MEDIUM PRIORITY

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

13/8

CL.61/92

IN THE MATTER of an application by GEOFFREY ROSS WILSON for directions under s.29B of the Companies Act 1955 and Part IVA of the High Court Rules

1307

BETWEEN: GEOFFREY ROSS WILSON in his capacity as Liquidator of MOA-NUI CO-OPERATIVE DAIRIES LIMITED (IN LIQUIDATION)

Plaintiff

A N D: MALCOLM BURKITT, JUNE BURKITT JAMES CLOUGH PAULINE CLOUGH ANDREW CLEMENT JOCELYN CLEMENT REX LANGLANDS SHIRLEY LANGLANDS MAURICE GATENBY and MAUREEN GATENBY

Defendants

Hearing: 8 July 1993

Judgment: 30 July 1993

Counsel: L McEntegart for plaintiff
D H Mulligan for defendants

JUDGMENT OF HENRY J.

In this proceeding the liquidator of Moa-Nui Co-operative Dairies Limited (Moa-Nui) seeks directions under s.298 of the Companies Act 1955 as to the entitlement of the defendants to a payment of 70 cents per kilogram of milkfat of wholemilk supplied by them in the 1991-1992 season.

The defendants were until 1989 supplying shareholders of Awatuna Co-operative Dairy Company Limited (Awatuna). In that year Awatuna merged with Kiwi Co-operative Dairies limited (Kiwi) pursuant to an agreement whereby Kiwi purchased the assets of Awatuna, the latter company then proceeding to liquidation. some of the supplying shareholders of Awatuna, including the defendants, did not accept the Kiwi offer and instead joined Egmont Co-operative Dairy Company Limited (Egmont) pursuant to individual agreements entered into with Egmont, the terms of which were identical in respect of all 17 supplying shareholders. Clause C (iii) of those agreements is critical to the present dispute and provides as follows :

> "The Company guarantees to the Supplier that the payment to the Supplier per kilogram of milkfat of wholemilk supplied to the Company by the Supplier during the three year period of the covenant herein by the Supplier shall be the higher of the Company's declared payout for the particular season OR within five cents of the payout of Kiwi Co-operative Dairies Limited for the particular season."

In December 1989 Egmont and Moa-Nui merged. The merger agreement provided that none of the Egmont factories would be closed,

and Moa-Nui also agreed to assume the obligations of Egmont in terms of its agreement with the Awatuna suppliers. During the 1990/1991 season merger discussions took place between Kiwi and Moa-Nui. the sequence of events was as follows :

11 December 1991:	extraordinary general meeting of Moa-Nui at which the shareholders resolved to recommend to the Board to proceed with merger discussions.
20 December 1991:	terms of offer sent by Kiwi
16 January 1992:	extraordinary general meeting of Moa-Nui. 68.73% of the shareholding voted in favour of a resolution that the proposed merger with Kiwi proceed in accordance with the offer of 20 December 1991.
24 February 1992:	extraordinary general meeting of Moa-Nui. The resolution of 16 January was confirmed, 78.03% of the shareholding voting in favour of the merger.

The merger was then put into effect according to the terms of the offer document of 20 December 1991. Clause 6 (f) of that document provided :

> "Moa-Nui will accrue in its accounts for 1991/92 season, an amount of 70 cents per kg milkfat as a separate

> appropriation from income to the credit of the distributable reserves of the merged Company."

The merger was effected by Kiwi issuing to each Moa-Nui supplying shareholder who elected to continue to supply to Kiwi one $1.00 share in its capital. All the defendants elected to continue supply, and are therefore now supplying shareholders in Kiwi.

Moa-Nui duly retained in a reserve account the premium of 70 cents per kilogram which then formed part of its assets to be transferred to Kiwi. In its payout to shareholders for the 1991-92 season Moa-Nui first deducted the 70 cents per kilogram. This resulted in shareholders receiving an actual payment calculated at $5.18 per kilogram of milkfat. The payout would otherwise have totalled $5.88 per kilogram. In order to meet its obligation to the Awatuna shareholders under the Egmont agreement, Moa-Nui paid them a further 17 cents per kilogram, calculated in line with the following analysis :

Kiwi payout	6.10
less 5 cents margin as per agreement	0.05
	6.05
less premium due to Kiwi	0.70
	5.35
Paid all shareholders	5.18
Balance...	.17

The dispute centres on the obligation of Moa-Nui to pay to the defendants the sum of $6.05 per kilogram as opposed to $5.35 per kilogram. The primary submission made by Mr McEntegart for Moa-Nui was that the 70 cents deduction was a term of the merger

agreement approved by shareholders which bound the defendants by virtue of s.24A (2) of the Co-operative Dairy Companies Act 1949. Subsections (1) and (2) of s.24A provide :

> **"24A. Power of Liquidator to accept shares, etc., as consideration for sale of property or company to another co-operative dairy company -**
>
> (1) If a company is proposed to be, or is in the course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another co-operative dairy company within the meaning of this Act (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive (in compensation or part compensation for the transfer or sale) shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.
>
> (2) Subject to subsection (3) of this section, every transfer, sale, or arrangement made by a transferor company and a transferee company pursuant to this section shall be binding on all member of the transferor company."

Subsection (3) is concerned with the procedures and resolutions necessary to give effect to the intended transaction.

The starting point is the provision in the Egmont agreements, under clause C (iii) of which Moa-Nui became obliged to make payment for the year in question of $6.05 per kilogram. That subclause constitutes a binding contractual provision, with the legal consequences which flow from that status. The case for Moa-Nui is that the merger agreement bound the defendants to pay the company the 70 cents premium by way of deduction from what would otherwise have been the payout figure.

Section 24A (2) is concerned with the transfer, sale, or arrangement made between Moa-Nui and Kiwi - it is that which becomes binding on the members of Moa-Nui. The terms of that agreement are contained in the offer document which is headed "Terms and conditions of merger offer to Moa-Nui Co-operative Dairies Limited" dated 20 December 1991. It is a 12 page document and was accompanied by separate explanatory notes. The merger was to be effected by liquidating Moa-Nui, with the liquidator being issued with one $1 share in Kiwi for each supplying shareholder in Moa-Nui. In consideration for the issue of shares, Moa-Nui was to transfer the whole of its assets and undertaking to Kiwi. The merger date was to be 1 January 1992. Under clause 3 (a) each company remained responsible for its own payout for the 1991/92 season. Under clause 6 (a) the final payout to Moa-Nui shareholders was to be calculated by reference to its consolidated accounts. Clause 6 (c) (v) required Moa-Nui to account to income all payouts in relation to the Egmont supply contracts. Clause 6 (f), requiring an accrual of 70 cents per kilogram premium, is in the terms earlier recited. There appears to be no other provision of

present significance either in the offer document or in the explanatory notes.

There is nothing in the terms of "arrangement" as between Moa-Nui and Kiwi which impinges on the Egmont agreement, or which determines the rights or obligations of the individual Moa-Nui shareholders as such in respect of the accrual of the premium under clause 6 (f). The arrangement as between the companies was simply that there would be an appropriation from income of 70 cents per kilogram of milkfat to a distributable reserve. This was effected by Moa-Nui making such an appropriation from income derived from sales rather than by any other alternative method, for example, by additional funding from the shareholders. There were tax advantages in adopting the chosen course. The decision to proceed in this manner rather than declaring a full payout and then requiring payment of the 70 cents premium for each individual shareholder was deliberate and considered. It must take effect according to its terms, and there is no justification for giving it a different form or substance, whatever the underlying intention of those formulating it.

It follows therefore in my judgment that because nothing in the merger agreement itself governed existing individual rights or obligations as between the shareholders and the company, s.24A (2) can have no application to the present dispute. The merger agreement does not deal or purport to deal with the interrelationship of the Egmont agreement and the reserve accrual. The company's right to make the appropriation from income is not doubted, being expressly authorised by the articles of association. Under the articles any such reserve is deducted from gross returns for the purposes of calculating the net

return, which then becomes the basis for determining the payout figure. It is clear that the procedure adopted resulted in the creation of a reserve fund, which has had the consequence of the payout figure being reduced to $5.18, or 87 cents less than that of Kiwi.

Mr McEntegart submitted that it was throughout the relevant time made clear to and understood and accepted by all shareholders that the 70 cents premium was to be deducted as against all current Moa-Nui shareholders. The documentation relied on is indicative of that intention. As an example, as the meeting of 11 December 1991 the chairman is recorded in the minutes as outlining five major points, including :

> "1. Moa-Nui will deduct a distributable amount of 70 cents/kg milkfat from this seasons (sic) payout which will be paid to Kiwi as part of the merger consideration.
>
> 2. That all current Moa-Nui shareholders are to be treated equally with regard to the 70 cents/kg milkfat deduction."

The recorded resolution passed by a majority at the meeting was "that the shareholders recommend that the directors proceed with the implementation of a merger with Kiwi Co-operative Dairies Limited upon the principle (sic) Terms of Merger presented to the meeting". This meeting preceded the receipt of the offer which formed the final agreement.

The next meeting on 16 January 1992 resolved (a single majority only being required) that the merger proceed in accordance

with the proposal of 20 December. The final meeting of 24 February 1992 resolved by the required 75% majority (in fact 78.03%) "that the resolution passed at the meeting of shareholders of the company on 16 January 1992 be confirmed, and it is hereby so confirmed". Thus the shareholders approved and approved only the terms of the offer of 20 December which then formed the contract between Moa-Nui and Kiwi.

Consequential special resolutions were also passed at the meeting.

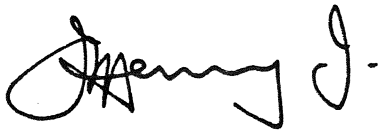
However whatever may have been the discussions which took place at either meeting as to the impact of the 70 cents premium on the individual shareholders or what each believed would be the impact, what remains is that the resolutions deal only with the acceptance of the Kiwi merger offer, and the procedural consequences of that. They do not purport to cover the implementation of the obligations to accrue the 70 cents premium from income. Accordingly they do not affect the separate Egmont agreements made between Moa-Nui as a company and the supplying shareholders as individual persons.

No legal basis for avoiding the clear words of the Egmont agreements other than the terms of the merger agreement and its binding effect under s.24A was pursued. For the above reasons, I do not see how that agreement can affect the right vested in the defendants to have the payout, accepted as being $5.18, uplifted to $6.05. The fact that the defendants elected to continue to be suppliers to Kiwi and received the benefit of becoming Kiwi shareholders as a result of the merger is irrelevant - they could have elected to cease supplying, and

the same deduction would still be made according to the plaintiff's submission. Nor can the fact that the merger was only possible by Moa-Nui paying the premium affect the position. For valuable consideration the defendants had entered into agreements with Egmont under which their payout was guaranteed for a three year period, and the rights given them under those agreements can only be varied in accordance with proper legal principle. No sustainable principle has been propounded.

Accordingly the liquidator is directed that the plaintiff is required to effect a further payment to the defendants of 70 cents per kilogram of milkfat of wholemilk supplied by them to Moa-Nui in the 1991-92 season.

Costs are reserved.



Solicitors:

Simpson Grierson, Auckland, for plaintiff
Brewer Mazengarb, New Plymouth, for defendants

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