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IN THE PRIVY COUNCIL No. 16 of 1979

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

B e t w e e n :

COACHCRAFT LTD.

Appellant
(Plaintiff)

-and-

S.V.P. FRUIT CO. LTD. and
MAXWELL GEOFFREY CHAPMAN

Respondents
(Defendants)

CASE FOR THE FIRST RESPONDENT

INCE & CO.,
11 Byward Street,
LONDON. EC3R 5 EN

Solicitors for the
Appellant (Plaintiff)

RICHARDS BUTLER & CO.,
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Solicitors for the
Respondents (Defendants)

IN THE PRIVY COUNCIL No. of 197

O N A P P E A L

FROM THE SUPREME COURT OF THE STATE OF VICTORIA

B E T W E E N :

COACHCRAFT LIMITED — Appellant

-and-

S.V.P. FRUIT CO. LIMITED and
MAXWELL GEOFFREY CHAPMAN — Respondents

CASE FOR FIRST RESPONDENT

Background Material

1. The First Respondent was incorporated under the name Southern Victorian Pear Packing Co. Ltd. on the 27th November 1930. On the 27th March 1946 it changed its name to Blue Moon Fruit Cooperative Ltd. It was a condition of that change of name, which included the word "Cooperative" that the Articles of Association of the company be amended, and they were in fact amended on the 7th March 1946, to include, inter alia, Articles 5, 6 and 159 of the present Articles. 127 184

2. Articles 5, 6 and 159, as amended, provided -

"5. No applicant for shares shall be allotted less than one share or more than Four Thousand shares in the company. 84.20,

6. The shares held or capable of being held by or on behalf of

any one member shall not exceed in number Four Thousand nor in value Four Thousand Pounds."

"159. Articles numbered 3, 5, 6, 7, 8, 41, 109, 127, 134 shall not be altered, varied or rescinded without the consent of the Governor-in-Council first obtained."

3. On the 8th December 1952, Articles of Association 5 and 6 were amended to substitute "Ten" for "Four", wherever "Four" appeared. The consent of the Governor-in-Council was not obtained for this amendment though the consent of the Crown Solicitor for the State of Victoria was. All parties have accepted in these proceedings that Articles 5 and 6 are operative in their amended form. 84.40

4. On or about the 7th October 1977, the First Respondent changed its name from Blue Moon Fruit Cooperative Ltd. to S.V.P. Fruit Co. Ltd. 128

5. At all relevant times the nominal capital of the company has been $1,000,000 divided into 500,000 shares of $2 each and its issued capital has been $830,110 made up of 415,055 shares of $2 each. 85.9

6. At all material times the Appellant has been a shareholder in the capital of the company. 1.28 85.16

<u>The Events occurring Between the 14th May and August 1977</u>

7. On the 14th May 1976, the Appellant sent to selected shareholders of the company a "First Come First Served" offer to purchase from each of the selected shareholders all his shares in the company at a price of 85 cents per share. The purchase price was later increased. As a result of this invitation, by the 2nd September 1976, the Appellant had purchased 58,888 shares in the company. 139 85.30

8. The offer of 14th May 1976 included the following statements - 139

"To selected shareholders of Blue Moon Fruit Cooperative Ltd.

This letter is an invitation to you to sell to us all your shares in Blue Moon Fruit Cooperative Ltd. The price we offer is 85 cents per share which is considerably more than the price at which we understand shares have recently changed hands when a buyer could be found.

Our offer is limited to a maximum of only 60,000 shares and is therefore on a strictly 'first come first served' basis. This letter is being sent simultaneously to selected shareholders so that each will have an equal opportunity to participate in this offer of 85 cents per share but you are urged to act quickly if you wish to sell. Acceptances received by us at the same time shall be treated as being received in such order as Coachcraft Ltd. in its absolute discretion shall determine.

Because of transfer restrictions in the Blue Moon Articles of Association it is a condition of our offer that you sign a power of attorney in respect of the shares you sell."

9. The power of attorney enclosed with this offer included the following provisions - 142

"Insert name and address ..... of ..... give notice as follows:

1. I have sold to Coachcraft Ltd. C/o: Industrial Equity Ltd. of 44 Market Street, Melbourne all my interest in shares in the capital of Blue Moon Fruit Cooperative Ltd. and I enter into this deed as one of the terms of such sale.... .

2. I hereby irrevocably appoint David Harold Allen Craig or failing him Barry Broughton Holmes or failing either of them such other person as may from time to time be nominated in writing for that purpose by Coachcraft Ltd. as my proxy to vote at meetings of the members of the company and I also irrevocably appoint each of such persons and also the said Coachcraft Ltd. severally as my attorney with power but only in relation to shares of the company to do all matters or things of every kind and nature which I myself could do if personally present and acting, including without limitation of such power the power to transfer, assign, mortgage or otherwise deal with such shares."

10. On the 21st April 1977, the Appellant made a formal "Take Over" offer for all the remaining issued shares in the company which had not already been acquired by it. It gave notice of the takeover offer to the Respondent on the 22nd April 1977. As a result of that takeover offer, the Appellant acquired approximately 60,000 more shares in the Respondent. 148

11. The takeover offer of the 21st April 1977 included the following statement - 151.25

"(d) Consideration.

The consideration offered is one dollar twenty cents ($1.20) cash for each offer share in respect of which you accept this offer by executing the form of acceptance and transfer and the two copies of the power of attorney and otherwise complying with paragraph (o) below. The power of attorney is required because payment will not be delayed pending registration of shares in the name of Coachcraft - see paragraph (i) below. Blue

Moon's article 6 at present provides 'The shares held or capable of being held by or on behalf of any one member shall not exceed in number 10,000 nor in value €10,000'."

12. The power of attorney annexed to the takeover offer included the following provisions - 169

"TO ALL TO WHOM THESE PRESENTS SHALL COME

I .....
of .....

give notice as follows:

1. I have accepted the offer dated ..... of Coachcraft Ltd. C/o: Industrial Equity Ltd. of 151 Macquarie Street, Sydney to acquire all my shares in th- capital of Blue Moon Fruit Cooperative Ltd. and have sold such shares to Coachcraft Ltd. I enter into this deed as one of the terms of such sale. Blue Moon Fruit Cooperative Ltd. is hereafter referred to as 'the company'. I hold the shares I have sold and all dividends, accretions and other benefits accrued or to accrue in respect thereof but not paid or made for Coachcraft absolutely."

Clause 2 of the power was in terms similar (but not identical) to clause 2 of the power set out in paragraph 9 above.

13. At the beginning of August 1977 the Appellant was registered as the holder of 10,000 shares in the First Respondent. 85.45

The Events occurring after August 1977

14. By a notice dated the 13th September 1977, the First Respondent called an extraordinary general meeting of its members for the 5th October 1977. The meeting was called pursuant to a requisition deposited by the Appellant at the First Respondent's registered office on the 5th August 1977, to consider and if thought fit to pass a number of resolutions as ordinary resolutions as well as the following resolution submitted as a special resolution: 132 86.1

> "7. That Articles numbered 159, 3, 6 and 80 of the company's Articles of Association be and are hereby deleted."

15. By the same document notice was given that the Board of Directors would submit to the meeting two special resolutions, providing that the First Respondent's name be changed to S.V.P. Fruit Co. Ltd. and that the company be voluntarily wound up. 86.27

16. At the meeting it was unanimously agreed that the winding up resolution submitted by the Board of Directors be put. This resolution was declared carried on a show of hands. A poll was thereupon demanded. On the poll, 186,511 votes were cast in favour of the resolution. It followed that at least 62,171 votes had to be cast against the resolution if it were to be defeated. 137,359 votes were in fact cast against the resolution. Of these votes, 10,000 were cast by the Appellant as the registered holder of 10,000 shares in the First Respondent, and these votes were allowed. A further 17,047 votes were cast by various shareholders in the company and these votes were also allowed. The chairman disallowed a total of 110,312 votes cast by three persons (Messrs. Brierley and Craig and Mrs. M. Moloney) purporting to act as proxies for shareholders by virtue of the powers of attorney referred to in paragraphs 9 and 12 above, and which had been deposited at the office of the First Respondent 87.45 87.50

before the time appointed for holding the meeting. Of the 17,047 votes allowed as aforesaid, some 15,000 were cast in respect of shares the holders of which had appointed Messrs. Brierley and Craig and Ms. Moloney as their proxies, these proxies having been in the form enclosed with the notice convening the meeting.

17. In consequence of the chairman's disallowance of the votes cast in respect of the abovementioned 110,312 shares, the winding up resolution was declared carried. If the disallowed votes had been allowed, the resolution would have been defeated. The Appellant subsequently brought this action for the purpose (inter alia) of challenging the passing of this resolution. 88.35

18. The action was heard by Menhennitt J. on the 1st, 2nd, 3rd and 6th February 1978. His Honour gave judgment on the 8th June 1978, when he dismissed the action. 39

19. The Appellant appealed to the Full Court of the Supreme Court of Victoria and the Appeal was heard by a Court constituted by Starke, McInerney and Murphy JJ. on the 22nd, 26th and 27th September 1978. The appeal was dismissed (save for one qualification which is not relevant to this appeal) on the 22nd November 1978, for reasons delivered by the Full Court on that date. 83

20. Upon Motion made to the Full Court of the Supreme Court of Victoria on the 18th day of December 1978, the said Full Court pursuant to Rule 2(a) of the Order in Council made by His Majesty King George V on 23rd January 1911 granted leave to the Appellant to appeal from its Decision to Her Majesty in Her Privy Council. 122

Arguments advanced on behalf of the First Respondent in opposition to the said Appeal

21. The First Respondent desires to advance the following arguments in support of the Decision given by the Full Court of Victoria upon the appeal.

General Submissions

22. It is respectfully submitted that the chairman of the meeting acted correctly in disallowing the 110,312 votes, and that the winding up resolution was properly declared carried. The First Respondent relies upon each of the matters advanced by the Full Court in their Honours' reasons delivered on the 22nd November 1978.

23. The Appellant in these proceedings devised an ingenious scheme to circumvent the Articles of Association of the First Respondent by inducing its shareholders to act in breach of their contract with each other and with the company.

24. The Articles of Association constitute a contract between the company and its members and arguably between the members inter se; Gower, Principles of Modern Company Law (3rd ed.) 261 ff. The cases supporting the propositions submitted in this paragraph are collected in Halsbury's Laws of England (4th ed.) vol. 7 pars. 117-121.

The members of a company are deemed to be aware of the contents of the Memorandum and Articles of Association. The members of a company are entitled to have the affairs of the company conducted in accordance with its articles and infringement of this right may amount to oppression; Re H.R. Harmer Ltd. /1959/ 1 W.L.R. 62 per Jenkins L.J. at 85 and per Romer L.J. at 87.

25. Articles 5 and 6 prevented the Appellant buying or holding beneficially more than 10,000 shares in the First Respondent. As the Full Court stated, it may be surmised that these articles were designed to

ensure an equitable spread of ownership and control among shareholders, and to prevent the ownership and control of the company from being concentrated into a very small group of members. By Article 159 these articles might not be altered, varied or rescinded without the consent of the Governor-in-Council first obtained.

26. The attempt to induce shareholders to sell to the Appellant more than 10,000 shares was an attempt by the Appellant to induce a breach of contract on the part of each of the shareholders concerned. The terms of both offers demonstrate that the Appellant was aware of this, and each of the shareholders must also have known of this.

27. Where the articles of a company limit the number of shares which can be held by a shareholder, a transfer to a person already holding the prescribed number by a transferor with notice of the fact is invalid; Re Newcastle-upon-Tyne Marine Insurance Co., ex parte Brown (1854) 19 Beavan 97.

28. The sales and purported transfers of the 110,312 shares amounted to a breach of contract (on the part of both the Appellant and the transferor shareholders), were invalid as against the First Respondent, and could have been restrained by action for injunction if the First Respondent had acted in time. Each of these points was properly conceded by Counsel for the Appellant both Before Menhennitt J. and the Full Court. It is submitted further that since the sales and transfers were invalid as against the company and shareholders who had not assented to them, the company and such shareholders would have been entitled after the event to a declaration to this effect.

29. As to the effect of a breach of the articles, the First Respondent refers to -

Hunter v. Hunter /1936 A.C. 233 per Lord Hailsham at pp. 243-8,

Lord Blanesburgh p. 255, per Lord Atkin p. 261 and per Lord McMillan p. 264.

Grant v. John Grant 82 C.L.R. 1 per Williams J. pp. 28-9 and per Fullagar J. pp. 46, 48.

Lyle v. Scott's Trustees [1959] A.C. 763 per Viscount Simonds p. 774 and per Lord Keith p. 786.

30. Article 6 is clearly directed to beneficial ownership. In other words in this respect the articles demonstrate an intention to go behind the share register by prohibiting the total quantity of shares held by or on behalf of one member from exceeding 10,000.

31. A beneficiary who is sui juris and absolutely entitled may direct his trustee how he should exercise his voting powers: Kirby v. Wilkins [1929] 2 Ch. 444, 454; Butt v. Nelson [1952] Ch. 197, 207; Walker v. Willis [1969] V.R. 778.

Further the trustee must exercise his discretion in voting in the best interests of his beneficiary unless and until the beneficiary directs him to vote in a particular way, in which case he must follow his instructions: Kirby v. Wilkins (supra).

32. It is respectfully submitted that the First Respondent would have accordingly been entitled to enforce the contract embodied in the articles against the Appellant and against those shareholders who sold and transferred in breach of Article 6, either by action for an injunction or for a declaration. It is further submitted that it follows that the company (and its chairman) was entitled (and indeed bound) at the meeting to treat the contracts of sale of the shares as invalid and to disregard matters wrongly done pursuant to these contracts.

Interpretation of Articles

33. Articles of Association are "commercial documents" (Palmer's Company Law (22nd ed.) 126). They "should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable" (per Jenkins L.J. in Holmes v. Keyes /1959/ Ch. 199 at 215. See also Rayfield v. Hands 1960 Ch. 1; and Victorian Onion Growers etc. v. Finnigan /1922/ V.L.R. 384, 389, 400-401).

The Nature of a Share

34. A share is a right to a specified amount of the share capital of a company, carrying with it certain rights and liabilities while the company is a going concern and in its winding up. It has been described as a "bundle of rights" (Re Banque des Marchands de Moscou (Koupetchesky) /1958/ Ch. 182 at 220. There are three major aspects to the rights of a shareholder -

(1) the right to a proportion of share capital (corpus);

(2) the interest in dividends and profits (income);

(3) the right to partake in management and control of the company (voting).

It is respectfully submitted that Articles 5 and 6 are clearly directed to management and control. The company and the other members plainly have a real interest in the power an individual shareholder might have to control the company. Articles 5 and 6 are unlikely to be related to profits or dividends since these are to be divided among shareholders, particularly in the light of Object (q) and the lack of limitation on the amount of business any individual shareholder may conduct with the company.

The Major Arguments

35. If the First Respondent had sought and obtained an injunction to prevent the sales of shares (which the Appellant concedes to have been the First Respondent's right), any such order would have affected the whole scheme, including the grant of the proxies. If the First Respondent on the other hand had contented itself with obtaining a declaration, that declaration would equally have extended to the whole scheme, including the proxies. It is submitted accordingly that if the company would have been entitled to an appropriate declaration it should follow that the company also remains entitled to disregard the scheme and the proxies as being invalid.

36. The First Respondent's primary submission is that it is unnecessary to read any implication into the articles to enable the First Respondent to succeed. One should approach the articles for the purposes of interpreting the written word and giving it business efficacy.

37. It is submitted that the so-called proxies were simply part of the means of achieving the Appellant's wrongful end. The shareholders were debarred by Article 6 from transferring beneficial ownership of their shares (those bundles of rights) to the Appellant. The purported proxies were the means by which one of the rights in each bundle - that with which the Article is most concerned - was to be transferred to the Appellant, for the purpose of carrying out the scheme.

38. The First Respondent respectfully submits that -

(a) Article 6 directly acts on the proxies if the expression "the shares" is construed as "the shares (including the rights thereto)";

(b) alternatively the Appellant's scheme is an attempt to do indirectly what the Appellant and the relevant shareholders could not do directly. It is submitted that the shareholders could clearly not have made a separate assignment to the Appellant of each of the separate rights (the voting right, the dividend right and the property right) that constitute each share;

(c) In Ansett Transport Industries (Operations) Pty. Ltd. of Australia and Others v. The Commonwealth (1978) 52 A.L.J.R. 254 at 257 Barwick C.J. referred to the general rule that a party to a contract made on the footing of the continuance of a state of things may not by any act within its power or control do anything to destroy or relevantly to diminish that situation. The Appellant has, of course, embarked on a course of action with precisely such a purpose;

(d) furthermore in Australian Hardwoods Pty. Limited v. Commissioner for Railways /1961/ A.L.R. 757, at 762, /1961/ 1 All. E.R. 737, at 742, Lord Radcliffe stated:

> "A plaintiff who asks the Court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations. The case of Measures Bros. Limited v. Measures /1910/ 1 Ch. 336; /1910/ 2 Ch. 248 is a familiar instance of this principle."

In the present case, the Appellant and the shareholders who had contracted with it, being themselves in breach of their contract with the other members of the company and the company itself, are thus disentitled

from seeking to enforce the same contract and cannot therefore obtain the relief sought by the Appellant in this action.

The Construction of Article 6

39. Articles 5 and 6 were presumably intended to ensure any one person (or group of persons) could not control the company.

40. Article 70 provides:

> "Subject to these Articles and to any special terms as to voting upon which any shares may have been issued on a show of hands every member present in person or by attorney and entitled to vote shall have one vote and upon a poll every member present in person or by proxy or attorney and entitled to vote shall have one vote for every share held by him."

It is respectfully submitted that Article 70 should be read in the light of the terms of Article 6. It would then follow that since no shareholder is entitled to hold or to be registered in respect of or to have held by any other person any number of shares which total in excess of ten thousand, a shareholder is not entitled to attend and vote at a meeting of the company in respect of any shares held by him or by him and on his behalf in excess of ten thousand.

41. Accordingly it is submitted that the Appellant was entitled to attend and vote at any meeting of the First Respondent in respect of shares to the total number of ten thousand only, registered in its name or held on its behalf. It was not entitled to procure and exercise voting rights in respect of shares over and above the permitted number of ten thousand.

42. It is submitted that in circumstances where a shareholder has wrongfully contracted to transfer his shares to

someone who already holds the maximum number of shares allowed by the Articles of Association he is not entitled to exercise voting rights in respect of such shares. For so long as the shareholder has subjected himself to a contract in breach of the Articles, and therefore has submitted his vote to control by the purchaser, the right to vote would be lost: see O'Keefe v. Williams 5 C.L.R. 217, 230 per Isaacs J., Ansett Transport Industries (Operations) Pty. Ltd. of Australia and Others v. The Commonwealth 52 A.L.J.R. 254, 273 per Aickin J., Chitty on Contracts (General Principles) (24th ed.) pp. 702-4 pars. 1491-2.

The Proxies

43. A proxy is merely the agent of the shareholder, bound to act in accordance with his instructions and in his interests. Cousins v. International Brick /1931/ 2 Ch. 90 per Lord Hanworth M.R. at 100 and per Lawrence L.J. at 102; Bowstead on Agency (14th ed.) 126, art. 45.

44. It is respectfully submitted that the "proxies" relied on by the Appellant were not in fact proxies at all. They were not because -

(a) there was no question of the "proxy holder" being a substitute for the shareholder. The shareholder was bound to act in the interests of the Appellant to whom an assignment of the beneficial ownership had already been made in breach of Article 6;

(b) the proxy holder had neither the obligation nor intention to act in the interests of the shareholder;

(c) the proxy was irrevocable and was in effect directed to the beneficial owner of the share;

(d) the "proxies" amounted to a wrongful attempt to assign the right to vote, to get into the hand of the Appellant as shareholder the very

thing prohibited by the Articles, namely voting control.

They should not be characterized as proxies but as assignments of the right to vote. For the same reasons each of these "proxies" was nothing other than a pretence or sham. The label applied to them by the Appellant could not it is respectfully submitted affect their nature in law.

Sections 140 and 141 of the Companies Act

45. The right of a member of the First Respondent to attend and vote stems, of course, from the fact of membership of the company. The right has a statutory basis in section 140(1)(c) of the Companies Act 1961 (Victoria), which exists "so far as the articles do not make other provision in that behalf". As stated above, the relevant article is Article 70 which it is submitted must be construed in the light of Article 6.

46. It is respectfully submitted that the Appellant can gain no assistance in this appeal from section 141. Section 141 is not relevant because it is not directed to the right to vote. Rather it assumes the existence of this right. The right to vote derives from section 140 and Article 70.

47. The Appellant accordingly cannot put its arguments higher than the following - if there is a right to vote, that right can be exercised by proxy; and that right to vote by proxy can only be regulated and cannot be taken away by the articles.

48. The First Respondent respectfully submits as to section 141 that -

(a) the "proxies" relied on are not in truth proxies;

(b) the granting of the "proxies" was a breach of contract which could have been restrained by injunction or declared to be a breach of

contract. Section 141 does not entitle a shareholder to act in breach of contract;

(c) the proper construction of Articles 5, 6 and 70 is that shareholders who have wrongfully sold their shares in breach of Article 6 have deprived themselves at least for the time being of their entitlement to exercise voting rights in respect of such shares. It would be no breach of section 141 to assert that a shareholder cannot by proxy exercise a non-existent right to vote;

(d) it is in any event merely regulatory of the right to vote by proxy to require the shareholder not to grant his proxy to someone who already controls 10,000 shares, where the proxy so given would relate to other shares already controlled by the proxyholder, in breach of Article 6.

Locus Standi of the Appellant

49. In any event the Appellant has no standing to complain of the chairman's disallowance of the 110,312 votes cast by proxy or of alleged breaches of section 141. The Appellant has not been denied the right to vote at all or by proxy in respect of the 10,000 shares of which it is registered as owner. It is the owners of the 110,312 shares which were purchased by the Appellant and whose "proxies" were disallowed, who would have had such standing. These shareholders have not been heard to complain of the chairman's actions or of any alleged breach of section 141.

Severance

50. It is submitted that the doctrine of severance can have no application to the facts of this case. The Appellant has argued that to say the proxy falls with the sale is to deny the very purpose for which it was given. It is for precisely this reason that severance cannot be applied. The

giving of the proxy was an essential part of, and inextricably bound up with, the Appellant's wrongful scheme. It would be to depart totally from reality to argue that the transferors would have given the proxies to the Appellant, if the Appellant had not wrongfully contracted to buy the shares and pay the price.

51. Further it is respectfully submitted that the grant of the proxy was in itself in each case a breach of the Articles and thus wrongful.

The Conclusiveness of the Chairman's Decision

52. Article 69 provided that -

> "No objection shall be made as to the validity of any vote except at the meeting or poll at which such vote was tended and every vote not disallowed at such a meeting or poll and whether given personally or by proxy or attorney shall be deemed valid. The decision of the chairman as to the admission or rejection of a vote shall be final and conclusive."

53. The chairman of the meeting, by virtue of Article 69, was put in the position of arbitrator as to the admission or rejection of votes by proxy or otherwise. There has been no suggestion that the chairman exercised his decision other than bona fide and consequently his decision to reject the 110,312 votes cannot be challenged.

54. The conclusiveness of the chairman's decision is established by Wall v. Exchange Investments Corporation Ltd. /1926/ 1 Ch. 143 and Colonial Gold Reef Ltd. v. Free State Rand Ltd. /1914/ 1 Ch. 382. It is respectfully submitted that in the absence of fraud by the chairman or inaccuracy on the face of the decision, the chairman's decision is conclusive. Fraud has never been alleged, and it is submitted that there is no inaccuracy involved in the chairman's decision.

55. It is respectfully submitted that the chairman's decision is, in the circumstances, conclusive and is not now open to challenge.

56. For the reasons advanced herein the First Respondent submits that the judgment of the Full Court of the Supreme Court of Victoria should be upheld and that the Appeal herein be dismissed with costs.

10

Stephen Charles

S.P. CHARLES

Peter R Hayes

P.R. HAYES

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