

Mosgiel Limited

Appellant

v.

(1) **Mutual Life and Citizens Assurance
Company Limited and**
(2) **Brierley Investments Limited**

Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
17TH NOVEMBER 1994

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD GRIFFITHS
LORD MUSTILL
LORD WOOLF
LORD NICHOLLS OF BIRKENHEAD

[Delivered by Lord Jauncey of Tullichettle]

This appeal concerns the rights of holders of cumulative preference shares in the appellant company ("Mosgiel"). The respondents ("Mutual Life" and "Brierley Investments") were formerly holders of such shares.

Article 4 of Mosgiel's Articles of Association empowered the company, subject to the provisions of section 66 of the Companies Act 1955, to issue preference shares redeemable on such terms and in such manner as the company before the issue of the shares might by special resolution determine. Section 66 of the Act provided *inter alia* that no redeemable preference shares should be redeemed except out of profits available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. Articles 119 and 121 provided respectively that the company in general meeting might declare dividends which did not exceed the amount recommended by the directors and that no dividends should be paid otherwise than out of profits. Article 122 empowered the directors before recommending a dividend to set aside appropriate sums out of profit as a reserve.

On 18th October 1977 there were passed two special resolutions of Mosgiel. The first authorised the directors to issue at par up to 1,500,000 redeemable cumulative specified preference shares of \$1.00 ("preference shares") and provided that the issue should be subject *inter alia* to the following rights, conditions and restrictions:-

- "(i) The holders of specified preference shares shall be entitled to receive out of the profits of the Company available for dividends a fixed cumulative preferential dividend at the rate of 13% per annum on the nominal amount of such shares. Such dividend shall take priority over the dividend payable on the ordinary shares of the Company. The dividend shall be paid by equal half yearly instalments on the last day of the months of April and October in each year. The first payment in respect of each preference share shall be due on the 30th April 1978 and shall be for the period to that date from the 30th November 1977.
- (ii) Holders of the specified preference shares shall be entitled on a winding-up to repayment of the capital paid up thereon and all arrears of preference dividends, whether earned or declared or not down to the commencement of the winding-up in priority to all other ordinary shares in the capital of the Company.
- (iii) The specified preference shares shall not confer on the holders thereof any further right to participate in the profits or assets of the Company."

The second resolution was in *inter alia* the following terms:-

"That subject to the provisions of Section 66 of the Companies Act 1955 the specified preference shares shall be redeemable on the following terms and in the following manner:-

- (a) Each holder of specified preference shares shall be entitled on the 31st October 1983 or on the last day of April or October in any subsequent year to request in writing the Company to redeem at par on such last day of April or October all or any of the specified preference shares held by such holder and upon receipt of such request and upon delivery to the Company of the certificate or certificates for the shares specified in such request the Company shall on such last day of April or October pay to such holder the preference dividend on the shares specified in the request up to such date and shall issue and allot to such holder such number of ordinary shares of \$1 each credited as fully paid up in the capital of

the Company as is equivalent to the number of specified preference shares specified in such request such ordinary shares to be issued and allotted at par and to rank for dividends and in all other respects pari passu with the issued ordinary shares in the Company.

- (b) (i) Each holder of specified preference shares not previously redeemed pursuant to paragraph (a) hereof shall be entitled by notice in writing given to the Company on or before the 30th April 1987 to elect to redeem all or any of the specified preference shares held by such holder for cash and on the 31st day of October 1987 (hereinafter called 'the redemption date') and on receipt from such holder of the certificate or certificates for such specified preference shares specified in such notice the Company shall pay to such holder the preference dividend thereon up to the redemption date and also \$1 in cash for each specified preference share specified in such notice.
- (ii) On the redemption date all specified preference shares not previously redeemed pursuant to paragraph (a) hereof and in respect of which an election notice pursuant to paragraph (b)(i) hereof has not been given shall be redeemed by the Company at par and on the redemption date the holders of such specified preference shares shall deliver to the Company the certificate or certificates therefor and upon receipt thereof the Company shall pay to such holders the preference dividend thereon up to the redemption date and shall issue and allot to each holder of such specified preference shares such number of ordinary shares of \$1 each credited as fully paid up in the capital of the Company as is equivalent to the number of specified preference shares held by such holder on the redemption date, such ordinary shares to be issued and allotted at par and to rank for dividends and in all other respects pari passu with the issued ordinary stock units in the Company."

Thus the holder of preference shares immediately before 30th April 1987 had the option of giving notice and receiving on the redemption date the preference dividend on his shares up to that date and \$1.00 in cash for each share or doing nothing and receiving the dividend and instead of \$1.00 an ordinary share credited as fully paid up for each of his preference shares.

In pursuance of the special resolution 1,260,000 preference shares were issued but on 30th April 1980 Mosgiel went into receivership and subsequently ceased to trade after its principal assets had been disposed of. The last preference dividend was declared for the period ending 31st October 1979. The receivers, however, evolved a scheme with the assistance of a bank whereby one of Mosgiel's subsidiaries which was not in receivership, Mosgiel Textiles Limited, was enabled to generate income against which the substantial tax losses of the Mosgiel Group could be offset. Suffice it to say that for the six years ending on 30th June 1989 Mosgiel Textiles made substantial profits and on 2nd December 1988 paid a dividend of \$4.4 million to Mosgiel. Throughout this period Mosgiel remained insolvent since Mosgiel Textiles' arrangement with the bank required that no dividend be paid by it to Mosgiel prior to 30th November 1988. However, the receipt of the above dividend enabled Mosgiel to come out of receivership, and to pay all its creditors leaving a sum of \$3.4 million available for its shareholders. As at the redemption date of 30th October 1987 the arrears of preferential dividend which would have been payable had there been profits available amounted to \$1,310,400.

On 28th April 1987 Mutual Life gave notice of their election to redeem 245,000 preference shares on 31st October 1987 in accordance with paragraph (b)(i) of the second special resolution. The sum of \$245,000 was paid to them on 2nd December 1988. Brierley Investments gave no such notice and Mosgiel converted their preference shares into ordinary shares in accordance with paragraph (b)(ii) of the second special resolution. Thereafter disputes arose between Mosgiel and the holders of preference shares as at 31st October 1987 as a result of claims by the latter that they were entitled to be paid out of the dividend paid by Mosgiel Textiles to Mosgiel arrears of dividend in respect of the period prior to 31st October 1987.

Mosgiel raised an action seeking declarations to determine (1) whether the shareholders electing for redemption were entitled to any arrears of dividend for the period up to 31st October 1987 during which no profits were available, and (2) whether the former shareholders of all the preference shares would be entitled to repayment of capital and/or to all arrears of dividend whether earned or declared or not down to 31st October 1987 in priority to the claims of other shareholders to participate in surplus assets. On 14th April 1992 Williamson J. made two declarations which effectively answered both questions in the negative. On 25th June 1993 the Court of Appeal allowed the appeals and quashed the substantive orders of the High Court.

In both courts below and before the Board the issue has been treated as one of construction. Williamson J. took the view that the special resolutions were exhaustive as to the terms of issue of the preference shares and were unambiguous. On 31st October 1987 the defendants were

entitled only to such dividend as had been declared out of profits earned prior thereto and, as there had been no such profits since the last declaration of dividend, it followed that there could have been no dividend. The Court of Appeal, on the other hand, held that since payment of \$1.00 per share was in conformity with the terms of paragraph (b)(i) of the second resolution when made after 31st October 1987, although there were no profits available on that date, a similar position should obtain in relation to "the preference dividend thereon up to the redemption date when profits became available". Accordingly preference dividend had to be read in a descriptive sense covering arrears of dividend whether earned or declared on the redemption date which could be met out of such profits as were available for dividends when the company completed the redemption process. The Court of Appeal were thus treating the date of completion of the redemption process as 2nd December 1988 when the \$245,000 was repaid to Mutual Life.

If the respondents were entitled to share by way of dividend in the profits accruing to Mosgiel on 2nd December 1988 it could only be because the words "the preference dividend thereon up to the redemption date" occurring in paragraphs (b)(i) and (ii) of the second resolution comprehended arrears of dividend on profits yet to be earned on that date. There is no doubt that the natural meaning of the words quoted would not permit of such a comprehension and it is therefore necessary to look further at the Articles and Special Resolutions to see whether there was anything which calls for these words to be given an extended meaning. The Articles provided that dividends should only be paid out of profits and that the company in general meeting might declare dividends subject to a restriction in amount as recommended by the directors. It is clear from these provisions (Articles 119-122) that a shareholder had no right to a dividend if there were no profits and that even if there were profits the directors might *bona fide* exercise their discretion to set aside therefrom a reserve before recommending any dividends. Thus at the redemption date and during the preceding 7½ years Mosgiel could not have paid a dividend to the respondents.

When a preference dividend of an amount reflecting prior short or non-payment is paid, it is treated as a single dividend for the year in respect of which it is declared and not as a number of dividends attributable to that and previous years. Thus only those persons who are registered as shareholders at the time of the declaration are entitled to receive the dividend (*In re. Wakley* [1920] 2 Ch. 205, *Godfrey Phillips Limited v. The Investment Trust Corporation Limited* [1953] 1 W.L.R. 41). It follows that a cumulative dividend declared and paid out of profits earned in 1988 could not be treated as a dividend for the period ending on 31st October 1987. Mr. Millard, for the respondents, did not challenge this proposition but submitted that the words "shall pay" in

paragraphs 2(a), (b)(i) and (ii) of the second special resolution were mandatory, that the whole concept of these resolutions was to protect the preference shareholders and that as at the redemption date shareholders had a right to a cumulative dividend which right continued until the whole of the unpaid arrears had been paid out of available profits. This argument necessarily involved reading into paragraphs (b)(i) and (ii) of the second resolution a considerable number of words which were not there. Their Lordships can see no justification for so doing.

In the first place the mandatory direction to pay presupposed the existence of (1) profits out of which a preference dividend up to the redemption date had been or would be declared, and (2) holders of the preference shares. The provisions of the two sub-paragraphs contemplated that the preference shares would cease to exist on the redemption date and that holders thereof would either receive one \$1.00 in cash or ordinary shares of \$1.00 in exchange for each share, upon the happening of which event they would no longer be holders of preference shares. Once the preference shares had ceased to exist it would no longer be possible to declare a dividend in respect of them. In the second place, and more significantly, there is a striking contrast between the phraseology of paragraphs (b)(i) and (ii) of the second special resolution and that of condition (ii) annexed to the first special resolution. That condition, which made provision for holders of the specified preference shares on a winding-up, contained a number of words which do not appear in the two sub-paragraphs. The first word of significance is "arrears", the second significant matter is the use of the word "dividends" in the plural and the most significant matter of all is the inclusion of the words "whether earned or declared or not". This condition provided that on a winding-up the specified preference shareholders became entitled to receive all the dividends which they had not previously received but which they should have received had there been profits available to pay them on the due dates. The words are absolutely clear and unambiguous. The Court of Appeal's conclusion was accordingly tantamount to holding that notwithstanding the marked difference in phraseology sub-paragraphs (i) and (ii) of paragraph (b) of the second resolution should be read as though they were in the same terms as condition (ii).

Their Lordships can see no justification for so concluding. Sub-paragraphs (i) and (ii) are clear and unambiguous in their terms as is condition (ii). There is no conflict between these provisions *inter se* or between these provisions and other provisions in the special resolution. There is accordingly no reason to afford to them anything other than their natural meaning. Mr. Millard prayed in aid anomalies which he submitted would arise from the construction advanced by the appellant. Anomalies could arise on either construction but that is no justification for reading into provisions which are entirely unambiguous words which are not there. The draughtsman has drawn a

clear distinction between the rights of preference shareholders on a winding-up and on the redemption date. It follows that the words "preference dividend thereon up to the redemption date" must be accorded their natural meaning.

For the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal of 25th June 1993 quashed and the order of Williamson J. of 14th April 1992 restored. There will be no order as to costs before their Lordships' Board.