Lian Hwee Choo Phebe and Another v Maxz Universal Development Group Pte Ltd and Others [2009] SGCA 4

Case Number : CA 61/2008

Decision Date : 13 January 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Suresh Nair and Tan Chin Kwan Jonathan (Allen & Gledhill LLP) for the appellants; Edmund Kronenburg and Leong Kit Wan (Tan Peng Chin LLC) for the first respondent; Harpreet Singh Nehal SC and Dawn Ho (Drew & Napier LLC) for the second respondent; Siraj Omar and See Chern Yang (Premier Law LLC) for the third respondent

Parties : Lian Hwee Choo Phebe; Kok Lan Choo — Maxz Universal Development Group Pte Ltd; Tan Boon Kian; Seeto Keong; Wong Choon Hoy

Companies – Memorandum and articles of association – Whether article providing for increase in share capital referred only to authorised share capital – Whether abolition of authorised share capital rendered said article otiose

Statutory Interpretation – Construction of statute – Interpretation of provisions in Schedule to an Act – Whether provision in Schedule could circumscribe provision in main Act

13 January 2009 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 At the heart of this appeal lies the proper construction of Art 32 of the articles of association of Maxz Universal Development Group Pte Ltd ("MDG"), the first respondent herein. The issue arose because of an important change made to the then Companies Act (Cap 50, 1994 Rev Ed) ("CA 1994") which abolished two requirements, namely, par value and authorised share capital, and the question before this court is whether, and if so how, the repeal of the requirement of authorised share capital affects the interpretation of Art 32 of MDG's articles of association ("the MDG Articles"). The said Art 32 is *in pari materia* with Art 40 of Table A in the Fourth Schedule to CA 1994 ("Table A (1994)"). This issue is of importance to companies in general because Art 32 is a common provision which is found in the articles of association of a large number of companies.

2 This appeal arose from the determination of a preliminary issue by the judge below ("the Judge"), pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), that a share issuance resolution passed at an extraordinary general meeting ("EGM") of MDG did not contravene Art 32 of the MDG Articles.

3 It may be helpful to set out briefly the context of the dispute between the parties. MDG, incorporated on 6 March 2000, is a holding company and its main assets are shares in Treasure Resort, a hotel on Sentosa. Before the present dispute arose, the two appellants each held an 18.18% stake in MDG. Following the passing of the share issuance resolution in question whereupon a share issuance exercise was held subsequently, each of the appellants' stake in the company was reduced to 2.77%. The appellants contend that the aim of the share issuance exercise was to dilute their shareholding and that the share issuance resolution was procured for collateral purposes by the

directors acting in breach of their duties. A further bow to their arrow was the contention that the share issuance resolution breached Art 32 of the MDG Articles because it did not prescribe the specific number of shares to be issued. It is this specific omission with which the present appeal is concerned. The Judge had, pursuant to the request of the parties, ruled on it as a preliminary issue.

4 The share issuance resolution in question was passed at an EGM of MDG on 13 December 2007 and it reads as follows:

> **ORDINARY RESOLUTION**
>
> **SECTION 161 AUTHORITY TO ALLOT AND ISSUE SHARES**
>
> RESOLVED THAT pursuant to the provisions of Section 161 of the Companies Act, Cap. 50 (the "Act") and the Articles of Association of the company, the Directors be and are hereby authorised to issue shares of the Company to such persons on such terms and conditions and with such rights or restrictions as they may think fit to impose and that such authority shall continue in force until the conclusion of the next Annual General Meeting or the expiration of the period within which the next Annual General Meeting of the Company is required by law to be held, whichever is the earlier.

5 Article 32 of the MDG Articles states:

> The Company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

Positions of the parties

6 The appellants contend that on a plain reading of Art 32 of the MDG Articles, the share issuance resolution was invalid because it did not prescribe the specific number of shares to be issued. The respondents' position is that the phrase "share capital" in Art 32 refers only to the *authorised* share capital of the company and, following the abolition of the concept of authorised share capital from 30 January 2006, Art 32 is no longer applicable. It has become otiose. The appellants, however, argue that the current effect of Art 32 is that *all* share issuances require the authority of the shareholders and every resolution of the shareholders which is passed to approve the issue of new shares must satisfy the requirements prescribed in that article, *ie*, to specify the precise quantum of the new shares to be issued.

Decision below

7 In dismissing the appellants' case, the Judge held that Art 32 of the MDG Articles had been rendered otiose by the legislative change abolishing the requirement of authorised share capital. He rested his decision on the following bases:

> (a) In determining the construction of Art 32, the proper approach was to examine its meaning in the light of the circumstances prevailing at the time MDG was incorporated (*viz*, 6 March 2000). At that time, Art 32 was understood to apply only where it was proposed to increase the *authorised* share capital and not an increase in paid-up or issued share capital.
>
> (b) Interpreting Art 32 in this way would be consistent with Art 4(a) of the MDG Articles, which effectively devolved the general powers of the company to issue shares to the board of MDG.

(c) On the other hand, to interpret Art 32 as requiring shareholders to authorise all share issuances would run counter to Art 4(a).

(d) The scope of s 161 of the Companies Act (Cap 50, 2006 Rev Ed) ("CA 2006") sufficiently protected shareholders in circumscribing the powers of the directors in issuing shares.

Grounds of appeal

8 The appellants brought the present appeal on the following grounds:

(a) Article 1 of MDG Articles states that "Table A in the Fourth Schedule to the Act shall not apply to [MDG] except so far as the same are repeated or contained in [the MDG] Articles" while Art 2 defines "[t]he Act" as "[t]he Companies Act, (Cap. 50) and any statutory modification or re-enactment thereof for the time being in force" and therefore the MDG Articles are not to be interpreted in accordance with the provisions of the Companies Act prevailing as at the date of MDG's incorporation.

(b) The literal reading of Art 32 of the MDG Articles should be the correct interpretation in the light of the decision in *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 ("*Bratton*").

(c) A literal interpretation of Art 32 is consonant with Art 4 of the MDG Articles.

(d) Section 161 of CA 2006 does not protect minority shareholders adequately.

9 Stripped of its husk, the pith of the appellants' case is really this: Article 32 of the MDG Articles is *in pari materia* with Art 40(*a*) of Table A (1994). Even though Art 40(*a*) previously dealt with a company's issuance of shares beyond its *authorised* share capital, it was not repealed by the Legislature in tandem with the abolition of the concept of authorised share capital in 2006. It must therefore follow that Art 40(*a*) now applies to regulate *every* issuance of shares by the company. Accordingly, the resolution passed at the EGM of MDG contravened Art 32 of the MDG Articles because it did not specify the number of new shares which the board of MDG was authorised to issue.

10 At this juncture, we should explain that when the Companies (Amendment) Act 2005 (Act 21 of 2005) came into force on 30 January 2006 and abolished the authorised share capital requirement by repealing the then existing ss 22(1)(*c*) and 71(1)(*a*) of CA 1994, it did not at the same time repeal Art 40(*a*) of Table A (1994). Instead, it was by way of a miscellaneous Act, the Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act 42 of 2005), enacted a little later the same year but brought into operation on the same day as Act 21 of 2005, that the reference in Art 40(*a*) of Table A (1994) to par value was removed, while the rest of Art 40(*a*) was still retained. At [21] below, the previous and the current versions of Art 40(*a*) are set out for ease of reference.

Interpretation of articles of association in the light of subsequent legislative changes

11 It is irrefragable that the articles of association of a company are, in essence, terms of an enforceable contract between the company and its members, and among the members *inter se*, upon which the ordinary canons of interpretation relating to contracts are to apply (see generally *Australian Corporation Law* (Butterworths, 1991, Looseleaf) vol 1 at para 2.4.0025 (Service 158, June 2008)). A key canon of interpretation relevant to the present case is that the court would have regard to the "*legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted" [emphasis in original] (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold*

Interior Design Construction Pte Ltd [2008] 3 SLR 1029 at [131], citing Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) at para 1.127). As a general rule, a contract must be interpreted as at the date it was made; it must be interpreted in the light of the circumstances prevailing on that date. To accept the argument the other way would, in a sense, lead to the result that "a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later" (see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603 *per* Lord Reid).

12 Notwithstanding that, we are conscious that Branson J in *Re GIGA Investments Pty Ltd* (1995) 17 ACSR 472 ("*Re GIGA*") at 476 astutely noted:

> Orthodox rules of construction would require that the words of the articles of association be given the meaning which they had as at the date of their adoption. …
>
> However, without departing from the orthodox rules of construction, courts are, in my view, entitled to recognise that articles of association are instruments of company governance intended to endure and to be capable of operating with flexibility in changing circumstance (cf the approach of the High Court to the interpretation of the Constitution …).

In *Re GIGA*, the issue was whether a "meeting" of the directors, as required by the articles of a company, was a valid one when one director was not physically present but was "present" via telephone. Branson J analysed the purposes and objectives behind a directors' meeting and held that the meeting was a valid one.

13 This somewhat dynamic approach to interpretation, particularly in relation to a document which is to endure for a long time, such as the rules governing a body, appears to have been adopted by Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 4th Ed, 2007) where the author states at p 185:

> There is a presumption that a contract must be interpreted as at the date when it was made; that words must be given the meaning which they bore at that date, and where the meaning has changed, evidence is admissible to prove the original meaning. However, in the case of a contract intended to endure for a long time, the presumption may be rebutted.

14 In relation to the question how a document should be construed in the light of a subsequent change in legislation, Lewison writes (*id*, at pp 130–131):

> *Where statute law changes, the court must decide how to apply the words of the contract to the changed circumstances*. In *Debenhams Retail Plc v Sun Alliance and London Assurance Co Ltd* [[2005] 3 EGLR 34] a lease provided for a turnover rent as a percentage of the tenant's "gross amount of total sales". When the lease was granted in 1965 purchase tax was levied on certain goods. Purchase price was replaced by VAT in 1973. The issue was whether VAT was to be included in the "gross amount of sales". The Court of Appeal held that it was. Mance L.J. said:
>
> > "To speak even of objective intention in such circumstances involves some artificiality. Even if we were judicial archaeologists, we would find in the wording of the lease negotiated in 1965 no actual or buried intention regarding VAT, since it was introduced in April 1973, and the regime in force in 1965 was the different purchase tax regime. But no-one suggests that the lease cannot or should not apply in the changed circumstances. *We have to promote the purposes and values which are expressed or implicit in the wording, and to reach an*

interpretation which applies the lease wording to the changed circumstances in the manner most consistent with them."

[emphasis added]

Put simply, in deciding how the words of a contract should apply in the context of a subsequent change in legislation, the court has to first carefully dissect the purposes and the values embedded within the relevant provisions of the contract. The interpretation reached must be one which is in consonance with the purposes and the values of those provisions.

15 Applying these principles to the present case, the court first has to scrutinise the original intention behind Art 32 of the MDG Articles as at the time of MDG's incorporation by, *inter alia*, considering the origins and genealogy of the phraseology employed in that article. The court then has to consider how that article can be interpreted in a way which promotes its purposes and values in the light of the subsequent legislative changes. Before we proceed to undertake this task, it may be expedient, at this stage, to dispose of the appellants' first two grounds of appeal (see [8] above).

Articles 1 and 2 of the MDG Articles

16 To recapitulate, the appellants contend that Arts 1 and 2 of the MDG Articles show that the articles are to be construed in accordance with the Companies Act that is in force at the time of the dispute. Article 32 of the MDG Articles is almost a mirror image of the then prevailing Art 40(*a*) of Table A (1994). Notwithstanding the abolition of the authorised share capital requirement, Art 40(*a*) still remains in CA 2006, in Table A in the Fourth Schedule to CA 2006 ("Table A (2006)"), although its language has changed somewhat (see comments in [10] above and see [21] below for a comparison). This, the appellants contend, must mean that Art 32 does not relate only to share issuances beyond the authorised share capital.

17 Articles 1 and 2 of the MDG Articles read:

TABLE A

1. The regulations in Table A in the Fourth Schedule to the Act shall not apply to the Company except so far as the same are repeated or contained in these Articles.

INTERPRETATION

2. In these Articles the words standing in the first column of the Table next hereinafter contained shall bear the meanings set opposite to them respectively in the second column thereof, if not inconsistent with the subject or context.

<u>WORDS</u> <u>MEANINGS</u>

…

The Act – The Companies Act, (Cap. 50) and any statutory modification or re-enactment thereof for the time being in force.

…

18 As the respondents keenly pointed out, the appellants' argument fails *in limine*. The article in question, Art 32, does not contain the words "the Act" and therefore Arts 1 and 2 are irrelevant. In

fact, Art 1 makes it clear that the provisions in Table A in the Fourth Schedule to the Companies Act for the time being in force shall not apply to MDG *unless* the relevant provisions have been expressly incorporated in the MDG Articles. In such circumstances, it is difficult to see how it could be said that Arts 1 and 2 mandate that every article of the MDG Articles should now be construed in accordance with the Act currently in force (in this case, CA 2006).

19 The second argument to be addressed is the appellants' reliance on the case of *Bratton* ([8] *supra*) for the proposition that the court ought not to imply the word "authorised" into the term "share capital". However, it is important to understand what it was that was being sought to be implied in that case. In *Bratton*, the issue before the UK Court of Appeal was whether it was possible to imply into the articles of association of a company set up to manage a development of flats a term that the shareholders, who were the owners of the flat, should make contributions for the upkeep of the amenity areas of the development. Steyn LJ drew a distinction (at 698) between implying a term purely from the language of the document itself, *ie*, constructional implication, and implying a term into the articles of association from extrinsic circumstances. As a matter of principle, we respectfully agree with Steyn LJ that the court should be careful in seeking to imply a term in the latter situation. However, this case is not such a case, because, as we shall see from the genealogy of Art 32 of the MDG Articles, no such implication is sought here. The term "share capital" in Art 32 had always been understood to refer *specifically* to authorised share capital.

20 We now turn to consider what the original intention behind Art 32 was and, in this regard, to examine its genealogy and whether the subsequent legislative changes affect the objectives contemplated by that article.

Genealogy of Article 32 of the MDG Articles

21 For ease of explication, the relevant provisions are tabulated below:

Article 32 of the MDG Articles	The Company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.	
	Legislative provision	**Table A**

Companies Act 1948 (c 38) (UK) ("UK CA 1948")	**61.**—(1) A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum as follows, that is to say, it may — (*a*) increase its share capital by new shares of such amount as it thinks expedient; ...	44. The company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

Companies Act 1985 (c 6) (UK) ("UK CA 1985") and Companies (Tables A to F) Regulations 1985 (SI 1985 No 805) (UK)	**121.**—(1) A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum in any of the following ways. (2) The company may — (*a*) increase its share capital by new shares of such amount as it thinks expedient; ...	**32.** The company may by ordinary resolution - (a) increase its share capital by new shares of such amount as the resolution prescribes; ...

CA 1994	**71.**—(1) A company, if so authorised by its articles, may in general meeting alter the conditions of its memorandum in any one or more of the following ways: (*a*) increase its share capital by the creation of new shares of such amount as it thinks expedient; ...	40. The company may from time to time by ordinary resolution — (*a*) increase the share capital by such sum to be divided into shares of such amount as the resolution shall prescribe; ...
CA 2006	Section 71(*a*) repealed	40. The company may from time to time by ordinary resolution do one or more of the following: (*a*) increase the share capital by such sum as the resolution shall prescribe; ...

22 It is germane to note that "[w]here 'capital' is used in relation to share capital, its precise meaning depends upon the commercial or legislative context in which it is used" (see *Australian Corporation Law* ([11] *supra*) vol 1 at para 2.6.0005 (Service 152, July 2007) citing *Incorporated Interests Proprietary Limited v The Federal Commissioner of Taxation* (1943) 67 CLR 508 at 515). From the excerpts set out at [21] above, it would be seen that Art 32 of the MDG Articles is identical with Art 44 of Table A in the First Schedule to the UK CA 1948 ("UK Table A 1948"). Article 44 of UK Table A 1948 was derived from s 61(1)(*a*) of the UK CA 1948 (see *Halsbury's Laws of England* vol 6 (Butterworth & Co (Publishers) Ltd, 3rd Ed, 1954) at para 311. Therefore, as one would expect, the language of Art 44 of UK Table A 1948 is akin to s 61(1)(*a*) of the UK CA 1948 which read:

Power of company limited by shares to alter its share capital

61.—(1) A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum as follows, that is to say, it may —

(*a*) *increase its share capital by new shares of such amount as it thinks expedient*;

…

[emphasis added]

23 Section 61(1)(*a*) of the UK CA 1948 subsequently took the form of ss 121(1) and 121(2)(*a*) of the UK CA 1985 but its substance remained unchanged:

Alteration of share capital (limited companies).

121.—(1) A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum in any of the following ways.

(2) The company may —

(*a*) *increase its share capital by new shares of such amount as it thinks expedient*;

…

[emphasis added]

What was changed, however, was that Art 44 of UK Table A 1948 was amended to track the wording of s 61(1)(*a*) of the UK CA 1948 more closely. It became Art 32 of Table A in the Companies (Tables A to F) Regulations 1985 (SI 1985 No 805) (UK) ("UK Table A 1985") and read:

ALTERATION OF SHARE CAPITAL

32 The company may by ordinary resolution -

(a) *increase its share capital by new shares of such amount as the resolution prescribes*;

…

[emphasis added]

24 It would be reasonable to assume that since the underlying legislation was unchanged, the change of Art 44 of UK Table A 1948 into Art 32 of UK Table A 1985 was to be regarded as merely semantic and that the object of the articles remained unaffected. It is incontrovertible that Art 44 of UK Table A 1948 (subsequently Art 32 of UK Table A 1985) was the embodiment of s 61(1)(*a*) of the UK CA 1948 (subsequently s 121(2)(*a*) of the UK CA 1985). There are ample academic works which have opined that s 61(1)(*a*) of the UK CA 1948 was intended to regulate *only* the issuance of shares beyond the authorised share capital and not *all* issuances, and that it was only whenever a company

wanted to issue shares beyond its authorised share capital that the shareholders had to pass an ordinary resolution (see Geoffrey Morse & Stephen Girvin, *Charlesworth's Company Law* (Sweet & Maxwell, 17th Ed, 2005) at p 147; *Gore-Browne on Companies* (Jordans, 45th Ed, 2004, Looseleaf) vol 2, ch 26 at para 2 (Update 71, May 2008); *Palmer's Company Law* (Sweet & Maxwell, 25th Ed, 1992, Looseleaf) vol 1 at para 4.203 (Release 86, December 1998)). The phrase "share capital" used in s 61(1)(*a*) of the UK CA 1948 and Art 44 of UK Table A 1948 meant "*authorised* share capital". Accordingly, at the time of MDG's incorporation, a provision like Art 32 of the MDG Articles was meant to provide a mechanism to facilitate the increase of a company's authorised share capital pursuant to the then existing s 71(1)(*a*) of CA 1994, our equivalent of s 61(1)(*a*) of the UK CA 1948. It was not meant to apply to a resolution to increase the *issued* or *paid up* capital. It is pertinent to note that the appellants conceded before the court below that, prior to the abolition of the requirement of authorised share capital in Singapore, Art 32 of the MDG Articles applied only in relation to an increase in authorised share capital and that was how MDG and its shareholders had understood and applied that article.

25 Indeed, as was observed by the Judge, the shareholders of MDG (including the appellants) had granted blanket approvals under s 161 of CA 1994 to the board of MDG in 2000, 2001 and 2002 without a corresponding authorisation by the shareholders for every specific issuance. More will be said of s 161 later. In 2005, the shareholders of MDG (including the appellants) similarly granted a blanket approval under s 161 to the board and another resolution was passed to increase the authorised share capital by a specific sum. In other words, prior to 2006, all the parties had understood that Art 32 of the MDG Articles was to apply only where shares were sought to be issued in excess of the authorised share capital. There was no evidence tendered to show that, following the abolition of the requirement of authorised share capital in 2006, the parties intended Art 32 to regulate every share issuance.

26 At this juncture, we pause to observe that the law currently in force in the UK is the Companies Act 2006 (c 46) (UK) ("UK CA 2006") which is expected to abolish the requirement of authorised share capital on 1 October 2009, as Singapore did in 2006. As mentioned before at [24] above, prior to the abolition of this requirement of authorised share capital, the local equivalent of s 61(1)(*a*) of the UK CA 1948, which later became s 121(2)(*a*) of the UK CA 1985, was s 71(1)(*a*) of CA 1994 which read:

> **71**.—(1) A company, if so authorised by its articles, may in general meeting alter the conditions of its memorandum in any one or more of the following ways:
>
> > (*a*) increase its share capital by the creation of new shares of such amount as it thinks expedient;
> >
> > …

The corresponding article in Table A (1994) was Art 40(*a*), which read:

> *Alteration of capital*
>
> 40. The company may from time to time by ordinary resolution —
>
> > (*a*) increase the share capital by such sum to be divided into shares of such amount as the resolution shall prescribe;
> >
> > …

It would be seen that Art 40 of Table A (1994) was, for all intents and purposes, similar to Art 32 of the UK Table A 1985 (see [21] above for a comparison).

27 Difficulties set in when Singapore abolished the requirements of par value and authorised share capital in 2006 by only repealing ss 22(1)(*c*) and 71(1)(*a*) of CA 1994 but not the corresponding s 40(*a*) of Table A (1994). Instead, Parliament amended Art 40 to the following:

> *Alteration of capital*
>
> 40. The company may from time to time by ordinary resolution do one or more of the following:
>
> (*a*) increase the share capital by such sum as the resolution shall prescribe;
>
> (*b*) consolidate and divide all or any of its share capital;
>
> (*c*) subdivide its shares or any of them, so however that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;
>
> (*d*) cancel the number of shares which at the date of the passing of the resolution in that behalf have not been taken or agreed to be taken by any person or which have been forfeited and diminish the amount of its share capital by the number of the shares so cancelled.

28 A comparison of Art 40(*a*) of Table A (1994) and the current Art 40(*a*) of Table A (2006) would show that the Legislature had removed all references to *par value* in the current Art 40(*a*) but had left intact what seems to be a reference to authorised share capital. As mentioned before, Art 40(*a*) of Table A (1994) related to the requirement of authorised share capital, and it ought logically to have been repealed together with the repeal of s 71(1)(*a*) of CA 1994 which was its corresponding statutory equivalent in the main body of the Act. Does it therefore mean that the current Art 40(*a*) of Table A (2006), and in turn a provision like Art 32 of the MDG Articles, now apply to *all* share issuances?

29 In this regard, it may be useful if we refer to how two other common law jurisdictions have effected similar changes. Australia abolished the requirement of authorised share capital in 1998 and repealed, *inter alia*, s 193(1)(a) of the Corporations Act 1989 (No 109 of 1989) (Cth) which was their equivalent of s 71(1)(*a*) of our CA 1994. At the same time, Australia repealed, *inter alia*, the corresponding article in their Table A. (The Australians abolished Table A and selected 40 provisions in their Corporations Act to act as "replaceable rules" in a company's constitution.) The UK CA 2006 abolished the concept of authorised share capital and *Buckley on the Companies Acts* (LexisNexis Butterworths, 2000, Looseleaf) Binder III, Division P at para T[A32.11] (Issue 13, July 2007) notes that, correspondingly, Art 32 of the UK Table A 1985 will "no longer be appropriate". In short, it appears anomalous for Singapore to retain Art 40(*a*) of Table A (1994) when s 71(1)(*a*) of CA 1994 has been repealed. Be that as it may, the fact remains that the Legislature had seen it fit to retain Art 40(*a*) by even specifically amending its terms to remove the reference to par value.

Relationship between Article 40(*a*) of Table A (2006) and section 161 of CA 2006

30 We would first underscore that the current Art 40(*a*) of Table A (2006), like its earlier version, is not a statutory provision that automatically applies to a company. It has to be expressly

incorporated by the articles of association of each company. Obviously, Art 40(*a*) of Table A (2006) must be read together with s 161 of CA 2006. Section 161 reads:

> **Approval of company required for issue of shares by directors**
>
> **161.**—(1) Notwithstanding anything in a company's memorandum or articles, the directors shall not, without the prior approval of the company in general meeting, exercise any power of the company to issue shares.
>
> (2) Approval for the purposes of this section may be confined to a particular exercise of that power or may apply to the exercise of that power generally; and any such approval may be unconditional or subject to conditions.
>
> (3) Any approval for the purposes of this section shall continue in force until —
>
> (*a*) the conclusion of the annual general meeting commencing next after the date on which the approval was given; or
>
> (*b*) the expiration of the period within which the next annual general meeting after that date is required by law to be held,
>
> whichever is the earlier; but any approval may be previously revoked or varied by the company in general meeting.
>
> ...

31 The appellants contend that the current Art 40(*a*) envisages two separate procedures in every share issuance: first, the authorisation of the increase in share capital by the shareholders of a company, and second, the subsequent share issuance by the board of the company. The appellants submit that the effect of Art 40(*a*), read with s 161 of CA 2006, is that s 161 is effectively overridden because Art 40(*a*) mandates shareholders' approval for *all* share issuances. Section 161 only operates as an additional stratum of protection *if* the articles of a company allow the directors to issue shares limitlessly.

32 This construction is not only intuitively unattractive but is also unsound because it seeks to use an article in a schedule to an Act to circumscribe a provision in the main body of the Act. In this regard, we would highlight s 5 of the Interpretation Act (Cap 1, 2002 Rev Ed) which provides that every schedule to an Act shall be construed and have effect as part of the Act. It seems to us that the correct approach would be to seek to read the provisions in the main body of the Act with those in the schedule harmoniously, having regard to what the legislative intent is. The suggested construction of the appellants also overlooks the fact, as we have pointed out at [30] above, that Art 40(*a*) of Table A (2006) does not have automatic application to a company. It must be expressly incorporated. Moreover, as highlighted by the respondents, it is also not in line with the comments in the *Report of the Company Legislation and Regulatory Framework Committee* (October 2002). In that report, the Company Legislation and Regulatory Framework Committee ("CLRFC") had deliberated on whether the abolition of the requirement of authorised share capital warranted an amendment of s 161 of CA 1994. The CLRFC stated in Recommendation 1.13 of the report, as follows:

> 6.5 Shareholder authorisation for allotment of shares
>
> 6.5.1 [Section] 161, CA [*ie*, CA 1994] requires shareholders' authorisation for directors to allot

shares, unless the directors have been specifically authorised to do so by the shareholders or by the company's articles.

6.5.2 When the Companies (Amendment) Bill was read in 1974 with respect to this provision, the rationale for *s.* 161, CA was primarily to protect the interests of shareholders against dilution and *to allow them to be apprised of the reasons for capital enlargement*. *The approval of the shareholders need not be sought for each issue of shares as the CA permits renewable blanket annual approvals. We considered the positions in Australia and New Zealand, all of which do not statutorily prescribe the need for shareholder approval for the issue of new shares*, thus leaving it to be determined by each company's articles of association. We note that for listed companies, the SGX Listing Rules would continue to require shareholder approval or mandates for share issues which will provide continuing protection against dilution for minority shareholders.

6.5.3 We do not however recommend any change to the Singapore position as we are not aware of any change in conditions which detract from the policy reasons underpinning the introduction of the requirement for shareholder approval for the issue of new shares in 1974.

[emphasis added]

33 The subsequent debate in Parliament over the abolition of the requirements of par value and authorised share capital did not mention anything contrary to the views of the CLRFC but, instead, reiterated that the amendments to the Act were to "give effect to the ... recommendations of the CLRFC" (see *Singapore Parliamentary Debates, Official Report* (16 May 2005) vol 80 at col 698 (Raymond Lim Siang Keat, Second Minister for Finance)). In other words, the appellants' construction of Art 40(*a*) of Table A (2006) and s 161 of CA 2006 (see [29] above) flies in the face of the CLRFC's statement emphasised at [32] above.

34 Indeed, whilst the Legislature wanted to give some form of protection to the shareholders of a company via s 161 of the Companies Act, it did not want to interfere unduly with the directors' business of managing the company. In introducing s 161 in 1974, the then Minister for Finance, Mr Hon Sui Sen, said (see *Singapore Parliamentary Debates, Official Report* (27 March 1974) vol 33 at col 957):

> The unfettered discretion of directors to issue shares (once authorised) has sometimes worked to the detriment of shareholders, for example, by diluting shareholders' capital in certain circumstances. The imposition of the proposed form of control will apply to the issue of shares for cash or for other consideration. Its effect will be to give more control to shareholders *without interfering unduly with the directors' business of managing the company*. [emphasis added]

That was precisely why blanket approvals were allowed and directors were not required to seek approval for every single share issuance once such approvals were given. Section 161 does not require that the approval granted by the general meeting to the board of a company to issue new shares must specify the precise number of shares; the CLRFC noted (see [32] above) that the rationale of the provision was simply to apprise the shareholders of the reasons for the enlargement of capital. The CLRFC had, in its review of s 161, considered the possibility of relaxing the requirement for shareholders' approval by adopting the Australian and New Zealand positions, both of which do not statutorily prescribe the need for shareholders' approval for the issue of new shares (see [32] above). However, the CLRFC specifically opted to keep s 161 in its same form, where shareholders' approval had to be sought for new issuances but such approval could be renewable annual blanket approvals.

35 How then should one interpret the current Art 40(*a*) in the light of s 161? While we would

have thought that Art 40(*a*) ought to have been repealed and not been amended and retained in its present form, it should be interpreted in a manner that is consistent with s 161. The respondents submitted that if we did not treat Art 40(*a*) as being otiose, and assuming that the terms thereof were incorporated in the articles of association of a company, we could regard it as a provision empowering the shareholders in a general meeting to set the limit or the price at which new shares should be issued. However, if the resolution did not set any limit as to the quantum or the price for the new shares to be issued, then such a resolution, like the resolution in the present instance, could constitute the approval under s 161 upon which the directors could then carry out a share issue exercise.

36 We would reiterate that it would be contrary to all principles of construction to construe a provision in the main body of an Act, in the absence of express provision otherwise, to be subject to a provision in a schedule to the Act. Article 40(*a*) of Table A (2006) should not be construed to prohibit the shareholders a company from giving the board of the company blanket approval to carry out share issuances when s 161 expressly empowers shareholders to do just that. If, as we think this is the right approach to reconciling Art 40(*a*) with s 161, we ought to interpret Art 32 of the MDG Articles in the same manner, the share issuance resolution in question passed by MDG at its EGM on 13 December 2007 did not contravene the said Art 32 and should not be impugned.

37 In passing, we would add that the appellants have further contended that if Art 32 was to be understood as applying only to issuances beyond the authorised share capital and would thus no longer be of any real effect, then the pre-emption provisions in Art 4 of the MDG Articles would similarly be of no effect having regard to the language of those provisions. Article 4 reads:

> a. After the first issue of shares made by the Directors, unless otherwise determined by the Company by special resolution or otherwise agreed in writing by the holders of all the shares for the time being issued, *all unissued shares shall before issue* be offered for subscription to the Members holding shares of the same class in proportion to their existing holdings of such shares or in such other proportions as may be agreed between them. Any such offer as aforesaid shall be made by notice specifying the number and class of shares and the price at which the same are offered and limiting the time (not being less than twenty-eight (28) days; unless the Member to whom the offer is to be made otherwise agrees) within which the offer if not accepted will be deemed to be declined.
>
> b. Subject as aforesaid any unissued shares *including any new shares created upon an increase of capital* shall be under the control of the Directors who may allot or otherwise dispose of them to such persons, on such terms and conditions and at such times as the Directors shall think fit, but so that no shares shall be issued at a discount except in accordance with Section 68 of the Act.
>
> [emphasis added]

38 Whilst it is true that the language of Arts 4(a) and 4(b) incorporates the requirement of *authorised* but unissued shares, the abolition of that requirement does not, *ipso facto*, render the two articles otiose. This is a prime example where the approach in *Debenhams Retail plc v Sun Alliance & London Assurance Co Ltd* [2005] 3 EGLR 34 (see [14] above) should and can be applied. Articles 4(a) and 4(b), being essentially pre-emption provisions, can apply to all *new* share issues, regardless of whether they are or are not created out of authorised share capital. Unlike Art 32 of the MDG Articles, Arts 4(a) and 4(b) are not inextricably linked to the requirement of authorised share capital. Reading Arts 4(a) and 4(b) in this manner would give them a sense which upholds the original intention of the parties even in an environment where there is no more need for a company to have

authorised share capital.

Lack of shareholder protection under section 161 of CA 2006

39 Finally, the appellants contend that it was never intended that the shareholders should be allowed to issue as many shares as they pleased, without any upper limit, and that s 161 did not grant sufficient protection to minority shareholders. It seems to us that the appellants are conflating two distinct issues, namely, how a company should issue new shares and the protection of minority interests. Section 161 (quoted in [30] above) explicitly provides that control in the issue of new shares rests with the shareholders at a general meeting and the general meeting is at liberty to set conditions as to the quantum or the price for the issue if it so chooses. The question of protecting the interests of the minority shareholders in a company does not arise from the way we seek to read Art 40 of Table A (2006). The problem of protecting minority interests is in no way exacerbated thereby. The CLRFC recognised in its report (see [32] above) that s 161 was not meant to be an exhaustive means through which minority shareholders' interests were to be protected. Company law provides other avenues, such as oppression suits under s 216 of CA 2006.

40 In the light of the foregoing reasons, we would uphold the decision of the Judge on the preliminary issue. The appeal is dismissed with costs and the usual consequential orders.