Privy Council Appeal No. 16 *of* 1979

Coachcraft Ltd. – – – – – – – – *Appellant*

v.

S.V.P. Fruit Co. Ltd. and Maxwell Geoffrey Chapman – *Respondents*

from

THE FULL COURT OF THE SUPREME COURT OF VICTORIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH FEBRUARY 1980.

Present at the Hearing:

LORD WILBERFORCE
LORD SALMON
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
LORD SCARMAN

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria affirming a judgment of Menhennitt J. in the Supreme Court, which dismissed the claim of the appellant/plaintiff.

In the action the appellant attacked the validity of a special resolution purportedly passed at an Extraordinary General Meeting of the first respondent ("the Company") held on 5 October 1977. This resolution, if valid, would have had the effect of putting the Company into a members' voluntary liquidation with the second respondent as liquidator. The appellant claimed that the resolution was invalid because, as it asserted, the chairman wrongly disallowed a number of votes, in particular 97,006 votes cast by Mr. David H. A. Craig as proxy. Mr. Craig was the Melbourne manager of the appellant, and for all purposes must be taken to have been acting in its interest and on its behalf.

The Company was incorporated in 1930 under the name Southern Victoria Pear Packing Co. Ltd. On 27 March 1946 it changed its name to "Blue Moon Fruit Co-operative Ltd". In 1977 it changed its name again to "S.V.P. Fruit Co. Ltd". At all material times the nominal capital of the company was $1,000,000 divided into 500,000 shares of $2 each, and its issued capital was $830,110 divided into 415,055 shares of $2 each.

On the occasion of the change of name in 1946, which included the word "Co-operative", it was a condition of that change being allowed that the Articles of Association should be amended. They were so amended so as to include (*inter alia*) the following Articles 5, 6 and 159. These provided:—

> "5. No applicant for shares shall be allotted less than one share or more than Four thousand shares in the Company.
>
> 6. The shares held or capable of being held by or by and 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 Articles numbered 3, 5, 6, 7, 8, 41, 109, 127, 134, shall not be altered varied or rescinded without the consent of the Governor-in-Council first obtained".

In 1952 "Ten thousand" was substituted for "Four thousand" in Articles 5 and 6 by amendments accepted as valid.

The present dispute arose out of an attempt by the appellant to secure control of the Company. This was made in two stages.

On 14 May 1976 the appellant made a "First Come First Served" offer to selected shareholders to purchase all their shares at 85c. per share (later increased). The offer contained a paragraph in the following terms:

> "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".

There was enclosed a power of attorney in the following terms:

"TO ALL TO WHOM THESE PRESENTS SHALL COME

I .....
(insert name and address)

of .....

.....give notice as follows:

1. I have sold to COACHCRAFT LTD., c/o INDUSTRIAL EQUITY LIMITED of 44 Market Street, Melbourne all my interest in shares in the capital of BLUE MOON FRUIT CO-OPERATIVE LIMITED and I enter into this Deed as one of the terms of such sale. BLUE MOON FRUIT CO-OPERATIVE LIMITED is hereafter referred to as 'the Company'.

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 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.

3. I hereby request the Company to register my address in the register of members as care of Industrial Equity Limited, 44 Market Street, Melbourne and direct that all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or other sums payable by the Company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Limited shall be full and sufficient discharge therefor.

4. I covenant that no person has any claim to the shares in the Company which I have sold which prevents me from selling the whole interest in such shares to Coachcraft Ltd. and that I will execute or have executed if so requested by Coachcraft Ltd. but at its expense all such further documents in relation to such sale as may be thought necessary or desirable more effectively to assure the benefit of such sale to Coachcraft Ltd. or to such other person as it may from time to time wish to have the benefit of such sale.

5. I covenant for myself my executors administrators and assigns to allow ratify and confirm all and whatever my attorney or proxy or Coachcraft Ltd. shall do or cause to be done by virtue of this Deed.

IN WITNESS WHEREOF I have hereunto set my hand and seal this day of , 1976.

(insert date)

SIGNED SEALED AND DELIVERED

by the said.....
(insert name & sign)

.....

in the presence of.....

.....
(Witness to sign)

Seal".

The offer resulted in the appellant purchasing 58,886 shares.

The second stage consisted of a takeover offer made on 21 April 1977 at a price of $1.20 per share in cash. It was a term of the offer that on acceptance the sellers should sign a power of attorney: this, it was said, was required

> "because payment will not be delayed pending registration of shares in the name of Coachcraft . . . . . Blue Moon's Article six at present provides 'The shares held or capable of being held by or on behalf of (sic) any one member shall not exceed in number ten thousand nor in value ten thousand pounds'."

The power of attorney sent with the takeover offer contained the following paragraphs:

"1. I have accepted the offer dated of COACHCRAFT LTD., c/o INDUSTRIAL EQUITY LIMITED of 151 Macquarie Street, Sydney to acquire all my shares in the capital of BLUE MOON FRUIT CO-OPERATIVE LIMITED and have sold such shares to Coachcraft Ltd. I enter into this Deed as one of the terms of such sale. BLUE MOON FRUIT CO-OPERATIVE LIMITED 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.

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 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 execute all notices proxies and other documents and 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.

3. I hereby request the Company to register my address in the register of members as care of Industrial Equity Limited, 151 Macquarie Street, Sydney, and direct that all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or other sums payable by the Company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Limited shall be full and sufficient discharge therefor".

As a result of this offer the appellant acquired at least a further 61,226 shares.

In August 1977 the appellant was registered as the holder of 10,000 shares in the Company, the maximum permitted by Article 6. Most of these had been acquired under the invitation or the takeover offer. The vendors of the remaining shares sold to the appellant under the invitation and the takeover offer continued on the register as holders of those shares.

At the Extraordinary General Meeting held on 5 October 1977 the Board of Directors submitted a resolution for the voluntary winding up of the Company. This resolution was carried on a show of hands. On a poll being demanded 186,511 votes were cast in favour of this resolution: so in order to defeat it 62,171 votes at least had to be cast against it. The appellant cast 10,000 votes in respect of its registered shareholding against the resolution, and 17,047 votes against were cast by other shareholders and allowed. The chairman however disallowed 97,006 votes attempted to be cast by Mr. Craig as proxy, and certain other proxy votes given by vendors of shares to the appellant. If Mr. Craig's votes had been allowed the respondent would have been defeated and the only issue is whether the disallowance of these votes was valid. It is now necessary to refer to other provisions in the Company's Memorandum and Articles of Association.

The Memorandum, para. 2(q), contains a provision, suitable for a Co-operative Company, enabling the Company, after paying dividends, to divide the Company's profits among the shareholders in proportion to the amount of business done with the Company by each shareholder. The Articles deal with the voting powers in a group of Articles 70—78. Article 70 must be quoted:

> "70. 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".

Article 74 provides that on a poll votes may be given personally or by proxy or attorney and Article 78 sets out the terms of an instrument of proxy, which is in common form. The remainder of the Articles, too, are generally in common form.

It is clear from the Articles quoted that the key to the present dispute is to be found in Article 6 read together with Article 70: then the legal effect of these has to be considered in relation to the power to vote. Before coming directly to this issue there is one point which requires to be cleared away.

Article 6 puts a limit upon the number of shares which may be held by or by and on behalf of any one member. A member in this context must mean someone who is on the register of members, so that the prohibition applies only against such a person. It was assumed that this provision applied to the appellant, thus enabling an argument to be developed that the relevant acquisitions by the appellant in 1976/7 or those in excess of 10,000 shares were made in contravention of the Articles. This argument was in effect accepted by and formed part of the basis of decision of the Full Court. But it appears that this assumption may not have been correct. If it were not, the case may have been argued and decided upon a basis of fact diverging from the reality. However it is not possible at this stage to question the assumption. The appellant's statement of claim averred that it was at all material times a shareholder in the Company and this was admitted by the respondents. No attempt was made to amend this, or to call evidence showing that it was incorrect and the appellant by counsel disclaimed any intention to depart from the assumption. Their Lordships therefore would not feel able, whatever doubts they might have as to its validity in fact, to deal with

the case otherwise than upon the basis that the assumption is correct. In the event however their Lordships have reached a conclusion upon the appeal which does not rest upon this assumption.

The main argument for the appellant on the construction of Article 6 was that this Article *per se* was nothing more than a limitation upon the number of shares which a member might have in legal and/or equitable ownership. It did not affect in any way the right to vote which registered owners of shares might possess: this remained governed by Article 70. The vendors of the shares sold to the appellant remained on the register, and by virtue of their membership and legal ownership retained the right to vote conferred by Article 70—one share one vote: this right could be exercised in person or by proxy. Even though a share may include, as one of the rights inherent in it, the right to vote, it could not be said that this right was (illegally) transferred by the vendors to the appellant, because the right to vote was retained by the vendors, this nonetheless though they appointed Mr. Craig as their proxy. This argument was attractively put by Mr. Callaway for the appellant. A number of answers, some of a sophisticated character, were put forward by the respondents. One was to the effect that Article 6 viewed as a contract between member and Company, should be read as subject to an implied term that nothing would be done by any member which would make the Article ineffective, the term suggested being that a shareholder would not exercise more than 10,000 votes either directly or indirectly through persons holding shares for him: this argument led directly to the invocation of authorities on implied terms (e.g. *Liverpool City Council* v. *Irwin* [1977] A.C. 239 and *Ansett Transport Industries (Operations) Pty. Ltd.* v. *Commonwealth of Australia* (1977) 52 A.J.L.R. 254 particularly per Barwick C.J. (p.257) and Aickin J. (p.273)).

Their Lordships do not discount the merit of these arguments, but they consider that a more direct approach to Article 6 can be made. What was it, they would ask, that happened, and should have happened, on 5 October 1977 at the Extraordinary General Meeting? The appellant was then the registered holder of 10,000 shares and the beneficial owner of 110,312 (these included the 97,006 shares in respect of which Mr. Craig held a proxy, and other parcels in respect of which proxies had been given to other persons). Article 6, in contrast to normal Company regulations which do not enable a Company to look behind the register, entitles the Company, in relations with its members, to have regard to the beneficial as well as to the legal ownership of shares. If the appellant had been the legal owner of the 110,312 shares, and had attempted to vote in respect of them, the Company, under its contract with the appellant, would have been entitled to say that under the Articles he could be treated as owner of 10,000 shares and no more. If he could not be regarded as validly the owner of the 110,312, clearly he could not claim to exercise 110,312 votes. The position which arose when, as was the fact, the appellant was not legal owner but beneficial owner of 110,312 shares must be exactly the same, since the prohibition in Article 6 extends to shares held "on behalf of" the appellant.

As regards the appellant's contentions:

1. Article 70 is, in their Lordships' view, clearly subordinate to Article 6. It opens with the words "Subject to these Articles". These words cannot be limited so as to apply only to Articles 70—78: they must apply generally, and in particular so as to limit the number of votes which may validly be given by any member to those which he casts in respect of shares of which he is legal and/or beneficial owner in accordance with Article 6.

2. As to the argument that the votes attempted to be cast were proxy votes cast on behalf of the registered vendors, the answer is that this is contrary to the facts. The documents associated with the sales by the vendors to the appellant (set out above) make it perfectly apparent that, as part of the contracts of sale, the vendors were assigning their rights to vote to Mr. Craig on behalf of the appellant: he was not to vote in their interest, or on their

behalf, but was to vote as representative of the appellant, *qua* purchasers, and in their interests. Indeed the terms of the takeover offer (as quoted above) make no secret of the fact that the shares to be acquired by the appellant under it were only left in the sellers' names, with a power of attorney, because of the prohibition contained in Article 6. The clear implication of this was that the shares were to be voted thenceforth in the appellant's interest and theirs alone. The fact is that the so-called proxies were not proxies at all, in the proper sense of that word (see *Cousins v. International Brick Co.* [1931] 2 Ch. 90, 100 per Lord Hanworth M.R.), but irrevocable authorisations by the vendors to a representative of the purchasers to use the voting power of the shares sold in the interest of the purchasers.

3. In so far as the appellant relied on section 141 of the Companies Act 1961, their Lordships' opinion is that this section has no application to the facts of this case. The relevant part of this section is as follows:—

> "141.(1) Subject to sub-section (2) of this section, a member of a company entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, shall be entitled to appoint—
>
> (*a*) in the case of a company not having a share capital—another member or, where the articles so provide, another person (whether a member or not); or
>
> (*b*) in any other case—not more than two other persons (whether members or not)—
>
> as his proxy or proxies to attend and vote instead of the member at the meeting and a proxy appointed to attend and vote instead of a member shall also have the same right as the member to speak at the meeting, but unless the articles otherwise provide a proxy shall not be entitled to vote except on a poll".

It is common ground that this section confers a statutory right to appoint a proxy to vote instead of a member, and that, in the case of a public company, this right cannot be excluded by the Articles of Association. But, as explained above, the vendors of the shares were not attempting to exercise, nor prevented from exercising, a right to vote by proxy: they were authorising Mr. Craig to vote on behalf of the purchasers. Moreover, it is difficult to see how they could be described as "entitled to vote" since by the joint effect of section 141 of the Companies Act 1961 and Articles 70 and 6 they had in effect and for the time being disfranchised the shares sold to the purchasers.

Their Lordships therefore agree with the conclusions reached by both courts below that the chairman acted correctly in disallowing the votes tendered by Mr. Craig as "proxy", with the result that the resolution was validly passed.

They will humbly advise Her Majesty that the appeal be dismissed with costs.

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MAXWELL GEOFFREY CHAPMAN

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LORD WILBERFORCE

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