IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 95 of 2017 (RPJ)

IN THE MATTER OF THE INTERPRETATION OF ARTICLES OF ASSOCIATION

AND IN THE MATTER OF NBRL GLOBAL, LTD.

BETWEEN:

LEARN CAPITAL VENTURE PARTNERS III, L.P.

PLAINTIFF

AND

NBRL GLOBAL, LTD.

DEFENDANT

IN OPEN COURT

Appearances: Mr Peter McMaster QC, and Mr Daniel Hayward-Hughes on behalf of the Plaintiff

Mr James Eldridge and Adam Huckle on behalf of the Defendant

Before:	The Hon. Justice Raj Parker
Heard:	31st May 2017
Draft Judgment Circulated:	14th June 2017
Released for Publication:	29th June 2017

HEADNOTE

Articles-interpretation-whether ripe for determination-principles to be applied to construing document.

JUDGMENT

1. By way of originating summons dated 16 May 2017 the Plaintiff Learn Capital ("Learn") requested a determination of the true construction of

the articles of NBRL Global, Ltd. dated 26 April 2016, the Defendant to this application (the "company").

2. The summons came on before me shortly in advance of an application by Learn to wind up the company. Both Mr McMaster QC for Learn and Mr Eldridge for the company agreed that the first question was whether or not the court should entertain the application. Mr Eldridge submitted that the matter was not ripe for determination. Mr McMaster QC on the other hand urged me to consider hearing the matter in order to provide clarity for the parties over the proper interpretation of the articles which had caused disputes so far, and to avoid further disputes.

3. Mr Eldridge submitted that although the drafting of the articles and their interpretation was less than ideal, there was no need to resolve the dispute now and the summons ought to be stayed sine die. If the parties fell out over the interpretation in the future, a decision could then be sought. He submitted that this had now become a purely academic point because the company had now reconstituted the board on 26 May 2017 so that there now is a complement of six directors.

4. I indicated that having heard counsel, I had come to the view that this was not an academic or theoretical application which only goes to the potential for future disputes -see for example Ainsbury v Millington [1987] 1 WLR at p 381 per Lord Bridge and the Court of Appeal in a Cayman case Porta Reef v Sawan (Unreported, CICA 26 July 2013 at p 28). I came to the conclusion that an interpretation from the court would serve a useful purpose as Learn contends. This is because the board has had less than six members since 12 October 2016, which resulted in uncertainty as to the legal effect of decisions taken by the board since then. There was also a period of time between 26 April 2017 and 26 May 2017 when the board was not able to properly deal with the winding up petition that Learn had brought. I have also seen the correspondence between the lawyers for the parties on this point. It seems to me that it does make sense and serves a useful purpose to determine the short question that has not been capable of agreement by the parties.

5. I therefore heard from counsel on how the articles ought to be properly interpreted. Having done so I have come to the conclusion that Mr McMaster QC is right in his analysis.

6. The four articles directly in point are as follows:

"69 There shall be a Board of Directors consisting of six (6) persons provided however that the Company may from time to time by Ordinary Resolution increase or reduce the limits on the number of Directors, subject to Article 7.6.1 [...]

70 The business of the Company shall be managed by the Directors who may exercise all the powers of the Company [...] A duly convened meeting of Directors at which a quorum is present may exercise all powers exerciseable by the Directors.

77 The quorum for the transaction of the business of the Directors may be fixed by the Directors, and unless so fixed shall be a simple majority of directors if there are four (4) or more Directors and shall be unanimous attendance if there are only three (3) or fewer directors

82 The continuing Directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to these Articles as the necessary quorum of Directors the continuing Directors or Director may act for the purpose of increasing the number of Directors to that number, or of summoning a general meeting of the Company, but for no other purpose."

7. The critical question is to determine what "quorum" means within the articles. I accept that the articles have to be read as a whole and should be construed as a business document so as to give them business efficacy. The well-known recent decision of the UK Supreme Court in Arnold v Britton [2015] UKSC 36 makes it clear that (per Lord Neuberger) the test is that of a reasonable person in possession of the relevant facts. There is an even more recent decision of the UK Supreme Court in Wood v Capita Insurance Services Ltd [2017] UKSC 24 per Lord Hodge who said that (at paragraphs 10 and 12): "The court's task is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause, but the court must consider the contract as a whole and depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching the view as to that objective meaning.

....

"This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated."

8. The parties disagree about the board's ability to function when the number of directors in office drops below the number (6) fixed in accordance with article 69. Mr Eldridge argues that this is the minimum number necessary to conduct business. He submits that the number specified is six and if the number falls to less than six then the board is not quorate and needs to be reconstituted under article 82. He says the only thing a board can do in those circumstances is to vote to make up the numbers to six again or to summon a general meeting. It cannot get on

with the ordinary business of the company unless and until that happens. He says that can easily be done and the board can easily reconstitute itself, as it had recently shown. It is also now able to ratify any decisions it took when it dropped to below six from October 2016 until recently.

9. In terms of shareholder rights, the Series Seed Preference shareholders (Learn) in accordance with the articles, may elect one director; and the ordinary shareholders may elect four. The remaining director can be elected by the ordinary shareholders and Learn voting together (7.5.2(a) of the articles). That route has, not surprisingly, given rise to some difficulty in view of the litigation Learn has brought. Mr Eldridge relies on article 7.5.2 (b) which provides that any vacancy on the board "...may be filled by a majority of the directors then in office, though less than a quorum, or by a sole remaining director.....". That is subject to the proviso however that where the shareholders have elected the post left vacant they can override the directors' decision. He says that is the mechanism by which the balance of power among shareholders is maintained and that I should construe articles 69 and 82 in accordance with that.

10. In my view article 69 is not to be read in isolation without reference to the following articles which provide for what happens when the Board of Directors consists of fewer than six persons. I find that the board can self-evidently function when the number falls below six because article 70 provides that a duly convened meeting of directors at which a quorum is present may exercise all powers exerciseable by the directors. I find that "quorum" should be construed by reference to articles 77 and 82 which expressly contemplate the board functioning with fewer than six members.

11. The correct interpretation of article 82 results in the conclusion that that the board can function if fewer than six, but is nevertheless "quorate" as contemplated by article 77. That fits naturally with article 82 which provides that the directors may act to transact the business of the company notwithstanding any vacancy in their number. Indeed article 77 contemplates the board falling to very low numbers: a unanimous number of votes are needed where attendance is three or fewer directors; and a majority if there are four. I find that the business of the company can still be transacted in those circumstances.

12. This allows for the company to hold meetings and exercise the company's powers from time to time when its board may fall below the number provided for in article 69. That number may of course from time to time by ordinary resolution be increased or reduced.

13. It follows that Learn's originating summons succeeds and that in any case where the number of duly appointed directors is below six the directors may exercise their powers under article 70 provided the requirement for a quorum under article 77 is met.

14. I award Learn its reasonable costs of this application to be taxed if not agreed.

JUDGE OF THE GRAND COURT
RAJ PARKER