

CONNECTIVE SERVICES PTY LTD & ANOR v SLEA PTY LTD & ORS
(M203/2018)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2018] VSCA 180

Date of judgment: 27 July 2018

Special leave granted: 14 December 2018

The Appellants ("Connective") were registered in 2003. Each of their constitutions contain pre-emptive rights in respect of the transfer of shares, requiring a member who wishes to transfer shares of a particular class to first offer those shares to existing holders of that class. At all relevant times, the shareholders in Connective were the first respondent ("Slea") and the third respondent ("Millsave").

On or about 12 August 2010, Slea and the second respondent ("Minerva") entered into an agreement ("the accommodation agreement"). The existence of that agreement was not disclosed by Slea until 14 December 2011 when it revealed it in a defence it filed in a Supreme Court proceeding. Connective commenced proceedings against the respondents on 11 August 2016, alleging that the accommodation agreement triggered the pre-emptive rights provisions of the Connective constitutions and seeking orders compelling Slea to comply with its obligations under those provisions ("the pre-emptive rights proceeding").

On 4 October 2016, Slea and Minerva applied for orders staying or dismissing the pre-emptive rights proceeding. The application was brought on three grounds: (a) that by commencing the proceeding in reliance upon the accommodation agreement which had been obtained through discovery in other proceedings, Connective had breached an implied undertaking not to use that agreement for any purpose other than those proceedings; (b) that instituting the proceeding was in breach of s 260A of the *Corporations Act 2001* (Cth); and (c) that Connective did not have standing to enforce the pre-emptive rights or to seek the relief they claim in the proceeding.

On 12 May 2017, Almond J rejected the s 260A ground and the standing ground, but upheld the first ground and stayed the proceeding as an abuse of process. On 2 June 2017, Connective applied to lift the stay ordered by Almond J and for leave *nunc pro tunc* to use the accommodation agreement for the purpose of instituting the proceeding. On 22 November 2017, Judd J granted the leave sought; and lifted the stay ordered on 12 May 2017.

Slea and Minerva applied to the Court of Appeal for leave to appeal from that part of the decision of Almond J in which his Honour dismissed the ground based on s 260A of the *Corporations Act 2001* (Cth). That section provides that a company may financially assist a person to acquire shares in the company only if giving the assistance does not materially prejudice the interests of the company or its shareholders or the company's liability to pay its creditors.

The Court of Appeal (Ferguson CJ, Whelan and McLeish JJA) held that the conduct of Connective in commencing and pursuing the pre-emptive rights proceeding, by reason that Connective was liable to pay for its own legal costs and potentially the legal costs of the respondents, was “financial assistance” within the meaning of s 260A(1).

The Court noted that the relief sought in the proceeding was an order compelling Slea to offer its shares to Millsave and a shareholder of Connective, Mark Haron. On the Connective companies’ case, absent a court order Slea would not make the offer. The commercial consequence was that some action has to be taken to enforce the existing right. The purpose of the proceeding was to compel Slea to make the offer. If Slea were forced to do so, Millsave and Mr Haron would have the option of accepting the offer and, if they did accept, of acquiring the shares. The proceeding sought to procure that outcome. This ‘assists’ Millsave and Mr Haron to both obtain the offer (which is an ‘option’) and to acquire the shares (if they decide to do so). The ‘assistance’ is properly characterised as ‘financial assistance’ because the assistance given to Millsave and Mr Haron comes at a financial cost. The Connective companies have incurred, and will continue to incur, legal costs in instituting and pursuing the proceeding. They have also undertaken a potential cost liability. There is no evidence that Millsave and Mr Haron have incurred any costs or taken on any potential cost liability. There is, therefore, in the relevant sense a net transfer of value from the company, which is bearing the cost, to the shareholders other than Slea, who will receive the benefit.

The grounds of the appeal include:

In dealing with the question of relief against financial assistance under s 260A of the *Corporations Act 2001* (Cth) the Court of Appeal erred in holding that:

- Each appellant’s institution of proceedings, incurring and continuing to incur the legal costs of such proceedings and exposure to the risk of an adverse costs order in such proceedings was capable of amounting to financially assisting a person to acquire shares in the appellants in terms of s 260A.