what I see the problems are, and my initial impressions on them in order to assist the way they formulate their submissions.

It will take, I would have thought, some time for both the oral judgment, which has extended over some two and a half hours, plus the large amount of the schedule to be transcribed. Accordingly, I will merely stand the matter over for short minutes to be brought in by arrangement with my associate after the transcription is available and, of course, any time for appeal will not start to operate until orders are made on the short minutes.

As Mr Starr's franchise has come to an end, and there may be some doubt as to whether the existing undertakings not to disturb it have come to an end, I think that unless the parties otherwise have some solution I should make an order in accordance with the existing undertakings preserving the status quo with Mr Starr's franchise up until final orders are brought in, and I make such an order. I also contemplate that when the short minutes are brought in there should be an order continuing that injunction up until the time when the sale is completed, so that the status quo will remain until that time.

Mr Wilson of counsel has pointed out that it is unsatisfactory to leave the winding up summons over the company's head any further, so I should at this time dismiss the application to wind up, but extend the time for appealing against that order to 28 days after the short minutes are handed up.

Mr Tuckfield QC has raised that even if Mr Starr sells his shares he may still be able to be a board member representing the B class shares or, indeed, to function as an alternate director. I am recording this submission because it may need to be considered when the short minutes are brought in. My first impression is that art 65 may well operate so that this is not really a problem, but if it is I cannot really see how I can stop the B class shareholders from appointing whomsoever they like as their representative, or stop any person from appointing Mr Starr as their alternate. The remedy would lie with the shareholders in making the appropriate amendment to the articles.

[5] ***SCHEDULE 1***

[6]

[7] ***SUMMARY VERSION***

The schedule to the judgment as published occupies 76 pages. It is appended only to the copies issued to the parties and the Law Court's Library. For any other reader the following extracts reproduce anything of general interest.

[8] First count

The allegation in summary is that board meetings have been conducted without regard to the views of directors, other than Mr Andrew. It is alleged that often serious matters are brought up at directors' meetings without adequate notice. The worst examples are said to be the meetings of:

(a) 27 September 1988;
(b) 1 November 1988; and
(c) 15 May 1989.

I will deal with the specific examples shortly. However, it is basic to the plaintiff's case under this count to establish that Mr Andrew had such control that the majority of directors would virtually always vote as he wished.

I should repeat that in accordance with the principles of law I set out at the commencement of these reasons, I fully appreciate that it is not unusual for skilful directors and executives of companies to increase their chances of having their views accepted by the board by employing legitimate commercial tactics. One favourite method of executives is to place voluminous documentation before a board at short notice, usually accompanied by expressions of urgency. Sometimes this procedure cannot be avoided by the exigencies of the situation. If, however, this occurs on a large number of occasions, many without any urgency, except that created by management failing to action board matters timeously, then one does suspect that unfair tactics are being used. Again, it is quite a legitimate tactic, in my view, to wait for a board meeting at which the principal opponent is on holidays, and then to bring on a proposal, or to "forget" to include a matter on an agenda of a board meeting, or to adjourn a proposal for personal or tactical reasons. It is only when this happens on a sufficiently large number of occasions, or where there is deception or failure to make proper disclosure, that, in my view, one goes over the line between legitimate commercial tactics and grounds for complaint. There is also ground for complaint

when such tactics are so constantly employed by the majority that the minority are virtually deprived of their statutory right fully to participate in general or directors' meetings.

Another common tactic is to contend that an opponent's motion is out of order, or that insufficient notice has been given, or that the matter should have progressed through some special procedure before being dealt with by a board. Competent directors know how to combat this very common tactic, but those who sit on boards infrequently perhaps are put off by it. There is also, of course, the device of diverting awkward issues by sending them off to a subcommittee whose members are too busy to meet and which is stacked with sympathisers of the diverter; again one can always say that the matter needed to be deferred for more information, which one knows one will never get. All these in their place between business people of experience are legitimate enough. It is only when they are used so frequently as to prevent the minority from really participating as they ought that they step over the boundary between legitimate tactics and oppression. Many of those devices were, as one would expect, used in the organisation of this company.

One tactic that did enter very prominently into the case has been called in evidence the "mini board meetings". This description was used in meetings of the defendants' faction to predigest issues before the board meeting. There is also some evidence that Mr Starr and Mr Hurley or their alternates on occasions met for similar purposes.

There is nothing wrong with a meeting together of some members of a board before a board meeting. Indeed, in many busy boards there will be an actual steering or executive committee to predigest the issues and to formulate draft resolutions so that the meeting can proceed smoothly. In many boards the directors represent different interests and will talk matters over with persons of similar interests for the quite legitimate purposes of considering how the proposed resolution will affect them or those whom they particularly represent, or to get more information, or otherwise to put themselves in a position where the matter can be meaningfully debated. On many occasions some board members will not be au fait with the matter that is being discussed and will need to predigest the matter before they can participate in the debate.

However, when mini board meetings get to the stage at which the participants have irrevocably decided how they will vote at the board meeting, so that virtually no matter what anyone says at the meeting, the decision of the mini board meeting will prevail, that gets over the legitimate line and can constitute oppression.

A key issue in the case was the role of a managing director. The various directors give their views as to what role a managing director should have, and they obviously differed considerably in their views. Mr Beasley tended to take almost a theoretical approach and say that it was not the board's place to question the executive power of the managing director. That sort of statement, while it may be correct with most companies, fails to take into account the situation of this company where the evidence shows that the managing director would not speak to Mr Starr unless he really had to.

Apart from the provisions of the articles of association of this company, which I will examine shortly, it is, however, an essential principle of commercial relations that a board must either live with its managing director or chief executive officer and back him or, alternatively, sack him. It is commercially impossible to live with a situation, at least for an extended period, where the

managing director does not have the support of the board, or where the board makes him aware of how it distrusts him by questioning every decision and requiring him to give reports to the board on every conceivable little matter. Generally speaking, the chief executive officer, whether he be managing director or general manager, is to be left to do the task of running the company from day to day. The theoreticians would say that there is a very real difference between the policy of the company, which is for the board, and running the company from day to day, which is in the province of the executive. However, in actuality there is no clear dividing line and sometimes some very ethereal act of an executive may, when properly analysed, involve some deep matter of policy. However, when one does see, as happened in this company, the board consistently challenging what the managing director did, one can see that there is something wrong. Of course, in the instant case it was not in the power of Mr Starr to sack the managing director, so that one must modify one's general view because there may not have been any other avenue open to Mr Starr to do his job as a director, other than consistently challenge Mr Andrew's functions not only as a director, but as an executive.

Before getting to the three matters mentioned in the particulars, I should mention the board meeting of July 1989. This was originally scheduled for 18 July. Mr Maley gave evidence that on that date he attended the first defendant's office with Mr Starr to attend a meeting of directors as alternate for Mr Hurley. After introductions Mr Andrew said to Mr Maley: "I won't accept that appointment because you are a legally qualified person and I don't think you can sit on my board".

I should interpolate that under art 71(1) there were no qualifications laid down as to who could accept appointment as an alternate director, and it was made quite clear that an alternate director need not be a member of the company.

Mr Maley replied: "My being a solicitor does not disqualify me from sitting on any board".

Mr Andrew said: "We are not going to have a meeting because I don't know and I want to get legal advice".

Mr Maley insisted that he was entitled to sit on the board. Mr Andrew merely answered, "I don't know that".

This interchange is significant as an indication of the general attitude that Mr Andrew took, that is, it was "my board" and that he would often go off and get legal advice before making any decision at all.

However, the meeting of 18 July was effectively stymied because at that stage Mrs Hannon, who was pregnant, said that she felt sick and was going home. There is no suggestion that Mrs Hannon left the meeting deliberately to terminate it, but she left it for legitimate reasons. Under art 75(1) all directors had to be present either in person or by alternate to constitute a quorum. Mr Andrew then said: "As she is leaving the meeting due to her illness I adjourn the meeting".

Mr Maley reminded Mr Andrew that those present had to wait for half an hour to see whether there could be a quorum, and the parties went through that waiting period, and the meeting was then adjourned for 7 days.

In *Anaray Pty Ltd v Sydney Futures Exchange Ltd* (1982) 6 ACLC 271, Foster J said that an alternate director is not the agent of his appointor. I respectfully agree. Accordingly, the question of the participation of Mr Maley as a director needed to be considered by looking at Mr Maley as if he were a full director, and one should not be diverted from this task by saying that he was only a substitute for Mr Hurley.

Mr Maley's evidence shows that he keenly appreciated the potential conflicts that might arise when the board might be considering a letter from his office as Mr Starr's solicitor, because Mr Maley may have to judge it according to the standard of what was for the benefit of the franchisor as a whole. He saw no real problem in that. However, the courts have consistently said that it is most unwise for a solicitor to put himself in such a position: see for instance per Kirby P in *Beneficial Finance Corp Ltd v Karavas* (New South Wales Court of Appeal, 17 May 1991, unreported) at 16. Although large firms of solicitors seem to take the view that there is an effective chinese wall between departments in their office, the courts tend to treat this as a myth: see for example *Malleson Stephen Jaques v KPMG Peat Marwick* (1991) ANZ Conv R 200–2 at 201. Accordingly, it does not seem to my mind at all unreasonable that Mr Andrew as in law a lay person would be quite suspicious of the appointment of Mr Maley as an alternate director. Accordingly, it does not seem to me that the incident takes the plaintiff very far, and I really only relate it at some length because it is a good illustration of Mr Andrew's general attitude.

The problem with the first meeting is resolution 88–429, which is as follows:

[9] "Franchisee control

> Mr R Andrew moved a motion that 'no person or company should hold a financial interest in more than three (3) franchises indirectly or directly with the exception of current holdings including Auburn office takeover'. Seconded S Cohen. Vote was 2–2 with one abstaining. The chairman gave the casting vote carrying the motion 3– 2.

Mr Starr said that he had no idea what the item "franchisee control" listed on the agenda was all about. He was enlightened as to what it was all about at the meeting and was horrified. He probably had interests in more franchises than any other person connected with the company and considered that the motion was directed against him personally.

The notice of meeting merely set out the contentious matter as "franchisee control". Mr Andrew acknowledged that in hindsight this might have been a bit enigmatic, but he said he would have thought that readers would have realised that it referred to a limitation of the number of franchises that could be held. Mr Cohen, while initially indicating that he had no confusion about what was going to be discussed, showed by his evidence that in fact he was confused.

It would seem to me that Mr Andrew's view in hindsight is correct. It would have been much fairer to have given more explicit notice of the item so that there would have been an opportunity for each director discussing the matter on an informed basis. Indeed, it might be said that the notice of meeting was invalid because it did not specify with sufficient particularity this item of business. Failure of a notice of meeting to so specify an item of business does give rise to legal embarrassment because the director who receives such a notice does not really know whether it is safe for him to say that the notice of meeting is invalid because of lack of specificity, at least so far as that item is concerned, or alternatively, to participate in the meeting. If he participates in the meeting at least without appropriate statements of reservation being noted in the minutes, it would seem from authorities such as *United States v Interstate Railway Co* (1926) 14 F (2d) 328, that he may have waived the defect.

Those convening meetings must not let this sort of situation arise, and it goes some way towards the plaintiff's case that this incident occurred when it easily could have been avoided.

I will now deal with other particular matters of concern which came out in the evidence and which might conveniently be dealt with here. The first of these is the way in which Mr Andrew summarily dismissed suggestions that a budget should be prepared.

In mid to late 1989, Mr Cohen suggested at a board meeting that a budget be prepared. There does not appear to be any mention of this in the minutes. Mr Starr supported Mr Cohen but Mr Andrew rejected the idea that there should be a budget prepared for the board. He replied angrily that "management" (ie himself) "will set planning and budgets". He never did so, or at least never told the board that he did so.

It is basic for almost every business that the board have up to date financial information including how the actual figures measure up with forecasts in budgets and why there are discrepancies. For this reason it is virtually essential that the board have access to annual budgets as to both capital and income of proposed receipts and expenditures. The action of a managing director taking umbrage at a board's request for such a budget to be prepared and the failure of Mr Andrew to actually prepare budgets for the board shows a propensity to arrogate unreasonably to himself reasonable functions of the board.

Then there is the question of Mr Andrew's salary. This matter is more fully discussed under particular (b) of the sixth count, but I will briefly mention it here.

At the relevant meeting, Mr Andrew was asked to withdraw. He refused to do so. He got upset that he was asked to do so. Although there was no suggestion that the salary package which Mr Andrew was seeking was exorbitant, Mr Andrew just could not see why he should withdraw from the meeting. Mr Rundle, for the plaintiff, suggested that the directors may well have wished to discuss a higher remuneration for Mr Andrew, but could not do so in his presence. That particular example may be fanciful, but the principle behind it is sound.

It is clearly the case that a strong member of a board may influence the proceedings of a meeting even if that member does not vote: see for example *Globe Woollen Co v Utica Gas & Electric Co* (1918) 121 NE 378. It seems to me that Mr Andrew should have departed the meeting when requested to do so, to enable the other directors to have full and free discussions about his salary package. The evidence shows that instead he hit the table with his fist and said, "This is not up for negotiation, it's the amount I want. What I am asking for is more than fair". It is clear Mr Andrew reacted angrily to the mere thought that what he wanted was being challenged. Although this matter in itself does not have great significance it must be added to other incidents.

It must be noted that the plaintiff has some difficulties in respect of this count because a system was in place whereby each director was able to include any matter on the agenda of a directors' meeting by phoning or writing to Mr Andrew. Further, there does not appear to be any occasion where an item he suggested was not placed on the agenda. The worst that happened was that a matter on the agenda put there by Mr Starr may have been adjourned for one or two meetings at the behest of the majority seemingly without any rational reason.

This count has loomed large in these proceedings because the plaintiff's mainstream case is that the second defendant deliberately and consistently frustrated the directors in raising matters at meetings by one or other of the tactics I have set out in the preceding pages. The plaintiff says this happened so

frequently and in conjunction with utterances by Mr Andrew that the company was really his company, that one should draw the inference that it was directed at oppressing the minority.

In my view there is great substance in the plaintiff's complaints on this count. Although Mr Starr himself was doubtless a frustrating sort of person in Mr Andrew's eyes, I think that the delaying tactics and other rules operated to deprive the minority of their rights to discuss relevant matters. Although there will always be some timorous souls at meetings who will never be ready to make a decision and will wish to delay resolution, when one sees a consistent pattern of delays of motions moved by one party, one suspects a malicious motive. Again, it may well be that from time to time delaying a matter may produce more information. This seldom happens but it sometimes does. However, like a school examination or a court case, a test has to be taken and a decision has to be made at a particular point of time and it is often not a feasible alternative to obtain an adjournment merely on the grounds of a hope of being better prepared later.

[10] Second count

The allegation is that the second defendant, with the concurrence of the third defendant, has often negotiated contracts without the authority of the board.

The particulars focus on four matters, viz:

(1) changes to the franchising agreements with respect to advertising;
(2) obtaining legal advice;
(3) a proposed merger with Laing & Simmons; and
(4) activities with respect to Robert R Andrew (Queensland) Pty Ltd.

It does not seem to me that the matters mentioned in the second count take the plaintiff's case very far at all.

[11] Third count

The allegation is that general meetings have been convened and conducted not in accordance with the interests of the first defendant as a whole. The particulars specifically refer to the meetings of July 1987 and February 1990.

The July 1987 extraordinary general meeting was convened to deal with an offer to purchase the company by a Queensland real estate group. The meeting was called at only 48 hours' notice. This was shorter notice than required by the articles, and indeed there was no chance of a 100 attendance as one member, Mr Douglas, was overseas. The evidence shows that the buyer insisted on an answer being given to its proposal within a few days. The managing director considered it was important to have the reaction of the shareholders even if no valid resolution might have been passed. I cannot see anything wrong with this approach at all.

The February 1990 extraordinary general meeting was again in relation to a proposed merger. This meeting was convened as a result of a requisition by members including the plaintiff. The complaint is that at the meeting the chairman would not allow discussion on any motion other than whether the shareholders were or were not in favour of a merger. He would not allow amendments or procedural motions. He also limited the time for discussion. It must be said, however, that the meeting itself confirmed the chairman's procedural directions. After speeches were made by anyone who wished to speak, a vote was taken and the meeting by a majority of 69 to 31 resolved to proceed with the merger in accordance with the chairman's views. As things turned out, the merger did not proceed for other reasons. Mr Starr very strongly objected to

only 10 minutes being allowed for each member to discuss the motion at the requisitioned extraordinary general meeting. He thought it added insult to injury that no amendments nor procedural motions were permitted.

As to this latter matter, I am sure that Mr Andrew was in error. The shareholders have a statutory right to requisition a meeting and that meeting when held, must be able to deal fully and adequately with the business for which it was convened. Even if the ultimate question was one to which an aye or nay answer would be given, it was quite legitimate for subsidiary motions to be proposed and debated. Indeed, the ordinary rules applicable to meetings required this be so. This is obvious enough. Suppose a person wanted to move that the meeting be adjourned for 14 days. Even if the notice convening the meeting was only to discuss the merger, it must have been competent for such a motion to have been moved and considered by the meeting and the chairman was in error in ruling otherwise.

As to the time limits, the defendants basically say:

(a) there were eight members each who could speak for 10 minutes, and that was 80 minutes which would allow a full enough debate; and

(b) no one seemed in fact to be affected because the time limit was announced before speeches began.

It is, of course, for a chairman to control a meeting, subject to the meeting resolving to dissent from his rulings, and in controlling a meeting, the chairman may lay down at least preliminary guidelines as to how it will be conducted. The meeting, too, as the master of its own business can lay down procedural rules. However, neither the chairman nor the meeting can by procedural resolutions remove the members' statutory rights to have a meeting convened and to have the business for which the meeting is convened fully and fairly discussed.

Absolute time limits for speeches raise awkward questions. It is a false assumption to say that if there are eight people entitled to speak at a meeting and one has 80 minutes available for discussion, then one should allot each speaker 10 minutes. At any meeting, some people attending will have special knowledge or qualifications to speak, some will be more articulate than others, some will be more affected by the proposals being debated than others, and will need to speak for longer than members not in that category. Indeed, there usually will be some less informed, less articulate and less affected people at the meeting, and some people who would almost rather die than have to speak publicly at a meeting.

In my court, when a case is conducted on affidavit, there is a rule of thumb known as "the 10 minute rule" in which a witness in chief has up to 10 minutes to become acclimatised in the witness box and to answer questions which update what is in the affidavit in a minor way. This rule is because it is unfair in a case conducted by affidavit that a party be able to keep matters up the sleeve and take the opponent by surprise when the witness goes into the witness box. However, if there is good reason, then the 10 minute period is extended. I think such a rule goes for a fair trial. I am conscious, however, that there are very great difficulties in absolute time rules and that one should never have a situation where come what may, someone will be cut off after a predetermined time limit has expired. The High Court of Australia in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 34–5, drew attention to the very real dangers in announcing arbitrary time limits which would be rigorously adhered to in an administrative inquiry. I think the same rules apply to a company meeting. While it may well be a matter for the chairman or the meeting to lay down some general guidelines as to length of speeches, this must always be subject to giving every

participant a fair opportunity to exercise his or her rights to speak and to put before the meeting the details that the speaker considers relevant to the motion, and that if there are any time limits laid down, a person should feel that they have the right at the end of the allotted time to ask for a reasonable extension to finish what is being put. Obviously this cannot be taken too far. First, it is a well recognised course that with a very large meeting someone may move a procedural motion that the matter has been sufficiently debated and that the motion should now be put, notwithstanding that not all the people wishing to speak on the motion have spoken. Again, there will be cases where a person is merely talking for the sake of talking and is not contributing anything to the debate or is filibustering where it may be quite proper to require the speaker to sit down; cf *Harrod v Brahe* [1975] ACLD 232.

Again, I think it is not to the point to say that people did in fact confine themselves to less than 10 minutes so that no harm was done. A person knowing that they only have a limited time may think that they can only put forward their, say, three best points, whereas there were three or four other good points to be made as well which had to be left unspoken and which may have been helpful to other persons attending the meeting.

In my view, the restrictions placed on people participating in this extraordinary general meeting went beyond the reasonable bounds. However, this does not amount to much in the ultimate because, first of all, the meeting itself endorsed the chairman's view, the meeting probably did have before it all the information it needed to have to make a decision and the issue in any event shortly thereafter went away. Thus no actual harm was done. The value of the evidence on this count is on the general attitude of the majority to the minority.

[12] Fourth count

The allegation is that the second defendant procured the board to pass a resolution restricting the number of franchises in which any one person could have a financial interest. This matter was called, as I have already remarked, "franchise control".

In my view the evidence does not enable me to say that the resolution was aimed at Mr Starr. It seems to me that reasonable commercial people might well wish to adopt such a policy. Accordingly, apart from the aspect which I have considered under the first count, this matter does not assist the plaintiff's case on oppression.

[13] Fifth count

The allegation is that access to the records of the company has been denied to the directors.

There is a problem for the plaintiff with respect to general principle (b) as the plaintiff is not a director, nor can one equate the plaintiff with Mr Starr as a director; see Paterson Ednie and Ford, *Company Law*, 3rd ed, para 320/13. I will, however, pass over this matter and deal with the merits of the count.

I do not think that the matters raised under the fifth count can assist at all in the resolution of these proceedings.

[14] Sixth count

The allegation is that there have been breaches of the articles of association. Those particularised are:

(a) on 9 August 1989, the seal was affixed to an agreement with W & A Management Pty Ltd (the Parramatta franchisee) without authority;

(b) on 27 September 1988, the second defendant voted in favour of his own employment as managing director; and

(c) that the second defendant had his daughter Mrs Hannon vote in matters in which they were interested.

Article 85(2) provides that the seal was only to be used by the authority of the directors. Like art 84 of the 1981 edition of Table A, the article does not use the words "authority of a resolution of the board of directors". In *J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd* (1985) 9 ACLR 593 at 616 McGarvie J said that so long as all the directors authorise the affixation of the seal, no actual resolution is necessary. However, in this case there was neither an authorisation by all the directors, nor a resolution of the board.

I do not really think that the matters raised under this count in themselves amount to very much, but I do think that, added to all the other incidents, they assist the plaintiff's case, and the W & A Management matter is one which illustrates very well the point that Mr Andrew was often rather blind to conflicts of interest in his own camp, but very careful when he could see that the other camp had problems of that nature.

[15] Seventh count

The allegation is that the second defendant has published comments against Mr Starr contrary to the interests of the company as a whole. The particulars state that Mr Andrew has made false allegations against Mr Starr including that he was a cheque forger and double dealer. There is further exception taken to the managing director's report of 15 May 1989 and to an incident that took place on 4 December 1989.

This sort of behaviour does not speak at all well of Mr Andrew. It is material which must be put in the weighing with all the other material, though of itself, it does not seem to amount to more than childish unpleasantness and an indication that the principal parties were constantly getting on each other's nerves.

[16] Eighth count

The allegation is that the second defendant has procured franchisees' meetings to be conducted in a manner oppressive to the plaintiff. The particulars show that the complaint involves the so called "cost reimbursement scheme" of August/October 1990.

It seems to me that this complaint really goes to the way in which a franchisee is affected and not as to how the plaintiff is oppressed as a member or person otherwise involved in the first defendant company. It does not seem to me that there is sufficient evidence to show that the scheme was directed against the plaintiff. Indeed, the fact that it only came to the franchisees' meeting for implementation after the plaintiff had been given notice of termination itself tells against that proposition.

[17] Ninth count

The allegation is that the disputes between Mr Andrew and Mr Starr were referred to conciliation and although the conciliator made a report, the board of the first defendant would not discuss the report or do anything about it.

I cannot see that this count goes anywhere towards making out the plaintiff's case on oppression.

[18] Tenth count

The allegation is that the plaintiff was oppressed in relation to the business of Modisha Pty Ltd, carrying on business as Robert R Andrew Merrylands (Commercial). The particulars contend that the second defendant, because of personal animosity towards Mr Starr and Mr Johnson, Mr Starr's co-director in Modisha, procured the first defendant to resolve on 20 March 1990 that unless Mr Johnson left Modisha, the Merrylands commercial franchise would be withdrawn.

I cannot see how this incident involves any oppression.

[19] Eleventh count

The alleged oppression here involves:

(a) the renewal of the Parramatta franchise in 1989;
(b) the resolutions of the board of 17 July 1990 to ratify certain acts of Mr Andrew preliminary to the termination of the plaintiff's franchise; and
(c) the actual termination thereof.

It now must be considered what is the effect where directors vote to terminate a franchise agreement on the basis of misapprehensions or a perverted understanding of the facts. This may be stating the question too broadly because Mr Beasley was at least partly motivated by the consideration that Mr Starr was a divisive influence in the company, and that while Mr Starr was involved in it, it would not progress. Mr Beasley more than the other directors of the majority, brought his mind to bear on the real issues and realised that there would be a loss of revenue and while termination of the franchise would not straight away remove Mr Starr as a director, in due course it would cause him to leave the group and cease to be a director so that the divisiveness in the board would cease.

Putting this last matter to one side and assuming that the decision was made on a misapprehension, the rule would apply that in general a person can justify a decision to terminate on any available ground and not just the ground proffered at the time; see for example *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359. Thus even if the reasoning behind the termination of the plaintiff's franchise was bad, the termination itself may well be valid.

However, the matter is even stronger because, as a matter of law, there was no current franchise other than the holding over under the 1986 agreement. No reason was needed to be given by either side to put an end to this holding over period. If no reason need to be given, it does not matter that the reason that is in fact given or the real reason is actually inadequate.

Accordingly, in my view the behaviour of the majority in and about the matters referred to in this count is most significant on the question of oppression, though on the cross-claim, I must find for the defendants.

[20] Twelfth count

The allegation is that the minutes of directors' meetings and general meetings have been improperly maintained in that the minutes are inaccurate and their distribution was deliberately delayed. No particular meetings are referred to in the pleadings.

It was common ground that a notice of meeting with agenda was distributed before each meeting and directors were given an opportunity to add to the agenda. There is no doubt that minutes of meetings were always taken. The question as to whether the minutes should be confirmed was raised at each

meeting and the motion was discussed where necessary. Only on one occasion, namely on 28 August 1990, did Mr Starr vote against the draft minutes being confirmed.

At most times in the company's history, either Mr Hurley took the minutes or a professional shorthand writer took them, but Mr Andrew was responsible for putting the minutes into "proper form". The philosophy adopted was that Mr Andrew would take notes and summarise what was said but that the minutes would never take the form of a verbatim report as to what occurred at meetings.

Miss Suzanne White, a contract shorthand writer, commenced taking the minutes on 16 February 1990. Miss White gave evidence in the proceedings. She said that prior to attending her first meeting Mr Andrew said to her, "The procedure we adopt at meetings is after there has been discussion on a motion I will ask you to record the motion before the vote is taken". She said that at board meetings she attended there was a proposed motion, general discussion and then Mr Andrew would say "Suzanne, will you take this down" and she then took down in shorthand what the chairman said the motion was. She said that sometimes when Mr Andrew was dictating what the motion was there were interjections while the wording was worked out, but eventually she would take down the motion and read it back to the meeting before the vote was taken. The vote was then taken and she recorded the vote.

Apart from the desirability of keeping minutes in any event, companies need to keep minutes because of the provisions of s 253(1)(a) of the Companies Code (s 258 of the Corporations Law is very similar). This provides that a company is to cause minutes of all proceedings of its general meetings and directors' meetings to be entered in its minute book. "Minutes" in that subsection means a record of "how the business of the meeting was conducted and what resolutions were passed": *August Investments Pty Ltd v Poseidon Ltd* (1971) 2 SASR 60 at 62. As Zelling J went on to say in that case, "The plaintiff cannot complain that the defendant…having in fact a complete transcript of proceedings, does not choose to use it as minutes".

In *R v Staples* (1893) 19 VLR 47 at 50–1, Hood J said that the Companies Act required "that everything should be recorded that directors do in their capacity as directors of the company. That being so, the fact that each man attends as a director would be recorded, and the fact that he proposes or seconds resolutions as part of his duty would be recorded. This view would exclude the extreme case…of a man misbehaving himself at a meeting. That would not be part of his duty, and should not be recorded."

The term "minutes" derived from the fact that in yesteryear the formal records of courts etc were so convoluted that for all practical purposes an outline or summary recorded in a book was read rather than the record itself. See " *Words and Phrases* " (US), Vol 27, p 425 based on the New York case of *Re Christern* 43 NY Super 523 at 531. In the Court of Chancery, counsel would prepare an outline of the proper order to be made and then would in court "speak to the minutes": see Jowitt's *Law Dictionary*, 2nd ed, p 1188. In modern times even the 19th century summary called "Minutes" is considered too cumbersome. Thus today it is common direction for counsel to bring in "Short Minutes" of Order.

While there is no reported case exhaustively defining what should go into company minutes, the textbooks do give uniform guidance and the following propositions are accurately stated in the various textbooks:

1. Minutes must note the nature and type of meeting, the time of commencement and like details.

2. Minutes must contain a full and accurate record of all business done including a list of who was present and all resolutions passed at the meeting.

3. At least where disqualification follows from non-attendance, the minutes should contain a list of apologies accepted. (The distinction between a tendered apology and an accepted apology may be significant: see *Ryan v Heiler* (1990) 69 LGRA 307.)

4. Minutes must be as concise as circumstances permit. Thus reasons for resolutions etc are seldom recorded.

5. Minutes must be phrased in non-emotive language and on the face of them must appear impartial and above suspicion.

6. A minute is not a report. Therefore speeches and arguments normally do not appear in minutes.

7. Minutes must contain a record of all appointments made and the terms of reference of any committee that is set up.

8. Normally failed motions need not be recorded.

9. At least in the case of large meetings, there is no necessity to record the name of the mover or seconder or the voting, though the secretary may consider it appropriate to record these matters.

10. A person present may insist that his or her vote or abstention be recorded.

11. Incidents occurring at the meeting which may be significant should be recorded, but not unrelated incidents. Thus in *Colorado Constructions Pty Ltd v Platus* [1966] 2 NSWR 598, the minutes should have read "At this point another director knocked Mrs Hermann unconscious and she sank to the floor". However minutes of a conference I recently attended which was interrupted by an intrusion of some entertainers, need not have recorded "At this point the meeting was invaded by Santa Claus and some mini-skirted elves!"

12. Reports of committees etc are not summarised in the minutes. A copy should be initialled or otherwise identified by the chairman and copy may be circulated with the minutes and/or attached to the original minutes.

13. The time of closure of the meeting and, unless on a regular day the time and place of the next meeting are noted.

14. Minutes must be prepared within a reasonable time after the meeting: *Toms v Cinema Trust* [1915] WN 29.

See the full discussion of the usual rules in *Horsley's Meetings*, 3rd ed, pp 164–8.

One special matter arose, and that was with respect to the minutes of 25 July. This meeting was adjourned from 18 July because of a lack of a quorum 7 days earlier. The minutes merely opened as follows:

> opening
> The meeting to be held on 18 July was adjourned due to lack of a quorum.

The evidence shows that the minutes took this form because the defendants' solicitors advised that art 75 seemed to suggest that if a quorum was not present at a meeting, that very meeting stood adjourned to the same day in the next week, so that the fact that persons had come together a week earlier but there were not sufficient numbers must be recorded because what happened on the adjourned date was still the same meeting as had commenced on the earlier date without a quorum. This advice is correct as far as it goes. However, the plaintiff's solicitors said that the minute was quite inadequate because it did not state who was present at the aborted meeting of the previous week and that it was necessary to record in the minutes that the meeting was adjourned to the next week because of the lack of a quorum. This advice is also correct. The names of the persons present

at a meeting must be recorded in the minutes as is evident from the passage from *Staples* case I cited earlier. However, any deficiencies in the minutes of 25 July stem from people acting on competent legal advice and could not constitute oppressive conduct.

In my view, the company complied with the statutory requirements in general as to minutes, the minutes were always duly confirmed and I cannot see how the matters raised under this count assist the plaintiff's case.

[21] Thirteenth count

The allegation is that the accounting records were maintained and distributed in an unfair way. The complaint is that the financial statements for the quarter or year ended 31 March 1990 and 30 June 1990 were not distributed to the directors of the plaintiff.

In 1989, the first defendant converted its accounting records to a computer system. As with many such systems when first installed, the system did not operate satisfactorily, nor perform in the way in which the company expected. As often happens, a complete replacement of the software was necessary. This occurred and since the new software was installed, accounts have been satisfactorily produced. There seems no debate about this, and it was really a waste of time the plaintiff bringing up this matter at all.

I should note that although there was a general complaint by Mr Starr as to the supply of information to him, information was not in fact restricted, though there may have been some irritations in obtaining it on some occasions. Certainly Mr Hurley said that he did not have any difficulty in obtaining the information he wished.

[22] Fourteenth count

The allegation is that the first defendant could and should have determined some of the franchise agreements of other franchisees but did not do so when it was in the interests of the company to terminate those franchises. The allegation concerns, inter alia, the franchise at Bankstown operated by the third defendant.

This matter cannot affect the result of this case.

[23] Fifteenth count

This count alleges that the second defendant attempted to induce a servant of the plaintiff, one Haydon, to resign from the plaintiff's employment and take out a franchise at Baulkham Hills.

It seemed to me that the plaintiff rightly treated this incident as a relatively trivial one. It really can have no bearing on the ultimate result of this case. Indeed, the incident reflects as much against Mr Starr in the use of his language as it does against Mr Andrew.

[24] Sixteenth count

The allegation is that the first defendant has been induced falsely to represent that it is able to use the name Robert R Andrew as a trade mark.

I do not consider that this matter advances the plaintiff's case at all.

[25] ***SCHEDULE 2***

[26]

[27] ***ROBERT R ANDREW (A'ASIA) PTY LTD***

1. Amend art 1(1) by including the following definitions:

"board of directors" means the lower house of the directorate; "board of supervisors" means the upper house of the directorate; "director" means a member of the board of directors; "directorate" means both the board of directors and the board of supervisors acting in accordance with these articles;
"supervisor" means a member of the board of supervisors.

2.Amend heading before art 61 by deleting "directors" and substituting "directorate".

3.Delete arts 61 and 62 and substitute:

61(1) The directorate shall consist of two houses. The lower house shall be called the board of directors and the upper house shall be called the board of supervisors.

62(1)Subject to these articles the decision of the board of directors shall be the decision of the directorate.

(2) Where a decision is made by the board of directors any director may within 5 working days request that the decision be reviewed by the board of supervisors.

(3) No request shall be made under art 62(2) where there has been a resolution duly passed without dissent and no director was disqualified from recording a vote.

(4) Where a request is made for review by the board of supervisors, the decision of the board shall not have operation, but be considered a provisional decision only until confirmed by the board of supervisors.

62 A (1) There shall be five members of the board of directors.

(2) There shall be three members of the board of supervisors.

4. Amend art 65 to read:

65 The directorate may resolve that a person shall be disqualified from being a director or supervisor on the ground that such person is interested in a real estate business other than a business which is a franchisee of the company or a company which has the words 'Robert R Andrew' in its name.

5. Article 67 is amended by adding:

(h) becomes disqualified pursuant to art 65.

6. Add new headings for art 78 A –79 H:

[28]"Board of supervisors

79 A The chairman of the board of supervisors shall be a person whose name currently appears on the list of official liquidators held by the Supreme Court of New South Wales.

79 B The board of directors shall in February of each year elect the chairman of the board of supervisors who shall hold office until 1 February of the next ensuing year, but be eligible for re-appointment.

79 C Should the board fail to pass a motion for appointment of the chairman of the board of supervisors without dissent then the secretary shall place the names of all the qualified persons who have indicated in writing to any member of the board that they would be prepared to accept appointment in a hat or other suitable container and the first name drawn from the hat shall be the chairman of the board of supervisors.

79 D The president of the company shall choose one member of the board of supervisors.

79 E The remaining members of the board of directors shall choose the third member of the board of supervisors. Should the vote be deadlocked, the vice president or his alternate nominee shall have a casting vote.

79 F The persons appointed under art 79 D and E shall not be the president or a vice president of the company nor a director thereof and shall hold office for one year from the date of their appointments, but be eligible for re- appointment.

[29]"President and vice-president

79 G Robert Ralph Andrew shall up to 1 August 2005 or until his earlier death or resignation be president of the company.

79 H John James Starr shall up to 1 August 2005 or until his earlier death or resignation be vice-president of the company.

7. Add new art 80(3):

80(3) Neither the president nor the vice-president shall be or act as managing director of the company.

8. Add new heading for art 83 A and B:

[30] Board of supervisors

83 A Meetings of the board of supervisors shall be conducted mutatis mutandis in the same way as meetings of the board of directors.

83 B The only business of the board of supervisors shall be to confirm or otherwise determine upon a provisional decision of the board of directors and to deal with any matter which is connected or associated with such provisional decision.

9. Article 97 is amended by adding new para 97(1)(d):

(d) Members of the board of directors and the board of supervisors.

10—Add new art 100:

100 Articles 61, 62, 62 A (2), 79 A –79 H, 83 A and 83 B shall cease to have effect on 1 August 2005 or on both Robert Ralph Andrew or John James Starr ceasing to hold the office of president and vice-president respectively.

G P F Rundle and *R Dubler* instructed by *Maclarens* for the plaintiff.

B J Tamberlin QC and *J R Wilson* instructed by *C P White & Sons* for the first defendant.

J H Tuckfield QC instructed by *Hall Tuckfield & Richardson* for the second and third defendants.

M EVANS
BARRISTER