



Précis Paper

Undoing Mistaken Transactions and Rectifying of Share Registers

A registered share transaction may have income tax implications – such as franking credits. What if a share transfer was illegal? May the share register be amended because of common mistake at common law?

Discussion Includes

- Can parties to a transaction agree to undo the transaction ab initio, and thus bind the Commissioner for Taxation?
- What is common mistake at common law and in equity?
- What consequences flow from common mistake?
- What is a company's share register, and how can it be rectified or corrected?
- Is the statutory power of correction different from the equitable power of correction?
- What importance do courts place on having a contradictor appear before them, where all relevant parties agree on what the court should do?

Précis Paper

Undoing Mistaken Transactions and Rectifying of Share Registers

1. In this edition of BenchTV, Charles Scerri QC (Barrister) and Ian Benson (Solicitor) discuss the recent decision of the Victorian Supreme Court (Sifris J) in *HWG Holdings Pty Ltd v Fairlie Court Pty Ltd* [2015] VSC 519, concerning the rectification of a share register. Mr Scerri acted for the successful plaintiffs, HWG Holdings and Fairlie Court.

Material Facts

2. A number of families in Tasmania owned a company (HWG) that operated a series of abattoirs. One of the families decided to retire and attempted to split up the company through a share buyback. As part of that arrangement, shares were transferred to an intermediate company (Fairlie) and then the shares were sold back to the parent company (HWG). This transaction was structured so that "Fairlie Court could obtain the benefit of provisions of the *Income Tax Assessment Act 1936* (Cth), which permitted shareholders to utilise a franking tax offset for the income tax already paid by the company in respect of a dividend": see [9] of the judgment.
3. The trouble was that 3 or 4 years later, when there was an audit by the ATO, it was held that Fairlie was not entitled to the franking credit from the shares because Fairlie had held the shares for less than 45 days per s 160APHO(2) of the now repealed Part IIIA of the *Income Tax Assessment Act 1936* (Cth). The franking tax offset was worth more than \$3million.
4. In order to avoid Fairlie's receipts being fully taxable, the parties wanted to pretend that the transaction never happened and they were entitled to do that because they had acted under a common or mutual mistake that the franking credits would accompany the buyback. Accordingly, HWG and Fairlie entered into deed which acknowledged there had been a mistake and undid the transaction ab initio (as if it had never happened)

Common Mistake

5. Common mistake is where the parties to a contract operate under a mistake as to a matter of fact or a matter of law. The common mistake here was that they thought that when the buyback occurred there would be a franking credit in relation to the payment of the price of the buy back. At common law, common mistake in relation to a serious or fundamental matter renders the contract void ab initio. In equity, common mistake may render the contract voidable, but not void.

6. The UK Court of Appeal in *Great Peace Shipping Ltd v Tsaviliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679 decided that there should be a restriction on the common law doctrine of common mistake. The Court determined that common mistake could only be made out where the result of the mistake was that the contract would be impossible to perform. In *HWG*, the mistake was not such as to make the contract impossible to perform.
7. This additional element for establishing common mistake from *Great Peace* was followed by the decision of the Queensland Court of Appeal in *Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328, which found that this additional element was also necessary under Queensland common law.
8. In light of these decisions from the UK and Queensland, an initial issue arose in *HWG v Fairlie* as to whether what happened qualified as a common mistake. Ultimately, it was found that these decisions did not bind Sifris J on the basis that there was contrary authority from the High Court. This was because the old English rule based on *Ball v Lever Bros Ltd* [1931] UKHL 2; [1932] AC 161 and *Solle v Butcher* [1950] 1 KB 671 had been adopted by the High Court a number of times (e.g. *Taylor v Johnson* [1983] HCA 5; 151 CLR 422). Accordingly, common mistake was established and the transaction was thus void.

Correction (Rectification) of the Register

9. However, under the *Corporations Act 2001* (Cth) once the buyback occurred the shares were cancelled on the register, such that it was as if they never existed notwithstanding the transaction being void. The significance of the cancellation was that the franking tax offsets would still not be applied to Fairlie even after the common mistake was made out.
10. A company's share register records who owns the shares and is only prima facie evidence of title. Section 176 notes:

SECTION 176:

Evidentiary value of registers

In the absence of evidence to the contrary, a register kept under this Chapter is proof of the matters shown in the register under this Chapter.

11. In the Supreme Court, the first and second plaintiffs sought an order pursuant to s 175(1) of the *Corporations Act* that the share register of the first plaintiff be rectified to restore the shareholding of the second plaintiff:

SECTION 175:

Correction of registers

- (1) *A company or registered scheme or a person aggrieved may apply to the Court to have a register kept by the company or scheme under this Part corrected.*
- (2) *If the Court orders the company or scheme to correct the register, it may also order the company or scheme to compensate a party to the application for loss or damage suffered.*
- (3) *If:*
 - (a) *the Court orders a company or scheme to correct its register of members; and*
 - (b) *the company or scheme has lodged a list of its members with ASIC;**the company or scheme must lodge notice of the correction with ASIC.*

12. Significantly, s 175 does not confer the jurisdiction to correct the register, that jurisdiction comes from the general law. Section 175 simply notes that you can apply for correction and rectification. Rectification depends on someone's rights being affected. The right affected here was the right of Fairlie to have its shareholding recorded correctly in the register. Because the transaction which led to the change in the share register was void, the share register was wrong and Fairlie had a right to have it corrected. Thus, the register was duly rectified.
13. Section 175 provided the standing to apply for the rectification but the application could have probably been made without s 175 because of the party's normal rights.

The Necessity for a Contradictor

14. Mr Scerri notes that the Commissioner of Taxation would have been a proper party to the court proceedings. However, the Commissioner elected to not appear and there was authority in NSW that there was no need for a contradictor: *Re Mogul Studs* [2012] NSWSC 1639.
15. Had the Commissioner said the parties were not entitled to this franking credit and that a rectification of the register would complicate that issue, the court might have declined to exercise jurisdiction because the power to rectify the register is discretionary.
16. The courts' preference for a contradictor stems from the wish to see that both sides of an argument are properly ventilated in the interests of justice, particularly where third party rights are affected. This is the basis for the adversarial system. Given the Commissioner had

been notified of the orders sought by the plaintiffs and the other shareholders consented, the proceedings were able to proceed without a contradictor.

Implications

17. In general, parties cannot rearrange their affairs retrospectively and thereby bind the Commissioner for Taxation to the new state of affairs. In this case, the common law doctrine of mistake applied to make the original agreement void ab initio as a matter of law – it was not a case of the parties agreeing to retrospectively change the affairs between them.
18. A practical consideration for parties in similar situations of mistake to be aware of is the importance that the deed and the joint-application played in the discretionary judgment of the court to correct the register.

BIOGRAPHY

Charles Scerri QC

Queens Counsel, Chancery Chambers, Melbourne

Charles Scerri QC was admitted as a Solicitor in 1975, called to the bar in 1986 and appointed silk in 1997. He has extensive experience in a wide variety of commercial matters with a particular emphasis on contractual disputes, competition and consumer law matters, class actions and commercial disputes within the mining and resources sector. He appears principally in the Federal Court of Australia and the Supreme Court of Victoria. He also appears regularly interstate and in Papua New Guinea.

Ian Benson

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Case

HWG Holdings Pty Ltd v Fairlie Court Pty Ltd [2015] VSC 519

Benchmark Link

https://benchmarkinc.com.au/benchmark/construction/benchmark_27-10-2015_construction.pdf

Judgment Link

<http://www.austlii.edu.au/au/cases/vic/VSC/2015/519.html>

Cases

Great Peace Shipping Ltd v Tsaviliris Salvage (International) Ltd [2002] EWCA Civ 1407; [2003] QB 679

Australia Estates Pty Ltd v Cairns City Council [2005] QCA 328

Ball v Lever Bros Ltd [1931] UKHL 2; [1932] AC 161

Solle v Butcher [1950] 1 KB 671

Taylor v Johnson [1983] HCA 5; 151 CLR 422

Re Mogul Studs [2012] NSWSC 1639.

Legislation

Income Tax Assessment Act 1936 (Cth)

Corporations Act 2001 (Cth)