44 pages.

ROYAL COURT

(Samedi Division)

162.

6th November, 1991

Before: P.R. Le Cras, Esq., Commissioner, and Jurats Vibert and Orchard

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Between:	**John Arthur William Baker**	Plaintiff
And:	**John Pierre Vernon Falle**	Defendant

Advocate M.M.G. Voisin for the Plaintiff;
Advocate A.R. Binnington for the Defendant.

JUDGMENT

COMMISSIONER LE CRAS: The Plaintiff, Mr. J.A.W. Baker, was until the 4th May, 1990, the Managing Director of Falle's Holdings Ltd., the Fourth Defendant ("the Company"). He is also a minority shareholder in the Company.

The present action arises out of his attempt to effect a sale of his shares in the Company after he had ceased to be a Director.

The Plaintiff had started working for the Group, as it then was, some 35 years previously, and, for about fifteen years

before his resignation, had been Managing Director, the majority shareholder, Mr. J.P.V. Falle ("Mr. Falle") the First Defendant having during a number of years largely left the running of the business to him.

In the late 1980's Mr. Falle began once again to take an interest in the running of the Group of Companies. It suffices to say that by late 1989 he and the Plaintiff did not see eye to eye on the reorganisation and redirection of the business which Mr. Falle deemed necessary.

The upshot was that on the 4th May, 1990, the Plaintiff, at a meeting with Mr. Falle at which Mr. M. Le Grand, another Director, was present, stated that he wished to resign and walked out. He made up his mind to confirm his resignation and this he did by letter dated 8th May, 1990, which he want and handed to Mr. Falle in his office.

The last paragraph of this letter reads:

"In accordance with the Articles of Association of Falle's Holdings Ltd., I am hereby offering the sale of my shares in Falle's Holdings Ltd., to the Directors and would appreciate any proposals within the stipulated 28 days from today, 8th May 1990".

The Articles of Association to which he, at this point, intended to refer were Articles 14-17. As these are highly germane to the dispute, we reproduce them herewith:

"TRANSFER OF SHARES.

14.- No transfer of any Share in the Company shall be made or registered without the previous sanction of the Directors, who may, without assigning any reason, decline to give any such sanction.

15.- Any Member desirous of transferring his share or shares shall by notice in writing inform the Secretary for

the time being of his intention so to transfer. Within the space of twenty-eight days after the Secretary has been served with such notice the Directors may select a Member or other person willing to purchase the shares (hereinafter called "the purchasing Member"), and upon notice thereof being given to the proposing transferor he shall be bound upon payment of the value of the shares as fixed by Article 16 hereof to transfer the shares to the purchasing Member.

16.- In order to ascertain the price of any share or shares proposed to be transferred as aforesaid, the Directors shall in every year, by resolution, fix the price of the said share or shares and such price shall be binding upon all Members of the Company for a period of twelve calendar months from the fixing of such price.

17.- If the Directors shall not, within the space of twenty-eight days after the Secretary has been served with the transfer notice, find a Member or other person willing to purchase the share or shares and give notice in manner aforesaid, the proposing transferor shall at any time within three calendar months afterwards be at liberty to sell and transfer the share or shares (or those not placed) to any person and at any price".

The course of events, relevant to this litigation which then ensured may be briefly stated. On the 4th June, 1990, Mr. D. Knight, the Company Secretary replied to say that the Directors had not yet fixed a price for the shares but would be in a position to do so on receipt of the 1989 consolidated accounts. On 21st June the Plaintiff replied claiming:

"With regard to your previous letter of the 4th June requesting more time to fix a price for the Shares (which I should have received by 5th June), I respectfully wish to point out that in view of the fact I have had no further communication from you, under Article 17 I am now at liberty to sell and transfer the Shares to any person and at any price".

On the 4th July a Directors meeting was held. Those present are described as being Mr. Falle, Mr. M.J. Le Grand, Mr. C.V. Falle as Directors, and Mr. D. Knight, Secretary.

There is no mention of any convening notice, nor is the minute signed.

The first part of the business dealt with the consolidated accounts for 1989 which were approved by a majority and signed.

The next item of business dealt with the share price, the minute being recorded as under:

> "The Chairman proposed that the Share price be fixed at £106.14p and this was seconded by Mr. C. Falle. Mr. Le Grand felt that under Article 74 the price could not be fixed by the directors at the present time because of the interest they would have on the disposal of Mr Le Grand and Mr. J. Baker's Shares. He believed the price should be fixed by the Company's auditors. The Chairman felt that if Mr. Le Grand wished to seek the advice of the company's auditors then he was free to do so at his own cost.
> Mr. Le Grand also expressed that he wished to reserve his right to go to arbitration in order to fix the price of his Shares".

we understood that this was the first time the share price had been thus fixed for many years; if indeed it had ever been so fixed before.

In passing, it may be convenient to note at this point that Mr. Le Grand also wished to sell his minority shareholding, in the Company.

Towards the end of July and during August the Plaintiff made a further effort to resolve the position. this was met by a response from Mr. Falle on the 18th August in which he wrote, *inter alia:*

> "Thank you for your letter, I had not forgotten to study the proposals that you put to me at the end of last month, these last few weeks I have been fully occupied and did not

have the opportunity to apply the necessary thought to the matter.

I will set out the points discussed as follows:

1. For me to buy your shares in Falles Holdings Ltd.

   I would be willing together with others nominated to purchase your shares. Terms for payment would have to be negotiated. The price would be £106 per share".

The rest of the letter is not relevant, we think, to this dispute.

This letter, too, was unsigned but Mr. Falle in his evidence agreed its terms.

This did not satisfy the Plaintiff who then not only put advertisements in the "Jersey Evening Post". and the Guernsey Press but also telephoned Mr. D. Kirch, a well-known property developer residing in the Island.

He duly met Mr. Kirch. We do not think that we need set out the course of the negotiations: it suffices to say that the result was that the Plaintiff having requested Mr. Kirch not to discuss it with Mr. Falle, obtained an offer of £750,000 for his shares, at a price per share of approximately £212.70. We are satisfied, both from the correspondence between Mr. Kirch and the Plaintiff at the end of August and from Mr. Kirch's evidence that this was a genuine offer, and that Mr. Kirch would have completed had he been permitted to do so.

We may add, at this point, that Mr. Kirch stated that the break up or net asset value - put by the Plaintiff's accountant (see below) at £709 at 30th November, 1989 - was in his view probably £720 per share, but, according to the Plaintiff took the view that as a minority shareholder the shareholding he (the Plaintiff) had to sell was worth substantially less per share.

The next step was a letter from Advocate Voisin acting for the Plaintiff to the Company dated 30th August, 1990, forwarding the share transfer and relevant certificates, advising the Company of the purchaser and the price, and requesting the registration of the transfer and the return of the share certificate to Mr. Kirch's Company, Channel Hotels and Properties, Limited. On the same day Advocate Voisin wrote also to Mr. Falle advising him of the position and, inter alia, stating that the Plaintiff considered that he had, under Article 17 only until the 4th September for the share transfer to be registered.. A good deal of the letter dealt with other proposals, but, as with the negotiations with Mr. Kirch we do not think that they are relevant to the present proceedings.

On the 4th September, Mr. Knight, the Company Secretary, replied to Advocate Voisin as follows:

> "I am directed by the Board of Falles Holdings Limited to refer to your letter of 30th August 1990, addressed to the Company and enclosing a Share Transfer form and Share Certificate in respect of Mr.J. Baker's Shares. The Board considered the proposed transfer on the 3rd September 1990 and pursuant to Article 14 of the Articles of Association declined to sanction the proposed transfer. No reason was given for the decision. The documents enclosed with your letter of 30th August are accordingly now returned".

In due course Mr. Kirch's offer lapsed so that the Plaintiff found himself still the owner of a minority shareholding, valued by the Directors at £106 per share if he

could find a buyer acceptable to the Board, having lost his sale, as he had thought, at £212 and now faced with the possibility of being "locked in" to the Company.

The case for the Plaintiff is put on a number of grounds which it may be useful to summarise, at this stage. They may be stated briefly as follows:

1. That the terms of Article 17 overrode those of Article 14; or

2. That the meeting refusing to sanction the transfer was not properly convened or held; or

3. That at that meeting Mr. Falle and his son, as Directors, were not acting *bona fide* and their decision constitutes an abuse of their fiduciary powers; or

4. That under Article 74 of the Articles Mr. Falle had an interest (in purchasing the Plaintiff's shareholding) and was neither entitled to vote nor should have been counted for the purpose of securing a quorum.

The defence, after first stating that no admission is made, is put in this way:

1. That Article 14 overrides Article 17, and that this is a matter of law.

2. That, to paraphrase, there was nothing wrong with the Directors meetings dealing with this application.

3. That the decision was bona fide and in the interests of the Company.

4. That Article 74 does not apply.

It was claimed by Counsel for the Plaintiff and conceded by Counsel for the Defendant, that the Plaintiff had only to succeed on any one ground to be successful. We propose now to examine each ground in turn.

The first ground was, in effect which of Articles 14 and 17 should prevail, and is in the view of the Court entirely one of construction.

We have referred to the Articles at the outset.

In his address, Counsel for the Plaintiff made as his first premise the proposition that shares in a Company are *prima facie* transferable, citing Article 12 of the ***Loi (1861) sur les Sociétés à responsabilité limitée:***

> ***"Les actions des Sociétés .... seront censées biens meubles et seront transférables de la manière et dans la forme que seront prescrites par les statuts ...."***

He took the view that the Articles started with a blanket provision which would be exercisable if a shareholder elected not to apply under Article 15 or after the three month period provided in Article 17 has expired. He treated both Articles 15 and 17 as exceptions to Article 14 and as giving an exemption therefrom. Thus if an application is made under Article 15, which the Plaintiff triggered by his offer on the 8th May, 1990, when he offered his shares to the Directors, the Directors have 28 days to find a purchasing member, but if they do not do so, then the proposed Vendor is entirely free to sell to any person

at any price, provided he does so within the time limit provided, after which the exemption ceases.

In support of his contentions he cited a number of authorities to us.

The first was Sutcliffe -v- Minister of Health (1942). He read the whole case to us, but we think we may remark that it was one dealing with the constructions of the 1925 Old Age Contributory Pensions Act.

The point which he put to us arising from the case was this, that under Section 13(4), which was a general section the Appellant would have been entitled, on the fact of it, to apply for a pension, but that by Article 15(7) there was an exception providing that a person who had been in an excepted employment was not capable of becoming an insured person. The Court held that the subsequent exception overrode the general provision. In particular he referred us to the statement at p.566 para D:

> ***"Counsel for the Respondent has called the attention of the Court to the general principle that, if two sections are conflicting, the later of the two sections is the section which would generally prevail, and that is a matter, I think, that no one would doubt is very well decided law".***

The learned Judge went on to say that in his view the two sections do not conflict: section 13(4) was a general provision and the appellant was excluded from it with absolute particularity.

A similar statement is made by Oliver J. at p.567 where he says:

> ***"The respective positions of the two sections of the Act and the principle of construction referred to make it quite clear that section 15(7) governs the matter and makes this case an exception to the general rule laid down in section 13(4)".***

Counsel then went on to cite Holmes & an. -v- Keyes & an., (1958) 2 All ER 129, a case not on all fours with this, but where Jenkins LJ stated at p.138 E:

> ***"I think that the articles of association of the company 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 article, in preference to a result which would or might prove unworkable".***

His point was this, whether Article 17, if governed by Article 14 was workable. If it were so governed, what, he submitted, was the point of having it. He accepted that in a company such as this, the Directors must be able to control shareholders. However they are given, he submitted, a power under Article 14 and further powers under Article 15. Is it right, he asked, that if they fail to use their pre-emptive rights that they can stop a transfer: for Article 17 only comes into play upon their failure to exercise their rights under Article 15 and then only for a limited period.

The result sought by the Defendant could force the shareholder to keep his shares. He conceded that there might be such a restriction but referred us to 4 Halsbury 7(1) at 471:

> ***"There is apparently no limit to the restriction on transfer which may be so imposed, although restrictive provisions are strictly construed because shares, being personal property, are prima facie transferable. Nevertheless if the intent and existence of the restrictions are sufficiently certain, they will not be rejected as being unworkable if a term can be implied which will give them business efficacy".***

He then referred us to a passage in Gore Brown on Companies (44th Ed'n), Ch.16:

> ***"16.2 Transferability of Shares***

Subject to certain limited restrictions imposed by law, a shareholder has prima facie the right to transfer his shares when and to whom he pleases. Subject to any provisions to the contrary, the word 'transfer' in a company's articles of association refers only to an instrument of transfer passing the legal interest in shares. So where under the articles, the directors were obliged to register a transfer of shares to an existing member, and such a transfer was lodged, it was irrelevant that the shares were subject to an equitable interest vested in a non-member and the court directed the directors to register the transfer.
This freedom to transfer may, however, be significantly curtailed by provisions in the articles, which are perfectly legal. ....
In determining the extent of any restriction on transfer contained in the articles, a strict construction is adopted; that is to say, the restriction must be set out expressly, or must arise by necessary implication, and any ambiguous provision is construed in favour of the shareholder wishing to transfer".

The authority cited in the text book was In re Smith & Fawcett, (1942) 1 All ER 542, where at p.543 H the following statement is made by Lord Greene, MR:

"The principles to be applied in cases where the articles of association of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider - not what a court may consider - to be in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles upon their true construction permit them to take into consideration. In construing the relevant provisions in the articles, it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with this property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than this: that the shareholder has such a prima facie right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on their true constructions permit".

Finally he put before us a statement in <u>Greenhalgh -v- Mallard</u>, (1942) 1 All ER 234 at p.257 B:

> ***"Questions of construction of this kind are always difficult, but in the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is prima facie transferable, although the conditions of the transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.***
> ***I am of the opinion that UTHWATT, J., took the right view in this case. Although the argument may be said to be rather nicely balanced, I think that, in deciding what is the true construction of the words used in the present case, one must bear in mind that, under what I conceive to be the practice, and what, in my experience, has always been the way in which judges have regarded these matters, the right of transfer remains unimpaired, save to the extent that with reasonable clearness it has been taken away or cut down".***

In reply, Counsel for the Defendant very properly accepted that in principle shares are freely transferable and that restrictions on transfer must be strictly construed.

He maintained however that there was no conflict between the Articles. He put it in this way, that under Article 14 there can be no transfer without the sanction of the Directors. One must therefore assume that a transferee has been sought and the following Articles set out how he is to be found.

The transferor to be must tell the Secretary, and within 28 days the Directors, as a body, would look and seek to select a purchasing member. He conceded that in practice, if the Directors succeed, then they override the veto, but maintained that the sanction of registration is nonetheless a requisite formality. Should the Directors fail to select within the 28 day period, then Article 17 comes into play and the transferor may find his own transferee and his own price; but he would

still have to go through the same procedure for the transfer and at this point the Directors may refuse their sanction, though he conceded that they would have to act bona fide and not capriciously. Article 15 was necessary as it controlled the price: otherwise it was possible that the Directors might not be able to interfere with the price as this would be of no concern to them. Both Articles 15 and 17 deal with selecting the transferee and controlling the price. There is always, he maintained, a two stage process with the selection under those two Articles with Article 14 overriding the selection process. He put it in this way that if Article 15 overrides Article 14, and if Article 17 does so as well, why have Article 14. Both processes are subject to Article 14 and there was no inconsistency. Furthermore he could find no precedent for overriding an Article such as Article 14.

He cited several cases to the Court. The first was Inland Revenue -v- Crossman, [1936] 1All ER 762, where Lord Russell of Killowen dealt with Articles of a similar nature at 785:

> ***"Except where a transfer is made pursuant to the above powers (and certain other immaterial cases) a member proposing to transfer shares can only do so after a period of three months, and then only if no member has been willing to purchase them at par plus certain additions defined by the articles. During the three months the other members have the overriding right of pre-emption at this fixed price. It is only if and to the extent to which this right is not exercised that the proposing transferor can sell and transfer shares to any person and at any price. The shares of a deceased member which have not been appointed by his will under the powers indicated above are similarly subject to an overriding right and pre-emption in the other members at the fixed price; and it is only if and to the extent to which this right is not exercised that the member's legal personal representatives can sell and transfer the shares to any person and at any price. Finally, the directors may refuse to register any transfer of a share (amongst other cases) where they are of the opinion that the proposed transferee is not a desirable person to admit to membership and that without being bound to assign any reason for such opinion; ....".***

However we note that in this case, the three month period is provided by Article 12 and the general power to refuse a transfer by the subsequent Article 15.

Counsel's submissions on the order were to the effect that in this case the order did not appear to be material; and that it is only material if there is a conflict.

Second, he referred us to Moodie -v- Shepherd, [1949] 2 All ER 1044, but there again the discretion to refuse a transfer is placed after provisions similar in intent to the present ones as to the purchase by Directors.

It is the view of the Court that the arguments of the Plaintiff must prevail on this point.

First, it is clear that shares ought to be transferable unless there is an express veto. If there is inconsistency, the freedom to transfer should prevail.

Second, where provisions are inconsistent the later should prevail.

Third, the view of the Court is that Article 14 is inconsistent with Article 17. We take the view that Article 15 when triggered and acted upon by the Directors must effectively end the veto conferred by Article 14, for they will themselves have selected the purchasing member and fixed the price and can hardly then seek to turn round and employ the veto. If Article 15 overrides Article 14 if it is acted upon, it is difficult to see why in a case where Article 15 cannot be brought into play as no price is fixed under Article 16, so that Article 17 must be brought into play, why Article 17 should not do so also, at least for the three months period then envisaged: after which

those provisions would lapse and an intending transferor would again start with the provisions of Article 14. In our view, Article 14 merely enunciates a general provision which is then subject to exceptions and exemptions. Had those drafting the Articles had a different view it would have been easy to put Article 14 after Articles 15-17 as a general proviso; or even to have referred back to it in Article 17. Put another way, the choice appears to us to be between keeping Article 14 as a veto in reserve or using it as a starting point. We find that it is the latter interpretation which must prevail.

On the first ground therefore, we find for the Plaintiff. We do not think, in fairness to the parties, that we should limit ourselves to this finding and we propose to deal with all four grounds.

We turn therefore to the second ground, that is whether the meeting of the 3rd September was properly convened or held.

The Minutes of the meeting reads as follows:

"FALLES HOLDINGS LIMITED

MINUTES OF A DIRECTOR'S MEETING HELD AT THE REGISTERED OFFICE ON 3rd SEPTEMBER 1990.

PRESENT: Mr. J. P. V. Falle.
Mr. C. V. Falle.
Mr. D. Knight.

CHAIRMAN: Mr. J. Falle was elected Chairman for the Meeting.

SHARE TRANSFER: The Board considered the proposed transfer of 3,526 Shares from Mr. J. Baker to Channel Hotels and Properties Limited and pursuant to Article 14

of the Articles of Association declined to sanction the proposed transfer.

There being no further business the meeting was adjourned".

Once again, there is little dispute between the parties as to the law.

The Court was referred to a series of authorities and again, because this is not a point which has come before this Court, we think it worthwhile to set them out *in extenso*.

The first was Palmer's Company Law (24th Ed'n), Chapter 61-03:

"Prima facie, due notice must be given convening a meeting of directors, and in default the meeting is irregular; but this is not always necessary, for, by the articles, or by the determination of the directors, meetings may be held at fixed times, in which case no notice of each separate meeting need be given. Where notice has to be given, it may be given verbally unless the articles require it to be given in writing, and it must be given a reasonable time before the meeting. Otherwise it will be invalid, unless, indeed, all the directors are present at the meeting".

We were then referred to a short passage in Gore Brown on Companies (44th Ed'n), Chapter 26.2 to the same effect:

"Notice of the meeting must be given to all the Directors, for business done at a meeting of which some Directors had no notice is invalid,...."

The authority relied on by the text book was *In re* Portuguese Consolidated Copper Mines Ltd. (1889) 42 Chancery, at pp. 167-8:

"LORD ESHER, M.R. :-
I will assume that every point taken by Mr. *Rigby* ***and Mr.*** *Buckley* ***ought to be decided in their favour except one. That one is this, that according to their own argument it***

is necessary that all the directors should have had notice of the meeting of the 24th. If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting could not adjourn itself to the 26th. So that the meeting of the 26th falls if the meeting of the 24th was not valid, and the only ground on which it can be contended to be valid is, that all the then qualified directors had notice of it. Now, what happened with regard to Lord Inchiquin? First of all, there is no legal evidence of his having said or done anything about the meeting; what it is suggested that he said is mere hearsay. But suppose there had been evidence that Lord Inchiquin had been told that they were going to hold a meeting or meetings during the next week, and had then said, "I cannot be there". It is said that he did so, and that is now relied on as a waiver of the right to notice. In my opinion he could not waive his right to notice. As he was within reach, and it was perfectly possible to give him notice, it was the duty of the directors to give him notice of the meeting. The circumstances existing at the time when he used the words relied on as a waiver might have been wholly altered, or he might have taken a different view if he had had notice of the time and object of the meeting. That notice ought to have been given to him, and there was no such notice. The meeting of the 24th of October was therefore invalid, and I think that is sufficient to determine this case without deciding any of the other points.

COTTON, L.J.:-

I am of the same opinion. Lord Inchiquin only went to Ireland, and there is a post daily to Ireland, so there was no want of means of communication. There is no evidence whatever that any notice was sent to him of the meeting to be held on the 24th, which was the origin of the meeting of the 26th, and in my opinion, assuming that notice to all would have made the meeting held on the 24th a good meeting, yet if in point of fact notice was not given or sent to all the directors when it could have been given to all or sent to all, the meeting was a bad one, and the whole foundation of the argument breaks down. The appeal therefore fails".

The statement in that case are clearly in line with those and the *ratio decidendi* in Homer District Consolidated Gold Mines, (1888) 39 Chancery at 550:

With regard to the notice of the meeting, it was such as had never before been given in the history of the company.

The shortest notice that had every been given before was a notice for the next day. The notice was sent out in a most irregular way. What is more, it was expressed in such a way (I cannot help thinking intentionally so expressed) as not to give *Witt and Simpson* ***notice of what was to be done. On that notice at two o'clock, the two directors present knowing that one of the other two summoned could not be present till three, and not knowing whether the other could come, proceeded at once to rescind a resolution passed by the board two weeks before. In my opinion that was about as irregular as anything could be. No doubt a bare quorum is capable to act and bind the company at a meeting duly convened, with proper notice given to the other directors, at which therefore all the other directors may, if they please, be present; ...."***

From these short passages we draw the conclusion, which again was very properly conceded by Mr. Binnington that if all the Directors are not given notice, the meeting must be invalid.

The question of course then arises as to who were the Directors at that date i.e. 3rd September, 1990, when the transfer was rejected.

Of those who had been Directors, the Plaintiff had resigned already and there is no dispute about the status of Mr. Falle and his son, Mr. C.V. Falle.

This leave before us the question of the status of Mr. Le Grand and two other gentlemen whom we have not so far mentioned, Mr. (now Deputy) G. Rabet and Mr. G.J. Roscouet. In the case of Mr. Le Grand it is agreed that he had previously been a Director and had a share qualification, the question in his case being whether he was still a Director at the date of the meeting.

We propose to deal with Mr. Le Grand's position in due course and turn first to the position of Messrs. Rabet and Roscouet.

We should say at once that in dealing with the position of these two gentlemen, we were impressed with the elegant and convincing argument of Mr. Binnington.

Before we deal with it we feel it appropriate to comment on the evidence put before us.

Mr. Rabet was appointed at a Directors' meeting held on the 12th March, 1986, and was re-elected at the Annual General Meeting of the 28th October, 1987, where he was stated to have retired by rotation. It was we understood conceded, such being the confusion in the Company's Minute book that had this election been effective he would still have been a Director at some point in 1990. For Mr. Roscouet the position is different. He was appointed by the Directors on the 7th January, 1987, and was not re-elected at any General Meeting. Neither of them acquired any shares in the Company.

Both attended a number of Directors' meetings.

The report of the Directors dated the 4th July, 1990, presenting the accounts to the 30th November, 1989, contain the statement that Messrs. Rabet and Roscouet resigned as Directors on the 24th May, 1990. Subsequently at the Annual General Meeting held on the 25th April, 1991, the Plaintiff, who had enquired about this, was informed that they should have been "removed" as Directors as they had failed in the share requirement of all Directors.

Mr. Rabet, it was accepted, had not been at the meeting on the 4th July, 1990. He, like Mr. Roscouet, was a Director of other companies in the Group and sent a letter dated the 1st October, 1990. where he resigned as "Director and Chairman of

the Company", whilst Mr. Roscouet resigned all his Directorships on the 12th October, 1990.

Both had asked the Plaintiff if they could buy shares; Mr. Rabet had requested him to ask Mr. Falle and had received an answer in the negative which seemed to embarrass the Plaintiff.

It is, we think it right to say, our view that Mr. Falle's evidence did little to clear the confusion. When asked in cross-examination whether he had told either Mr. Rabet or Mr. Roscouet that they were no longer Directors he supposed they must have implied it. Their function had creased due to a change in the organisation of the Group. He was cross-examined at some length on this aspect, and we have to say that we found his evidence virtually worthless on this point.

Faced with this administrative muddle, Mr. Binnington referred us to the Articles, which, both Counsel agreed, governed the position, whatever all the parties had done carelessly or in ignorance of them and their import.

He took as his starting point Article 63:

"63.- The qualification of a Director shall be the holding of three shares in the capital of the Company. A Director may act before acquiring his qualifications but shall in any case acquire the same within two months of his appointment".

He then referred the Court to Article 64, under which the Company in General Meeting may (as was done) increase the number of Directors and submitted that this was one method of appointing Directors. Under Article 65 the Directors may appoint any qualified person, which he construed as one having a

share qualification, and such a Director may only hold office until the next following ordinary General Meeting. Article 76 provides for the rotation of Directions and Article 77 that a retiring Director may be eligible for re-election. By Article 78 the Company in General Meeting may appoint a "person" to the office of Director.

Thus, he said, there are two methods of appointing Directors.

a) by the Company in General Meeting; and
b) by the Directors, so long as the person elected is qualified, the Directors having only a limited power to appoint.

The election of the unqualified person is then followed through by Article 73(d). We reproduce here the whole of Article 73:

"73.- The Office of a Director shall be vacated:-

(a) If he become bankrupt or insolvent or compound with his creditors.

(b) If he be convicted of an indictable offence.

(c) If he become of unsound mind or be found a lunatic.

(d) If he cease to hold the necessary share qualification or do not obtain the same within two months from the date of his appointment.

(e) If he absent himself from the Meetings of Directors for a period of six months without special leave of absence from the other Directors.

(f) If he give the Directors one month's notice in writing that he resigns his office.

But any act done in good faith by a Director whose office is vacated as aforesaid shall be valid unless prior to the doing of such act, written notice has been served upon the

Directors or an entry has been made in the Directors Minute Book stating that such Director has ceased to be a Director of the Company".

The proviso to this Article, is, Mr. Binnington submitted, to give cover to the Director.

The inevitable result therefore which flowed from a proper construction of the Articles, were he suggested, these:

1. The initial appointments of Messrs. Rabet and Roscouet to the Company were invalid and they were not and could not be Directors as a result of that appointment.
2. Mr. Roscouet therefore never had any rights as a Director.
3. Mr. Rabet's position was different in that he was re-elected at a General Meeting and thus the proviso in Article 73(d) applies to him.
4. This means only that he is protected against the consequence of acts done, as against having the right to do the acts. Thus if he (Mr. Rabet) comes to a meeting, his acts are good, but he has no right to be summoned to it as the office is vacated. He is, he conceded, liable for his acts to the outside world; but the saving, under Article 87 (to the effect, broadly, that acts done by him are valid) turns neither him, nor for that matter, Mr. Roscouet, into Directors.

So far as offering shares to them was concerned, whatever the moral obligation falling on those who appointed them, there was certainly no legal obligation on the part of any shareholder to do so.

Finally, he submitted, given this position, the manoeuvrings and letters in 1990, and the statements that they had resigned, or subsequently, been removed, are simply irrelevant.

The Court accepts this argument, and we accordingly declare that neither Mr. Rabet nor Mr. Roscouet were Directors on the 3rd September, 1990, and that neither had any right to be summoned to or to attend the meeting.

This however leaves us with the position of Mr. Le Grand.

Mr. Le Grand, like the Plaintiff, his cousin, had during 1989 become unhappy with Mr. Falle's proposals and had then indicated he would like to sell his shares. We will revert to this aspect in due course, but, dealing for the moment with his position as a Director the upshot was that Mr. Le Grand wrote to Mr. Falle on the 2nd July, 1990, in the following terms:

> "Following our recent discussions and after very careful consideration, it is with much regret and sadness that I now give you two months notice of termination of my employment".

He was present at the Directors meeting held on the 4th July, 1990, when the 1989 consolidated accounts were approved by Messrs. J. and C.V. Falle but not by him and when the share price was fixed at £106.14.

He maintained that he resigned only from his employment, but did not resign as a Director until the end of January, 1991, when he sold his shares to Mr. Falle. He was neither invited to nor received a convening notice for the meeting of the 3rd September, 1990. Although no longer an employee, he felt he would have had a view to offer.

He conceded that he had purchased a car for his wife when he left the Company in July, 1990, and also stopped his free petrol - another Directors perquisite - as he felt he should not continue to receive it. In cross-examination he stated that he still regarded himself as a Director: but that after giving

notice was almost at once asked to leave. He wished, as the third largest shareholder, to protect his own interests by knowing what decisions were taken.

We may perhaps add that Mr. Le Grand was summoned to a further Directors' meeting on the 26th November, 1990, but as this was done on legal advice we propose to disregard it for the purposes of our decision as to the position on the 3rd September, 1990.

Mr. D. Knight, a certified Accountant and the Secretary of the Company regarded the letter as a notice of resignation operative that day. When asked why Mr. Le Grand was present on the 4th July he stated that he was not sure whether the letter was received before the meeting. He did not know why he had not minuted it, although it was not the normal practice to minute a Director's resignation. He confirmed Mr. Le Grand's account as to the purchase of the car for his wife and the immediate cessation of free petrol.

Mr. Falle's evidence is, we have to say, no more helpful on this point than on that relating to Messrs. Rabet and Roscouet. He variously asserted in cross-examination, 1) that Mr. Le Grand ceased to be a Director on the date he resigned; 2) that in his (Mr. Falle's) eyes, Mr. Le Grand finished when he was paid off a few days later; 3) that although he thought he had resigned, he nonetheless invited him as he wished to be sure it was done safely; 4) that he invited him on advice but was now not sure whether he had taken advice then; and, 5) that he must still have been working out his time and that he ceased when he was paid off.

Advocate Voisin, Counsel for the Plaintiff put his case in this way, that it was only a figment of Mr. Falle's imagination

to say that Mr. Le Grand had resigned; that merely because a Director accepts in one way or another a withdrawal of benefits does not and cannot affect his position; that there is no article in the Company's Memorandum and Articles which requires that a Director be an employee; that resignation as an employee does not of necessity require or imply resignation as a Director; and that the only way in which Mr. Le Grand could either cease to be or be removed from his office was:

a) under Article 82 which provides:

"82.- The Company in General Meeting may by Special Resolution remove any Director (other than the then Managing Director) before the expiration of his period of office, and may by an Ordinary Resolution appoint another person in his stead. The person so appointed shall hold office during such time only as the Director in whose place he is appointed would have held the same if he had not been removed".

or

b) under Article 73 (v. supra) none of the terms of which apply; and that indeed Article 73(1) requiring one month's notice in writing resigning his office strengthens his case;

or

c) at an Annual General Meeting where he retires by rotation and is not re-elected.

None of these apply and there is no question he said but that Mr. Le Grand was a Director on the 3rd September, 1990.

In reply Advocate Binnington who, as we say, quite properly conceded that Mr. Le Grand was still a Director on the 2nd July, 1990, this time elected not to rely on the Articles. He pointed first to a paper given to the Plaintiff and Mr. Le Grand when they first bought shares in the Company in 1963 at £1 apiece. This unsigned piece of paper contained *inter alia:*

5. That the Directors be employed by the Company.

Since then Mr. Le Grand had made three other share purchases and this related to the original share purchase at the par value of £1. The issuing of further shares, we note, at paragraph 13 was to be decided by the shareholders.

Furthermore, Mr. Binnington was forced to concede that on the evidence *(v. infra)* Mr. Falle who *(v. infra)* approached the Plaintiff in 1987 or 1988, had not offered shares to other shareholders as provided by paragraph 9; and he had of course not taken the point that the Plaintiff had not done so when he resigned in May, 1990, but had followed the course prescribed by the Articles.

It is not a Resolution which was minuted; nor does it amend the Articles of Associates. At best, if it is binding at all, it is binding at the instance of the selling shareholder and cannot in any case do more than relate to the original purchase of shares at £1, and, unless specifically extended, cannot relate to the subsequent purchases made by Mr. Le Grand, who certainly, for example, paid more than £1 later on.

For the rest, Mr. Binnington made the point that Mr. le Grand having relinquished his employment and the benefits he received as a Director, had *de facto* resigned on the 2nd July; it was questionable whether he should have been there on the 4th July, but he certainly should not have been there on the 3rd September.

We find no merit in this submission.

We find that, just as we did with the Defendants first submission on this point, the point is, and must be, governed by the Articles which both parties concede must govern the administration of the Company, however much they may have been ignored over the years by the parties. It is quite clear to the Court from a perusal of the Articles that Mr. Le Grand, when he resigned his employment did not resign as a Director

We find therefore that Mr. Le Grand was still a Director on the 3rd September, 1990; and that in consequence the meeting was improperly held, and was invalid.

On this ground also, we find for the Plaintiff.

We turn now to the third ground, that is whether in refusing to transfer the Directors i.e. Mr. Falle and his son, were acting *bona fide* in the interests of the Company.

The thrust of the Plaintiff's case is that Mr. Falle wanted the shares for himself and wanted them at considerably less than their sale value. Before we look at the immediate circumstances we should say that the Directors, that is Mr. Falle and his son, chose to state their reasons.

We turn first to the share values.

Mr. Falle's view, and clearly one which had led to the great success of his business, which had been in existence a good many years, was that one could not do things by oneself. He wanted good people to come into the Company. In furtherance of this, four people were originally offered shares. They were a Mr. Harrison, a Mr. Le Lievre, Mr. Le Grand and the Plaintiff who joined the Company before Mr. Le Grand.

There is no dispute as to when these shares were issued or as to the price at which they were issued. So far as Mr. Le Grand was concerned they were correctly set out in a memorandum prepared by Mr. Falle dated the 25th June, 1990, which is confirmed, so far as it affects him, by the Plaintiff.

There is no question but that those allocated in 1963 at £1 and 1966 at £2 were at considerably less than asset value and were made on easy terms. The Plaintiff received the bulk of his shares in the second allocation in 1966. However, as Mr. Le Grand pointed out, these prices are relative; although he had been appointed a Director of the Company in 1962, he was in 1963 earning £11 per week. Whereas he conceded that the 1963 price was fair and the 1966 price was a good offer, we also note his claim that the Company succeeded on account of the people there.

In 1970, Mr. Harrison sold his shares at £5 per share. Mr. Falle claims that he (Mr. Harrison) had requested £5 for each of his shares and that this was agreed.

We are satisfied that at the point as claimed by Mr. Falle, neither the price at which the shares were issued nor the price obtained by Mr. Harrison were related to asset values; nor, of course, at that time or until much later was the share price fixed annually by the Company as required by the Articles.

The next share transaction took place in 1983 when Mr. Le Lievre decided to sell his shares. It is clear, from the memorandum of the 25th June, 1990, that the price for the shares that he owned was fixed by Mr. Le Lievre at £61 per share and accepted by the Directors. Whether it bears any relationship to the then asset value was not made clear to us. Mr. Falle claims that no other figure was ever mentioned and we accept that. As in 1970 no share price had been agreed in the intervening years

as contemplated by the Articles. This was to remain constant up to the date when the Plaintiff resigned.

In 1987 or 1988 the Plaintiff claims that Mr. Falle offered him shares. In his cross-examination Mr. Falle agreed that he had offered the Plaintiff a further minority interest at £500 each. He added that he did not think that the Plaintiff who had been asking for more shares to be issued, would buy them at that price. Later, in his cross-examination, Mr. Falle was asked whether the offer of these shares to the Plaintiff was a joke. His reply was that it was as to price; and he denied being serious in offering the shares. He conceded that his divorce proceedings were in train at the time. It was not he said in response to the Plaintiff wanting to buy shares. Pressed as to details, his memory became vague. In reply to a question from the Court he claimed that he quite frequently joked about money. When asked whether he would have sold the shares if the offer had been accepted by the Plaintiff, he replied that he would not and that he did not intend to be legally bound by the offer. No evidence was heard that he offered them elsewhere or as provided by the Company's Articles.

We may say at once that we find Mr. Falle's assertions on this point to be, at best, unconvincing and find that he did make this offer intending it to be serious.

By the summer of 1990, the Plaintiff was not the only shareholder who was seeking to sell his shares. Mr. Le Grand, too, also disenchanted, was seeking to sell his own during that year.

Mr. Le Grand, a cousin of the Plaintiff had joined the Company in 1960 and had, as we say, become a Director in 1962. He had been successively Company Secretary, then Finance

Director and finally Deputy Managing Director. He had worked with and for the Plaintiff.

In November, 1989, Mr. Le Grand, like the Plaintiff, became concerned at Mr. Falle's proposals, arising from his recent revival of interest, for the reorganisation of the business. Having spoken to Mr. Falle the week before, he put his views in writing by a letter dated 7th May, 1990. After reminding Mr. Falle that he had told him as long ago as November, 1989, that he wished to sell; and having heard that he (Mr. Falle) had offered shares at £500 each to the Plaintiff, he asked for £477 per share. This produced first a verbal reply and second a response from Mr. Falle on the 26th June, 1990, in which the latter firmly rejected Mr. le Grand's figure and offered him £106.14. After reciting the easy terms on which Mr. Le grand had bought the shares and reminding him that the capital had been advanced to him and paid out of the dividend he received on the shares, the memorandum goes on to set out how Mr. Falle had calculated the price, which was based on the 1983 share sale price and increased by a formula which employed the increase in the Company's profits since that date.

On the 2nd July, 1990, Mr. le Grand replied, rejecting Mr. Falle's figure

On the 3rd July, Mr. le Grand gave formal notice that he wished to sell his shares; but on the 9th, being dissatisfied with the price offered, viz. £106.14 withdrew his conditional offer and sought to go to arbitration under Article 109. There the matter rested for some months. Finally, in January, 1991, following correspondence between his Solicitor and that for Mr. Falle, he accepted an offer of £212.75 for each share.

Meanwhile, during the summer of 1990 the negotiations between Mr. Falle and Mr. Baker rumbled on.

On the 4th July, 1990, as we have seen, the Directors fixed the price at £106.14. On the 15th August, 1990, the Plaintiff obtained a report in draft from his accountants which suggested a maximum price of £170 per share on an earnings basis, and of £709 on a break up basis. The report carries the warning that "This value (of £170) needs to be treated with caution because prices of private Company shares tend to be significantly less than that of public companies because the shares are much less marketable".

As we state, supra, the Plaintiff in fact received an offer at approximately £212 from Mr. Kirch; and on the 18th August Mr. Falle had reiterated his offer for £106, adding that terms for payment would have to be negotiated.

As we say, supra, Mr. le Grand's shares, notwithstanding the price fixed, were purchased at £212.

Finally, with regard to price, Mr. Knight stated that on the 15th July, 1991, the Directors again fixed the share price at £106.14. He conceded that although the Company's net profit had doubled, the increase in profits for 1990 was not taken into account in fixing the share price; in his mind he saw no reason to increase the price.

He added that he agreed that Mr. Falle would not sell at that price, a point which Mr. Falle had made very plain in his evidence when he stated that if he were selling his shares it would be a different matter. We may say that Mr. Falle made this observation immediately after asserting that he thought the shares were worth £106, though he did make the proviso that on

asset value they would be worth more. We are satisfied though that Mr. Falle was looking at the price from his position as the majority shareholder. He added that he was not in a position financially to buy them.

When Mr. Falle heard that the Plaintiff was seeking to sell his shares, he agreed that although shares had been issued to make his staff try harder, he had not made any efforts to find a purchaser, as had also been the case with Mr. Le Grand's shares. He had not thought that the Plaintiff could sell to anyone after 28 days, and was of the opinion that he would be able to approve anyone produced by him. Notwithstanding his inaction, he wished, he said, to sell shares to employees at affordable prices, and would have dealt with this after the immediate problems which faced him.

We should add that we are in no doubt but that he did have problems at that time. There had clearly been a considerable reorganisation of (by local standards) a large business and he had just lost, for whatever reasons, his Managing Director who had had the carriage of the business for a number of years and three other long serving employees in Messrs. Le Grand, Rabet and Roscouet.

Mr. Falle did not know whether he had fixed the price on account of the Plaintiff's or Mr. Le Grand's desire to sell, though he supposed it was for Mr. Le Grand. The price he said had been worked out before. He denied that he had fixed a low price for Mr. le Grand's shares in order to further his own interests as if this were the case, Mr. Le Grand would retain them and not sell them: and in any case he did not agree that it was a low price.

He did not accept that the Plaintiff and Mr. Le Grand could in the circumstances sell only to him; and maintained that he was acting in the interest of the Company. When he was asked what was the object of allocating shares to employees he replied that it was a good way to have people take a good long-term interest in the Company. When asked whether in order to get the benefit they should not get a fair price his reply was to the effect that it should be in a broad sense fair to everybody. When put that it was important for the Plaintiff being his life savings, he simply replied that they had had the shares for many years; he had not considered the importance to them as he had calculated out what he considered fair. Mr. Kirch's price, he said, could not have been reasonable: it was not the same as his.

He maintained that, as purchasers of the Plaintiff's shares, a number of people would have been acceptable to the Directors. He had, he said, discussed Mr. Kirch's offer (though his Company) with senior employees before coming to his decision.

As to his objection to Mr. Kirch, or to be more accurate to the Company in which Mr. Kirch owns the overwhelming majority of shares, he had made his feelings clear to him in a telephone conversation on the 3rd September, 1990. Mr. Falle produced a signed note of this conversation dated 4th September, 1990. Mr. Falle stated that he had let Mr. Kirch know, not in direct terms, that he would not welcome him as a shareholder. He was aware, he went on, that a lot of his assets were under-utilized but that he would not consider developing the Company's properties in a way with which he did not agree. He would not, he thought, object if the Plaintiff sold the shares to someone in a similar position to that to which the Plaintiff was in when he bought the shares. He asked him whether he would withdraw

his offer, but Mr. Kirch told him that he considered he was bound for two months.

Mr. Falle told the Court that he had taken the decision to refuse the transfer to Channel Hotels and Properties, Limited, in the best interests of the Company having given it due consideration. The primary reason was that the applicant was a Company, not a person, and that this situation had not arisen previously, the other shareholders having been employees. The ownership of the shares, had the shares in Channel Hotels and Properties, Limited been sold, would have been out of his jurisdiction. The Company had always been run by people in the motor trade whereas he thought Mr. Kirch to be by reputation a property speculator and thought that he would have used his position (as a minority shareholder) to obtain some of the Company's properties. He knew that he had a property next to one of the Company's garages and considered that he (Mr. Kirch) would like to get the Company's adjacent garage. He thought Mr. Kirch would come in to strip assets and not benefit the Company.

In cross examination, it was put to him that in the Plaintiff (and Mr. Le Grand at this time) he had an outside shareholder who was no longer an employee, and who had retired from the motor trade. Asked why he considered Mr. Kirch an asset stripper he replied that he did not operate the Companies as businesses and would get rid of under earning properties. Asked whether this was not what he wanted a proper return according to their use not their marketable value and that Mr. Kirch would not have been of use, given the way they operated. When asked whether it was unreasonable not to have another outsider he replied that he did not want to have a company. He had not spoken to Mr. Kirch before he considered the share transfer and had only met him twice.

He went on to say that although Channel Hotels and Properties, Limited would have been locked in, the beneficial owner (Mr. Kirch) could sell the shares and that that Company had already changed hands and direction. Asked what rights a minority shareholder had to control he did not know but thought he might asset strip: it would have been his fear. He might have purchased more shares on his death, or might have bought other shares from willing sellers. Asked again why it was in the interest of the Company to keep Mr. Kirch out, he replied that he was not obliged to answer, but subsequently added that he wanted someone more in his way of thinking. He denied on several occasions, that the reasons for his refusal was to have a better chance of buying for himself. He was asked at the time of the receipt of the proposed transfer to Mr. Kirch whether he wanted to buy the Plaintiff's shares, and replied (despite the letter of the 18th August) that he did not give it a thought.

He was then pressed on this reply and in response to a suggestion that on 3rd September he still had it in mind to buy the shares, he replied that if he did not the Plaintiff would sell elsewhere, he would have said yes. Asked why he had not telephoned the Plaintiff and offered £212 he replied, after a long delay, that he could not say and did not know why. He just assumed from the letter that all discussions were through lawyers. Equally, he added, the Plaintiff did not telephone him. Asked whether by refusing the transfer he had not thought that he would get them cheaper himself he replied "yes" but in answer to the next question disagreed that this was the real reason for the refusal. He maintained that it was the Company's not his own personal interest that he had in mind. He added that he thought that a period of two days after the refusal (before the three months expired) would be reasonable for the Plaintiff to find another purchaser, as he assumed he would have spoken to others beforehand.

We may perhaps say at this point that Mr. Kirch thought his purchase would have been profitable for both parties.

Mr. Falle was then questioned as to why no dividend had been declared for the 1990 figures.

He stated that dividends had been paid for every year for some thirty years past and that a dividend had been declared for 1989, the Annual General Meeting having been held on 25th April, 1991, well after the Plaintiff had resigned. In spite of greatly increased profits for 1990, no dividend had been declared , but the Directors remuneration had increased substantially despite the Plaintiff no longer receiving any fee, largely due to an extra payment - called a consultancy fee - made to Mr. Falle who had also increased his loan borrowings.

His explanation was that he wanted to reduce the Company's borrowing from the Bank, which he had largely done, in time for considerable increased expenditure, a good deal of which was projected in the future and to which the Company was not yet committed. He denied that he behaved in this way to prevent the Plaintiff getting a dividend, which was he said a one off decision as he should be paying one next year. He denied, that the refusal to pay a dividend, the increase in his salary and his loan from the Company were connected.

We may perhaps, at this point comment on the evidence of Mr. C. V. Falle which closely followed that of his father. The suggestion was made that he was under the influence of his father. We feel that we should say at once in fairness to both father and son that we did not find this to be so; and although he had, inevitably, discussed his circumstances with his father

it was a case of seeing things in the same way rather than of being in any way under his direction.

This then was the evidence on which we were addressed, and before considering our findings we propose to look at the law which was cited to us in order to consider the format in which we must consider them.

Once again, because this is the first time on which, it would appear, that this point has come before the Court, we think it helpful that we should set out the authorities placed before us in extenso.

Once again, Counsel were virtually agreed on the tests we should apply. Counsel for the Plaintiff put in this way:-

The power must be exercised *bona fide* in the interests of the Company. There must not be a collateral interest. Although it is not for the Directors to justify their conduct, their power is not absolute; but there must be some evidence before the Court which would justify the conclusion that they have not done their duty. However, once an illegitimate motive is brought home the normal legal presumption must go. He then sought to show that stopping a buyer getting a foot in the door is not a proper exercise.

In his reply Advocate Binnington accepted that the Directors did not have to state their reasons but that if they chose to do so then they may be questioned. The burden of proof is on the Plaintiff to show an ulterior purpose unless the directors have made statements which are demonstrably incorrect. There must be some evidence to rebut the presumption; and to have a stranger in may be a good reason for a refusal. The Court cannot overrule the decision simply because we might come

to a different conclusion ourselves (a principle which, we may say at once, that we entirely accept).

Advocate Voisin took as his starting point a passage in Gore-Brown on Companies (44th Ed'n) at 16.2.1.

> ***"16.2.1 Power to refuse registration***
>
> ***Any discretionary power vested in the directors to refuse to register transfers of shares is a fiduciary power, which must be exercised bona fide in what the directors conceive to be the interests of the company. Thus, if shares are subject to a lien in the company's favour by virtue of a debt due from their holder, the directors should ensure that registration of a transfer of them does not imply that the lien has been waived, and even if no lien arises out of such a debt, they should consider whether refusal to register might not lead to the debt's being paid more promptly. Equally, if the transferor can show affirmatively that the directors have acted wantonly or capriciously or from an improper motive or with a collateral purpose in refusing to register the transfer, the Court will order the transfer to be registered".***

He then referred to <u>*In re* Smith & Fawcett</u>, (1942) 1 All ER 542, at 544 to the statement that where there is an absolute and uncontrolled discretion.

> ***"... it is a fiduciary power and the directors must exercise it*** *bona fida* in what they consider to be the interests of the Company."

He then referred to <u>*In re* Coalport China Company</u>, (1895) 2 Ch. 404 and to passages at pp. 407 and 409 which set out very clearly the attitude the Courts have taken to an issue of this nature. We cite first at 407.

> ***"LINDLEY L.J. This appeal must be allowed. The question raised is an extremely simple one; and before I read the articles I will state shortly the principle which I think is applicable to it. Under the articles the directors have a power to refuse a transfer. I will not say at present for what reasons: I will allude to them presently. They do***

refuse a transfer; they do not say why. The argument is, and the view taken by the learned judge is, that it is for them to justify their conduct. Now, that appears to me to be wrong. It is for those who say that the directors have exercised their power improperly to give some evidence to that effect. Here there is absolutely none. Therefore, in common fairness, as a matter of justice between man and man, it strikes me that the decision is based upon an erroneous principle."

and at 409 we went on to say -

"I wish to be cautious in this matter, because I have not the slightest doubt that the Court has ample power to control the refusal of directors, or the exercise by them of their power to refuse, provided there is some evidence which justifies the Court in coming to the conclusion that they have not done their duty; but in the absence of all such evidence the Court has no right to presume - it is contrary to the ordinary principles of justice to do so - that they have done wrong, but it must be presumed that they have done right."

We were referred also to the remarks of Rigby L.J. at 409:-

"Even though in terms the power is absolute, it is a fiduciary power; it is to be exercised for the benefit of the company and with due regard to the rights of transferee; so that no power is absolute in that sense; and the Courts have held that they are not bound to say, "We threw aside all external considerations, and applied ourselves to the exercise of the power in a proper manner"; and if they do not do it in that case, I do not see why they should do it when the power itself arises only in certain cases. The fact that they have resolved must be taken, in the absence of positive evidence sufficient to satisfy the Court to the contrary, to mean that they have resolved within their jurisdiction and for right reasons."

We were then referred to re Bell Bros. Ltd.; *Ex Parte* Hodgson, (1891) L.T. 245, the headnote to which reads as follows:-

"The directors of a company in exercising their power of refusal to register transfers of shares, must exercise such power in good faith in the interest of the company, and with due regard to the shareholder's right to transfer his

shares, and the question of the transferee's fitness must be fairly considered at a board meeting."

He then referred to a passage from the Judgment of Chitty J. at 245.

"According to the constitution of this company every shareholder is entitled to transfer his shares to any person not being an infant, lunatic, married woman, or under any legal disability. This right, which is a right of property, is subject to the discretionary power conferred on the directors by articles 18 and 34, of approving of the person to whom the transfer is made and of rejecting the transfer on the ground that they do not approve of the transferee. The discretionary power is of a fiduciary nature, and must be exercised in good faith; that is legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it, the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting. When the court once arrives at the conclusion that the directors have in good faith rejected a transfer on the ground that the transferee is not a fit person to become a member of the company, it will not review the directors' decision. The directors are not bound out of court to assign their reasons for disapproving. If they decline to do so, or if their decision is challenged in court and they refrain from giving evidence, upon which a cross-examination may take place as to their reasons, or if, giving such evidence, they refrain from stating their reasons, the court will not, merely on that account, draw unfavourable inferences against them. In these articles there is an express provision protecting the directors against any liability to disclose their reasons. They are, however, at liberty, if they think fit, to disclose them, and if they do the court must consider the reasons assigned with a view to ascertain whether they are legitimate or not; or, in other words, to ascertain whether the directors have proceeded on a right or a wrong principle. If the reasons assigned are legitimate, the court will not overrule the directors' decision merely because the court itself would not have come to the same conclusion. But if they are not legitimate, as, for instance, if the directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees,

the court would hold that the power had not been duly exercised. So, also, if the reason assigned is that the transferee's name is Smith, or is not Bell. Where the directors do not assign any reason, it is still competent for those who seek to have the transfer registered to show affirmatively, if they can, by proper evidence that the directors have not duly exercised their power."

He referred us to a later passage but we do not consider that we need reproduce it in full. It suffices to say that the Court went on the make a finding (at 248) as to the "real and only reason" why the directors rejected the transfer.

He then referred the Court to In re Hafner; Olhausen-v-Powderley, (1943) Irish Reports at p.444:

I consider such an exercise of their discretion so actuated would not be bona fide discharge of their fiduciary duty, and that, if they acted under Art. 6, at least one illegitimate motive must be attributed to them. Once an illegitimate motive for such a decision is brought home to directors, I think the normal legal presumption that they acted legitimately must go by the board, and that I am set free to consider whether they should be given credit for having had other and better reasons and, further, that I am free to comment - as Mr. Justice Chitty did in Bell's Case (1) - upon their omission to state what any of their reasons were. I feel no longer bound to ignore their silence, or to refuse to draw any inference from it. It was not ignored in Bell's Case (1) and I cannot ignore it in this case. So far as I am aware, the judgment in Bell's Case (1) has never been dissented from in any particular."

He then cited Tett v. Phoenix Pty Co., (1984) BCLC 599, at 621.

In my judgment the plaintiff is entitled to succeed on another ground. It is trite law that the court will not interfere with the exercise by directors of a discretion not to register a transfer if their decision was one which a reasonable board of directors could bona fide believe to be in the interest of the company. If the discretion is an unfettered one and not limited to specific grounds of refusal the court will not compel the directors to give their reasons for their refusal. If their decision was one which a reasonable board could consider to be in the

interests of the company then the court presumes that they acted bona fide and had good grounds for their decision. However, if the directors once give their reasons the court can consider how far those reasons did justify their decision. In the instant case Mr. Brock and Mr. Bass were both asked in cross-examination whether if they had considered whether or not to register the transfer to the plaintiff at the meeting on 26th April 1982 they would have refused to do so and if they would then upon what grounds. That question was not objected to by their counsel. both asserted that they would have refused to register the plaintiff as a member at that time upon the ground that he had been revealed as the principal on whose behalf Lazards had made an offer to acquire all the shares of the company in September 1980. Both said that they thought they were entitled to refuse to admit as a member someone who was aiming at control of the company and who hoped by acquiring 90 shares to 'get his foot in the door', Mr. Brock made it clear that apart from that ground he had no reason for refusing to register the transfer. The ground relied on is not in my judgment a proper ground for refusing to register the transfer. The shares in question amounted to under one per cent of the issued share capital. The plaintiff if registered would acquire no rights beyond those conferred on members generally and indeed he was already in a position where on giving a proper indemnity to the executors he could require them to apply to be registered and to vote the shares in accordance with his directions, to furnish him with copies of the company's accounts and to exercise the right of pre-emption if it again arose. Having heard Mr. Brock and Mr. Vass give their evidence I am left in no doubt that their real objections were two-fold. First, the plaintiff once registered as a member would be likely to take a critical view of the board, in particular of their failure to notify shareholders of his offer through Lazards to acquire all the shares when it was made and of a later recommendation by the board to refuse an offer to acquire all the shares for an aggregate consideration of £1.1m. Secondly and more importantly, he would be in a position where he would be directly competing with Mr. Brock and Mr. Vass for any further shares offered round under the pre-emption provisions and would be likely to bid up the price. In my judgment those reasons were reasons of personal advantage and it the directors, by resolving on 26 April 1982 to offer round the shares transferred to the plaintiff, are to be taken as having resolved not to register the transfer the resolution was invalid as not made bona fide in the interests of the company."

We note here particularly the reasons of personal advantage described by Vinelott J.

Finally he referred us to the old case of In re Gresham Life Assurance Society; *ex parte* Penney, (1872) 8 Chancery Appeals 446, the headnote to which, at p.449, reads:-:

> ***"Held (reversing the decision of the Master of the Rolls), that the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the board; and that, in the absence of evidence to the contrary, the Court would take for granted that they acted reasonably and bona fide. But if there is evidence to shew that directors who have such a power have exercised it capriciously or unfairly, the Court has jurisdiction to interfere, and this jurisdiction may be exercised on a summons under the 35th section of the Companies Act, 1862.***
>
> ***In this case I feel compelled to come to a different conclusion from that of the Master of the Rolls. The clause in the deed of settlement appears to me very clear, which provides that no transfer shall be made to any person outside the company unless that person shall be approved of by the board of directors. No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which this Court would interfere with any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon that ground it must be made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. That must be alleged and proved, and the persons who has a right to allege and prove it is the shareholder who seeks to be removed from the list of shareholders and to substitute another person for himself."***

We may perhaps add here that Mr. Binnington referred us to a long passage in Forte Investments, Ltd v. Amanda, [1964] Ch.D. 240 at p.254, which provides a most useful summary of the litigation to that date. We do not propose to reproduce it in full, but we should remark that Willmer L. J. started from the basis that such a refusal to transfer cannot be questioned in the absence of actual evidence that they have not acted *bona*

fide; as well as the statement by Lord Lindley M. R. that ***"The Court ought as a matter of honesty between man and man, to presume that the Directors were acting within their powers unless the contrary was proved; but that was not proved by casting unfounded aspersions on them."*** The judgment then went on to refer to Lord Green's remarks in In re Smith & Fawcett (supra) where he emphasised that ***"an article such as we have here is such as to give the Directors what it says, namely, an absolute and uncontrolled discretion."*** Finally in this case he referred us to the remark at the foot of p. 254:

> ***"It seems to me that the directors of a private company, such as that in question here, would be perfectly entitled in their absolute discretion to refuse the registration of a transfer merely on the ground that the proposed transferee was a stranger.***

These then are the parameters within which we must decide this point.

The case put for the Plaintiff was that the primary reason for the refusal was that Mr. Falle wanted, at the lowest price, the shares for himself; that this was the reason for fixing the share price as he (or otherwise stated the Board) did and there was no good reason for refusing Mr. Kirch (or his Company) and replacing a disaffected shareholder. Mr. Falle, he submitted, could have met Mr. Kirch had he wanted to.

The Defendant's case is put thus. The Directors quite properly did not want a stranger, who was unknown to them except as a property developer who owned a site adjacent to one of the Company's properties, who was a limited Company not in the motor trade and whose business was that of a property developer whose evidence showed clearly that he saw the acquisition as an entree into the Company where he considered there were certain properties surplus to requirements. The test is whether Mr.

Falle was looking at the Company's interest; and Mr. Kirch was looking to his own interest. The acquisition of shares would give him not duly pre-emption rights and access to accounts but a voice at General Meetings.

He submitted that these were legitimate reasons. He went on to answer the charge that Mr. Falle had fixed a low price to acquire at an undervalue by stating that is nothing to show how the share price should be fixed, and that, his calculation whereby he arrived at £106 is a method of valuation not so different form the price of £170 hazarded by the Accountants. The Court should regard it as a question of *bona fides* rather than a formula.

As to the sale £500 this was not a fair guide line, as Mr. Falle did not realistically intend to sell; whilst the purchase of Mr. Le Grand's shares, was like Mr. Le Lievre's sale, a bargin reached outside the frame work of the Articles, in this case to avoid litigation. As to the cutting of the dividend, this he submitted was to reduce Bank borrowings and Mr. Falle took the extra payment as his reward for coming back into the business.

Finally he submitted, there was no evidence that Mr. Falle wanted the shares; and that if he had, he could have framed his letter differently.

We accept that Mr. Falle, whether for reasons which were justified or not, did not want Mr. Kirch as a shareholder.

However we do not find that this decision was taken *bona fide* in the interest of the Company but rather for Mr. Falle's personal advantage, as he did not wish to see his position threatened in any way within the Company; and clearly he

regarded, for some reason, Channel Hotels and Properties, Limited as being more of a threat to his resumption of power in the Company than a disaffected former Managing Director, now retired from the motor trade who wished to sell his shares.

Furthermore, we are quite satisfied that, apart from keeping Mr. Kirch out, he had a purpose which was more than a collateral purpose and was indeed a prime purpose, which was at the same time to lock the Plaintiff into the Company until he could obtain his shares at a time and at a price advantageous to himself.

We are quite satisfied that despite his protestations that it was a joke, Mr. Falle did call on the Plaintiff and offer him a shareholding which would still have left the Plaintiff as minority shareholder at £500 per share; and that the Plaintiff was entitled to take this offer seriously. The next price given was £106, calculated by reference to increasing profits in response to Mr. Le Grand's desire to sell, a price which was repeated by Mr. Falle to the Plaintiff during August: that Mr. Falle would not have sold at this price is not in our view decisive as at all times he was looking at his interest as the majority shareholder. However, although we find that Plaintiff must have expected a substantial discount on asset value as a minority shareholder, we find this figure was entirely an arbitrary one having as its starting point Mr. Le Lievre's offer.

We are satisfied also that at that point, on 18th August, 1990, Mr. Falle was satisfied with the position which had been reached, viz that he would offer a price which he thought satisfactory on terms to be arranged; and that the proposed transfer to Mr. Kirch at double the price was an unwelcome shock.

He dealt with this, as we have seen, by refusing to transfer it; and then proceeded, in our view quite deliberately, to reduce the value of the Plaintiff's shareholding by increasing payments to himself whilst refusing to pay a dividend; and by refixing the price of £106 in spite of vastly increased profits. We have, given the tenor of his evidence little confidence in his assertion that the decision not to pay a dividend was a "one off" decision. We may note as well, that when it suited him, he was prepared to meet Mr. Le Grand's price of £212.

To put it another way this was an arbitrary and capricious exercise of power; and we find ample evidence to support the Plaintiff's claim on this ground. On this ground also, therefore, we find for the Plaintiff.

This leaves the fourth ground which may be dealt with very shortly. In our view of Article 74 could not apply the circumstances of this case and we did not require to hear argument from the Defendant on this point. On ground four therefore we find for the Defendants.

There will be judgment therefore for the Plaintiff and we propose to hear counsel as to the rate of interest which should be awarded.

Authorities

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I.R.C. v. Crossman & ors. [1936] 1 All E.R. 762;

In re Smith & Fawcett, Limited [1942] Ch 304; (1942) 1 All ER 542.

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4 Halsbury 7: paras: 471-472.

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