



HIGH COURT OF AUSTRALIA

9 October 2019

CONNECTIVE SERVICES PTY LTD & ANOR v SLEA PTY LTD & ORS [2019] HCA 33

Today the High Court unanimously dismissed an appeal from the Court of Appeal of the Supreme Court of Victoria which concerned the scope of s 260A(1) of the *Corporations Act 2001* (Cth).

In 2003, the appellant companies were incorporated to conduct a mortgage aggregation business ("the Connective companies"). At all relevant times, the shareholders in the Connective companies were Sleas Pty Ltd ("Slea"), Millsave Holdings Pty Ltd ("Millsave") and Mr Haron. The constitution of each Connective company contained an identical pre-emption clause. In May 2009, Mr Tsialtas, the sole director and shareholder of Slea, entered into an agreement with Minerva Financial Group Pty Ltd ("Minerva") for the sale of Mr Tsialtas' shares in Slea. A second agreement was entered into by Slea, Minerva and Mr Tsialtas in August 2010.

The Connective companies instituted proceedings against Slea and Minerva, also joining Millsave and Mr Haron as defendants claiming that these agreements breached the pre-emptive rights provisions. Slea and Minerva applied to have these proceedings dismissed or stayed and sought, amongst other forms of relief, an injunction under s 1324 of the *Corporations Act* to restrain the Connective companies from prosecuting the proceedings on the basis that by doing so they were in contravention of the implied prohibition in s 260A(1) of the *Corporations Act* against financial assistance.

Section s 260A(1) of the *Corporations Act* relevantly provides that a company may financially assist a person to acquire shares in the company only if giving the assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its creditors. Section 1324(1B)(a) provides that where the ground relied on in an application for an injunction under s 1324 is an alleged contravention of s 260A(1)(a), the Court must assume that the conduct constitutes or would constitute a contravention of s 260A(1)(a) unless the company or person proves otherwise.

In order to vindicate their pre-emptive rights, Millsave and Mr Haron were required to bring legal proceedings against Slea. If those proceedings had been commenced by Millsave and Mr Haron, then it would plainly have been financial assistance for the Connective companies to fund those proceedings. Instead, the proceedings were commenced at the expense of the Connective companies, in which Millsave and Mr Haron hold 66.67% of the shareholding. The primary judge held that this did not amount to financial assistance in contravention of s 260A. The Court of Appeal allowed the appeal from that decision. By grant of special leave, the Connective companies appealed to this Court.

The High Court held that the commencement of the pre-emptive rights proceeding was financial assistance within the meaning of s 260A(1), and that the Connective companies did not discharge their onus of proving that there was no material prejudice to the Connective companies or their shareholders. The Connective companies eased a financial burden in the process of any acquisition of shares by Millsave and Mr Haron. The commencement of the proceedings by the

Connective companies, at their expense, was financial assistance to Millsave and Mr Haron. Further, costs would be incurred by the Connective companies in conducting the proceedings that would not, even if they succeed, be entirely recoverable. Section 260A(1) of the *Corporations Act* was therefore contravened and an injunction must issue.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*