SUPREME COURT OF QUEENSLAND

CITATION:	*Andrews v Qld Racing Ltd* [2009] QSC 338
PARTIES:	**WILLIAM BERNARD ANDREWS** (plaintiff) **v** **QUEENSLAND RACING LIMITED ACN 116 735 374** (defendant)
FILE NO/S:	9471/09
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Brisbane
DELIVERED ON:	23 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	20 and 21 October 2009
JUDGE:	Wilson J
ORDER:	**Order:** **1. A declaration that the Shortlist has not been prepared in compliance with clause 17 of the QRL Constitution;** **2. An injunction restraining QRL, by its Chairman, from announcing at the Annual General Meeting scheduled to take place on 17 November 2009 the election of the two Directors purportedly selected in reliance upon or by reference to the Shortlist;** **3. An injunction requiring that QRL undertake the selection of the Directors to fill the vacancies created by the retirements of Mr Andrews and Mr Lambert in compliance with clause 17 of the QRL Constitution based upon the twenty-six (26) applications for appointment to the Board of QRL received by Northern Recruitment as at 29 May 2009;** **4. That the counterclaim be dismissed;** **5. That there be liberty to apply;** **6. That the defendant pay the plaintiff's costs of and incidental to the proceedings (including the counterclaim) to be assessed on the standard basis.**
CATCHWORDS:	CORPORATIONS – CONSTITUTION AND REPLACEABLE RULES – GENERALLY – where defendant is a company limited by guarantee and a "control body" under the *Racing Act* 2002 (Qld) – where plaintiff is one of five Directors of the defendant – where plaintiff and

another Director will retire at the next Annual General Meeting – where director selection process is contained in the company's Constitution – whether the director selection process was undertaken in accordance with the Constitution – whether to make order pursuant to s 1322(4)(a) of the *Corporations Act* (2001) (C'th)

Corporations Act 2001 (C'th), s 140, s 1322(4) and s 1322(6)
Racing Act 2002 (Qld), s 8(b)(ii), s 9, s 42(2)(c), s 44

Bundaberg Sugar Limited v Isis Central Sugar Mill Co Ltd [2007] 2 Qd R 214, cited
Holmes v Lord Keyes [1959] Ch 199, cited
Link Agricultural Pty Ltd v Shanahan [1999] 1 VR 466, cited
Lyon Nathan Australia Pty Ltd v Coopers Brewery Ltd [2006] 156 FCR 1, cited
Mentha v Colorbus Pty Ltd (2005) 23 ACLC 183, cited
Miller v Miller (1995) 16 ACSR 73, cited
Papaioannoy v Greek Orthodox Community of Melbourne (1978) 3 ACLR 801, cited
Re Pembury Pty Ltd (1991) 9 ACLC 937, considered
Ryan v South Sydney Junior Rugby League Club Ltd [1975] 2 NSWLR 660, cited
Whitehouse v Capital Radio Network Pty Ltd (2003) 21 ACLC 17, cited

COUNSEL:	D J S Jackson QC and S Cooper for the plaintiff R M Derrington SC and D Colthier for the defendant
SOLICITORS:	McCullough Robertson for the plaintiff Cooper Grace Ward for the second defendant

[1] **Wilson J**: The plaintiff William Bernard Andrews is one of five Directors of the defendant, Queensland Racing Limited. He and another Director will retire at the Annual General Meeting scheduled to take place next month. In this proceeding he challenges the process which has been employed to fill the vacancies on the board.

[2] Queensland Racing Limited is a company limited by guarantee. Since 1 July 2006 it has been a "control body" under the *Racing Act* 2002 (Qld), responsible for the management of thoroughbred racing in Queensland.

[3] The defendant's Constitution was adopted by its first members on 26 April 2006.

[4] Membership of the defendant is comprised of Class A Members (racing clubs) and Class B Members (the Directors of the company from time to time).

[5] There were five Founding Directors – Messrs Bentley, Hanmer, Lambert, Ludwig and Andrews (the plaintiff). By clause 15, they hold office until the Annual General Meeting following the Initial Term, which is the period of not less than three years commencing on 1 July 2006 and ending at the first Annual General Meeting after those three years.

[6] Two directors must retire at each of the first and second Annual General Meetings following the Initial Term, and one must retire at the third Annual General Meeting following the Initial Term. That is why the plaintiff and Mr Lambert will retire at the Annual General Meeting scheduled to take place on 17 November 2009.

[7] Clause 17 of the Constitution provides:-

> "**17. SELECTION OF DIRECTORS**
>
> 17.1 Seven months prior to the conclusion of the Initial Term a director selection process must take place in accordance with the provisions of this clause 17. Thereafter a director selection process must be initiated each calendar year in accordance with the provisions of this clause 17.
>
> 17.2 Not less than seven months prior to the Annual General Meeting, the Company must by public notice (an '**Advertising Notice**'), advertise for Directors to fill positions which will be vacated on the Board of the Company at the next Annual General Meeting. The Company will send a copy of the Advertising Notice to each of the Class A Members and the Class B Members.
>
> 17.3 Not less than five months prior to the Annual General Meeting a Shortlist of the applications received in response to the Advertising Notice must be prepared by the Independent Recruitment Consultant, by reference to the Selection Criteria contained in **Appendix A**. The number of Director Candidates on the Shortlist is to be decided by the Independent Recruitment Consultant. However the Shortlist shall be no less than the number of Director positions plus two.
>
> 17.4 Not less than four months prior to the Annual General Meeting and subject to the application of the Selection Criteria and probity checks being conducted on all Director Candidates, the Shortlist will be provided to the Class A Members and the Class B Members (other than those who are Director Candidates) for consideration and determination of their preferred Director Candidates.
>
> 17.5 Each of the Class A Members and the Class B Members (other than those Class B Members who are

Director Candidates) shall determine the order of preference of the Director Candidates in accordance with Part 1 of **Appendix B**, before the Selection Committee meets under clause 17.6.

17.6 Not less than eight weeks prior to the Annual General Meeting, a Selection Committee must be convened by the Chairman. The Selection Committee will be comprised of:

(a) Member Representatives from the Class A Members; and
(b) Class B Members who are not Director Candidates.

17.7 The Chairman shall chair the meeting of the Selection Committee.

17.8 The meeting shall first discuss the short list and try to agree who is to be the preferred candidate or candidates to fill the vacancy.

17.9 If no agreement is reached on the preferred candidate or candidates after such time as the Chairman considers reasonable, the Selection Committee shall follow the ballot procedure in accordance with Part II of **Appendix B** for the selection of Directors.

17.10 Where a meeting of the Selection Committee is convened pursuant to clause 17.6, that meeting must continue until such time as the Directors to be elected have been determined or the Chairman adjourns the meeting.

17.11 The decision of the Selection Committee shall effect the election of those Directors from the close of the next Annual General Meeting. The Chairman shall, at the Annual General Meeting announce the election of those Directors selected.

[8] Appendix A provides:-

"APPENDIX A

Directors Selection Criteria

It is a mandatory requirement for any two or more of the following to apply:

1. Five or more years experience as a director or senior manager of a Large Proprietary Company*, a Public Company or a public section entity;
2. Five or more years experience in a senior administrative role;

3. Five or more years experience at a senior level in the fields of finance, law, marketing or commerce; or
4. Five or more years experience as a non executive Director in a Large Proprietary Company* or a Public Company.
5. Knowledge of the Thoroughbred Racing Code.

**A proprietary Company is a large proprietary company if it satisfies at least 2 of the following paragraphs:*

(i) The consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is $10 million or more;

(ii) The value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $5 million or more;

(iii) The company and the entities it controls (if any) have 50 or more employees at the end of each financial year.

Candidates must also be capable of demonstrating that they are an eligible individual within the meaning of the Racing Act."

[9] At all material times an "eligible individual" was defined by section 9 of the *Racing Act* as:

"9 **Meaning of *eligible individual***

An ***eligible individual*** is an individual who—

(a) is not affected by bankruptcy action; and

(b) does not have a disqualifying conviction; and

(c) is not subject to an exclusion action under any control body's rules of racing; and

(d) is not licensed by, or is not an executive officer of a corporation that is licensed by, a control body; and

(e) is not a member of a committee, or employee, of—

(i) a licensed club; or

(ii) an association formed to promote the interests of 1 or more participants in a code of racing, whether or not formed under this Act; and

(f) is not disqualified from managing corporations, under the Corporations Act, part 2D.6."

[10] At its meeting on 6 March 2009 the board resolved to appoint Northern Recruitment as the Independent Recruitment Consultant for the purposes of clause 17. That is a company (Northern Recruitment Pty Ltd) of which Mr Mark Wilson is the sole shareholder and director.

[11] On 1 April 2009 Mr Bentley (the Chairman of the Company) and Ms Murray (the corporate counsel) met Mr Wilson and explained something of the task and the relevant time line. Northern Recruitment was formally retained. Shortly after the meeting a form of advertisement to be placed in The Courier Mail and The Australian Financial Review was settled. Northern Recruitment prepared a "Director Strategy" and a budget. The Director Strategy included the Selection Criteria in Schedule A to the Constitution and a description of the general characteristics, professional background and personal attributes of which applicants should have.

[12] Applications for nominations closed on 29 May 2009. There were 26 written applications, including applications from the plaintiff, Mr McGruther, Mr Stewart and Mr Milner.

[13] At the time the applications closed, Mr Stewart was the Chairman of the Toowoomba Turf Club, and Mr Milner was the Chairman of the Brisbane Turf Club. Mr Stewart confirmed in his application that he was an eligible individual within the meaning of the *Racing Act,* and Mr Milner wrote on the day following his application advising that he would resign his position if his application were successful

[14] Mr Wilson interviewed seven applicants, including the plaintiff, Mr McGruther, Mr Stewart and Mr Milner.

[15] On 17 June 2009 Mr Milner resigned as Chairman of the Brisbane Turf Club.

[16] On 18 June 2009 Northern Recruitment wrote to the defendant advising of the outcome of Mr Wilson's deliberations and providing a Shortlist of four persons – Mr Milner, Mr O'Hara, Mr Ryan and Mr Stewart. The letter was addressed to Ms Murray. She made it available to Mr Bentley.

[17] On 25 July 2009 Mr Stewart resigned as Chairman of the Toowoomba Turf Club.

[18] There was a board meeting on 26 June 2009 at which neither the receipt of the letter of 18 June 2009 from Northern Recruitment nor the Shortlist was disclosed.

[19] On 14 July 2009 Ms Murray wrote to each member of the Board advising of the shortlisted Director Candidates.

[20] On 15 July 2009 Ms Murray wrote to each Class A Member and each Class B Member advising of the short listed Director Candidates.

[21] There was another board meeting on 7 August 2009 when the plaintiff and Mr Lambert questioned the process which had been adopted. I shall return to this.

[22] On 14 August 2009 there was a meeting of Class A Members at which they determined the following order of preference: Milner, O'Hara, Stewart, Ryan.

[23] Later that day there was a special board meeting when there was further discussion of the process which had been adopted.

[24] Later still that day there was a meeting of Class B Members at which they determined the following order of preference: Milner, Stewart, Ryan, O'Hara.

[25] On 14 September 2009 the Selection Committee met, and by secret ballot, Mr Milner and Mr Stewart were selected.

[26] The Annual General Meeting has been scheduled for 17 November 2009.

Plaintiff's allegations

[27] The plaintiff alleges that the director selection process has not been undertaken in accordance with clause 17 of the Constitution in that -

1. Mr Wilson acted on the basis that clause 17 required the Shortlist to be comprised of a maximum of four persons

2. Mr Wilson was not relevantly independent;

3. Mr Wilson was partial;

4. Mr Wilson did not prepare the Shortlist by reference to the Selection Criteria contained in Appendix A; and

5. The Shortlist did not comply with the requirement that it be comprised of a minimum four persons because two of the four included in it were not eligible individuals for the purposes of the Selection Criteria.

[28] The resolution of these questions requires the interpretation of relevant provisions of the Constitution and findings of fact as to what actually occurred.

Construction of the Constitution

[29] By virtue of s 140 of the *Corporations Act* 2001 (Cth), the Constitution takes effect as a contract between the company and each member and between the company and each Director. Therefore it is to be construed according to the rules of construction applicable to contracts generally. It should be regarded as a business document, and construed so as to give it reasonable business efficacy if such a construction is available on the language used, in preference to one which would or might prove unworkable: see *Holmes v Lord Keyes* [1959] Ch 199 at [215]; *Lyon Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2006] 156 FCR 1 at [46] – [48]; *Bundaberg Sugar Limited v Isis Central Sugar Mill Co Ltd* [2007] 2 Qd R 214 at [28].

[30] As a Director and Member of the Company, the plaintiff is entitled to have the election or appointment of Directors decided lawfully in accordance with that statutory contract: see *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466 at [20] per Kenny JA with whom Batt and Buchanan JJA agreed.

[31] At trial it was common ground between the parties that clause 17.3 required that the Shortlist:-

(a) be prepared by the Independent Recruitment Consultant;

(b) be prepared by reference to the selection criteria in Appendix A; and

(c) contain a <u>minimum</u> of four names.

Eligible Individual

[32] Appendix A provides (inter alia) –

> "Candidates must also be capable of demonstrating that they are an eligible individual within the meaning of the Racing Act."

[33] When were Mr Milner and Mr Stewart required to satisfy the requirement that they be eligible individuals within the meaning of the *Racing Act*?

[34] Clearly neither of them satisfied this requirement at the time he submitted his application. Mr Milner became an eligible individual on 17 June 2009 – the day before Northern Recruitment sent the Shortlist to the defendant. Mr Stewart became an eligible individual on 25 July 2009 – after Ms Murray had sent the Shortlist to the Class A Members and the Class B Members (15 July 2009) but before the meetings of the Class A Members and Class B Members for determination of their preferred Director Candidates (14 August 2009).

[35] Counsel for the plaintiff submitted that on the proper construction of the Constitution Director Candidates were required to be eligible individuals as at the closing date for applications or alternatively as at the date of preparation of the Shortlist. Counsel for the defendant submitted that this requirement needed to be satisfied by the time the Class A Members and Class B Members considered and determined their preferred Director Candidates.

[36] Under the *Racing Act* only an "eligible corporation" may apply to the Minister for approval as a control body. A corporation is an eligible corporation if (inter alia) it has a constitution that at all times requires its executive officers (including directors) to be eligible individuals: s 8(b)(ii). Clearly the Legislature intended to exclude persons such as bankrupts, those with criminal convictions and those with conflicts of interests from the management of control bodies. The Act is concerned to ensure that executive officers are eligible persons while they hold office. It recognises that an individual's circumstances may change (with the result that he cannot continue to be an executive officer): see, for example, s 42(2)(c) and s 44.

[37] It is unlikely that "Candidates" in Appendix A was intended to have a different meaning from "Director Candidates" in clause 17.

[38] "Director Candidates" are defined in clause 1 of the Constitution as meaning "persons named on the Shortlist and to be considered by the Selection Committee in accordance with the provisions of clause 17".

[39] Clause 17.3 provides that the number of Director Candidates on the Shortlist is to be decided by the Independent Recruitment Consultant. By clause 17.4, Class B Members who are Director Candidates are not to be provided with the Shortlist, and, by clause 17.5, Class B Members who are Director Candidates are not to participate in the determination of the Class B Members' order of preference of Director Candidates. So an applicant becomes a Director Candidate when he is named on the Shortlist.

[40] There is force in the submission of counsel for the defendants that if applicants were required to resign from positions which might render them not eligible individuals when submitting their applications, (that is, at a time when they could have no any assurance of even being named on the Shortlist), capable and appropriately experienced persons might well be dissuaded from applying. Such a construction would not give business efficacy to the Constitution.

[41] As counsel for the defendant submitted, the reference to "subject to the application of the Selection Criteria" in clause 17.4 of the Constitution is an acknowledgement that the satisfaction of the Selection Criteria may well be an ongoing process.

[42] By clause 17.11, it is the decision of the Selection Committee which effects the election of Directors, but that decision does not take effect until the close of the next Annual General Meeting.

[43] It could not sensibly be suggested that the Selection Committee could determine that someone who was an eligible individual when the Shortlist was provided to the Class A Members and the Class B Members but subsequently ceased to be so could be elected as a Director. That is an illustration of the ongoing character of the application of the Selection Criteria.

[44] For these reasons I have concluded that the requirement that a candidate be an eligible individual within the meaning of the *Racing Act* had to be satisfied by the time the Selection Committee met on 14 September 2009. Mr Milner and Mr Stewart both satisfied that requirement well before then.

The number of persons on the Shortlist

[45] Two issues arose at the trial – whether Mr Wilson in fact prepared the Shortlist on the basis of a maximum (rather than a minimum) of four persons, and if he did, whether he had been instructed to do so. While the evidence on each issue is intertwined with that on the other, ultimately it is only the first issue that has to be determined.

[46] In his letter to Ms Murray of 18 June 2009, Mr Wilson said –

> "The purpose of this correspondence is to advise you of the outcome of my deliberations regarding the nomination of candidates for selection as Directors of Queensland Racing.
>
> At the time of closing for receipt of applications, we had received 26 written submissions regarding each individual's interest and suitability for consideration in the role of a Director with Queensland Racing. A matrix in alphabetical order is enclosed.
>
> Of the 26 applications that were considered, seven clearly stood out in terms of either their commercial capability, or entrepreneurial achievements at club level. Each of the seven candidates was invited to a meeting to discuss their thoughts, ideas and motivations for wanting to be put forward in consideration for the role of Director.
>
> Unfortunately, we are required to reduce the number to four nominations for consideration for the appointment of two Directors. I would like to place on record my observation that the likely workload for the Board over the next year or two would be better supported if there were seven Directors instead of five to allow for a richer and broader range of skill sets on the Board, as well as to give greater flexibility with regard to succession planning into the future.
>
> Of the seven candidates, four were more forthright in outlining their appreciation of developments in racing not only in Queensland, but in Australia and internationally.

> There was quite a marked distinction between the final four candidates and others who were under consideration, in terms of their willingness to devolve any activities that may cause a conflict of interest, and with this group alone, there was a complete absence of lobbying or third party endorsement.
>
> The four candidates nominated below, in my opinion, represent the optimum combination of skills with regard to understanding the financial operating parameters at club level, demonstrated experience in lifting financial performance at club level and the weighting of experience across metropolitan, and non metropolitan racing activity. This is not the only potential combination of skills and experience. This particular group does however seem to represent a more hands on approach to the fulfilment of Director duties.
>
> The candidates are presented essentially on the basis of equal merit, because we do not have objective criteria against which we could rank them. The order is merely alphabetical."

He went on to provide the names on the Shortlist in alphabetical order rather than order of merit, and to add other comments.

[47] Mr Wilson was questioned about this letter at the trial. In his evidence in chief he was questioned as follows –

> "Now, in it, if I can take you to – you will see there that you formally identify four persons as being on the shortlist. That's on page 2?—That's correct.
>
> Can you explain to her Honour how that came about? Not the writing of the letter, how you came to-----?-- How I came to this conclusion?
>
> Yes?-- Yes, I can. I found of the seven people that we interviewed, these four satisfied the eligibility criteria, in my mind. They also seemed to be particularly suitable. Each person was very engaging during the interview. They outlined for me their activities at race club level. They were able to demonstrate to me during the time that we spoke----
>
> MR JACKSON: Your Honour, we are objecting on the grounds of relevance. We don't know that it's an issue in the case whether the other four people were eligible or suitable.
>
> HER HONOUR: I'll allow the question at this stage.
>
> MR DERRINGTON: Thank you, your Honour. Just continue?-- He's interrupted my flow of thinking. They were engaging, we were able to – I drew the conclusion that these people had really both the capability and also very, very

strong desire to be involved in the creation of a strong and robust racing industry in Queensland. Importantly, each one was able to demonstrate for me not only they'd taken particular initiatives as a member of a race club – a race club committee, but in fact some of those initiatives, or the thing they tried to do were often at variance with the wishes of Queensland Racing or the chairman of Queensland Racing, and I thought that showed a real independence of spirit. They were also able to demonstrate to my satisfaction they understood the importance of being independent and being seen to be independent if they were successful in achieving their nomination to the Queensland Racing board.

Can I ask you to go to the first page of the letter, please?--- Yep.

Can I take you to the fourth paragraph on the first page?— Yes.

Can I ask you to explain to her Honour why you wrote that first sentence?-- It was the royal we. I found that I really only had four people I felt were suitable to nominate, and I thought that was unfortunate because I didn't like the idea of having only four. In the event somebody fell by the wayside for whatever reason. We were going to move into unchartered [sic] territory, and that's the intent behind that comment.

HER HONOUR: What did you mean by the word "required"?-- It wasn't a particularly deliberate use of the word. It was just the phrase I used at the time. I mean, under the selection process I was required to put people forward who I felt met the criteria and I only had four, and it was in that context I used the word "required".

MR DERRINGTON: Could I take you to tab 21, please?-- Yes.

Before I come to that, do you recall that there is – there was a period in time where you settled on four or----?-- I mean, after we – the nominations had closed and I interviewed the seven and only after I'd interviewed the last person did I come to the conclusion I had four.

Did you have in your mind at any time a belief as to the number that you were required or obliged to produce on the list?-- No. In fact, it was a – until I got to that point I didn't know that it would only be four. I mean, I – you know, the reason I interviewed seven is because I thought – I interviewed those people in good faith believing, I'd hope, that we could find they would be worthwhile putting through.

> Okay. Sorry------?—Did that answer you question?"

He said that he had formed the view that the Shortlist had to contain a minimum of four names "the minute [he] read the Constitution". He denied ever receiving an instruction to limit it to four.

[48] This exchange occurred in cross-examination of Mr Wilson:

> "And when you wrote that you had in mind that what you were asked to do, and what you had to do, was come up with four?
> That's right, isn't it?-- No.
>
> Why did you use the word "unfortunately"?-- Because I considered the fact we only had four was extremely unfortunate. I would like to have had more people on the shortlist.
>
> Well, you were always aiming to come up with four, weren't you?—No, I wasn't – I didn't have a number in mind. I had to have a minimum of four but there was no upper limit."

This explanation does not sit well with a comment Mr Wilson made towards the end of his letter of 18 June 2009 –

> "As an aside, I would also like to make the comment that the process that is currently constructed may tend to cause candidates who are not successful in the nomination to unnecessarily develop a sense of enmity towards the control body because by the very nature of the process of selection they must be excluded, and some, although capable, cannot be supported in their application."

[49] At the outset Mr Wilson prepared a Director Strategy and a budget. The first draft budget he submitted referred erroneously to there being four positions to be filled. Later, when Ms Murray inquired about progress, he sent her an email on 18 May 2009 in these terms –

> "All is well.
>
> At the moment we have the right number for four sensible nominations to go forward.
>
> There may yet be some late starters to increase the choice, but so far, so good."

Although Mr Wilson explained that email in terms that he had been concerned he might not have sufficient suitable candidates to be able to put forward even four names, on its face its meaning is ambiguous.

[50] At the board meeting on Friday 7 August 2009 Mr Andrews and Mr Lambert raised Mr Wilson's letter of 18 June 2009, asserting that the process had been flawed.

[51] The following Monday Mr Lambert telephoned Mr Wilson and expressed his concern at the wording of the letter of 18 June 2009, which seemed to imply a constraint on Mr Wilson – a maximum of four names on the Shortlist. I accept that Mr Wilson was taken unawares by the call, and that it was a tense conversation.

[52] Mr Lambert gave evidence that Mr Wilson said that he "had been advised by Shara Murray that this was required under the Constitution." He asked Mr Wilson if he had correspondence or documentation in relation to this; Mr Wilson replied that he did, and when asked to do so, said he would locate it.

[53] I accept Mr Lambert's evidence of that conversation. He was an impressive witness. An economist by profession, he gave his evidence concisely and in a calm and measured fashion. He will retire as a Director at the next Annual General Meeting, and is not seeking re-election. I had no reason to think his evidence was in any way coloured by his friendship with the plaintiff. His evidence is consistent with the following:

(a) Shortly after 3.00 pm Mr Lambert sent Mr Wilson an email–

> "...Further to my discussion with you this morning could you let me know the outcome of your checking on the reason for the statement in your letter of 18 June that 'we are required to reduce the numbers to four nominations' ...."

(b) Mr Lambert repeated his version of the conversation in an email he sent Mr Bentley and the other Directors at 3.30 pm that afternoon.

(c) Ms Murray phoned Mr Lambert and said she had spoken to Mr Wilson, who had said he had not received that she had not directed him to reduce the number to four.

(d) There was a further telephone conversation between Mr Lambert and Mr Wilson that afternoon. Mr Wilson said that he had been having a bad day, that what he had said in the morning was incorrect, and that he had formed his view of the interpretation of clause 17.3 independently and not influenced by conversations with Ms Murray.

(e) In cross-examination, Mr Wilson initially denied having said that Ms Murray had instructed him the Shortlist was to contain a maximum of four names. He said that was "not [his] recollection", but when Mr Lambert's version was put to him again, he replied, "That is not untrue."

(f) In a letter written to the plaintiff's solicitors on 14 August 2009, the defendant's solicitors said –

"2. Ms Murray denies the suggestion that she directed Mr Wilson to limit the number of candidates for consideration to four only.

3. Further, Ms Murray did not speak or communicate in any way with persons at Northern Recruitment, other than to arrange and forward Mr Wilson a copy of various documents relevant to his appointment by QRL.

4. Further, Mr Wilson has emphatically denied that Ms Murray or any other person involved with QRL spoke to him about the number of candidates to be shortlisted.

5. It is a pity that you failed to include, in your email, the true position regarding Mr Wilson's comments to Mr Lambert. We are instructed that shortly after Mr Wilson made the comments attributed to him in the email of 10 August 2009, Mr Wilson telephoned Mr Lambert back to correct his statement. During this second conversation, Mr Lambert was told that Mr Wilson had answered his question in haste and in doing so, he had made a mistake. He specifically told Mr Lambert that neither Ms Murray nor QRL had directed him to shortlist the candidates to four only.

6. It is quite apparent from our investigations, that the decision of Mr Wilson to shortlist the nominations to four candidates was a decision made by Mr Wilson and him alone. Our client was not involved in this decision process."

Paragraph 5 corroborates Mr Lambert's version of his first conversation with Mr Wilson. When it was put to Mr Wilson in cross-examination, he accepted it as "a fair summary."

[54] I am satisfied that Ms Murray did instruct Mr Wilson that the Shortlist was to contain a maximum of four names.

(a) By letter dated 3 July 2009 Mr Bentley advised the Minister of the Shortlist. The letter was prepared by Ms Murray. It included the following paragraph –

"I advise that Northern Recruitment were required to reduce the number of applications received

> (26), to four nominations for consideration for the appointment of two Directors.'

Ms Murray used the same wording in the letters she wrote to Directors and the Office of Racing on 14 July 2009.

(b) In her letters to Class A Members and Class B Members on 15 July 2009 Ms Murray said –

> "I advise that Northern Recruitment, the Independent Recruitment consultant considered the applications received (26), and has prepared a Shortlist of Director Candidates for consideration and election of two Directors. This meets the requirements of the Constitution that the Shortlist contain not less than the number of director positions plus two."

(c) Ms Murray prepared papers for the board meeting on 7 August 2009. Under the heading "Update" she said –

> "I advise that Northern Recruitment were required to reduce the number of applications received (26), to four nominations for consideration for the appointment of two Directors."

She went on to provide the names of the four persons on the Shortlist. A copy of Northern Recruitment's letter of 18 June 2009 was sent to board members as correspondence to be noted.

Ms Murray is a well-qualified lawyer, but she was not an impressive witness. Her manner was nervous and defensive. Her conduct evinced lack of the careful attention to detail reasonably expected of someone in her position.

She acknowledged that what she wrote in the letters of 3 and 14 July 2009 and in the board papers was simply copied from Northern Recruitment's letter. Of course, it was inconsistent with what she said in the letters of 15 July 2009, and, importantly, with clause 17.3 of the Constitution. Ms Murray acknowledged that she did not keep records of telephone conversations.

(d) I accept Mr Lambert's evidence that at the board meeting on 7 August 2009 she said (i) that she had previously held the erroneous view that clause 17.3 required the Shortlist to contain a maximum of four names and that that view had been shared by the defendant's solicitor Mr Grace, and (ii) that she now appreciated that there had to be a minimum of four, but there was no maximum.

(e) She was clearly concerned and upset by the suggestion that she had instructed Mr Wilson to prepare a Shortlist with a maximum of four

names and by what she perceived to be criticisms of her by Mr Lambert on 10 August 2009 – both at the time and at trial.

[55] In all the circumstances, I am persuaded that Mr Wilson did prepare the Shortlist on the basis that it was to contain a maximum of four names. That is consistent with the plain meaning of his letter of 18 June 2009.

Whether Mr Wilson acted independently

[56] The plaintiff alleges that Mr Wilson "was not relevantly independent" because –

(i) he acted upon an instruction from the defendant to limit the Shortlist to no more than four persons; and

(ii) he acted upon a requirement of Mr Bentley that the Shortlist include candidates with race club experience as well as some financial accounting background.

[57] I have already found that he did act on an instruction to limit the Shortlist to four names.

[58] There was nothing untoward in Mr Bentley discussing with Mr Wilson the skills and qualities which he thought the Directors should have. Indeed it would have been remiss of Mr Wilson not to have sought this information. It is unremarkable that Mr Bentley wanted the new board members to have race club experience and some financial and accounting background. And Mr Lambert, too, saw the need for someone with financial and accounting experience.

[59] By his own admission, Mr Bentley runs "a tight ship". He considers it important to keep those with whom he works informed of what he perceives to be relevant developments and comments by others, as and when they occur. He spoke with Mr Wilson on a number of occasions between April 2009 and the provision of the Shortlist (including on at least one occasion in relation to an unrelated personal matter on which he had previously consulted Mr Wilson). While some may question whether Mr Bentley's modus operandi strikes the appropriate balance between engagement and approachability on the one hand and detachment and circumspection on the other, there is no evidence that he directly interfered in the preparation of the Shortlist. There is no evidence that he knew who was going to be on the shortlist before the letter of 18 June 2009 was received by Ms Murray.

[60] Accordingly I am not satisfied that the second particular of want of independence has been made out.

Whether Mr Wilson was partial

[61] The plaintiff alleges that Mr Wilson was partial, and that his partiality is to be inferred from his having asked one of the (unsuccessful) applicants what school he had attended and whether he was a practising Catholic.

[62] Mr Wilson acknowledged having asked these questions in the context of a general discussion with Mr McGruther about his background and life. He found Mr McGruther "frosty" and had to draw him out. One of the attributes he was

looking for was consistency of achievement: educational attainments were an aspect of that. In that context he inquired of Mr McGruther where he went to high school, and whether he completed year 10 or year 12. When Mr McGruther said he had attended Terrace (a well known Catholic boys school), he had asked him whether he was "still practising". He said he was not influenced in any way by Mr McGruther's religious affiliation.

[63] Mr McGruther is a successful and well-respected citizen. He appeared somewhat reserved in manner, and was clearly unimpressed by Mr Wilson's interview technique generally, which was out of step with the way he himself would have undertaken the task.

[64] In the circumstances I do not think Mr Wilson demonstrated partiality by asking these questions.

Whether Mr Wilson failed to prepare the Shortlist by reference to the Selection Criteria

[65] The plaintiff alleges that Mr Wilson's failure to prepare the Shortlist by reference to the Selection Criteria is to be inferred from –

his asking Mr McGruther these questions about schooling and religion;

his including Mr Milner and Mr Stewart who were (allegedly) not eligible individuals; and

his acting upon Mr Bentley's requirement that the shortlist include candidates with race club as well as some financial accounting background.

[66] The Independent Recruitment Consultant was bound to prepare the Shortlist "by reference to" the Selection Criteria. Those criteria are that a Director satisfy two or more of five categories of experience and that he be capable of demonstrating that he is an eligible individual within the meaning of the *Racing Act*.

[67] I am satisfied that Mr Wilson did have regard to these criteria, and that the persons on the shortlist he prepared did satisfy these criteria. As he explained in his evidence, he looked for more than satisfaction of these criteria – he looked for suitability, too. His doing so was perfectly proper.

[68] I have found that Mr Milner and Mr Stewart fulfilled the requirement that they be eligible individuals within the meaning of the *Racing Act*. It is not to be inferred from either of the other two matters relied on that Mr Wilson did not prepare the Shortlist be reference to the Selection Criteria in Appendix A.

Relief sought

[69] The plaintiff seeks the following relief –

> "1. A declaration that the Shortlist has not been prepared in compliance with clause 17 of the QRL Constitution.

2. An injunction restraining QRL, by its Chairman, from ~~taking any further steps to elect two directors to its Board~~ announcing at the Annual General Meeting scheduled to take place on 17 November 2009 the election of the two Directors purportedly selected in reliance upon or by reference to the Shortlist.

3. A declaration that Neville Clyde Stewart was not an eligible individual within the meaning of s.9 of the *Racing Act 2002* as at the date of preparation of the Shortlist and was not able to be nominated as a Director Candidate within the meaning of that term as contained in the QRL Constitution.

4. Alternatively to 3, a declaration that Wayne Milner and Neville Clyde Stewart were not eligible individuals within the meaning of s.9 of the *Racing Act 2002* as at the closing date for application for appointment to the Board of QRL and were not able to be nominated as a Director Candidate within the meaning of that term as contained in the QRL Constitution.

5. An injunction requiring that QRL undertake the selection of the Directors to fill the vacancies created by retirements of Mr Andrews and Mr Lambert in compliance with clause 17 of the QRL Constitution based upon the twenty six (26) applications for appointment to the Board of QRL received by Northern Recruitment as at 29 May 2009."

Defences

[70] The defendant has pleaded –

(i) that the plaintiff deliberately refrained from applying for relief to restrain the Selection Committee from appointing two Directors to fill the vacancies;

(ii) that any non-compliance with clause 17 has been ratified by the members of the Defendant, and that it is immaterial given that Mr Milner and Mr Stewart have already been appointed, (presumably by the Selection Committee) with effect from the next Annual General Meeting;

(iii) alternatively, that the Shortlist has been fully acted upon and nothing remains to be done, so that the relief lacks utility, and should be refused in the exercise of the Court's discretion.

[71] The plaintiff's refraining from applying for relief at an earlier time is a factor in the exercise of the Court's discretion whether to grant declaratory and equitable relief. But it is counterbalanced by the defendant's conduct in pressing ahead

with further steps in the selection process after the flawed assumption on which Mr Wilson acted had been brought to its attention. It was discussed at the board meeting on 7 August 2009 and at another specially convened board meeting a week later. The majority of Directors were of the erroneous opinion that because the Shortlist contained the necessary minimum number of Director candidates there was compliance with the Constitution.

[72] Counsel for the defendant have submitted that a declaration that the Shortlist was not prepared in accordance with clause 17 of the Constitution would lack utility, because the function of the Shortlist is fully spent: it has been provided to the Class A Members and the Class B Members who have voted on it, and based on those votes, the Selection Committee has chosen the new Directors. They have submitted that an injunction restraining the defendant by its chairman from announcing the election of the two Directors purportedly selected in reliance on the Shortlist would also lack utility, because it is the decision of the Selection Committee that effects the election of the new Directors.

[73] I do not accept those submissions.

[74] Counsel for the plaintiff submitted that the proceedings of the Selection Committee meeting were themselves flawed because Ms Murray wrongly advised Mr Lambert that his presence was not required and because the meeting did not discuss the Shortlist and try to agree upon the preferred candidates before a ballot was conducted.

[75] I accept that Ms Murray wrongly advised Mr Lambert that it would not be necessary for him to attend that meeting because he would have no role to play. However, the proffering of erroneous advice did not itself cause the proceedings at the meeting to miscarry.

[76] The Constitution required the Class A Member representatives and the Class B Members who attended the Selection Committee to first discuss the Shortlist and try to reach agreement on who should fill the vacancies. In the absence of agreement after such time as the Chairman considered reasonable, they were to proceed to a ballot. Those in attendance were told that they were there to attempt to agree on the new directors. There was no constitutional requirement that they spend undue time in a fruitless attempt to reach agreement. It was established very quickly that agreement would not be reached when Mr Dixon said it was unlikely and moved to proceed to a ballot. The motion was seconded by Mr Patch, and passed without dissent.

[77] I do not accept that the proceedings at the Selection Committee meeting were flawed.

[78] Nevertheless, the Constitution provides for the Chairman to announce the election of the Directors selected at the Annual General Meeting, and that the decision of the Selection Committee take effect from the conclusion of the Annual General Meeting. In the premises, it cannot be said that the relief sought in paragraphs 1 and 2 of the Claim is lacking in utility.

[79] As a member of the company, the plaintiff had a personal right to have the selection of directors conducted in the prescribed manner. See *Ryan v South*

Sydney Junior Rugby League Club Ltd [1975] 2 NSWLR 660; *Papaioannoy v Greek Orthodox Community of Melbourne* (1978) 3 ACLR 801. Infringement of that personal right cannot be ratified by the members of the company in general meeting or otherwise: *Link Agricultural Pty Ltd v Shanahan*[1999] 1 VR 466 at [18]; *Miller v Miller* (1995) 16 ACSR 73 at 89; Ford, Austin & Ramsay: *Ford's Principles of Corporations Law*12th ed (2005) at [8.390].

[80] By its counterclaim the defendant has sought a declaration pursuant to s 1322(4)(a) of the *Corporations Act* 2001 (C'th) that the preparation of the Shortlist is not invalid by reason of any alleged contravention of a provision of the Constitution.

[81] Section 1322 subsections (4) and (6) provide –

> **"CORPORATIONS ACT 2001 - SECT 1322**
>
> **Irregularities**
>
> ...
>
> (4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
>
> (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
>
> (b) an order directing the rectification of any register kept by ASIC under this Act;
>
> (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
>
> (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;
>
> and may make such consequential or ancillary orders as the Court thinks fit.

...

(6) The Court must not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and

(b) ...

(c) in every case--that no substantial injustice has been or is likely to be caused to any person.

[82] Apart from the matters in subsection (6) about which it must be satisfied, the Court has an unfettered discretion under subsection (4). In *Re Pembury Pty Ltd* (1991) 9 ACLC 937 Byrne J considered that the application of the provision should not be restricted to instances of inadvertence or accidental non-compliance.

[83] The three matters expressed in paragraph (a) of subsection (6) are alternatives. Before making an order under subsection (4), the court must be satisfied of one of them and of the matter in paragraph (c).

[84] Of the matters in paragraph (a) - I am inclined to the view that the irregularity was more than procedural in nature; it went to the very heart of the governance of the company. In the circumstances I could not be persuaded that it would be just and equitable to make an order under s 1322(4). To satisfy the second alternative there would need to be evidence that all of the persons involved in the contravention acted honestly (rather than an absence of evidence that they acted dishonestly). See *Mentha v Colorbus Pty Ltd* (2005) 23 ACLC 183 at 187.

[85] Under subsection (6)(c) what must be shown is that the irregularity has not caused substantial injustice to any person or that it unlikely to do so, rather than that what took place consequent to it has not caused or is unlikely to cause substantial injustice. See, for example, *Whitehouse v Capital Radio Network Pty Ltd* (2003) 21 ACLC 17.

[86] I consider that the preparation of the Shortlist on the basis that a maximum of four names was required caused substantial injustice to the plaintiff in that it infringed his personal right to have the Shortlist prepared in accordance with the Constitution. It also caused injustice to applicants other than those who were included who might otherwise have been included.

Accordingly, I decline to make an order under s 1322(4)(a).

Orders

[87] Having regard to my finding that Mr Milner and Mr Stewart satisfied the requirement that they be eligible individuals within the meaning of the *Racing Act* the relief sought in paragraphs 3 and 4 of the Amended Claim must be refused. Otherwise I will hear counsel on the form of the orders to be made.

Addendum

[88] After hearing Counsel's submissions, the Court orders as follows:

(a) Orders as per paragraphs 1, 2 and 5 of the Amended Claim;

(b) That the counterclaim be dismissed;

(c) That there be liberty to apply;

(d) That the defendant pay the plaintiff's costs of and incidental to the proceedings (including the counterclaim) to be assessed on the standard basis.