IN THE COURT OF APPEAL OF NEW ZEALAND

CA380/2014
[2015] NZCA 130

BETWEEN	GINA LOUISE SATTERTHWAITE, BENJAMIN THOMAS GOUGH AND FIFE HOLDINGS LIMITED Appellants
AND	GOUGH HOLDINGS LIMITED First Respondent
	ALEXANDER MALCOLM MCKINNON, JOHN RUSSELL STRAHL, ANTONY THOMAS GOUGH, TRACY OWEN GOUGH, AVENAL BERYL ELIZABETH MCKINNON, LISA ANGELIQUE D'HARCOURT GOUGH, WYNTON GILL COX, NICHOLAS RICHARD WILLIAM DAVIDSON, HARCOURT DAVID GOUGH, JAMES TRACEY GOUGH, RACHEL CORALIE KOOPMAN-GOUGH, MATTHEW OWEN MCKINNON AND SOPHIA AVENAL ANNA MCKINNON Second Respondents
	JOHN RUSSELL STRAHL AS TRUSTEE OF THE O T GOUGH FAMILY TRUST Third Respondent

Hearing:	17 March 2015
Court:	Ellen France P, Harrison and French JJ
Counsel:	T C Weston QC and A V Foote for Appellants L J Taylor QC for First Respondent (appearance excused) J A Farmer QC and P A Robertson for Second Respondents Antony Thomas Gough, Tracy Owen Gough and Harcourt David Gough J W A Johnson and A J C Carter for Second Respondents Alexander Malcolm McKinnon and Avenal Beryl Elizabeth McKinnon

No appearance for Third Respondent

Judgment: 29 April 2015 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed and the declaration issued by the High Court set aside.

B The respondents are ordered to pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] A clause in the constitution of Gough Holdings Limited (Gough Holdings) provides:

> No person shall be appointed as a Director who:
>
> …
>
> (c) Is a member of the Gough family unless all Shareholders unanimously agree.

[2] The main issue for determination is whether the phrase "no person shall be appointed" refers only to the initial act of appointment or whether it is being used in a continuous sense so as to include the status that the initial act of appointment confers.

[3] In the decision under appeal, MacKenzie J held in the High Court that it had the latter meaning, which he described as a "term of appointment" meaning, as distinct from a "time of appointment" meaning.[1]

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1 *Strahl v McKinnon* [2014] NZHC 1257.

[4] For the reasons that follow, we disagree with the Judge's conclusion.

Background

[5] Gough Gough and Hamer Ltd (GGH) is a well-known and highly successful New Zealand company established by the late Mr T T Gough.

[6] Mr T T Gough died in 1955. At the time of his death, he owned almost all the shares in GGH. Over the years, the disposition of his estate has been the subject of various deeds, such that the ownership of GGH is now governed by a relatively complex trust and company structure. For present purposes, only the following matters need to be noted:

(a) Mr T T Gough was married twice and the shareholding is divided between the resulting two branches of his family, the O T Gough branch and the B T Gough branch.[2]

(b) Members of the B T Gough branch hold approximately 0.3 per cent more of the total ordinary shares than do members of the O T Gough branch.

(c) As part of a major restructuring that took place in 1986 and 1987, the first respondent, Gough Holdings, was formed to hold the estate's interest in GGH and also to acquire shares held by family interests separate from the estate's holding.

(d) At the same time, trust arrangements previously in place were restructured with the creation of a head trust and two sub-trusts of the estate trusts, one for each branch of the family. The trustees of the head trust (the head trustees) comprise one trustee from each of the two sub-trusts, with a third person appointed by those trustees.

[7] When Gough Holdings was re-registered under the Companies Act 1993 (the Act), it required a new constitution. The new constitution was registered in 1997.

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[2] O T Gough was a son of the first marriage and B T Gough a son of the second marriage.

[8] Under cl 13 of the 1997 constitution, the power to appoint and remove directors is vested in the head trustees during such time as there are head trustees. The clause further states that directors retire by rotation at three-yearly intervals, except for directors who are in the full-time employment of the company. The latter are not subject to any rotation requirement.

[9] Clause 13.7 states that if there are no head trustees, then the provisions of the third schedule to the constitution (the third schedule) are to apply in addition to some but not all parts of cl 13. We attach copies of cl 13 and the third schedule in an appendix to this judgment. For ease of reference, we have marked the copy of cl 13 to show which clauses remain in force once the third schedule becomes operative and which do not.

[10] We examine the relevant provisions in more detail later in the judgment. At this juncture, it is only necessary to note that under the third schedule, instead of being appointed by the head trustees, directors are elected by the ordinary shareholders by a simple majority vote. The directors are also subject to removal by ordinary shareholder resolution. The three-year rotation provision continues to apply, as does the exemption from rotation for directors who are full-time employees.

[11] There is currently a dispute between the two branches of the family as to whether the head trust has already come to an end or is about to come to an end, thereby rendering the third schedule operative. This issue is the subject of a separate proceeding brought by the head trustees in the Auckland High Court. We were told that a hearing to determine this issue has been allocated for August 2015.

[12] The focus of the present proceeding, brought by a trustee of the O T Gough family trust, is a disagreement between the two branches of the family about the correct interpretation of cl 3 of the third schedule. The clause concerns disqualification from appointment of directors. The O T Gough family trust seeks a declaration under the Declaratory Judgments Act 1908 as to the interpretation of cl 3 in anticipation of the third schedule becoming operative.

[13] Clause 3 states:

> 3 **Disqualification from Appointment**
>
> No person shall be appointed as a Director who:
>
> (a) Has attained the age of 70 years;
>
> (b) Is prohibited from holding office under the Act;
>
> (c) Is a member of the Gough family unless all Shareholders unanimously agree.

[14] The dispute centres on the meaning of the word "appointed" and in particular the ramifications of cl 3(c) for existing directors who are members of the Gough family.[3] There are currently two directors in that position, one from each branch. One of the two family directors is also a full-time employee of Gough Holdings. It will be recalled that directors who are full-time employees are exempt from the three-yearly rotation requirement.

[15] In the High Court, there were two competing interpretations.

[16] According to the O T Gough branch, cl 3 means that if existing directors appointed by the head trustees come within (a), (b) or (c), they are automatically disqualified from holding office immediately upon the third schedule coming into force.

[17] The B T Gough branch, however, argued that cl 3 refers to the initial act of appointment and therefore only impacts on actual appointments made after the third schedule becomes operative. Under this interpretation, the existing director who is also a full-time employee and therefore exempt from the rotation policy could potentially remain in office indefinitely without unanimous agreement. The director in that position, Mr Ben Gough, is a member of the B T Gough branch. Mr Ben Gough is the managing director of GHL and the dealer principal.

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[3] "Gough family" is defined in the constitution as the descendants of the late T T Gough.

[18] Justice MacKenzie preferred the interpretation advanced by the O T Gough branch. He held that cl 3 bears what he described as "the term of appointment" meaning. The Judge issued the following declaration:[4]

> Where under clause 13.7 the provisions of the Third Schedule are applicable, clause 3(c) of that Schedule prohibits the continuation in office of a director who is a member of the Gough family previously appointed by the head trustees unless all shareholders unanimously agree to his/her continuation.

[19] The wording of this declaration was different in one respect from that sought by the O T Gough branch. The question they had posed related only to the position of an existing Gough family director who is also an employee. Justice MacKenzie, however, considered that the position of an employee family director was no different from that of any other family director who may hold office once the third schedule becomes operative. The terms of the declaration are therefore expressed to apply to all family directors regardless of whether they are employees or not.

[20] Dissatisfied with the outcome of the High Court hearing, the B T Gough branch filed an appeal in this Court.

Analysis

[21] Counsel for the appellant Mr Weston QC contended that the approach taken by MacKenzie J amounted to the implication of a term and referred us to the authorities on implied terms in contract. We have not found it necessary to refer to those authorities. In our view, this case is simply about the application of orthodox principles of interpretation, bearing in mind that the task of the Court is to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[5] The objective meaning is taken to be that which the parties intended.

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4 *Strahl v McKinnon*, above n 1, at [47].

5 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (UKHL) at 912 per Lord Hoffman; cited in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 at [60].

Natural and ordinary meaning

[22] Justice MacKenzie took as his starting point the natural and ordinary meaning of the words. He held that cl 3 was ambiguous and that the two competing interpretations – the "term of appointment" meaning and "the time of appointment" meaning – were equally consistent with the ordinary use of language.[6] Having come to that conclusion, the Judge then undertook a textual analysis of the constitution before examining extrinsic material.

[23] We disagree with the Judge's initial premise. In our view, there is no ambiguity. As a matter of language and ordinary usage, the words "to appoint" and "be appointed" are primarily referable to an action, not the concept of a continuing status. To attribute the latter meaning to the words – and so equate "be appointed" with "holding office" – strikes us as a somewhat strained and unusual use of language.

[24] We are reinforced in that conclusion by reference to dictionary definitions of "to appoint" or "be appointed". The New Zealand Oxford Dictionary simply defines "appoint" as "assign a post or office to".[7] The Merriam-Webster Dictionary defines the word relevantly as "to fix by a decree, order, command, resolve, decision, or mutual agreement" and "to assign, designate, or set apart by authority".[8] The Oxford Dictionary defines "appoint" as "agreement, settlement", and "appointed" as "fixed by authority, ordained".[9]

[25] The view we favour is also consistent with how the term 'appointed" is used in the Act.

[26] In the Act, the words "appointed" and "holding office" are consistently used to denote discrete concepts. Thus, for example, under the heading "Appointment and removal of directors", s 151(2) lists specified categories of persons who are

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6 At [17].

7 Tony Deverson and Graeme Kennedy *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 48.

8 Philip Babcock Gove (ed) *Webster's Third New International Dictionary* (G & C Merriam Co, Springfield (Mass), 1976) at 105.

9 J A Simpson and E S C Weiner (eds) *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) at 578.

"disqualified from being appointed *or* holding office" (emphasis added). Section 159, dealing with notice of change of directors, talks about a change occurring "as the result of a director ceasing to hold office or the appointment of a new director, or both". The word "appointment" also appears in ss 152, 154, 155, 158 and 159 and in none of those sections does the word carry a continuing status connotation.

[27] We accept, of course, that words may take on an unusual or different meaning if context or purpose so require. And accordingly, we turn to the constitution itself.

Internal context

[28] In his decision, MacKenzie J identified what he described as a number of "contextual clues" in the constitution. On his assessment, these contextual clues – four in total – were of "relatively minor significance", but on balance pointed to the "term of appointment" interpretation.[10]

Use of the expression "holding office"

[29] The first contextual clue considered was the fact the expression "holding office" is used elsewhere in the constitution.[11] It was argued that the use of a separate expression indicated an intended distinction between the terms "appointed" and "holding office". However, the Judge regarded this as a neutral factor because he considered that the use of the phrase "holding office" in other provisions was context-driven. In his view, the relevant contexts made the expression "holding office" a more natural and less awkward one than the expression "appointed" in a continuous sense.[12]

[30] On appeal, Mr Weston complains that the Judge did not consider all of the provisions where the phrase "holding office" is used, including in the third schedule itself. We agree that the Judge was too dismissive of this argument which we consider provides some (albeit limited) support for our view as to the usual meaning of "appoint". In making that comment, we have not overlooked Mr Johnson's point that, because the constitution contains what are patently drafting errors, reliance on

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10 At [32].
11 At [19].
12 At [19].

differing use of words may be problematic. Despite these drafting infelicities, however, there is reasonable consistency in the use of "appointed".

Use of the future tense

[31] The second clue was the use of the future tense in the phrase "*shall* be appointed".[13] Justice MacKenzie considered this was also neutral because the future tense could apply equally to a future act of appointment or to a future status of appointment. In our view, the "shall" is primarily directive and is of little or no consequence.

The other categories in cl 3

[32] Thirdly, the Judge examined the position of the other categories of persons disqualified from appointment in cl 3; that is, the person who has attained the age of 70 years and the person who is prohibited from holding office under the Act.[14]

[33] As regards the position of persons who turn 70 while in office, the Judge considered it significant that cl 13.3(c) had not been carried over into the third schedule. Clause 13.3(c) provides that a director who attains the age of 70 ceases being a director at the next annual meeting. Its absence in the third schedule could be seen as supporting the "term of appointment" interpretation because under that interpretation there would be no need for such a clause. There would be no question of waiting until the next general meeting; the director would be disqualified immediately on turning 70.

[34] An alternative explanation for the absence of cl 13.3(c) is that the drafters of the constitution were content to allow the director who turns 70 to remain in office until retirement by rotation or if the director was an employee, by retirement from full time employment. That would be the effect of the "time of appointment" interpretation. There is no evidence, however, of any such deliberate policy choice having been made and we agree with the Judge that the absence of cl 13.3(c) is a factor slightly favouring the "term of appointment" interpretation.

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13 At [20].
14 At [21].

[35] Mr Weston sought to argue to the contrary by relying on the fact that the 1997 constitution increased the retirement age from 65 to 70 years. However, we do not see any logical inconsistency between that change and requiring automatic disqualification on turning 70. Mr Weston also sought to rely on cl 1(b) of the third schedule. Clause 1(b) states that a nominee for a directorship must be less than 70 years of age. Mr Weston submitted that if attaining the age of 70 results in automatic disqualification, the relevant age for nomination would have been 67 to enable the director to serve a full term. In our view, that argument is somewhat tenuous. It is not supported by any of the extrinsic evidence.

[36] The third schedule also provides that no person shall be appointed as a director who is disqualified under the Act. Justice MacKenzie noted that this had not been expressly addressed in the constitution before. Section 151(2) of the Act lists the categories of persons who are disqualified from being appointed or holding office as a director. They include an undischarged bankrupt and a person subject to a prohibition order.

[37] Justice MacKenzie stated that under a "time of appointment" interpretation, cl 3(b) would only prevent the initial appointment or reappointment when the person is already disqualified, whereas the "term of appointment" interpretation would cover all situations of removal for disqualification under s 151(2), including that of a director who becomes ineligible under the Act while in office.[15] In the Judge's view, it was more likely the drafters would have wanted to cover all situations regarding removal, which therefore provided further support for the "term of appointment" interpretation.

[38] This reasoning, however, assumes that cl 3 covers removal of directors and precludes the application of s 157 of the Act which deals with the consequences of a person who holds office becoming disqualified under s 151.

[39] In our view, the assumption is incorrect. Clause 3 is concerned only with disqualification. Disqualification and removal are distinct concepts. There is no

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15 At [24].

reason why s 157 would not apply just as it did previously. In our view, the position of the director caught by cl 3(b) does not inform the interpretation of cl 3(c).

[40] In a subsequent passage of his decision, the Judge himself referred to the fact that there is no express provision in cl 3 providing for the removal of a director who becomes disqualified under (a), (b) or (c) after the date of appointment. He suggested that this may favour the "time of appointment" interpretation because under that interpretation no such provision is required.[16]

[41] The acknowledgment that cl 3 does not provide for removal appears contrary to the Judge's reasoning in relation to cl 3(b) discussed above. Our view is that the absence of any express provision for removal does not assist either way because the provisions of the Act will apply.

Absence of mechanism

[42] The last contextual clue identified by the Judge was the absence of any machinery to regulate how and when the shareholders under the "term of appointment" interpretation are to communicate unanimity or dissent to the appointment of a family member as director. The Judge acknowledged this consideration favoured the "time of appointment" meaning but only to a "small extent".[17]

[43] We disagree. In our view, of all the contextual clues, this is by far the most cogent.

[44] If "term of appointment" were intended, it would be reasonable to expect there to be some process by which the requirement for shareholder unanimity is to be tested and measured in the transition from head trust to the third schedule. There is none.

[45] Further and even more importantly, in the absence of any machinery, the effect of the "term of appointment" interpretation is that a single shareholder would

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16 At [26].
17 At [25].

hold an ongoing power of veto over a family member director that the shareholder could exercise at any time. As Mr Weston put it, the director's tenure would remain on a knife edge. The uncertainty and governance problems thereby created would make for an unworkable situation. In our assessment, this of itself is a very strong indication against such an interpretation being correct.

Purpose

[46] In addition to the contextual clues, MacKenzie J derived further support for the "term of appointment" interpretation by considering the purpose of cl 3 in the context of the constitution as a whole. The Judge stated that the constitution on its face was "forged around a careful balancing and equal treatment of the two branches of the family".[18]

[47] It is not clear to us why the Judge considered a "term of appointment" interpretation to be more consistent with equal treatment of the two branches than a "time of appointment" interpretation. The Judge does not actually articulate any reason. The main reason the O T Gough branch opposes the "time of appointment" interpretation is because it would result in the existing director from the B T Gough branch who is an employee and so exempt from rotation being able to hold office indefinitely until such time as his employment ended. The "term of appointment" interpretation will give them protection from that scenario. However, MacKenzie J said he found "little assistance" from the provisions dealing with the rotation of directors and exceptions from rotation.[19]

[48] In any event, as Mr Weston points out, the further difficulty with the analysis is the fact that the two branches do not have equal shareholding. The B T Gough branch holds the majority of the shares. There is no express reference to equality in the constitution and the two provisions relied upon by the Judge to support a contrary view are of limited assistance.[20] One is a pre-emption provision which has the effect of preserving the current unequal shareholding and the other relates to requirements for a quorum.

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18 At [28].
19 At [30].
20 At [28].

External context

[49] Having reached a tentative conclusion based on the wording of cl 3 as read in the context of the constitution as a whole, the Judge then turned to cross–check that conclusion by taking into account the external context and the facts and circumstances known to those responsible for drafting the constitution.[21]

[50] The Judge found there had been a history of deep division between the two branches of the family and that the restructuring of the estate trust and the formation of two family trusts that had taken place in 1986–1987 "entrenched and gave an institutional structure" to those divisions.[22] The Judge further found that family disharmony was having such a deleterious effect on the business of GGH that its major asset (a dealership with Caterpillar Inc) was at risk.[23] In 1986, Caterpillar had gone so far as to refuse to continue the dealership if there were any members of the Gough family serving in any capacity as an employee, a director or a trustee of either of the two family trusts.

[51] There were lengthy negotiations preceding the drafting of the constitution in the mid-1990s, and the Judge was provided with some of the correspondence and background material. At the time the constitution was drafted, none of the directors was a family member.

[52] Having reviewed the documentation, the Judge found that those responsible for drafting the constitution expected that the long-standing family divisions would continue.[24] They were also mindful of the need to address Caterpillar's requirements. It was therefore imperative both to have strict controls on the ability to appoint a family member as a director and to ensure that the controls involved the assent of both branches to the appointment.[25]

[53] In the Judge's view, those considerations found expression in cl 13 by vesting the power of appointment and removal of directors in a trust which was comprised of

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21 At [33].
22 At [34].
23 At [34].
24 At [43].
25 At [44].

both branches and in cl 3 of the third schedule. Clause 3 reflected the expectation that the disharmony would continue and that considerable modification to ordinary majority control by shareholders would be necessary once the institutionalisation of the two branches through the trust structure no longer existed.[26]

[54] The Judge concluded that the reasonable and properly informed observer would find from the context in which the constitution was adopted in 1997 that the intention of the constitution was to prevent any family member holding office as a director in any circumstances without unanimous agreement. He said this view, informed by the relevant background facts, confirmed the "term of appointment" interpretation which he had derived from a consideration of the provisions of the constitution alone.[27]

[55] On appeal, Mr Weston took issue with the Judge's analysis of the background material. In Mr Weston's submission, the documentation shows that cl 3(c) was intended to deal with the position of Caterpillar and not with some concept of equality between the two shareholding blocks. Mr Weston disputed the existence of "long-standing" divisions and pointed out that when the two family members were appointed as directors in 2007, there was no suggestion during the course of that process that they would be automatically removed as directors in the absence of unanimity if and when the head trust came to an end.

[56] We consider Mr Weston's submissions downplay the family divisions. We agree with the Judge that there appears to have been a long history of family disharmony as well as related concerns about family members being involved in governance because of the effect of the resulting disharmony on the business. We also accept that the third schedule was intended to address those concerns and provide a protection in place of the head trust structure.

[57] However, we are not persuaded that this justifies ascribing an intention contrary to the usual meaning of the words and which produces a plainly nonsensical

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[26] At [44].
[27] At [45].

and unworkable result, namely the situation of a single shareholder holding an ongoing power of veto.

[58] Further and more fundamentally, it is, in our view, wrong to assume that a "time of appointment" interpretation completely frustrates the purpose of cl 3(c). Contrary to fears expressed at the appeal hearing, Mr Ben Gough will not be able to stack the Board with B T Gough family members for perpetuity because any new appointment of a family member will require unanimous shareholder consent under cl 3(c). The control of appointments of non-family directors will rest with the B T Gough family but that was always going to be the case under the third schedule because that branch holds the majority of the shares. All directors (family and non-family alike) will be subject to rotation unless they are also employees. There are good reasons why employee directors should be exempt from rotation.

[59] We note too that Mr Ben Gough has always been exempt from rotation. It is true that under the head trust regime he was subject to removal by the head trustees, which will no longer apply under the third schedule, but the head trustees' power of removal was not an absolute one. The extent of the head trustees' powers are apparently a central feature in the Auckland proceeding and it would therefore be inappropriate for us to comment in any detail. Suffice it to say, the powers must be of a fiduciary nature and not unfettered.

An alternative approach

[60] It was evident at the hearing that, were it not for the fact there is an existing director who is both a family member and an employee, a "time of appointment" interpretation would be more palatable to the O T Gough branch.

[61] Significantly, Mr Farmer QC who represents some members of the O T Gough branch acknowledged the difficulties arising from the Judge's interpretation. In what was a departure from the position taken in the High Court, Mr Farmer told us his clients were not arguing that upon cl 3(c) coming into effect, the existing directors who are family members are immediately and automatically disqualified. He submitted that both directors should see out their three-year term and then only be re-appointed if they obtain the unanimous support of shareholders.

Similarly, he submitted a director who turns 70 while holding office should see out his or her term.

[62] Mr Farmer suggested this outcome could be achieved by precluding family members from being entitled to the benefit of the employee exemption from rotation. Clause 6 of the third schedule sets out the exemptions from rotation. It states:

> 6. **Exceptions to rotation:**
>
> (a) The following Directors shall be exempt from the obligation to retire under clause 5:
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> (i) Directors appointed by the Directors, who are subject to re-election under clause 2; and
>
> (ii) Any Director who is in the full time employment of the Company or a subsidiary of the Company.
>
> (b) For the purposes of clause 6, the managing Director shall be included in, and the Directors referred to in clause 6(a)(i) shall be excluded from, the number of Directors upon which the calculation is based.

[63] Mr Farmer submitted that limiting the application of the cl 6(a)(ii) exemption to non-family members could be justified on the basis of the well-established principle that in the event of a conflict between two clauses, the specific must override the general.

[64] Mr Farmer's suggested solution may well represent a sensible basis on which the parties could agree to settle this dispute.

[65] However, whether it is available to the Court is a different question. There are a number of difficulties with it in the context of this appeal.

[66] The first is that it is inconsistent with the Judge's "term of appointment" interpretation and the declaration he issued. There was no cross-appeal or notice to support the decision on other grounds.

[67] The second and more important reason is that, in our view, it would take the Court outside its proper function of interpretation. There is no necessary conflict

between cl 3(c) and cl 6(a)(ii) as would justify imposing such a significant qualification or gloss. Nor is there any "gap" such as to trigger the application of the approach taken in *Attorney General of Belize v Belize Telecom Ltd* as advocated by Mr Johnson.[28]

[68] Clauses 3(c) and 6 deal with different things. One deals with the act of appointment and the other deals with rotation which comes later in time. Further, it is clear the drafters of the constitution did turn their minds to whether the employee exception from rotation should continue to apply in the new regime and made a deliberate choice that it should.

Outcome

[69] In our view, the phrase "no person shall be appointed" as it appears in cl 3(c) of the third schedule should be interpreted as referring to the act of appointment, not the term of appointment. The impact of this is that a member of the Gough family who is a director will not be disqualified upon cl 3(c) coming into operation.

[70] The appeal is therefore allowed. The declaration issued in the High Court is set aside.

[71] As regards costs, it was agreed that costs should follow the event. Accordingly we order the respondents to pay the appellant costs for a standard appeal on a band A basis and usual disbursements. Justice MacKenzie reserved costs in the High Court and we were told that no order has been made. It is therefore unnecessary for us to deal with High Court costs.

Solicitors:
Duncan Cotterill, Christchurch for Appellants
Mortlock McCormack Law, Christchurch for Second Respondents Antony Thomas Gough, Tracy Owen Gough and Harcourt David Gough
Wynn Williams, Christchurch for Second Respondents Alexander Malcolm McKinnon and Avenal Beryl Elizabeth McKinnon

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[28] *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 (UKPC).

APPENDIX

CLAUSE 13 SHOWING AMENDMENTS CONSEQUENT UPON THIRD SCHEDULE BECOMING OPERATIVE

13. DIRECTORS

13.1 **Number of Directors:**

(a) The minimum number of Directors shall be three.

(b) The maximum number of Directors shall be seven.

~~13.2 **Appointment of Directors:**~~

~~(a) Subject to subclause (b) hereof the Head Trustees shall be entitled to appoint and remove any person as a Director of the Company.~~

~~(b) The Head Trustees may, on the recommendation of the Board, appoint any full-time employee of the Company or a subsidiary thereof, as a Director of the Company.~~

~~(c) The appointment and removal of a Director appointed pursuant to subclauses (a) and (b) shall be effected by notice served by the Head Trustees at the registered office of the Company. The removal of a Director appointed under subclause (b) shall not affect the executive position of that person.~~

~~(d) No Director or person who has attained the age of 70 years shall be appointed or reappointed.~~

~~(e) For the avoidance of doubt the right of appointment and removal of all executives of the Company and its subsidiaries shall be vested in the Board who may delegate that power.~~

13.3 **Removal and Cessation of Office of a Director**

A director shall cease being a Director of the Company:-

(a) ~~Upon that Director being removed by notice under clause 13.2(c).~~

(b) Upon a Director giving notice of resignation to the Company such notice to be effective from the date specified therein or if no date is specified then forthwith on that notice being given.

(c) ~~At the annual meeting after that Director attains the age of seventy.~~

13.4 **Rotation:** The Head Trustees shall determine those Directors who are to retire by rotation at the annual meeting of the Company. If the Trustees make no determination as aforesaid then subject to clause 13.5 one third of the Directors (excluding any Directors who are full time employees of the Company or a subsidiary of the Company) shall retire from office at the annual meeting in each year but such one third shall be calculated so that no Director is subject to retirement by rotation except at three yearly intervals. Those to retire shall be those who have been longest in office. If two or more Directors were last elected on the same day the Directors to retire shall be determined by lot unless the Directors agree among themselves.

13.5 **Exceptions to Rotation:** The Directors who are in the full time employment of the Company or any subsidiary of the Company are exempt from the obligation to retire under clause 13.4 but are subject to removal only as a Director (but not as an employee) by the Head Trustees at any time.

13.6 **Disqualification:** Without limiting Section 157, the office of Director shall be vacated if the Director:

(a) Absents himself or herself from the meetings of Directors for a period of three months or does not attend at least one−half of the meetings of Directors held in each year, without special leave of absence from the other Directors; or

(b) Being an employee of the Company ceases such employment provided that the Head Trustees may by direction to the Board waive this provision requiring that employee to vacate office as a Director.

~~13.7 During such time as there are Head Trustees only the Head Trustees shall be entitled to remove and appoint the Directors of the Company or if there are no Head Trustees then the provisions in the Third Schedule hereto shall apply in addition to clauses 13.1, 13.3 (but excluding subclauses 13.3(a) and (c)), 13.4 to 13.6 and 13.8 but with the exclusion of clause 13.2.~~

13.8 **Managing Director:** Without limiting Section 128 or 130:

(a) The Board may appoint one or more of their body to the office of managing Director or managing Directors of the Company either for a fixed term not exceeding five years or without any limitation as to the period for which he or she is or they are to hold such office. The Directors may fix his or her or their remuneration which may be in addition to his, her or their remuneration as an ordinary Director or Directors and may be either by way of salary, commission on profits earned or participation in the profits of the Company or by a combination of two or more of those modes. The Board may terminate that appointment.

(b) Subject to any contract, the managing Director shall be subject to the provisions as regards resignation and removal (as set out in clauses 13.2(c) and 13.3) and disqualification as the other Directors.

(c) The Board may entrust to and confer upon a managing Director any of the powers exercisable by the Board (except the power to issue equity securities, make calls, forfeit Shares, borrow money or issue debentures) upon such terms as they may think fit, either collaterally with or to the exclusion of their own powers, and may revoke, withdraw, alter or vary all or any of those powers.

(d) Every managing Director shall be liable to be dismissed or removed as set out in clause 13.3(c) or by the Board and shall have no right to continue in that office. The only remedy shall be a claim in damages against the Company.

(e) If the managing Director ceases to hold office as a Director from any cause he or she shall cease to be managing Director.

THIRD SCHEDULE

ELECTION OF DIRECTORS

1. **Nomination of Directors**:

   (a) No person (other than a Director retiring at the meeting) shall be elected as a Director at the meeting of Shareholders unless that person has been nominated by a Shareholder entitled to attend and vote at the meeting.

   (b) Subject to clause 3 there shall be no restriction on the person who may be nominated as Directors nor shall there be any precondition to the nomination of a Director other than compliance with time limits in accordance with this clause and that person is less than 70 years of age.

   (c) The opening date (if any) for nominations, shall not be later than three months, and the closing date for nominations shall not be earlier than two months, before the meeting at which the election is to take place.

   (d) Notice of every nomination received by the Company before closing date for nominations shall be given by the Company to all persons entitled to attend the meeting together with, or as part of, the notice of meeting. Failure to do so shall not invalidate the nomination but the meeting, as far as the election of Directors is concerned, shall be adjourned until such notice shall have been given.

   (e) No resolution to appoint or elect a Director (including a resolution to re-elect any Director appointed under clause 2(a)) shall be put to Shareholders unless:

      (i) the resolution is for the appointment of one Director; or

      (ii) the resolution is a single resolution for the appointment of two or more Directors, and a separate resolution that it be so voted on has first been passed without a vote being cast against it.

   (f) Nothing in this clause prevents the election or two or more Directors by ballot or poll.

2. **Appointment by Directors:**

   (a) The Directors may appoint any person to be a Director, either to fill a vacancy or as an addition to the existing Directors.

   (b) Any person who is appointed as a Director by the Directors shall retire from office at the next annual general meeting of the Company, but shall be eligible for re-election at that meeting.

3. **Disqualification from Appointment**

No person shall be appointed as a Director who:

(a) Has attained the age of 70 years;

(b) Is prohibited from holding office under the Act;

(c) Is a member of the Gough family unless all Shareholders unanimously agree.

4. **Alternate Directors:**

(a) A Director may appoint another person to be an alternate Director during his or her absence or inability to act as Director. No Director may appoint another person to act as alternate Director for him or her, except with the consent of a majority of his or her co-Directors. That appointment may be revoked by a majority of his or her co-Directors. A Director may not be appointed to act as alternate for another Director. No Director shall appoint a deputy or agent otherwise than by way of appointment of an alternate.

(b) An alternate Director shall be entitled to all notices of meetings of the Directors and any minutes or documents sent to Directors and to attend and vote at any meetings of Directors but shall not vote at that meeting except in the place of the Director for whom he or she is an alternate. An alternate Director shall not be entitled to be remunerated otherwise than out of the remuneration of the Director appointing him or her. Any appointment so made may be revoked at any time by the appointer. Any appointment or revocation under this clause shall be effected by written notice to the Company.

(c) The appointment of an alternate Director shall be cancelled and an alternate Director shall cease to hold office whenever the Director who appointed him or her ceases to be a Director. A Director retiring at any meeting and being re-elected shall not for the purposes of clause 2 be deemed to have ceased to be a Director.

4. **Removal:**

All Directors shall be subject to removal from office as Directors by Ordinary Resolution.

5. **Rotation:**

Subject to clause 7, at least one-third of the Directors or, if their number is not a multiple of three, then the number nearest to one-third, shall retire from office at the annual meeting each year but shall be eligible for re-election at that meeting. Those to retire shall be those who have been longest in office. If two or more Directors were last elected on the same day, the Directors to retire shall (unless they agree among themselves) be determined by lot.

6. **Exceptions to rotation:**

(a) The following Directors shall be exempt from the obligation to retire under clause 5:

(i) Directors appointed by the Directors, who are subject to re-election under clause 2; and

(ii) Any Director who is in the full time employment of the Company or a subsidiary of the Company.

(b) For the purposes of clause 6, the managing Director shall be included in, and the Directors referred to in clause 6(a)(i) shall be excluded from, the number of Directors upon which the calculation is based.

7. **Re-election:**

The Company at a meeting at which a Director retires may fill the vacated office by electing a person to it. In default a retiring Director shall if offering himself or herself for the re-election be deemed to have been re-elected unless at that meeting it is expressly resolved not to fill the vacated office or unless a resolution for the re-election of that Director is put to the meeting and lost.