KINSELLA 1982 No. 9527 P

DONAL KINSELLA AND OTHERS

.v.

ALLIANCE AND DUBLIN CONSUMERS
GAS COMPANY AND OTHERS

Judgment of Mr. Justice Barron delivered the 5th day of October 1982.

This action challenges the validity of the proceedings at an extraordinary general meeting of the company held on the 10th September, 1982. At that meeting, voting was permitted only by stockholders whose names had been entered in the register of shareholders and only such stockholders were permitted to attend the meeting. Persons to whom stock had been transferred and in respect of which transfers had been received by the secretary of the company, but whose names had not been entered in the register of shareholders were not permitted to attend the meeting.

Before dealing with the legal issues raised I feel it necessary to refer to the facts to show how such a situation arose. The extraordinary general meeting was called upon the requisition of the plaintiffs and those who support them. The resolutions for consideration at the meeting were essentially to remove the existing Board and to replace its members with nominees of the plaintiffs. In the ordinary way, this trial of strength would have been decided by the respective shareholdings of the members supporting each side. However

in the case of the Gas Company the voting rights of its members are governed by the Company Clauses Consolidation Act, 1845. Under this Act, which in the main, comprises the constitution of the company, each member has one vote for each share held by him up to ten, one additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares. The original shares were of a nominal value of £10 each and for many years had been converted into stock. Reference to a vote per share or number of shares is accordingly a reference to multiples of stock of £10 denomination.

It was seen by each side in the coming trial of strength that it was to their advantage to subdivide larger holdings in order to increase the voting power attributable to the stock comprising such holdings. Because of the need to build up voting strength not only by purchasing stock in the market place but also by subdivision of existing holdings, a very large number of transfers were required and these were delivered to the Secretary in the days preceding the date fixed for the meeting. While less then ten such transfers a week was the norm, three hundred and eighty eight transfers were lodged in the last week of August, three Hundred and forty one transfers on the 2nd and 3rd September, ten hundred and fifty two transfers on the 6th September, four hundred and forty nine transfers on the 7th September, three hundred and eighty six

transfers on the 8th September and seventy six transfers on the 9th September.

It was the secretary's duty to register these transfers. As might be expected, the facilities available to the secretary to process such a large number of transfers were inadequate and it became necessary for him to call in registration staff from Craig Gardner & Company the company's auditors to assist him in this job. The secretary's task was further complicated by the need to process some four thousand proxies delivered to him in respect of the meeting. Here again he was obliged to rely upon the assistance of the registration staff of Craig Gardner & Company.

I do not propose to deal in detail with the work done by this registration staff. At first two members of the staff of Craig Gardner's were called in. Later they were joined by two more, and ultimately by a further six. They worked long hours - up to 9 p.m. on some nights, to mid-night on others, and the night before the meeting to 4 a.m. They were able to process all transfers received by the secretary of the company up to 4.15 p.m. on Monday the 6th September, but none received after that time of which there were approximately eleven hundred. In addition, they checked all the proxies and were able to provide for the chairman of the meeting the number of votes attributable to such proxies. It is in relation to these approximately eleven hundred stockholders whose transfers were not registered that the dispute in

this action arises.

It became obvious to Mr. Jackson, one of the solicitors acting for the plaintiffs that the weight of paper being delivered by him to the company both in the form of stock transfers and proxies was such that there was a serious doubt whether or not all the transfers could be registered in time for the meeting. He telephoned Mr. Hogan his colleague acting for the company on Wednesday the 8th September and asked him whether or not unregistered stockholders would be allowed to vote. Mr. Hogan said that he would consider the matter. Mr. Jackson rang Mr. Hogan again that evening and was told by Mr. Hogan that he had no answer for him yet but that he was getting counsels opinion the following morning. On the following day Thursday the 9th September Mr. Jackson wrote to Mr. Hogan as follows:-

"Dear Mr. Hogan,

Further to my telephone conversation of the 8th instant, I wish to confirm my telephone conversation with you on the 8th in connection with the Alliance and Dublin Consumers Gas Company. My client, Donal Kinsella, shall be claiming a right to vote on foot of proxies lodged in respect of transfers which have been duly delivered to the Secretary and accepted by him prior to 11 o'clock on Wednesday the 8th September, 1982.

"I particularly confirm that I referred you to Sections 61, 62 and 64, as well as Sections 14 to 20 inclusive of the Companies Clauses Consolidation Act 1845. In addition, I referred you to Halsburys Statutes of England, third edition, volume 5 page 49 and thereabouts as well as the case of Nanney .v. Morgan (1887) 37 Ch.D. page 346 and 353 as well as page 354 and 356.

My clients supporters through their proxy of my client will be claiming entitlement to vote on foot of those proxies lodged concerning any stocks that may remain unregistered (but having been duly delivered) at the time of the meeting.

I would also point out that there appears to be no regulation whereby the register of transfers can be closed and it would be my clients contention that registration in any event can be completed by the time of the meeting of those transfers as yet unregistered in view of the number that were registered on Monday, the 6th September, 1982.

I felt it best to put the basics of our conversation and my clients contentions in writing at this stage even though I realise that at the time of writing you are urgently considering the contents of my telephone call.

Yours sincerely".

On the same day Mr. Hogan's secretary rang Mr. Jackson to say that he had as yet no answer for him. He got no answer that day nor was he able to contact Mr. Hogan the following morning prior to the meeting. He attended the meeting and learned from the opening remarks of the chairmen of the meeting that the attendance of unregistered stockholders was not being permitted.

The plaintiffs complain that the failure to register all the transfers submitted was as a result of a conscious decision to deprive the transferees affected of their rights as stockholders and that the failure of Mr. Hogan to answer the question put to him was part of that conscious decision and deprived them of the opportunity to apply to the Court for an injunction to restrain the holding of the meeting.

The evidence adduced shows that no more work could have been done by the registration staff prior to the meeting. It was the decision of Mr. Mooney, the senior member actually carrying out the work, made on the afternoon of Tuesday the 7th September that he would be unable to register any more transfers than those upon which he and his staff were then engaged. On the following afternoon, the registration staff were instructed by the secretary of the company acting on the advice of Mr. Fitzgerald, another member of the firm of solicitors acting for the defendants, that their priority was to have the proxies processed and that if this meant leaving transfers unregistered

this would have to result. I have no evidence that there was any conscious decision by the board of the company or any one acting on its behalf to leave these transfers unregistered. The evidence is all to the contrary as I have indicated. Mr. Fitzgerald indicated that they would rely upon the expertise of Craig Gardner and Company. It was through no lack of expertise on their part that the total work could not be completed. In my view, they did much more than could have been expected of them and are to be commended for their efforts. They were beaten by the sheer volume of paper and the shortness of the time available to them.

No reasonable explanation was given for the failure by Mr. Hogan to reply to the question raised by Mr. Jackson. Although it was not known on the Wednesday evening whether the instruction given to the registration staff would result in any transfers being left unregistered, it was reasonable at that stage to expect that this would apply to a large number of transfers. However, what was known, if not on the Wednesday, then on the Thursday, was that stockholders who were not registered in the register of shareholders at the time of the meeting would not be allowed to vote. Mr. Fitzgerald in evidence said that the failure to answer Mr. Jackson's question was that both he and Mr. Hogan had a lot of things to do and that there was no obligation to answer it. This answer and

the manner in which it was given was unfortunate since it tended to support an allegation for which there was no evidence. I think that an answer should have been given.

The basic question raised in these proceedings is the stage at which a transferee of shares in the company becomes entitled to exercise his or her voting rights in respect of such shares. The plaintiffs say it is when the transfer of such shares is acknowledged by the secretary of the company to have been received by him. The defendants say it is when the stockholder is actually registered as a stockholder in the register of shareholders.

In support of his submission counsel for the plaintiffs relies on the wording of Section 15 of the 1845 Act and on passages in the judgment of Cotton L.J. in Nanney .v. Morgan, 37 Ch.D. 346. Section 15 of the 1845 Act in so far as it is material is as follows:-

"15. The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called the "Register of Transfers", and shall endorse such entry on the deed of transfer, and shall, on demand, deliver a new certificate to the purchaser,.... and on the request of the purchaser of any share an endorsement of such transfer shall be made on the certificate of such share,

" instead of a new certificate being granted; and such endorsement being signed by the secretary, shall be considered in every respect the same as a new certificate, and until such transfer has been so delivered to the secretary as aforesaid the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share".

In Nanney .v. Morgan, Cotton L.J. at page 353 cites Section 15 from the words "and until such transfer has been so delivered" until the end of the section and continues:

"that as regards the company provides that the deeds shall not have any effect, so as to put the transferee into the position of the transferor until it has been left with the Secretary, and it must be not only left, but accepted by him as properly left, because if the secretary finds that it does not comply with the provisions of the Act it is his duty to refuse to receive it".

Further on in the same paragraph the Judge says:-

"I do not place any reliance on the transferee being entered on the register, because when a deed of transfer duly executed is left with the

"secretary, it becomes the duty of the company to register the transferee as entitled to the shares, and the mere neglect of the company to do that, will not in my opinion affect the right of the transferee to be treated as the legal owner of the shares".

This was the view of the majority of the Court, although one member, Lopes L.J. regarded it as unnecessary to express an opinion on the point.

The defendants reply to this submission is that it is well settled law that only shareholders are entitled to vote and that, for the purpose of ascertaining who are shareholders, the company, whether incorporated under the Companies Acts or a statutory corporation as in the present case, need look only to its register of shareholders. Counsel for the defendants relied so far as companies governed by the 1845 Act are concerned, upon a passage in the judgment of Linley L.J. in Powell .v. London and Provincial Bank 1893 2 Ch. 555. At page 560 Linley L.J. said:-

"....in order to acquire the legal title to stock or shares in companies governed by the Companies Clauses Consolidation Act you must have a deed executed by the transferor, and you must have that transfer registered. Until you have got both you have not got the legal title in the transferee".

Counsel for the defendants also referred to several sections in the 1845

Act in support of his argument. He relied particularly upon Sections 3, 8, 9 and 75. These sections are as follows:-

"3. The following words and expressions both in this and the special Act shall have the several meanings hereby assigned to them, unless there be something in the subject or the context repugnant to such Constitution:

the word "shareholder" shall mean a shareholder, proprietor, or member of the company; and in referring to any such shareholder, expressions properly applicable to a person shall be held to apply to a Corporation.

8. Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company.

9. The company shall keep a book, to be called the "register of shareholders"; and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such

" shareholders shall be respectively entitled...

75. At the general meetings of the company every shareholder shall be entitled to vote according to the prescribed scale of voting, and where no scale shall be prescribed every shareholder shall have one vote for every share up to ten, and he shall have an additional vote for every five shares beyond the first ten shares held by him up to one hundred, and an additional vote for every ten shares held by him beyond the first one hundred shares..."

Counsel further submitted that similar sections in the Companies Act 1862 and later Acts had been construed as he suggested and relied amongst other decisions upon Pender .v. Lushington (1877) 6 Ch. D. 4. 71.

The provisions of the 1845 Act like any other document must be construed as a whole. I am of the view that they are quite clear. Persons entitled to stock must be registered in the register of shareholders. Until they are, they are not entitled to vote. This is a well established principle and I would be wrong not to follow it.

I do not regard either Section 15 of the 1845 Act or the decision in Nanney .v. Morgan as being contrary to this view. Nanney .v. Morgan was a case in which the issue for the Court was whether a settlor of stock in a railway company held such stock under a legal or an equitable title at the date of the

settlement. If he had held under a legal title, a settlement would have been invalid, whereas if he had held under an equitable title it would have been good. The Court took the view that if a valid transfer had been accepted by the secretary at the date of the settlement, the settlor would have had the legal estate, but that the failure of the company to do what it had to do, i.e. register the transferee in the register of shareholders, could not have affected the transferees rights. Presumably, the Court was acting on the equitable maxim that it regards as having been done that which ought to have been done and was not prepared to permit failure by a company to determine whether the settlement was effective or ineffective.

There is nothing either in section 15 which provides that the right to vote acquired by the transferee shall be exercisable before registration of the name of the transferee in the Register of Shareholders. Having regard to the view expressed in Nanney .v. Morgan and the express words of Section 15 of the Act, it may be that the true interpretation of that section is that the legal interest when completed by registration relates back to the date of receipt of a valid transfer.

It follows from my decision on the question of voting that the meeting was a valid meeting. Only the votes of those entitled to vote were accepted whether in person or by proxy. The decision of the meeting was therefore in accordance

with its constitution.

The plaintiffs next submission is that nevertheless the chairman of the meeting should have adjourned the meeting to enable the transfers which had not been registered to be registered. His basic argument is that the true verdict of the stockholders of the company could not otherwise have been obtained.

This argument is one with which I have considerable sympathy on a practical rather than on a legal basis. The purpose of the meeting was to test voting strength. The agreement of the Board to resign, if the first resolution was determined against them, shows this. Accordingly, when it became apparent that the real purpose of the meeting was not going to be achieved, it would have been in keeping with the intention of the parties that the meeting should have been adjourned to enable the transfers to have been registered so that all the transferees could vote at the meeting.

Nevertheless, the chairman of the meeting had no obligation to adjourn the meeting, nor could he have done so if the majority was against it. The meeting was entitled to proceed on the basis of the register of shareholders as it then existed. In my view, the failure of the Board to put the question of adjournment to the meeting is a matter of comment, it does not affect the validity of the meeting or of what took place at it.

HPB.

As part of his submission that the meeting should have been adjourned,

Counsel for the plaintiffs relied upon the failure of Mr. Hogan to answer the question raised by Mr. Jackson. He submitted that if an adverse answer had been received, he could have applied for and obtained an injunction to restrain the holding of the meeting pending the registration of all the transfers. This might have happened, but the failure to reply did not invalidate the meeting. If it had, my jurisdiction would have been to assume that the majority view, claimed by the plaintiffs to have been in their favour at that date, continued and to restrain any action of the Board contrary to such majority view: see Pender v. Lushington at page 80. I would have not been entitled to declare the resolutions carried, but merely to direct the holding of a fresh meeting to determine the matter and to restrain the Board in the manner I have indicated until the verdict of such later meeting had been obtained. As it did not, I must leave it to the parties to call such further meeting.

The meeting was properly held on the basis of the register of shareholders as it then existed. I accept that the secretary of the company has a reasonable time in which to register transfers received by him. In the present case, all reasonable efforts were made to register transfers, and the failure to so register them is not a ground on which the plaintiffs are entitled to rely.

In this case, the plaintiffs are not entitled to the relief they seek.

This does not however mean that they are not entitled to call a further extraordinary general meeting with a similar order of business to that of the meeting of the 10th September, 1982.

Henry Barron

5/10/82.