

“just and equitable” in Clause 7, the compensation should be allowed. The Tribunal concluded that the amount of CGT directly attributable to the re-acquisition of the parcel of coal should be compensated.

CHANGE IN CONTROL IN SHAREHOLDERS’ AGREEMENT*

Fedsure International Limited v NSP Financial Services Group Pty Ltd and Others

NSW Supreme Court Equity Division Commercial List [2001] NSWSC 910, 16 October 2001

This case concerns the interpretation of a change in control provision in a shareholders agreement for a proprietary company.

Shareholder agreement provisions

The change in control provision (clause 14) provided that should a shareholder cease to be controlled by its original shareholder then the original shareholder (*the deemed offeror*) will be deemed, on the day prior to that on which the change of control takes place, to have made an offer (*Deemed Offer*) to sell all its shares in the company on the terms and conditions stated in clause 13 which shall apply to the deemed offer, *mutatis mutandis*. The price of the offered shares shall be determined by the company’s auditors as the fair market value of the offered shares. Should any dispute arise in connection with the valuation, any party may require that valuation be referred for determination to an independent auditor.

Clause 13 provided that should any shareholder wish to sell its shares, that shareholder shall first offer those shares to the other shareholders pro rata according to their shareholding and the offer shall be open for acceptance for 30 days, stipulate a price at which and the other terms and conditions on which the offeror wishes to sell the shares to a bone fide third party who shall be named in the offer and shall not be subject to any other terms and conditions except that the whole and not part of the offer must be accepted and the offerees may be required to indemnify the offeror against any claim made against the offeror by virtue of its liability as a guarantor for any obligations of the company. If any offeree does not accept the offer in respect of any shares, the offerees who have accepted the offer shall be entitled to buy those shares. Should the offerees not accept the whole of the offer, the deemed offeror shall be entitled within 30 days after non-acceptance to sell all the shares to a bone fide third party on no more favourable terms.

Facts

Fedsure Holdings entered into a sale agreement for shares in the company with Investech on 24 December 2000. On 4 June 2001, NSP, one of the other shareholders, instructed KPMG to prepare a valuation pursuant to the change in control provision. On 6 June 2001, Fedsure Holdings and Investech issued a press release stating that the conditions precedent to the acquisition of the shares had been fulfilled. On 8 June 2001, NSP wrote to the other shareholders indicating that a change in control had occurred in the company. On 9 August 2001, KPMG determined the price

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of the deemed offer under the change in control provision and NSP sent a copy of that report to the other shareholders and the report was received by the other shareholders on or around 13 or 14 August 2001. On 24 August 2001, an independent auditor reviewed the KPMG report and on or about 14 September 2001, the independent auditor confirmed that the valuation in the KPMG report was appropriate. On 18 or 19 September 2001, the other shareholders accepted the Deemed Offer.

It was agreed that the Defendants had notice of the events giving rise to the Deemed Offer on 6 June 2001.

Issue

The issue for determination in the case was what was the date on which the Deemed Offer was made under the change in control provision.

Contentions

The Plaintiff contended that the Deemed Offer was made on the day prior to the actual change in control having occurred (which was agreed to be 4 June 2001) and that the offer was open for acceptance for 30 days thereafter despite the fact that the sale price for the shares had not yet been determined. This was on the basis that the offer deemed to have been made contained a term that the price to be paid by the offeree upon acceptance would be the price per share determined by the auditor in accordance with the mechanisms contained in the change in control provision.

The Defendants contended that a Deemed Offer could not have been made so as to set the 30 day acceptance period running until the offerees had been notified of a price per share and that this did not occur until the time of receipt of the KPMG report on 10 August 2001 at the earliest or at the time of receipt of the independent auditor report on 18 September 2001 at the latest. They accepted the Deemed Offer within the 30 day period commencing on either of those two dates. One of the other Defendants contended that a Deemed Offer could not be made so as to set the 30 day acceptance period running until the deemed offeror gave written notice of the Deemed Offer to the other shareholders.

Conclusions

Palmer J agreed with the Plaintiff. His reasoning was as follows:

- (a) Clause 14 provided that where a change of control occurs in a shareholder then regardless of any intention, act or omission of the deemed offeror, an offer for sale was deemed to have been made. The structure of the clause is clearly designed to remove the right to acquire a deemed offeror's shares from the control of the deemed offeror;
- (b) the deemed offeror is deemed to have offered to sell all of its shares upon the terms and conditions stated in clause 13, *mutatis mutandis* and the price at which the deemed offeror is to sell is to be as determined by a third party according to market value, a commonplace mechanism in commercial contracts;

- (c) the Deemed Offer is therefore capable upon acceptance of maturing into a binding contract. Its terms as to price and number of shares to be sold are ascertainable by the mechanisms in the clause.

This construction is, in the Judge's opinion, in accordance with the ordinary and natural meaning of the words employed in the clauses and the construction provides a workable commercial mechanism for the exercise of pre-emptive rights in a closely held corporation. The Judge also stated that when a change of control in a shareholder occurs, one would expect that the other shareholders would wish to have the earliest opportunity of exercising a right to acquire the shares of the shareholder whose control has changed so that the new controller should have no influence over the conduct of the company's affairs and he construed the clause in light of that expectation.

He went on to say that Clause 14.3 had a dual purpose. The first was to provide that, without anything further to be done by a shareholder suffering a change of control, the other shareholders are to have a pre-emptive right. The second purpose is to set running the time during which the pre-emptive right may be exercised. It is not to the point that the commencement date for exercise of the pre-emptive right is artificially determined or starts when the price is not known. That is the way in which the parties have agreed that their rights will be regulated.

It was submitted that the above construction can produce a commercially absurd result, in that a shareholder may suffer a change of control and yet be completely unaware of it at the time or else may determine to keep the change of control secret from the other shareholders. The result being that other shareholders will have no notice of the change in control and the pre-emptive right period will expire before the other shareholders realise that they had a pre-emptive right. The Judge's response was that it is unreal to suppose that except in extraordinary and bizarre circumstances, the subsidiary of a public listed company such as the Plaintiff or the directors of the other corporate defendant shareholders will not be aware of a change of control as soon as it happens or before and that commercial contracts should not be construed so as to produce an absurd result in a quite unrealistic set of supposed circumstances.

Secondly, there would be an implied term in the shareholders agreement, as in every contract, that each party will do all things necessary to allow the others to have the benefit of the contract. Accordingly, there would be an implied term in the shareholders agreement that as soon as a shareholder became aware of a change in control of one of its shareholders, notice of that fact should be given to the other shareholders. The contract should be construed in the light of that implied term and in the light of the presumption that it would be duly performed.

The result was that the Deemed Offer was made on 4 June 2001 and none of the Defendants had accepted the Offer within the 30 day period commencing on that day.