In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2016 No: 458

BETWEEN:

MICHAEL KUCZKIEWICZ

Plaintiff

And

HG (BERMUDA) LTD

Defendant

JUDGMENT

Dates of Hearing:	Monday 12 March 2018
Date of Ruling:	Monday 19 March 2018
Counsel for the Plaintiff:	Mr. Jayson Wood and Mr. Mark Burrows (Zuill & Co)
Counsel for the Defendant:	Mr. Christian Luthi and Mr. Rhys Williams (Conyers Dill & Pearman Limited)

Construction of Company Bye-Laws / Contra Proferentem Principle
Contractual entitlement to exercise a Company Warrant to convert unpaid Share Redemption

JUDGMENT of Shade Subair Williams A/J

Introduction and Summary of Facts:

1. The Plaintiff, Mr. Michael Kuczkiewicz, is a previous shareholder and was a former employee of the Defendant ("the Company") for a period exceeding 11 years ending on 31 December 2012. This Court is concerned with the Plaintiff's action against the Company claiming an entitlement to the benefit of a warrant ("the Warrant) under the Company's bye-

laws, as amended on 9 April 2012 ("the bye-laws"). The exercise of the Warrant would entitle the Plaintiff to convert his unpaid redemption of shares into the consideration which would have been owed to him had he been a preferential shareholder on the closing date of the Stock Purchase Agreement which transacted the sale of the Company to a Delaware corporation, namely Korn/Ferry International ("Korn/Ferry"). The Company's position is that the Plaintiff is not entitled to exercise the Warrant.

2. This judgment is on liability alone and the only evidential material before the Court is the witness statement of the Chief Executive Officer of the Company, Mr. Chris Matthews.

Background on Court Proceedings:

3. The Court proceedings in this matter were commenced by the filing of a Generally Indorsed Writ of Summons on 30 November 2016. At this initial stage, the Plaintiff was represented by the attorneys of Harneys Bermuda Limited ("Harneys"). The Defendant entered an appearance on 12 December 2016 and the Plaintiff's current attorneys of record replaced Harneys by a Notice of Change of Attorney dated 14 February 2017. There followed an Amended Generally Indorsed Writ of Summons and a Statement of Claim, both filed on 14 February 2017.

4. The Defence dated 2 March 2017 is the last pleading filed with Court prior to the 30 August 2017 Consent Order on trial directions. The only subsequent pleading filed was an Amended Statement of Claim filed on 6 September 2017.

The Issues in Dispute

5. The disputed issues besiege matters of construction on the relevant bye-laws which were thoroughly rehearsed and skillfully analyzed by Counsel for both sides. More specifically, the litigious stir between the parties relates to the calculation of the timeframe during which the Warrant was operative and available to the Plaintiff for the payment of consideration arising out of the sale to Korn/Ferry.

6. The Warrant, contained in Bye-Law 3.7, provides as follows:

"*Effective beginning October 1, 2012, a Previous Shareholder who has not elected to exercise any Retirement Option under the grace period transition rule set forth in Bye-law 3.11 and who has not received his or her Final Redemption payment shall have a warrant to convert his or her unpaid redemption payments into the consideration that such Previous Shareholder would have received as a holder of Preferred Shares of the Company in any sale transaction (as defined below) on a pro rata basis, as of September 30 following the year of*

his or her Employment Cessation, provided that such warrant may only be exercised upon the sale or other disposition by sale, amalgamation, merger, consolidation or otherwise, of more than 50% of the shares or assets of the HG Group taken as a whole to an entry that is not part of the HG Group (any such transaction, a "Sale Transaction"), the closing of which transaction occurs by September 30 of the third anniversary of the Previous Shareholder's effective date of Employment Cessation."

7. This case hinges on the words which most pivotally determine the kickoff point of the Warrant: "*... as of September 30 following the year of his or her Employment Cessation…*" and its final cap: "*provided that such warrant may only be exercised upon the sale ..., the closing of which transaction occurs by September 30 of the third anniversary of the Previous Shareholder's effective date of Employment Cessation*".

8. The compact version of the Plaintiff's case is that the Warrant period commenced on 30 September 2014 and ended with the closing of the sale on 1 December 2015. The Defendant's case is that the Warrant ran from 30 September 2012 through to a date certain, 30 September 2015.

The Law

9. The germane legal principles at play look to the Court's approach to the construction of ambiguous clauses which are subject to dispute between the parties. The boundaries within which the Court must remain when it pertains to interpreting company bye-laws are examined further below.

General Legal Principles on the Construction of Written Contracts

10. The general principles for construing written contracts were considered by the learned Justice Stephen Hellman in *Kingate Global Fund Ltd (in liquidation) v Kingate Management Ltd [2015] Bda LR 86* where the Court was concerned with a scheme of company contracts. In *Kingate Global Fund Ltd* the Plaintiff Funds ("the Kingate Funds") sought to recover management fees from the Defendants under a claim for breach of contract and an alternative claim for unjust enrichment.

11. The onset of litigation spiraled from the famous collapse of the Bernard Madoff Investment Securities' Ponzi scheme. Unknowingly, the Plaintiff was a victim feeder fund to the Ponzi scheme which led to cross-border liquidation proceedings in BVI and Bermuda. Court proceedings were actioned by the Fund to resolve whether, *inter alia*, management fees paid were contractually due to the Kingate Funds' management company, Kingate Management

Limited ("KML"), the 1st Defendant. The management agreement was the relevant document for construction to resolve the contractual disputes between the Kingate Funds and KML.

12. Other contractual documents under the Court's consideration included the Articles of Association between the Kingate Funds and its members and the Information Memoranda between investors and the Kingate Funds. The 2nd and 3rd Defendants were independent financial service companies incorporated in England and Wales. These companies, FIM Ltd and FIM Advisers LLP ("the FIM Defendants") were responsible for calculating KML's monthly management fees which were tied to the net asset value of the Kingate Funds. The FIM Defendants were referred to as the Administrators. The Court's analysis of the company contracts therefore extended to the Administration Agreements between the FIM Defendants and the Kingate Funds.

13. At page 7, paragraphs 25-26, Hellman J held:

"*In order to understand the competing submissions on the Manager Agreements it is necessary to consider those Agreements in the context of other contractual documents relating to the Funds, namely the Articles of Association, the Information Memoranda published to potential investors, and the Administration Agreements.*

Alan Boyle QC, counsel for the Trust Defendants, with whom the other Defendants agreed on this point, submitted that these documents were the component parts of an interlocking whole, and that the Articles of Association, the Information Memoranda and the Administration Agreements formed part of the essential commercial background and matrix against which the Manager Agreements fell to be construed ("the Contractual Scheme")."

14. In *Kingate Global Fund Ltd*, the Court did not have bye-laws under its interpretive consideration. However, other principles of construction are of relevance. At page 19, the Court relied on passages recited by Lord Neuberger in *Arnold v Britton (SC(E)) [2015] AC 1619*:

"*Lord Neuberger, with whose judgment Lord Sumption and Lord Hughes agreed, helpfully summarized the applicable principles in Arnold v Britton at para 15. Although directed to the interpretation of a particular clause in a number of leases, his summary is mutatis mutandis of general application.*

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the

language in the contract to mean' to quote Lord Hoffman in Chartbrook Ltd v Perismmon Homes Ltd [2009] AC 1101, para 14."

Thus the task of the court is to construe the parties' implied intention, ie the intention which is reasonably to be inferred from the contract read in the context of the relevant background knowledge, even though this may not correspond with the parties' actual subjective intention. As Lord Hoffman, giving the judgment of the Board in Attorney General of Belize v Belize Telecom Ltd, stated at para 16, that meaning is not necessarily or always what the authors or parties to the document would have intended. However, there is no evidence of any such disparity in the present case.

Lord Neuberger continued:

And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases in their documentary, factual and commercial context. That meaning has to be assessed in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn [1971] 1 WLR 1381, 1384-1386; Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce; Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum Ebony JSC."

17. At paragraphs 88-91, Hellman J continued:

"88. There is sometimes a tension between two of the factors mentioned by Lord Neuberger, namely the language of the contract and business common sense. In Rainy Sky, giving the judgment of the Court, Lord Clarke stated at para 30 that:

"...where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense."

89. In similar vein, in Re Sigma Finance Corp (in administrative receivership) Lord Collins with whom Lords Hope and Mance agreed, warned at para 35 against an overly literal approach to construction:

"In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose.
This is one of those too frequent cases where a document has been subjected to the type of textual analysis more appropriate to the interpretation of tax legislation which has been the subject of detailed scrutiny at all committee stages than to an instrument securing commercial obligations: cf. Satyam Computer Services Ltd v Unpaid Systems Ltd [2008] 2 CLC 864, at [2]."
90. On the other hand, in Arnold v Britton Lord Neuberger cautioned that commercial common sense, while a very important factor to take into account when interpreting a contract:

i. should not be invoked to undervalue the importance of the language of the provision which is to be construed (para 17);
ii. should not be invoked retrospectively (para 19):
"The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language";
and that
iii. a court should be slow to reject the natural meaning of a provision as correct simply because it appears to have been a very imprudent one for the parties to have agreed, even ignoring the benefit of hindsight (para 20).

91. I am satisfied that a reasonable person, having all the background knowledge of the parties, which would have included the terms of the Articles of Association, Information Memoranda and Administration Agreements, would have understood the parties to the Manager Agreements to intend that the monthly NAV determinations by the Administrator for the purposes of the subscription and redemption of shares were to be used to calculate the monthly management fee due to KML. I am, therefore, satisfied that this was an express contractual term. There is no suggestion in any of the contractual documents that any other calculations were to be used for this purpose."

General Legal Principles on the Construction of Company Bye-Laws

15. When the Court queried the value of extrinsic evidence in construing company bye-laws, Mr. Wood correctly submitted that there was none. The Bye-laws of a company are not to be judicially interpreted outside of the shell of the document. Counsel for both sides were agreed on this principle.

16. The Defendant filed a witness statement accompanied by various exhibits from the CEO of the Company, Chris Matthews. The statement provides non-contentious insight to the corporate structure of the Company and on the underbelly of the parties' dispute.

17. However, at page 7 of Mr. Matthews' witness statement, he outlined the Company's objections to the Plaintiff's claim and provided a copy of various amendments prior to the 9 April 2012 version of the Bye-laws. More so, a copy of an expert legal opinion on the Plaintiff's entitlement to exercise the Warrant is produced under Exhibit 5. Unsurprisingly, the Plaintiff objected on grounds of inadmissibility. The Defendant made minimal references to the statement, characterizing it as mere background facts.

18. The contractual legal principles relied on in *Kingate Global Fund Ltd* were examined by the learned Hon. Chief Justice, Ian RC Kawaley, in *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd [2017] Bda LR 78*[1]. Notably, in *Capital Partners Securities*, the Court was concerned with the question of admissibility of extrinsic evidence in its determination of the correct interpretation to give to a company bye-law. *Capital Partners Securities Co Ltd* is distinguishable from *Kingate Global Fund Ltd* where the Court was instead looking at a scheme of ordinary company contracts in a complex corporate structure.

19. In my previous ruling on security for costs in *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd [2018] SC (Bda) 5 Com (16 January 2018)* paras 5-8, I summarized the background facts as follows:

"*5. The Respondent, ("the Fund"), was incorporated as a Bermuda exempted company on 20 March 2007. The Fund primarily invested in natural resources in Kazakhstan.*

6. The share capital of the Fund, which is said to be worth a sum in excess of $40,000,000.00, comprised of management shares (where voting rights were mostly vested without any right to collect dividends or other distributions[2]*) and participating shares (where there was an entitlement to declared dividends and surplus assets). Participating shareholders did not have automated rights of redemption under the operation of the Fund and the sale or purchase of participating shares required the consent of the Board of the Fund, who were effectively the Management Shareholders.*

7. The Appellant ("CPS") in this case is a securities company whose registered office is in Tokyo, Japan. CPS invested in the Fund and aimed to attract their clientele of Japanese

[1] The judgment of Kawaley CJ in the Supreme Court is subject to reversal on appeal. On the date of delivery of this judgment, the Court of Appeal had not yet delivered judgment on appeal.

[2] Under Bye-Law 3.1.3 holders of Management Shares were entitled to receive the amount of capital paid up on their Management Shares after payment of the capital for the Participating Shares in the event of a winding up, dissolution of the Company, or any other occurrence resulting in the distribution of capital.

investors to invest in the Fund. Collectively, CPS and its investor clients became the registered holders of 7,561,000 of the Fund's total of 7,600,000 issued participating shares.

8. By 2015 the share value depreciated significantly from its offering price and CPS became keen to redeem its shares. The Bye-laws (pre-2014) provided for the proposal of a Special Resolution at the 2014 Annual General Meeting ("AGM") for the winding up of the Fund effective 31 December 2015 subject to an extended period specified not to go beyond 31 December 2017. However, in 2014 a resolution was approved by the management shareholders to amend the company bye-laws as they related to the redemption of the participating shares. The amended bye-laws inserted a new provision stating that a participating shareholder could only redeem 5% of its shares every two years effective 1 March 2015. This provision replaced the previous afore-mentioned parts of the bye-laws where the Special Resolution for the dissolution of the Fund was not to extend beyond 31 December 2017.

9. CPS, through a series of Court proceedings which followed, complained that the 2014 amendment wrongfully removed the end-date for the winding-up of the Fund as stated in the original version of the byelaws. The case advanced by CPS was that the 31 December 2017 operated as a maximum fixed term for the investment in the Fund. CPS further complained that the 2014 amendment wrongfully deprived it (CPS and its clients as Participating Shareholders) of their voting rights on the dissolution of the Fund."

20. The ensuing litigation in *Capital Partners Securities Ltd* is divisible by three stages of Court proceedings. Firstly, it was triggered by attempts made by CPS to obtain an Order of the Court to wind up the Fund on just and equitable grounds under section 111 of the Companies Act 1981 (for oppressive or prejudicial conduct).

21. However, CPS lacked standing to petition the winding up the Fund as it was not a registered shareholder. To meet the standing objection, legal title to the 7,561,000 participating shares was transferred back CPS. Relentlessly, the Fund's Board of Directors refused to register the shares. On 10 March 2016 CPS withdrew the Petition and proceeded by way of an Originating Summons for an Order of the Court to compel the share rectification.

22. Having successfully battled the second proceedings, CPS resumed the petition proceedings to wind up the Fund on the same grounds of it being 'just and equitable' to do so. The Fund maintained that it was an unlimited term investment. It argued that the Management Shareholders alone (Sturgeon Holdings Limited- initially Compass Asset Management Ltd) were entitled to exercise voting rights, and that CPS, as an insider, could not claim ignorance of these facts and seek to impose a contrary interpretation on the core documents of the company.

23. In the Court's final Judgment, handed down on 14 July 2017, Kawaley CJ ultimately found in favour of the Fund and held that the bye-law clauses never made it mandatory for the Fund to be wound up by 31 December 2017. (CPS was successful on the secondary point relating to their voting rights.)

24. The learned Chief Justice found the meaning of Bye-law 78.2 for the finding of an alternative wind-up date to be '*so clear that any inconsistent wording in other documents*' was '*immaterial for the purposes of the relevant construction analysis*.'

25. In scrutinizing the principles of construction for company bye-laws, the Court considered Lord Neuberger's summary of the general principles on contractual construction in *Arnold v Britton [2016] 1 ALL ER 1 p. 5-6*. These were the same general contract principles correctly relied on by Hellman J in *Kingate Global*. However, in *Capital Partners Securities,* at paragraph 44, the learned Chief Justice observed the rule which uniquely applies to the construction of company bye-laws:

"*44. These judicial observations clearly undermine the proposition that CPS, qua shareholder, should be bound by a distinctive interpretation of the Fund's Bye-Laws based on its own peculiar knowledge, acquired in its capacity as prospective Placement Agent, of the negotiating process. Or, to put it another way, it is difficult to see why the prohibition on the use of extrinsic evidence relating to the circumstances in which bye-law are adopted should not only apply in the present case where the extrinsic evidence is being relied upon to crucially determine the extent of Participating Shareholders' rights. While the Fund's counsel conceded this principle in his written and oral submissions, this position was somewhat obscured in the course of the hearing because of the enthusiastic emphasis which Mr. Atherton QC placed in oral argument on the drafting history of the Bye-Laws. Having reserved judgment, however, my own researches confirmed that the special legal status of bye-laws meant that the sort of extrinsic evidence about negotiating history, upon which the Fund apparently relied in the present case and which was clearly available for the construction of ordinary contracts, was not admissible for construing company bye-laws at all."*

26. Citing *HSBC Bank Middle East and others-v-Paul Clarke (as liquidator of the Oracle Fund Limited) and others [2006] UKPC 31* the learned Chief Justice recalled that the Judicial Committee of the Privy Council considered it uncontroversial that extrinsic evidence is, as a matter of general principle, inadmissible when construing company bye-laws. (Also see *McKillen v Misland Cyprus Investments Ltd [2011] EWHC 3466.*)

The Contra Proferentem Principle

27. The Plaintiff also relies on the *contra proferentem* principle on the basis that the bye-laws belong to the Company. Chitty on Contracts[3] Volume I General Principles Para 15-012:

"*This principle of construction embraces two differing, but closely related principles…First, since the party seeking to rely upon an exemption clause bears the burden of proving that the case falls within its provisions, …any doubt or ambiguity will be resolved against him and in favour of the other party…Secondly, as in the case of any other written document, …in situations of ambiguity the words of the document are to be construed more strongly against the party who made the document and who now seeks to rely on them*…"

28. This principle was applied in *Capital Partners Securities* at para 51:

"*51. CPS in the alternative to its primary construction arguments invoked the contra proferentem rule in its Skeleton:*

"83…CPS was not legally qualified to and did not finalize or approve the Core Documents…CPS looked to an relied on Mr. Shimazaki (appointed by the Fund to act on its behalf as its legal expert) and Appleby as the legal experts on these matters…As such it is entirely proper for the wording in the 2007 Bye-Laws and the Core Documents to be construed against the Fund if this Court is of the view that there is any ambiguity."

52. CPS's right to rely on this rule was not as such disputed. It follows that to the extent that the Bye-Laws are ambiguous CPS is entitled to rely upon the contra proferentem rule."

The Bye-Laws

29. It is helpful to separately consider the start date of the warranty period from its end date. Tirelessly, Counsel challenged one another on both timeframes.

Interpreting the components of the Warrant as it relates to its Commencement Date

30. The following excerpt from the Warrant clause is relevant in examining the start date for the exercise of the warrant:

"*Effective beginning October 1, 2012, a Previous Shareholder who has not elected to exercise any Retirement Option under the grace period transition rule set forth in Bye-law 3.11 and who has not received his or her Final Redemption payment shall have a warrant to convert his or her unpaid redemption payments into the consideration that such Previous Shareholder would have*

[3] Thirty-Second Edition

received as a holder of Preferred Shares of the Company in any sale transaction (as defined below) on a pro rata basis, as of September 30 following the year of his or her Employment Cessation…

"Effective beginning October 1, 2012"

31. The 1 October 2012 date is the start date on which the Warrant rule, in its entirety, came into effect. Therefore, the removal of these words; "Effective beginning October 1, 2012, …" would not change the meaning or construction of the Warrant rule itself. The 1 October 2012 date merely serves to define the start date on which the rule stated in the Warrant applies.

"Previous Shareholder"

32. The term "Previous Shareholder" is defined in the Interpretation section of the bye-laws as "*an individual previously a Shareholder who has been subject to Final Redemption or who has suffered or caused an Employment Cessation, Voluntary Withdrawal or Involuntary Withdrawal, a Removal, or otherwise is longer a Shareholder*".

"Retirement Option under the grace period transition rule"

33. The exercise of a Retirement Option is in respect of payment of a redemption amount. It refers to the options available to a Previous Shareholder in good standing before the effective start date of the rule provided by the Warrant.

34. Bye-law 3.11 provides:

> "*Until October 1, 2012, Shareholders in Good Standing satisfying the requirements of Retirement shall have the options set forth in this Bye-law in regard to the payment of a Redemption Amount PROVIDED THAT notice of the selection of a Retirement Option shall apply only to retirements effective on October 1, 2012 and must be made on or prior to a date determined by the Ownership Board in its discretion and communicated to Shareholders, but not later than September 30, 2012, and once made the selection is irrevocable and PROVIDED FURTHER that the guaranteed payment to which the options refer will be calculated at the level of interest then paid to the banks lending to the HG Group under its revolving credit line. If the notice of selection of a Retirement Option is made after the date selected by the Ownership Board above in any financial year of the Company, and the Employment Cessation of the Shareholder occurs in fact on or prior to September 30, 2012, then the notice shall be deemed to be effective, provided however, that only Retirement Options 2, 3 and 4 shall be available to such Shareholder*."

35. Under Bye-law 3.11, there are four distinct Retirement Options outlined with a specification of the payment period and the relative amount for payment. A Retiree Shareholder in good standing may exercise any one of the irrevocable Retirement Options where, *inter alia*:

    (i) His /her retirement was effective on or prior to 1 October 2012; and
    (ii) He / she gave notice of the selected Option on or prior to the date determined by the Ownership Board and in any event no later than 30 September 2012

36. A Retiree Shareholder in good standing, whose last day of employment occurred on or prior to 30 September 2012, may only exercise Retirement Options 2, 3, or 4 if his / her notice of the selected Retirement Option was given after the date selected by the Ownership Board.

"On a Pro Rata Basis"

37. No controversy was made out of the ordinary meaning of the term '*pro rata*'. Linguistically, it denotes proportionality. However, it seems to have been wrongly presumed by Counsel that the '*pro rata*' reference in the warrant was made in in reference to proportionality of time. The '*pro rata*' insert applies to the sum of consideration payable upon the sale of the Company based on the proportion of the Previous Shareholder's share holdings.

38. The employment of the term '*pro rata'* is to be given its context by having regard to the following portion of the Warrant:

    "…shall have a warrant to convert *his or her unpaid redemption payments into the consideration that such Previous Shareholder would have received as a holder of Preferred Shares of the Company in any sale transaction (as defined below) on a pro rata basis,*

39. It is helpful to conjoin these words as follows: "shall have a warrant to convert… *on a pro rata basis,…".*

40. The absence of a comma in front of 'on a pro rata basis' confirms the literal association and continuity between the starting words of the provision; "*Effective beginning October 1, 2012, a Previous Shareholder… shall have a* ***warrant*** *to convert…"* and the words "*on a pro rata basis".*

41. Therefore the 'pro rata' application applies to the exercise and calculation of converting the unpaid redemption payments into the consideration payable to a preferential shareholder at the sale of the Company.

"As of September 30…"

42. In common parlance, the phrase '*as of*' followed by a specified period, is synonymous to '*commencing from*'. It is the exact opposite of "until" a specified period. Thus, it may be reasonably understood that the starting point is the stated time which follows. Thus the start date will fall on a particular 'September 30'.

43. The question is: 'what will start on the particular 'September 30'?' The answer is not so unhidden. As of the particular 'September 30', the Previous Shareholder shall have a warrant ie a legal right to convert his / her unpaid share redemption into the consideration owed to a preferential shareholder upon the sale of the Company.

"As of September 30 Following the Year of his or her Employment Cessation"

44. The parties diverge woefully in their stances on how this segment of the Warrant is to be construed. Had the draftsman denied the Courts this most intriguing excerpt for construction, this dispute might have been quietly resolved between the parties.

45. In the face of such mischief, the Court is compelled to consider the other parts of the bye-laws for a more spherical understanding of the use of these terms and the objectively reasonable inferences to be drawn.

46. However, it is worth pausing here for a moment to observe that the one clear word in this portion of the phrase is "following" ie 'after' or 'behind'. Hence, it is reasonable to exclude any suggestion that the 30 September start date precedes the Employment Cessation date which was on 31 December 2012. Absent clear wording in the bye-laws to suggest otherwise, it is implausible that the Warrant start date was intended to be 30 September 2012.

47. Bye-law 64 defines the Company's financial year as follows:

> "*64.* ***Financial Year End***
> *The financial year end of the Company may be determined by resolution of the Ownership Board and failing such resolution shall be 30th September in each year*."

48. The last day of the financial year at all material times was on a 30 September. Thus a new financial year started on 1 October 2012 and the Plaintiff's termination followed some three months thereafter on 31 December 2012. Paragraph 29 of Mr. Matthews' witness statement reads:

"*The Plaintiff ceased full time employment on 31 December 2012, which is his date of Employment Cessation, and the date upon which he became a Previous Shareholder*."

49. All roads lead to 30 September 2013 as the start date on which the Plaintiff's possessed the warrant. The '30 September' following (ie. after / behind) the calendar year of the Plaintiff's date of Employment Cessation was 30 September 2013. The '30 September' following (ie. after / behind) the fiscal year of the Plaintiff's date of Employment Cessation was also 30 September 2013.

Interpreting the components of the Warrant as it relates to its End Date

50. The relevant portion of the warrant for determining its end date is as follows:

"*...provided that such warrant may only be exercised upon the sale or other disposition by sale, amalgamation, merger, consolidation or otherwise, of more than 50% of the shares or assets of the HG Group taken as a whole to an entry that is not part of the HG Group (any such transaction, a "Sale Transaction"), the closing of which transaction occurs by September 30 of the third anniversary of the Previous Shareholder's* ***effective date of Employment Cessation.***"

"Provided that"

51. The term 'provided that' in ordinary daily speech is interchangeable with 'on the condition that'. I see no reason to assign it any other meaning and I have not been invited to do so.

"Such warrant may only be exercised upon the Sale…Closing of which transaction"

52. The 'warrant' is the right assigned to the Previous Shareholders under Bye-law 3.7 to convert unpaid redemptions in the consideration owed to a preferential shareholder upon the sale of the Company within a specified period.

53. Accordingly, the words "*such warrant may only be exercised*" clearly stand as the introduction of a condition which must be satisfied in order for the Warrant to be exercisable.

54. It is common ground between the parties that the Company was sold to Korn/Ferry and that the closing date of the sale was 1 December 2015.

"Occurs by September 30 of"

55. "Occurs by" in everyday language is synonymous with "occurs on or before". The specification of "September 30" is an end date isolated from the year to which it would apply. To this extent, Mr. Luthi is correct that the ultimate end date was set to a date certain.

"The third anniversary of"

56. There is no real complexity here. "The third anniversary" of a specified date is third year or the third time that the specified date occurs.

"Previous Shareholder's Effective date of Employment Cessation"

57. Mr. Luthi submitted that the date of withdrawal was entirely different from the date of Employment Cessation. In support of this distinction, he relied on the language used in the calculation payment chart in Bye-Law 3.7. Specifically, he referred to the Second Priority category which would apply to the Plaintiff as an employee departing in good standing.

58. In accordance with the column prescribing the amount to be distributed, it provides:

> "*Effective beginning as of October 1, 2012, Value of Preferred Shares then being redeemed as of last Value effective prior to date of termination of employment, subject to additional annual interest payments calculated from the end of the fiscal year of departure of the Shareholder, fixed for three years at eight (8%), and to be determined thereafter in accordance with the published yield on the Bank of America Merrill Lynch Global High Yield…*

59. Putting it another way, the value of any shares redeemed from 1 October 2012 onwards will be based on the last value given to it prior to the termination of employment. This is subject to additional annual interest payments calculative from the end of the fiscal year of the Plaintiff's departure, ie 30 September 2013.

60. The provision which immediately follows in the amount-column is the Warrant with which the Court is presently concerned. Mr. Luthi cross-referenced the relevant amount-column to the final column, "*Schedule of Distribution*", as it relates to the same class of Previous Shareholders of Second Priority and Good Standing. It provides:

> "*Paid from funds declared available by the Ownership Board after distributions in the First Priority, in seniority by fiscal year of departure, subject to a delay of up to three years from the end of the fiscal year of departure of the Shareholder. Interest payments shall be payable*

within 30 days after the first, second and third anniversaries of the effective date of termination."

61. "*Paid from funds…by fiscal year of departure*": We know that the umbrella fiscal year of the Plaintiff's departure ran from 1 October 2012 to 30 September 2013. Thus the last day of the fiscal year was 30 September 2013. Accordingly, the potential three year delay period ranged from 30 September 2013 to 30 September 2016. The interest payable in the 30 day period is after each of the three anniversaries of the "effective date of termination." The question then arises: what is the "effective date of termination"?

62. The interpretation section of the bye-laws refers to Bye-law 3.3(a) for the definition of 'Employment Cessation'. Bye-law 3.3(a) provides:

    "*the last day of Full Time Employment of the Shareholder, or any Connected HG Person attributed to a Shareholder who is not an HG Person, by the HG Group ("Employment Cessation")*"

63. The wording of 3.3(a) is clear. However, the full scope of 'Employment Cessation' must also be considered under the definition of 'Withdrawal'. 'Withdrawal' is defined in the interpretation section of the bye-laws as "*an Involuntary Withdrawal, a Voluntary Withdrawal, an Employment Cessation or Removal or Retirement of a Shareholder who is an HG Person*." This means that the term 'Withdrawal' includes an Employment Cessation.

64. Bye-law 3.4 is also of relevance in understanding the full context of 'Withdrawal' and 'Employment Cessation':

    "*The redemption of Preferred Shares pursuant to these Bye-laws shall be effected by the cancellation of the Preferred Shares in the Register of Members* ***as of the last day of that financial year (which shall be deemed to be the date of Withdrawal by the Previous Shareholder)*** *and upon such cancellation, such Previous Shareholder shall have only the right to payment of a Redemption Amount as set forth in Bye-law 3.7, subject to such offsets and other rights of the Company in respect of the Previous Shareholder as may be provided in these Bye-laws."*

65. There is an express cross reference between Bye-law 3.4 which employs the term '*deemed to be the date of Withdrawal*' and the "Redemption Amount" column in Bye-law 3.7 relied on by Mr. Luthi which imports the term "*effective date of termination*."

66. In the context of an effected redemption of Preferred Shares, an Employment Cessation (as part of the larger definition of 'withdrawal') is deemed to be 'as of' (ie commencing from) the last day of 'that' financial year. Thus, the *deemed* date of withdrawal in respect of this

Plaintiff was 30 September 2013. (This is, of course, distinct from the Plaintiff's Employment Cessation date under Bye-law 3.3(a), which was 31 December 2012.)

67. The issue for resolve is whether the "*deemed date of Withdrawal*" in Bye-law 3.4 is synonymous to "*effective date of termination (Employment Cessation)*" in Bye-law 3.7.

68. In its natural use, there is parity between "deemed" and words such as "presumed" or "taken" which are not dissimilar in context from "effective". The subject of share redemption is central to both Bye-laws 3.4 and 3.7, so it would not be reasonable on any standard to assign disparate meanings to these terms in the face of their linguistic semblance.

Findings of the Court

Plaintiff Entitled to rely on the Principle of Contra Proferentem

69. Mr. Luthi initially impressed the Court with his masterly attempt to dim the relevance and applicability of the contra proferentem principle in this case. He correctly distinguished the facts in *Capital Partners Securities Ltd* where the Court simultaneously found that the contra proferentem principle applied, despite its findings that those Shareholders also had voting rights. The deciding point in *Capital Partners Securities Ltd*, no doubt, was that the shareholders had been, de facto, deprived of their voting rights and there was no suggestion that the shareholders were involved in the making of the bye-laws.

70. He argued that *contra proferentem* has no place in the case at bar because the bye-laws of the Company represent the collective will of the shareholders and they are not bye-laws given to investors as a *fait accomplit*. Mr. Luthi relied on the amendment provisions in Bye-law 74 as an example of the shareholders voting power in the making of the bye-laws and the resolution of its amendments:

"*No Bye-law may be amended, varied or terminated until the same has been approved by a resolution of the Ownership Board and by a resolution of the Shareholders approved by seventy five percent in value of the Shareholders entitled to vote at a general meeting of the Shareholders of the Company approving such amendment, variation or termination either (i) expressly In Writing, or (ii) by an affirmative vote by way of poll at a general meeting of the Shareholders of the Company; provided that no amendment, variation or termination of these Bye-laws shall have any effect on the rights or obligations hereunder of any person who is no longer a Shareholder at the time of such amendment, variation or termination is adopted*."

71. Mr. Luthi contended that case did not entail the proffering of an agreement by one party to which the other party had to accept. Unlike shareholders *ad libitum*, the management

shareholders in *Capital Partners Securities* controlled all the votes and gave the participating shareholders a prospectus to which they were bound.

72. However, Mr. Wood argued that as a matter of legal principle, as opposed to evidential proof, company bye-laws could not be equated with a bilateral contract as the Shareholders of the Defendant were ever-changing.

73. The relevant question is a basic one. Who made the bye-laws? This question is not necessarily answered by reference to the rules relating the shareholders' voting powers in the bye-law amendment procedure, albeit that there are inferences which may be drawn therefrom. Notwithstanding, it has not been suggested that the Plaintiff, a sole shareholder, equally made or partook in the making of the bye-laws on the one hand, with the equal participation of the Company on the other. Even if there was evidence before the Court that the Company's shareholders (of the relevant period) collectively partook in formulating the bye-laws, I cannot see how that would bar a sole shareholder (perhaps outside of the majority vote of the shareholders) from relying on the *contra proferentem* principle.

Plaintiff was entitled to exercise the Warrant under Bye-Law 3.7

74. This Court is obligated to remain within the four corners of the bye-laws in interpreting the disputed provisions. For those reasons, I did not consider the legal opinion produced at Exhibit 5 of Mr. Matthews' witness statement. I also disregarded the previous bye-law versions exhibited and all statements of opinion by Mr. Matthews on how the bye-laws should be interpreted.

75. Lord Hoffman's stated approach in *Chartbrook Ltd v Perismmon Homes Ltd [2009] AC 1101, para 14* is subject to a necessary adjustment when applied to the approach to be used in interpreting ambiguous provisions in company bye-laws. The Court must simply look to the implied intention of the parties by reference to what a reasonable person would have understood by the language of the bye-laws read as a whole. The subjective intention of the parties is irrelevant. This Court has applied the relevant principles of construction outlined by Lord Neuberger in *Arnold v Britton (SC(E)) [2015] AC 1619* in so far as I first considered the natural and ordinary meaning of the bye-law provisions in question. I also looked to the neighboring bye-law provisions in order to gain the requisite understanding of the overall commercial purpose of the Warrant and the bye-laws in which it is hosted.

76. The Warrant provision in question:

"*Effective beginning October 1, 2012, a Previous Shareholder who has not elected to exercise any Retirement Option under the grace period transition rule set forth in Bye-law*

3.11 and who has not received his or her Final Redemption payment shall have a warrant to convert his or her unpaid redemption payments into the consideration that such Previous Shareholder would have received as a holder of Preferred Shares of the Company in any sale transaction (as defined below) on a pro rata basis, as of September 30 following the year of his or her Employment Cessation, provided that such warrant may only be exercised upon the sale or other disposition by sale, amalgamation, merger, consolidation or otherwise, of more than 50% of the shares or assets of the HG Group taken as a whole to an entry that is not part of the HG Group (any such transaction, a "Sale Transaction"), the closing of which transaction occurs by September 30 of the third anniversary of the Previous Shareholder's effective date of Employment Cessation."

77. I find that "*September 30 following the year of his or her Employment Cessation"* denotes the starting-point of the Plaintiff's right to the warrant and that such starting point occurred on 30 September 2013. In so finding, I collectively considered Bye-laws 3.4 and 3.7 in addition to the definition of '*Withdrawal*' in the Interpretation section of the Bye-laws in drawing the parallel between the terms "*effective date of Employment Cessation*" and "*deemed date of withdrawal*".

78. I find that the "*effective date of Employment Cessation*" is clone in its meaning to the '*deemed ... date of Withdrawal*' in Bye-law 3.4. I found that the Plaintiff's deemed date of Withdrawal was 30 September 2013. Thus the Plaintiff's effective date of Employment Cessation was also 30 September 2013. It is clear to me that the starting point of the Warrant was intended to be the same date as the effective date of Employment Cessation. For that reason, I am further grounded in my judgment that this construction of the "*effective date of Employment Cessation*" is correct.

79. The Plaintiff's end date of the entitlement to exercise the Warrant was 30 September 2016. This is so because that is the third anniversary of the effective date of Employment Cessation which I have found occurred on 30 September 2013. It is common ground between the parties that the closing date of the sale occurred on 1 December 2015. Thus the sale transaction occurred within the third anniversary of the effective date of Employment Cessation.

80. For these reasons, I find that the Plaintiff was entitled to exercise the Warrant under Bye-Law 3.7.

The Court's Construction of the Warrant aligns with the Commercially Sensible Approach

81. This Court's obligation to identify the commercially sensible approach was well stated by Hellman J in *Kingate Global Fund Ltd* at para 88; '…w*here a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense'.*

82. The Defendant invited this Court to find as a matter of construction that the start date for the Plaintiff's Warrant occurred on 30 September 2012, ie prior to the actual last day of his employment which ceased on 31 December 2012. At paragraph 19 of the Defendant's written skeleton there is a curious concession that the Defendant's suggested interpretation gives rise to a narrow period within which a Previous Shareholder could effectively compete with the Company without forfeiting the Warrant. This window of opportunity is unrecognizable because under Bye-law 78 a shareholder is restricted from competing during their shareholding (which would apply to the period of active employment) and further restricted for a minimal 2 year period immediately following Employment Cessation (ie. the last day of employment).

83. Bye-Law 78.1 reads:

"*No Shareholder who is an HG Person and no Connected HG Person and no Connected HG Person who is attributed to a Permitted Transferee pursuant to Bye-Law 12.2 shall compete with or undertake any investment or activity in competition with the Business while that HG Person is a Shareholder of the Company or for a period of the longer of: (a) two (2) years after the HG Person or Connected HG Person (as applicable) ceases to be an active employee; or (b) any period which the Redemption Amount paid on account of a Shareholder's or Permitted Transferee's (as applicable) Preferred Shares is not yet paid under any deferral required or permitted as an option pursuant to Bye-law 3. The provisions of this Bye-law 78.1 shall be in addition to any provision regarding obligations not to compete or restrictions upon activities after termination that may arise out of the terms of employment of an individual by the HG Group. For greater certainty, each Shareholder acknowledges and agrees that the restriction imposed in this Bye-law 78.1 shall continue to bind and shall be enforceable by the Company and its permitted successors and assigns in accordance with the foregoing terms against every HG Person who transfers Preferred Shares to a Permitted Transferee, to the same extent as though such HG Person remained a registered Shareholder*."

84. Bye-law 78 firstly prohibits a Shareholder (or HG person in a like class) to compete with the Company during their shareholding. The bye-law also interdicts competition from a Previous Shareholder within 2 years of the date of Employment Cessation. However, if that 2 year period is exceeded by the ongoing payment of a redemption amount under one of the Options

in Bye-Law 3.7, then the prohibition will continue until the completion of those payments. So, the minimal period is 2 years after the last day of active employment by the Company.

85. If the Defendant had correctly perceived a lacuna period allowing for such competition owing to the interpretation advanced by the Defendant on the starting point of the Warrant, this would not have been consistent with the commercial purpose or context of the restrictive covenant. It may be reasonably understood that the non-compete clause purposefully prevented competition from any HG employee and / or Previous Shareholder who was collecting ongoing redemption payments.

Conclusion

86. The Plaintiff is entitled to the benefit of the Warrant arising out of the Stock Purchase Agreement. The monies owed to the Plaintiff pursuant to the Warrant arising out of the Stock Purchase Agreement shall be assessed for payment of the outstanding sums to be paid by the Defendant to the Plaintiff.

87. Unless either party files a Form 31D within the next 14 days to be heard on costs, costs to follow the event on the issue of liability in favour of the Plaintiff, to be taxed on a standard basis, if not agreed.

Dated this 19th day of March 2018

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SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE OF THE SUPREME COURT