IN THE SUPREME COURT OF NOVA SCOTIA

Citation: E L Management Inc. (Re), 2004 NSSC 169

Date: 2004 08 19
Docket: S.H. 228062
Registry: Halifax

Re.

E L Management Incorporated

Ex Parte Applicant

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date Heard: 19 August 2004

Counsel: Charles Reagh, Counsel for the Applicant

Orally, Moir, J.:

[1] With the proclamation last March of the new *British Columbia Business Corporations Act,* Nova Scotia became the last memorandum of association jurisdiction in Canada. Our system for incorporation by registration adopted the English and Scottish statute, the *Joint Stock Companies Act* (1856) as amended to 1900. So much are we given to preserving the old system that, when the Legislature decided to adopt the derivative action and shareholder oppression remedies from the *Canada Business Corporations Act*, it did so by creating a schedule to our *Companies Act* rather than to disturb the ancient language and layout.

[2] The memorandum of association style for statutes permitting incorporation by registration provides for a fundamental constituting document and for a far more detailed document providing most of the terms by which members (shareholders in other corporations) and the company agree to conduct themselves. The latter is the Articles of Association (by-laws in other corporations). It can be amended by prescribed pluralities of the members. The other is the Memorandum of Association, not all aspects of which may be amended by the members. There is

not a lot required in a Memorandum of Association. One of the few things the memorandum of a limited liability company must state is that liability is limited: *Companies Act*, s. 10. Silence on that subject is permissible for an unlimited liability company: see s. 12. There is no mechanism by which the members acting on their own, even unanimously, can amend the Memorandum of Association to convert a limited liability company into an unlimited liability company.

[3] There are sometimes advantages under the Canada/US Tax Treaty to bringing an American corporation under the laws of a Canadian province. There may also be tax advantages available to an unlimited liability company, a creature that otherwise lost attractiveness in the nineteenth century but remained a possibility under our statute from that century. Each year numerous foreign corporations continue as Nova Scotia corporations and go through an amalgamation with a Nova Scotia unlimited liability corporation to achieve the unlimited status. Sometimes, however, the mechanism of amalgamation is not a safe route. As Mr. Reagh amusingly puts it, “the corporate objective could have been fulfilled by amalgamation but would have resulted in collateral damage”. The damage may be caused by the creation of a new company and resulting new year ends with implications for taxes and licences.

[4] E L Management Incorporated could benefit by becoming unlimited but it would suffer if it went through an amalgamation. It is a private Delaware corporation continued as a Nova Scotia company since 1997. It proposes to become unlimited, not by amalgamation but by way of a court sanctioned plan of arrangement. Mr. Reagh is aware of about a dozen occasions when this Court has sanctioned a plan of arrangement to alter a Memorandum of Association from limited to unlimited liability. Each time, he has provided the Court with a very extensive brief surveying English authorities for the proposition that the Memorandum can be altered in this way and Australian authorities somewhat suggestive of the opposite. Each time, the chambers judge has accepted the upshot of Mr. Reagh's submission. However, chambers judges have not recorded reasons so as to provide a reference in future. I have been in that position twice in the past. It is time to state reasons in publishable form.

[5] Section 14 of the *Companies Act* prohibits amendments to the Memorandum of Association "except in the cases and in the mode and to the extent for which express provision is made in this Act". Section 130 of the *Companies Act* provides for compromises and arrangements. In 1900, when there was no federal

insolvency legislation, full force could have been given to these provisions as valid exercises of provincial legislative jurisdiction over "property and civil rights". Since then, their usefulness in insolvencies has probably been eclipsed by operational conflicts with the *Companies Creditors Arrangement Act* and the *Bankruptcy and Insolvency Act*, which were subsequently enacted under the specific federal power in respect of "bankruptcy and insolvency". However, s. 130 still has life where a solvent company needs to compromise with or make arrangements among either its creditors or its members. Subsection 130(1) reads:

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up under the *Companies Winding Up Act*, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

Mr. Reagh points out this edited text:

> Where a[n] . . . arrangement is proposed . . . between the company and its members . . . the court may . . . order a meeting of . . . the members . . . to be summoned in such manner as the court directs.

Subsection 130(2) gives effect to a compromise or arrangement adopted by a meeting of creditors or members if it is sanctioned by this Court:

> If a majority in number representing three fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or class of creditors, or on the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up under the *Companies Winding Up Act*, on the liquidator, members and contributories of the company.

Edited to the words of direct concern to us:

> If a majority in number representing three fourths in value of the . . . members . . . agree to any . . . arrangement, the . . . arrangement shall, if sanctioned by the Court, be binding . . . on the members . . . and also on the company . . . .

The questions are whether "arrangement" includes an agreement to alter the Memorandum of Association by changing limited to unlimited and whether an arrangement under s. 130 falls within "except in the cases and in the mode and to the extent for which express provision is made in this Act" in s. 14. These are questions of statutory interpretation. They have not been answered definitely by any authority binding on this Court. However, there is some guidance to which Mr. Reagh has referred. Let us look at those authorities then turn to the basics of statutory interpretation.

[6] Professor Gower was of the opinion that the former English equivalent of our s. 130 permitted an alteration from limited liability to unlimited liability: L. C. B. Gower, *The Principles of Modern Company Law*, 2nd ed. (London, Stevens & Sons, 1957), p. 94 - 95, "Note on the Power of a Registered Company to Alter its Memorandum", para. (e). Mr. Reagh points out that the English Parliament liberalized amending powers after 1957, so the passage does not appear in subsequent editions of Gower. Professor Gower's opinion is supported by cases in which the courts sanctioned plans of arrangements altering Memoranda of Association in ways not otherwise expressly authorized by the legislation of the time. Among these, Mr. Reagh referred me to *Re. Palace Hotel Limited,* [1912] 2 Ch. D. 438, *Re. Nordberg Limited,* [1915] 2 Ch. D. 489, *In Re. City Property Trust Corporation, Limited,* [1951] S.C. 570 and *Re. Edinburgh Railway Access and Property Company Limited*, [1932] S.C. 2.

[7] As Mr. Reagh carefully points out there are Australian cases tending to the opposite conclusion. In some cases, the Australian courts have been concerned with whether a company can change its "status" by way of a plan of arrangement. In *Re. Bamboo Gold Mines Limited,* [1986] VIC LEXIS 1198 (S.C.V.), the

Victoria statute provided for five kinds of status: liability limited by shares, liability limited by guarantee, liability limited by a combination of both, unlimited liability and, for mining only, no liability, i.e., no recourse of any kind against members. The statute expressly permitted some status changes but it did not expressly allow a change from limited to no liability. Saying that "The 'term' arrangement . . . has been generally held to require liberal interpretation to achieve the purposes of the legislation", the Supreme Court of Victoria sanctioned a meeting to consider a plan of arrangement to convert Bamboo Gold Mines from limited liability to no liability. The Supreme Court of South Australia reasoned to the contrary in *Re. Insight Mining Pty. Ltd.* (1987), 11 A.C. L. R. 704 (SCSA). The statute was similar to Victoria's. The Supreme Court of South Australia, however, was influenced by the number of possible conversions of "status" permitted by the legislation and by the specific requirements attached to each. The express provision for some conversions and the restrictions attached to them tended to suggest the exclusion of the other conversions by any means including plan of arrangement. The Court refused to sanction a plan of arrangement under which Insight Mining would have its status changed from limited by shares to no liability. In *Re. Peter Grenfell Windsor and the National Mutual Life Association of Australia Limited* (1992), 106 A.L.R. 282 (FCA), a majority of a three member

panel of the Australia Federal Court provided, in *obiter dicta*, an interpretation of the Victoria statute that precluded changes in "status" through plans of arrangement. The majority reasoned that the very extensive provisions for status and the extensive restrictions on changes in status constituted a complete code. This is an *expressio unius* kind of reasoning. Secondly, the majority delved into legislative intent by commenting on the importance of "status" under the statute. It reasoned that a plan of arrangement was between the company and its creditors or a company and its members but a change in status may affect others, such as the Commission and the general public (para. 26). The status of the company was more fundamental than the subjects appropriate to a plan of arrangement and

> . . . the legislative intention was to permit a change of status to be effected in the circumstances described in s. 69 [memorandum] but in no other circumstances [such as s. 315, compromises and arrangements].

A five member panel of the High Court of Australia delivered a *per curium* decision in *Australian Securities Commission* v. *Marlborough Gold Mines Ltd.* (1993), 112 A.L.R. 627 (AHC). The company sought to change its "status" (para. 3) from limited to no liability in order to avoid restrictions on issuing shares at discount. It was solvent but it needed quick cash to meet investment commitments

tied to mining tenements granted by the state of Queensland. It sought to make the change through a plan of arrangement. The High Court concluded (para. 31):

> . . . because the Law does not permit the conversion of a limited liability company into a no liability company, s. 411 [compromises and arrangements] does not authorize approval of the arrangement in the present case.

The Court did not embrace the decision in *Grenfell* but it did provide a commentary (see para. 17) along the lines of *expressio unius.* The numerous and detailed provisions controlling status and changes in status precluded achieving a change in status through the general provision for compromises and arrangements.

[8] As I said, this is a question of statutory interpretation. On various occasions members of the Supreme Court of Canada have accepted Professor Driedger's formulation of the basic principle of statutory interpretation as set out at p. 67 of E. A. Driedger *The Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1974): eg *Re. Rizzo & Rizzo Shoes Ltd.* (1998), 221 N.R. 241 (SCC) at para. 21. The modifications to Driedger's formulation in later editions of "Driedger" by Professor Sullivan have not been generally accepted. In Canadian law,

> ...the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[9] There is nothing in section 130 to exclude arrangements altering provisions for limited or unlimited member liability. Indeed, the word "arrangement" in association with "compromise" shows a legislative intent to allow for a very wide variety of alterations. In the context of the *Companies Creditors Arrangement Act*, which partially eclipsed s. 130, Houlden and Morawetz suggest in the 2004 edition at p. 1109:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes that debt or lacks the means to pay it. "Arrangements" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing of the affairs of the debtor. [Lloyd W. Houlden & Geoffrey B. Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Carswell, Toronto, 2004), p. 1109]

Mr. Reagh has referred me to authorities to similar affect concerning compromises and arrangements under equivalents of s. 130: *Re. Savoy Hotel Limited*, [1981] 3 All E.R. 646 (ChD); *Grouse Mountain Resorts Ltd. v. Robert Giovann Angeli* (1989), 42 B.L.R. 219 (BCCA); *Palmer's Company Law* (1987) v. 1, at page 1135 and Gower, *Modern Company Law* (4th Ed., 1979), at p. 687. In their immediate

context the words of s. 130 clearly allow what is proposed to be done in this case, to convert to unlimited liability by a plan of arrangement endorsed unanimously by all members at a meeting sanctioned under s. 130.

[10] The broader context supports this reading. I refer to the third edition of *Gower*, chapters two and three for the social and economic history which led to incorporation by registration legislation of the kind we have in Nova Scotia. Very briefly, there was a distrust of joint stock companies after the South Sea Bubble and it was not until the one year Gladstone presidency of the Board of Trade, in 1844 to 1845, that Parliament adopted an incorporation by registration statute. At that, the statute did not provide for limited liability. It appears that there was a vigorous debate in Britain as to whether unlimited liability should be allowed at all. The *Act* of 1855 provided for the kind of scheme we have today. It required companies limited by shares to call themselves “Ltd.” or “Limited” as a warning to potential creditors and others. Today that has little significance. It shows, however, a context in which not all conversions would be of concern. Specifically, this context discloses no political reason to limit conversions from limited to unlimited.

[11] So, I reject the suggestion in one Australian authority that there are more important issues of public policy associated with changes in "status" than with other kinds of compromises or arrangements. To the contrary, the kind of restructuring formerly allowed by the present wording of s. 130 and now governed by the *Bankruptcy and Insolvency Act* and the *Companies Creditors Arrangements Act* is of great public importance.

[12] The *expressio unius* kind of reasoning employed by some Australian authorities does not work under the language of our statute. We do not have intricate provisions for changes in "status" as would found that kind of interpretation. Further, I do not think the expansive language of s. 14, "except in the cases and in the mode and to the extent" should be ignored for its elaborate Victorian style. No doubt today the Legislature would speak more plainly. But, still, the elaboration suggests that one is to search the rest of the statute in the expectation of finding many opportunities to alter the memorandum of association.

[13] In conclusion, s. 130, read in full context, allows for plans of arrangements that alter the liability of members as provided in the Memorandum of Association.

[14] I was satisfied two days ago as to the merits of ordering a meeting of the members of E L Management Inc. and I am now satisfied on the merits to sanction the plan of arrangement that was adopted unanimously by the members.

J.