IN THE SUPREME COURT OF NEW ZEALAND

SC 7/2008
[2008] NZSC 104

BETWEEN	ELDERS NEW ZEALAND LTD Appellant
AND	PGG WRIGHTSON LTD Respondent

Hearing: 12 August 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Gault JJ

Counsel: D F Dugdale, K J Crossland and B A Toy-Cronin for Appellant
P R Jagose and H M M Northover for Respondent

Judgment: 5 December 2008

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondent of $15,000 together with reasonable disbursements to be fixed if necessary by the Registrar.

REASONS

(Given by McGrath J)

Introduction

[1] In 2005 the appellant, Elders New Zealand Ltd, was a joint owner with Wrightson Ltd of 13 stock saleyards. Elders' rights and interests in relation to 11 saleyards were set out in agreements and, in relation to the remainder, in the constitutions of companies which it and Wrightson jointly owned.

[2] In all cases the relevant agreements or constitutions gave each co-owner a right of pre-emption if the other wished to "transfer, sell, lease or otherwise dispose of the whole or part of its interest in the Saleyards". As well, it was generally provided that no party should make any such disposition of its interest in the saleyards "except as provided in this agreement".

[3] In 2005 Wrightson and PGG Wrightson Ltd, the respondent, which was then called Pyne Gould Guiness Ltd, agreed on terms of merger under which a scheme of arrangement involving an amalgamation was to be put before the High Court for approval under Part 15 of the Companies Act 1993. A key element in the scheme was that:

> 2.1
>
> (i) PGG and Wrightson will amalgamate, with PGG continuing as the surviving company under the Act with the name "PGG Wrightson Limited" and with the effect that:
>
> (i) PGG Wrightson will succeed to all the property, rights, powers and privileges of Wrightson;
>
> (ii) PGG Wrightson will succeed to all the liabilities and obligations of Wrightson;
>
> …
>
> (v) Wrightson shares held by PGG Wrightson will be deemed to be cancelled without payment or other consideration and Wrightson will be removed from the New Zealand register;
>
> (vi) the constitution of PGG Wrightson will be the same as the constitution of PGG immediately before the Effective Date;
>
> …
>
> 4 **Conditions**
>
> 4.1 The Scheme is conditional upon the Final Court Orders being granted by the Court in accordance with sections 236(1) and 237(1) of the Act on terms acceptable to the boards of PGG and Wrightson.

[4] On 7 October 2005 an Associate Judge of the High Court made orders under s 236 of the 1993 Act, on a joint application, approving the scheme of arrangement and directing that it be binding on the applicants and their shareholders from the time specified in the merger plan. The amalgamation has since become effective.

[5] Elders subsequently brought proceedings in the High Court seeking a declaration that there had been a disposition by Wrightson to PGG Wrightson of Wrightson's interests in the saleyards in a manner that triggered Elders' pre-emptive rights. The parties recognised that the dispute between them would be resolved by the determination of whether the Court's order approving the scheme of arrangement had the effect of transferring, selling or otherwise disposing of Wrightson's saleyard interests in terms of the pre-emptive provisions in the saleyard agreements and company constitutions. The Court made an order, by consent, that this question should be determined before trial.[1]

[6] The issue raised by the litigation is whether the completion of the amalgamation under Part 15 necessarily involved a transfer or other disposition of property by Wrightson to PGG Wrightson, triggering the rights of pre-emption, or whether PGG Wrightson became the owner of that property on some other basis, which did not activate the rights under the saleyard agreements and constitutions.

[7] In the High Court Allan J decided in favour of the latter proposition. The Court of Appeal upheld his judgment. This Court has given leave to appeal on two questions:

> (1) Whether an amalgamation approved under Part 15 of the Companies Act 1993 has the same effect as an amalgamation under Part 13.
>
> (2) Whether the final order made by the High Court under Part 15 had the legal consequence that Pyne Gould Guiness Ltd and Wrightson Ltd continue as one company, namely PGG Wrightson Ltd.

Statutory Amalgamations

[8] While the Court's approval of the scheme of arrangement made the amalgamation effective, the legal nature of the concepts through which PGG Wrightson became owner of property formerly owned by Wrightson is a question of interpretation of the provisions in the 1993 Act which governed the amalgamation process. The language of the merger plan is not determinative.

---

[1] Under r 418 of the High Court Rules.

[9] The Companies Act 1993 facilitates the process of corporate merger by providing two procedures for giving effect to the desire of companies to amalgamate. The two procedures are set out in Parts 13 and 15 of the 1993 Act. In this instance the appellant and Wrightson followed the procedure under Part 15. Under this procedure application may be made to the High Court for orders giving effect to corporate reconstructions. The Court is empowered to make orders that an amalgamation shall be binding on a company, and other persons and classes of persons specified, on such terms and conditions as the Court thinks fit. The Court's powers are expressed broadly. The central provision in Part 15 is s 236 which relevantly provides:

> **236 Approval of arrangements, amalgamations, and compromises**
>
> (1) Notwithstanding the provisions of this Act or the constitution of a company, the Court may, on the application of a company or any shareholder or creditor of a company, order that an arrangement or amalgamation or compromise shall be binding on the company and on such other persons or classes of persons as the Court may specify and any such order may be made on such terms and conditions at the Court thinks fit.

[10] The Court may make initial procedural orders requiring that notice of the application together with such information concerning it as the Court thinks fit be given to such persons and classes of persons as it specifies and that a meeting of shareholders or creditors of a company be held to approve the proposal.[2]

[11] Additional orders may be made for the purpose of giving effect to any amalgamation approved by the Court. In particular s 237(1) provides:

> **237 Court may make additional orders**
>
> (1) Without limiting section 236 of this Act, the Court may, for the purpose of giving effect to any arrangement or amalgamation or compromise approved under that section, either by the order approving the arrangement or amalgamation or compromise, or by any subsequent order, provide for, and prescribe terms and conditions relating to, –
>
> (a) The transfer or vesting of real or personal property, assets, rights, powers, interests, liabilities, contracts, and engagements:

---

[2] Section 236(2)(a) and (b) of the 1993 Act.

[12] The appellant's argument is that when, as in the present case, an amalgamation is effected under Part 15 the statute contemplates that the company which is the product of the amalgamation will acquire property it does not already own from amalgamating companies by a process of "transfer or vesting" under s 237(1)(a). The appellant says that this involves a disposition of the property of Wrightson to PGG Wrightson which triggers the appellant's contractual rights of pre-emption.

[13] Under Part 13, amalgamation is effected by the informed vote of those interested without approval by the Court. The scheme of Part 13 requires that closely prescribed procedures are followed. Terms for amalgamation are set out in an amalgamation proposal.[3] The proposal must be put before the shareholders of each amalgamating company. It must be supported by resolutions of the respective boards that in their opinion amalgamation is in the best interests of the company and that the amalgamated company will be solvent.[4] Similar information must also be sent to secured creditors. Shareholders of each amalgamating company must be fully informed and give their approval of the amalgamation proposal by special resolution, requiring a majority of 75 percent.[5] The approved proposal and associated documents must then be delivered to the Registrar.[6] The amalgamation then takes effect in terms of the approved proposal.[7]

[14] Part 13 commences with a general declaratory statement:

> **219 Amalgamations**
>
> Two or more companies may amalgamate, and continue as one company, which may be one of the amalgamating companies, or may be a new company.

In relation to the property of amalgamating companies s 225 relevantly provides:

---

3 Section 220.
4 Section 221.
5 Section 221(5). See also s 106 and the definition of special resolution in s 2.
6 Section 223.
7 Section 225.

225 Effect of certificate of amalgamation

…

(d) The amalgamated company succeeds to all the property, rights, powers, and privileges of each of the amalgamating companies; and

(e) The amalgamated company succeeds to all the liabilities and obligations of each of the amalgamating companies;

[15] The conceptual notion expressed in s 219 that the amalgamating "companies" continue as the amalgamated company is carried forward into s 222 which provides for a short form amalgamation of a company with its subsidiaries. The parent and subsidiary amalgamating companies are to continue as one company, that being formerly the parent.

The *Carter Holt Harvey* case

[16] The manner in which the provisions of Part 13 deal with property of amalgamating companies was addressed by the Court of Appeal in *Carter Holt Harvey Ltd v McKernan*.[8] There the respondents, who were the shareholders and directors of a company, gave personal guarantees of its trading account to a subsidiary of Carter Holt Harvey. The benefit of the guarantees did not extend to assignees or successors of the subsidiary. Carter Holt Harvey and the subsidiary (along with other subsidiary companies) were amalgamated under the procedure provided for in Part 5A of the Companies Act 1955. Part 5A was repealed when the 1993 Act came into force in relation to all companies in 1997 but its provisions mirrored those enacted in Part 13 of the 1993 Act.[9] As a result of the amalgamation (which was under the short form procedure) the subsidiary was removed from the register of companies and Carter Holt Harvey became the creditor of the guarantors' company. At issue was whether the guarantors had ceased to be liable on their guarantees.

---

8 [1998] 3 NZLR 403.

9 The Companies Act 1993 operated from 1 July 1994 in relation to newly formed companies. From the same date the Companies Amendment Act 1993 inserted into the Companies Act 1955 Parts 5A and 5C. Those Parts, which respectively mirror Parts 13 and 15 of the 1993 Act, were in force until repealed with effect from the close of 30 June 1997. Thereafter the 1993 Act applied to all companies in New Zealand.

[17] A Full Court of the Court of Appeal held that the guarantors remained liable. The effect of the statute was that following an amalgamation the amalgamated company stood in the same position as each of the amalgamating companies in respect of their rights and obligations. This reflected the statutory concept of continuance of the amalgamating companies. The Court said:[10]

> Continuance is of the corporate entities, not of the undertakings and operations of those entities. They merge into one corporation which is to be regarded as their equivalent or, more loosely, their successor. Section 209G speaks of the amalgamated company succeeding to all the property, rights, etc and all the liabilities and obligations of each of the amalgamating companies. In a short form amalgamation involving a parent (under s 209D(1)), the entity "succeeds" to property and liabilities which have been *its* property and liabilities beforehand, as well as succeeding to those of the other entities. But, as the parent continues and is not deemed to be dissolved, it is clear that "succeeds", a word used in Canadian case law though not in the legislation in that country to which we have been referred, is not to be read as requiring that there be a predecessor and a successor. The merged entity succeeds to the assets and liabilities because that is where they are to be recognised as being or remaining as a result of the continuance of all parties to the amalgamation.
>
> …
>
> We discern in the legislation a parliamentary intent that the benefits and burdens of the contracts of all merging companies are to continue in force for all purposes. The amalgamated company is to enjoy all advantages previously conferred on any of the amalgamating companies and to have their liabilities. It is not to be treated as a different entity or as a new party to the contractual arrangements. It is not the equivalent of an assignee. Accordingly, in the case of a guarantee, neither amalgamation of the creditor nor of the debtor will discharge the guarantor in respect of post-amalgamation advances, any more than it would discharge pre-amalgamation advances. The amalgamated company simply stands in the shoes of the amalgamating company.

Competing positions

[18] In the present case, Mr Dugdale for the appellant pointed out that Part 15 of the 1993 Act is expressed in terms materially different from those of Part 13. It has no provision equivalent to s 219 which gives rise to the continuing existence of an amalgamating company in the form of the amalgamated company. He argues that the consequence is that there is a need for property of companies amalgamating under Part 15 to be transferred to the product of the merger which is what has

---

[10] At p 411.

happened in the present case. This need is reflected in the Court's power under s 237(1) to make orders transferring or vesting property to give effect to the approved arrangement.

[19] Mr Dugdale also relies on the legal history of Part 15. Unlike Part 13 of the 1993 Act, which was a new procedure for amalgamation proposed by the Law Commission, Part 15 is based on provisions to facilitate amalgamations in earlier companies legislation. These provisions, first enacted in the United Kingdom in 1929, were adopted in New Zealand in 1933.[11] They were substantially re-enacted in the Companies Act 1948 (UK)[12] and in the Companies Act 1955.[13]

[20] In *Nokes v Doncaster Amalgamated Collieries Ltd*,[14] the House of Lords considered the United Kingdom legislation of 1929 and decided by a majority that the Court's ratification of an amalgamation under statutory powers did not effect or enable assignment of a contract of service to the amalgamated company. At common law such a contract could not be assigned without the consent of the employee and that rule prevailed. Mr Dugdale argued that, because the New Zealand Parliament had re-enacted provisions which were materially the same as those which had been addressed by the House of Lords in *Nokes*, the provisions of Part 15 of the 1993 Act should be given the same meaning. He submitted this approach to Part 15 protected the rights of third parties in an amalgamation. Otherwise Part 15 does not readily enable third parties to put before the Court any material indicating that they would be prejudiced if the amalgamation were approved.

[21] Mr Jagose for the respondent argued that the s 219 concept of continuance of the amalgamating companies, including that of succession to their property by the amalgamated company, as explained in *Carter Holt Harvey*, carries through to amalgamations under Part 15. Counsel submitted that such continuation precludes any notion that a disposition of Wrightson's property took place, triggering the pre-

---

11 Sections 153 and 154 of the Companies Act 1929 (UK) were enacted in New Zealand in ss 159 and 160 of the Companies Act 1933.

12 Sections 206 and 208.

13 Sections 205 and 207.

14 [1940] AC 1014.

emption provisions of the Wrightson agreements. This argument reflects the reasoning of the Court of Appeal and the High Court Judge.

History of "amalgamation" in Parts 13 and 15

[22] "Amalgamation" is not a precise term. It states an end but the word on its own does not say anything of the means for getting there. As Dixon J once said:[15]

> The general notion conveyed by "amalgamation" is the combination of separate things or separate collections of things into a single uniform or homogenous whole.

[23] The idea that an amalgamated company is a continuation of the amalgamating companies, expressed in s 219 and explained in *Carter Holt Harvey*, clarifies the conceptual nature of the process of amalgamation under Part 13. That Part, including the concept of continuance, was proposed by the Law Commission,[16] which took the model from Canadian corporations legislation.[17] In *R v Black and Decker Manufacturing Co Ltd*,[18] the Supreme Court of Canada had said of the equivalent provision in Canadian legislation that "continue" was the controlling word and carried the meaning "to remain in existence or in its present condition".[19] Its effect was that of "blending and continuance as one and the selfsame company".[20] There was "an amalgamated company into which, simultaneously, two amalgamating companies have fused along with their assets and liabilities".[21] The Supreme Court held that it followed that an amalgamated corporation remained liable for prosecution for offences committed prior to the amalgamation.

[24] The passages cited above from *Carter Holt Harvey* also make clear that the amalgamated company enjoys the benefits and burdens of its amalgamating companies' contracts by operation of law.[22] The concept of continuance under s 219

---

15 In *Citizens and Graziers' Life Assurance Co Ltd v Commonwealth Life (Amalgamated) Assurances Ltd* (1934) 51 CLR 422 at p 455.

16 New Zealand Law Commission, *Company Law Reform and Restatement* (NZLC R9, 1989).

17 The phrase "two or more companies … may amalgamate and continue as one company" appeared in s 137(1) of the Canada Corporations Act 1964-65.

18 [1975] 1 SCR 411 per Dickson J.

19 At p 417.

20 At p 417.

21 At p 419.

22 Above at para [17].

colours the meaning of "succeeds" in s 225. There is no assignment or other disposition of rights causing property to pass to the amalgamated company because it is in law the same entity. It must follow that if the merger with Wrightson had taken place under the Part 13 procedure, the contractual rights of pre-emption would not have been triggered. This is accepted by the appellant.

[25] The Law Commission report on company law reform included a draft Bill. In relation to reconstructions and amalgamations, proposed new provisions, which were substantially enacted in Part 13, replaced those of ss 205 and 207 of the Companies Act 1955. The new provisions were seen as necessary to "provide convenient machinery for merging and reconstruction"[23] which was the purpose of the reform. The concept in s 219 of continuance of the amalgamating companies formed part of that convenient machinery. It avoided the need to effect separate transfers of property to the amalgamated company because in law it was not considered to be a different entity from the amalgamating companies.

[26] The legislative history of Part 15 of the 1993 Act, and its provisions for amalgamation under court supervision, is very different. Part 15 was not part of the Law Commission's proposals. It first appeared in the Companies Bill as Part 13A when it was reported back from the Justice and Law Reform Select Committee. In its report the Select Committee simply said, without further explanation, that the Parts of the Bill dealing with amalgamations and compromises would be recast and that:[24]

> A new Part XIIIA is to be added, dealing solely with Court approval of amalgamations and compromises.

[27] The Bill as introduced had included a backstop provision for the court to approve an amalgamation proposal where it was impracticable for the parties to use the prescribed procedures.[25] This provision was omitted when the Bill was reported back. The provisions of the new Part, which became Part 15, were wider in scope. They provided an alternative procedure to that of Part 13, which involved court

---

23 At para [624].

24 Report of the Justice and Law Reform Committee on the Companies Bill (1992) para [5.1] recommendation 15.

25 Clause 195.

approval and which was available to merging parties without any threshold requirement of impracticability.[26] The alternative procedure is similar to that provided for in the 1955 Act.

Meaning of "amalgamation" in Part 15

[28] For reasons we can state quite shortly, we are satisfied that in Part 15 "amalgamation" carries the same meaning as in Part 13, where it is governed by the concepts of fusion and continuance expressed in s 219.

[29] The meaning of "amalgamation" in Part 15 of the 1993 Act in the end must be ascertained having regard to the purpose that the term serves in the statutory scheme and the context of its use. Continuance through a process of fusion under s 219 extends to assets and liabilities and carries forward contractual rights and obligations into the amalgamated company. This aspect reduces administrative tasks associated with amalgamation and is an important feature of the facilitative purpose of the 1993 Act. The appellant's argument requires that "amalgamation" be given a meaning in Part 15 that will not serve the statutory purpose of providing convenient machinery for mergers. The view that Part 15 reverts to the concept of amalgamation prior to the 1993 Act does not sit comfortably with what is the underlying purpose of the reform. It hardly seems likely that it was part of the legislative purpose to maintain elements of administrative complexity which elsewhere in the Act were being removed.

[30] In ascertaining the meaning of amalgamation in s 236, we have also borne in mind that a drafter normally uses words consistently throughout an Act.[27] In relation to a concept such as amalgamation Parliament is likely to have intended to enact legislation that is coherent and self-consistent.[28] This principle supports giving the same meaning to "amalgamation" in both Parts of the 1993 Act.

---

[26] See *Weatherston v Waltus Property Investment Ltd* [2001] 2 NZLR 103 at para [20].
[27] Burrows, *Statute Law in New Zealand* (3rd ed, 2003), p 163.
[28] *Bennion* on *Statutory Interpretation* (5th ed, 2008), section 268.

[31] There is a similarity in the structure of Parts 13, 14 and 15 which points to these Parts being read together. As noted, Part 13 commences with a conceptual statement which clarifies the meaning of "amalgamation", with which that Part is concerned. Part 14 is concerned with "compromises with creditors" and it commences with an interpretation clause defining "compromise". Part 15 deals with "Approval of arrangements, amalgamations and compromises by the Court". Its interpretation provision defines "arrangements" which is a new term. In this context, the absence of any definitions of the other two terms in Part 15 indicates that they carry forward the meanings which have earlier been given them.

[32] Importantly this interpretation is supported by s 238, appearing in Part 15. Section 238(a) provides:

> **238 Parts 13 and 14 not affected**
>
> The Court may –
>
> (a) Approve an amalgamation under section 236 of this Act even though the amalgamation could be effected under Part 13 of this Act.

This is a use of "amalgamation" in relation to both Parts in a way that suggests it carries the same meaning. It would be artificial to say that this use does not extend to the means by which amalgamation is effected.

[33] On the other hand we do not accept that s 237(1)(a), which confers a power to transfer or vest property, indicates that under Part 15 a disposition is necessary to give effect to amalgamations. The power concerned is broadly framed and discretionary. It is conferred for the purpose of giving effect to arrangements and compromises, which will often involve transfers of property, as well as to amalgamations. The opening words of s 237 make it clear that it is not a provision which limits the meaning of s 236. It provides flexibility and can be used to facilitate a particular structuring taking effect if fusion of the amalgamating companies is inadequate on its own. The provision, however, conveys no general contextual assistance in the interpretation of "amalgamation" in Part 15.

[34] Of course, other contextual factors could indicate that Parliament intended the term to carry inconsistent meanings in different places. The legal history of

s 207 of the 1955 Act, its relationship with Part 15 and the manner in which earlier provisions have been interpreted by the courts are said to indicate there is such inconsistency. But Part 15 is now an alternative amalgamation procedure that is expressed in broadly worded provisions. These were inserted by the Select Committee in substitution for the original narrowly framed backstop clause. Part 15 is clearly intended to operate in a wider range of cases than were covered by the original backstop or are covered by Part 13 itself. In this context it is difficult to discern any policy reason, consistent with the primary thrust of the 1993 legislation, supporting an interpretation under which the nature of the resulting "amalgamation" would be different because it was effected under Part 15.

[35] Mr Dugdale suggested that third parties in the position of the appellant would encounter difficulty in bringing before the court their concerns over the effect of a merger. Part 15 does not require public advertising of the proposal as is the case with the more prescriptive provision in Part 13. But the court has the power to require notification of Part 15 applications.[29] In any event we do not accept that this argument provides a proper basis for interpretation of s 236 or of Part 15 generally. It is in essence a criticism of the appropriateness of use of an ex parte application procedure, and the way it is administered in the High Court, in relation to s 236. We are satisfied that due compliance by solicitors and counsel with the requirements in the High Court Rules for ex parte applications will disclose any need for notification because of the effect of a merger on third parties' rights and obligations in particular cases. Failure to do so may put a party who has obtained an order ex parte at risk.[30] In the present case there was no such need as Elders' rights were not affected.

[36] In the end we are satisfied that the principal contextual indicator of the meaning of "amalgamation" throughout the 1993 Act, which is a statute that has a purpose of providing legislative machinery that facilitates mergers, lies in s 219 itself. It introduced to the law concerning amalgamations concepts of fusion and continuance imported from North America. Part 15 was inserted as an alternative procedure at the same time but there is no contemporary indication that in doing so

---

29 Under s 236(2)(a).

30 See *Automatic Parking Coupons Ltd v Time Ticket International Ltd* (1996) 10 PRNZ 538 (HC).

Parliament intended to revert to the earlier complexities. Significantly, as we have said, s 238 supports the contrary view.

Conclusions

[37] For these reasons we are satisfied that amalgamation under s 236 and elsewhere in Part 15 is the same concept as that stipulated in s 219 and as explained by the Court of Appeal in *Carter Holt Harvey*. An amalgamation approved under Part 15 of the 1993 Act accordingly has the same effect as an amalgamation approved under Part 13.

[38] It follows that the merger of Wrightson and Pyne Gould Guiness caused the fusion of those companies. PGG Wrightson is the continuing amalgamated company. It holds the property of Wrightson accordingly by operation of law as if it were still Wrightson. No transfer or disposition of property was involved in the amalgamation and the appellant's rights of pre-emption did not arise.

[39] In light of these conclusions, the appeal must be dismissed. The appellant must pay costs to the respondent of $15,000 together with reasonable disbursements to be fixed if necessary by the Registrar.

Solicitors:
Stace Hammond, Hamilton for Appellant
Chapman Tripp, Wellington for Respondent