

Registered Clubs Regulation 1996 have not been fulfilled. This provision requires:

“The memorandum of understanding must:

“(b) be made available for inspection on the premises of each such registered club and on the club's website (if any) for at least 21 days before any such meeting is held.”

3 The submission was that the memorandum of understanding had not been made North Sydney Club's website for at least 21 days before the meeting is to be held and, also, that the document which was available was not that required by the regulation. In this case the relevant period was from 11 March to 2 April 2008. The evidence, at least in the affidavits of John Bishay and Sara Lynne Linden, established in my opinion an arguable question to be tried as to whether the memorandum of understanding was so available for the whole of the prescribed period.

4 Mr Bishay says that he could not open the link to the memorandum of understanding on 13 March 2008, and there was his and other evidence to the effect that that situation may have continued possibly until 26 March 2008. Together with Miss Linden's evidence, (pars 12 and 13 of her affidavit) in my opinion there is support for the inference that the amended memorandum of understanding was unavailable for a substantial part of 18 March 2008. In addition, it was common ground that the document, when available, was an unsigned version of the memorandum of understanding which had been executed on 10 March 2008 (Exhibit 3).

5 The plaintiffs submitted that upon its proper construction reg 11C(3) required that a facsimile of the executed document be made available on

the website. Thus, it was put, there was non-compliance both as to the document which was made available and as to the relevant length of time.

6 In my opinion there is force in these submissions. Both the factual issue and the construction issue are arguable and, in my opinion, should be left for trial. I should add, without deciding, my opinion is that compliance with this regulation is strict and mandatory so that making available a document other than the signed memorandum of understanding as agreed would not suffice. If it were otherwise, the member may well be left in a state of uncertainty as to whether the unexecuted version was a complete copy of the memorandum of understanding which was to be acted upon and intended for consideration by the members. That such a situation is unlikely to have been one intended by the legislature lends support to the prima facie opinion I hold as to the proper construction of the provision.

7 Another ground for relief relied upon by the plaintiffs is that there has been insufficient information provided to members to enable them to properly consider and make an informed decision as to whether or not to approve the proposed amalgamation and the related application to the Licensing Court. As the notice to members shows (Document 16) there are two resolutions for consideration, in the following terms:

“That the members hereby:

- (a) Approve in principle the amalgamation of North Sydney ANZAC Memorial Club Ltd ABN xxx xxx with Ramsgate RSL Memorial Club Limited ABN xxx xxx and such amalgamation to be effected by the continuation of Ramsgate RSL Memorial Club Limited and the dissolution of North Sydney ANZAC Memorial Club Limited; and
- (b) Approve in principle the making of an application to the Licensing Court of New South Wales for approval of such amalgamation.”

8 Thus the proposed meeting has been called with regard to the requirement of reg 11C(3)(a) for members' approval of the proposed amalgamation and

s 17A (5)(c)(iii) of the *Registered Clubs Act* 1976 for members' approval in principle of the making of the relevant application to the Licensing Court.

9 The information to members was contained in the letter of 8 March 2008 (Document 15). I don't propose to attempt to summarise it. It is sufficient to observe that the only reference to expressions of interest from other clubs is in the first two paragraphs of the letter. The clubs themselves are not identified. Thereafter the cause for amalgamation is briefly set out under the heading "Why Amalgamate?" and, thereafter under the heading "Why Amalgamate with Ramsgate RSL Memorial Club?" is set out a list of what is said to be benefits offered by Ramsgate.

10 The plaintiffs also submitted that par 2 under this heading, which is in the following terms:

"Our current lease conditions stipulate that North Sydney Council is under no obligation to transfer or assign the lease except to an approved Returned Soldiers Club, such as Ramsgate RSL Memorial Club ..."

was in effect a misleading statement as to the true effect of cl 8(d) of the relevant lease (Exhibit 2).

11 I note that there was additional information available on the website, being the notices of 7 March 2008 and 8 March 2008. The notice of 7 March 2008 (Document 10) under the heading "Attention Members" included the statement that "... Expressions of Interest were received from North Sydney Leagues Club Limited, Ramsgate RSL Memorial Club Limited and Northbridge Golf Club Limited", and continued with the statement that "... on 23 February 2008 the Board met to consider each of the Expressions of Interest. After careful consideration the Board resolved to pursue an amalgamation with Ramsgate RSL Memorial Club Limited".

12 The notice of 8 March 2008 stated that the North Sydney Club and Ramsgate have now entered into a formal memorandum of understanding in relation to the proposed amalgamation, and that the memorandum was available for inspection at its premises.

13 However, these notices were not referred to in terms in the letter of 8 March 2008 and thus, it seems to me, an argument arises as to whether the members who read the letter of 8 March 2008 are to be taken to have been aware of the information contained in those notices.

14 In support of their claim the plaintiffs contended that the information in the letter was insufficient to fully and fairly inform members of what is to be considered at the meeting and for which their proxy may be sought. Accordingly, it was put the directors had failed in their duty to make disclosure of relevant information according to the principles explained in *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, particularly pp 465 to 467. At p 467 the Court said:

“... unless the information given constitutes a full and fair disclosure of all facts which are material to enable the members to make a properly informed decision, the combination of what is said and what is left unsaid may, depending on the full circumstances, be likely to mislead or deceive the membership.”

15 Concomitant principles are also to be found in *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423, particularly pp 434 and 435, and p 440 which states:

“... The authorities previously mentioned establish, in my opinion, that [the directors] are under a duty to make a full disclosure of all facts within their knowledge which are material to enable the members, or class of members, to determine upon their action.”

16 For the defendants it was submitted that there was no arguable case on this issue. It was put that the resolutions proposed made clear that

approval was sought to the proposed amalgamation with Ramsgate which would not reasonably require or involve the members considering the merits of the expressions of interest submitted by the plaintiffs and Northbridge Golf Club Ltd. Essentially, it was put that the only task for the members was to decide whether or not to approve the Board's proposal being one which was made after its consideration of the expressions of interest. It was put that it was not the members' concern to evaluate the expressions of interest or to engage in a comparative exercise to assess their strengths or weaknesses. Thus it was put the information provided to the members was sufficient material information to enable them to fairly consider the questions before them at the meeting, it being clear from this information that Ramsgate was the only club which the Board found had met the advertised criteria evidenced by Exhibit 1.

- 17 In my opinion, however, the plaintiffs have established that there is an arguable question to be tried as to whether, in the circumstances of the case, there has been sufficient disclosure of material information to the members who are called to deal with the business of the meeting tonight. In *Fraser* it was said (p 468):

"It is important that the adequacy of the information provided by the prospectus and supporting documents be assessed in a practical, realistic way having regard to the complexity of the proposal."

- 18 Those considerations support the conclusion which I have reached that the issue is an arguable one. In my opinion, the approval sought must necessarily be an approval given by a member aware of the underlying information relevant to the decision he or she is called upon to make. In the circumstances of this case where it is self-evident that the directors are seeking approval of their choice, it is strongly arguable that the relevant information should include, at least in summary, factors taken into

account in making the choice. It is relevant, in my view, to keep in mind that the letter stated (par 3):

"The Board has carefully and diligently examined each submission in order to determine which of those submissions best meets the needs and aspirations of the members of the ANZAC Club and the North Sydney community... "

and went on to say:

"... Your Board disregarded this outside interference and judged each submission on its merits. It is for the members of the Club to determine what action should be taken, not for others."

19 In my opinion it is arguable that these statements would properly provoke questions from members for information as to the merits so that they could fairly determine, as this letter exhorts them to do, what action should be taken.

20 I now turn to the question of balance of convenience relevant to whether or not, in the exercise of discretion, the restraining order should be made. In all of the circumstances, I find that the balance of convenience favours the plaintiffs. An undertaking as to damages will be given before any order is made. In my opinion it is preferable that this Court should hear and determine the issues foreshadowed, particularly as to the construction of the relevant provisions of the *Registered Clubs Act* and of the Registered Clubs Regulation, and as to whether the information in the letter and notice to members of 8 March 2008 is sufficient material information as will fully and fairly inform members of what is to be considered in dealing with questions of approval of the proposed amalgamation and of approval of any application for amalgamation to the Licensing Court. The procedures of this Court should enable the matter to be heard without very much delay, the carriage of which, of course, will be in the hands of the parties. This Court is as well placed as the Licensing Court to deal

with the matter. It appears already that much of the evidence has been filed and I fail to see the benefit in refusing relief, permitting consideration of the proposal by the meeting which, if approved, may be put at risk in proceedings in the Licensing Court with attendant costs, delay, and uncertainty. In my opinion the fact that the Licensing Court is an alternative forum in which the plaintiffs' objections may be heard is not determinative of this issue so as to deprive the plaintiffs of the interlocutory relief they now seek.

21 Accordingly, in my view, the plaintiffs are entitled to the interlocutory relief they now seek. As foreshadowed yesterday some thought will need be given as to the appropriate order to be made.

22 I should also note additional matters. Firstly, I am not persuaded that there has been any delay in commencing these proceedings of the kind which would disentitle the plaintiffs to relief. Further, the grounds upon which I have come to the view that the interlocutory relief sought by the plaintiffs should be granted render it unnecessary to deal with the several other grounds advanced by the plaintiffs. The issues raised by them, if thought fit, will be properly canvassed at any trial.

I certify that this and the ⁷.....
preceding pages are a true copy of
the reasons for judgment herein of
the Honourable Justice Nicholas.

03/04/08
Date

Associate

