**BROWN**

**V.**

**BRITISH ABRASIVE WHEEL COMPANY, LIMITED**

CHANCERY DIVISION, OF THE HIGH COURT

24TH JANUARY, 21ST FEBRUARY, 1919

1919 B. 97

**LEX (1919) – 1 CH. 290**

OTHER CITATIONS

2PLR/1919/2 (CH.D)

[1919] 1 CH. 290

**BEFORE:** ASTBURY J.

**BETWEEN**

BROWN – Appellant

AND

BRITISH ABRASIVE WHEEL COMPANY, LIMITED – Respondent

**REPRESENTATION**

*MICKLEM K.C*. and *DIGHTON POLLOCK* for the Plaintiff.

*UPJOHN K.C*. and *HENRY JOHNSTON* for the Defendants

Solicitors:

*ANDREW, WOOD, PURVES AND SUTTON, for R. A. Rotherham AND Co., Coventry*

*SURR, GRIBBLE AND CO., for DOCKER, HOSGOOD AND CO., BIRMINGHAM*

**ISSUES FROM THE CAUSE(S) OF ACTION**

COMPANY LAW – ARTICLES OF INCORPORATION:– Alteration of same - Power enabling Majority to expropriate Minority on proper Compensation - Benefit of Company as a whole versus benefit of majority to the detriment of minority – How determined – Legal implication - Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 13 in review

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

A company was in great need of further capital. The majority, representing 98 per cent. of the shares, were willing to provide this capital if they could buy up the 2 per cent. minority.

Having failed to effect this by agreement, they proposed to pass an article enabling them to purchase the minority shares compulsorily on certain terms therein mentioned, but were willing to adopt any other mode of ascertaining the value that the Court thought fit.

*MOTION.*

The defendant company was incorporated as a private company on January 12, 1909, and on May 9, 1911, it was turned into a public company.

The present capital was 50,000 in 1l. ordinary shares, all issued and fully paid.

The articles adopted Table A with modifications.

Art. 8 empowered the directors in their absolute discretion and without assigning any reason to decline to register a transfer. Subject thereto a member might transfer his shares to his relatives therein mentioned, or to any member of the company.

Art. 10 provided that no share should be transferred to a non-member so long as any member was willing to purchase at the fair value determinable as thereinafter provided.

Art. 11 provided that a member desiring to sell should give a sale notice to the company.

Art. 12 contained provisions as to the company finding a purchaser.

Art. 13 provided that "the fair value of shares or the price at which shares may be purchased in pursuance of a sale notice, shall be such a sum as having regard to the dividends declared by the company in the three last preceding years would give an average return of 12 per cent. per annum on such price."

Art. 25 provided that on a poll every member should have one vote per share.

The company had hitherto not been successful and was practically at the end of its resources at the beginning of 1918.

In the previous nine years of its existence it had only paid four dividend - namely, 2 per cent. in 1913; 5 per cent. in 1915; 6 per cent. in 1916; and 5 per cent. in 1917. There was no dividend in 1918.

Two shareholders, Smith and Astbury, however held a high opinion of the company's secret processes and determined to make it a success. In March, 1918, they accordingly offered to buy up the shares of the existing members at par.

This offer was to a large extent accepted, and Smith and Astbury now held 49,119 out of the 50,000 shares, and the three directors held 100 shares each. The remaining shares belonged to five small holders, including the plaintiff, who held 50.

The position of the company had now improved. The board, which had been reconstituted, was active in the company's interest, and the holders of the controlling interest being known to the bank, financial assistance was forthcoming. Developments were anticipated, and the directors and the owners of the controlling interest thought it desirable that those owners should have power to buy up the rest of the shares, because a great deal more capital would be required, and difficulties might arise with regard to shareholders who did not contribute. The proposed power would facilitate the introduction of further capital. The alternative would be a winding up. The directors were of opinion that the proposed power was for the benefit of the company as a whole.

On January 10, 1919, the directors gave notice of extraordinary meetings to pass the following article by special resolution:

Art. 15A. "A member who holds shares in the company shall be bound upon the request in writing of the holders or holder of nine-tenths of the issued shares to sell and transfer his shares ex dividend to the nominee of such holders or holder in consideration of the payment of the fair value of his said shares ascertained in accordance with the provisions of clause 13 of these articles or the par value thereof (whichever shall be the greater) and the sale shall be carried into effect at the company's office 21 days after the date of the request, and if the member so called upon to sell and transfer makes default in so doing the company may receive and give a good receipt for the purchase money on his behalf and may register the said nominee as holder of the said shares and issue to him a certificate for the same and thereupon the said nominee shall become indefeasibly entitled thereto. The vendor shall in such case be bound to deliver up his certificate for the said shares and on such delivery shall be entitled to receive the said purchase money without interest."

Here followed provisions for service of the request by registered letter, and proof of the posting by statutory declaration.

On January 14, 1919, the plaintiff on behalf of himself and all other shareholders other than the directors issued a writ and notice of motion to restrain the company and directors from convening or holding meetings to pass, and from passing, art. 15A.

The plaintiff did not challenge the bona fides of the directors or the majority, but submitted that it was not in the interests of the company as a whole to pass an article enabling the majority to expropriate the minority. This was prima facie oppressive and contrary to natural justice.

The motion was treated as the trial of the action.

ISSUES FOR DETERMINATION WITH ARGUMENTS OF COUNSEL

*Micklem K.C*. and *Dighton Pollock* for the plaintiff.

The proposed article authorizes the majority to expropriate the minority without any just cause. That is contrary to natural justice: *Dawkins v. Antrobus* (1); *Baird v. Wells.* (2).

(1) (1881) 17 Ch. D. 615, 620.; (2) (1890) 44 Ch. D. 661, 670.

The power of altering articles under s. 13 of the Companies (Consolidation) Act, 1908, must be exercised subject to the general principles of law and equity applicable to powers enabling majorities to bind minorities, and it must be exercised bona fide for the benefit of the company as a whole: *Allen v. Gold Reefs of West Africa, Ld.* (1); Buckley on Companies, 9th ed., pp. 23-25.

The benefit of the company as a whole means the benefit of all the corporators both the majority and the minority. This is simply for the benefit of the majority and cannot be allowed: *Menier v. Hooper's Telegraph Works.* (2) See also *W. AND A. M'Arthur, Ld. v. Gulf Line, Ld.* (3); *In re Peveril Gold Mines, Ld.* (4)

*Upjohn K.C*. and *Henry Johnston* for the defendants.

The proposed article is obviously within the powers of s. 13. It is bona fide and for the benefit of the company as a whole - i.e., as an independent entity. It need not be for the benefit of every single corporator: *Allen v. Gold Reefs of West Africa, Ld.* (1)

It does not transgress any statutory provisions as in *In re Peveril Gold Mines, Ld.* (4)

The company as an entity is in great need of further capital. The 98 per cent. majority are willing to provide it if they can buy up the 2 per cent. minority. That is far more for the benefit of the company than a winding-up, which is the alternative. The article was intended to be absolutely fair. But in order to avoid any conceivable risk of injuring the minority, the majority are quite willing to have the proper price of the shares ascertained by arbitration or in any other way the Court thinks fit.

*Menier v. Hooper's Telegraph Works* (2) was a case of fraud. See *Mason v. Harris.* (5) But bona fides is here admitted, and the case is really covered by *Allen v. Gold Reefs of West Africa, Ld.* (1) A similar new article was allowed in *Borland's Trustee v. Steel Brothers AND Co.* (1) The only test is whether the new article would have been valid as an original article.

(1) [1900] 1 Ch. 656, 671.; (2) (1874) L. R. 9 Ch. 350.; (3) 1909 S. C. 732.; (4) [1898] 1 Ch. 122.; (5) (1879) 11 Ch. D. 97, 107, 108.

*Micklem K.C*. in reply. That is clearly not the test. Otherwise *Allen v. Gold Reefs of West Africa, Ld.* (2) would have been unarguable. In *Borland's Trustee v. Steel Brothers AND Co.* (1) it does not appear whether or not the new article was a reproduction of an original article. But it is immaterial, as Borland was a party to passing the new article, and no objection on the ground of oppression was raised.

DECISION OF THE CHANCERY DIVISION

*Held,* [Approving the Injunction]

1. in the circumstances, that the proposed article was not just or equitable or for the benefit of the company as a whole, but was simply for the benefit of the majority. It was not therefore an article that the majority could force on the minority under s. 13 of the Companies (Consolidation) Act, 1908.

2. In earlier decisions, no case of any oppression of the minority by the majority was set up. The proposed alteration is not directly concerned with the provision of further capital, nor does it insure that it will be provided. It is merely for the benefit of the majority. If passed, the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the present benefit of this company.

**MAIN JUDGMENT**

ASTBURY J. (after stating the facts).

The question is whether this alteration of the articles is one that this large majority are entitled to force on the minority.

The plaintiff contends that it is really an oppressive attempt to buy out the minority for the benefit of the holders of this large block of 49,119 shares. Although there is no allegation of mala fides the question is whether on the present evidence the proposition is or is not contrary to natural justice. If fair and just in the interest of the company and the shareholders generally, I have no right to interfere. If on the other hand it is oppressive, it is both my right and duty to prevent it being imposed on the minority.

Now the proposed alteration will place in the hands of the shareholders who hold the 49,119 shares the decision of the question whether the minority capital is to be bought up.

In 1918 they tried to buy it up at par by agreement. They were unable to do so. The proposed article will enable them to do forcibly what they were unable to effect by agreement with the minority. It is tantamount to saying: "If you will not agree to sell your shares we will take compulsory powers to make you." The provision requiring the request of the holders of nine-tenths of the issued shares is not important. If the article is valid with that provision, it would be valid if it provided for a sale at the request of a bare majority.

The majority are perfectly frank. They are unwilling to risk putting up further capital, unless their interest is commensurate with their outlay and they get the whole of the shares in their hands.

(1) [1901] 1 Ch. 279.; (2) [1900] 1 Ch. 656.

They say that the alteration is directly within s. 13 of the Companies (Consolidation) Act, 1908, and the authorities thereon, and that I have no alternative but to dismiss the motion.

Sect. 13 provides that "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution."

This language, though very wide, must obviously be read with some qualification, and many instances outside the range of validity contemplated by the section are referred to in Buckley on Companies, 9th ed., pp. 23-25.

In *Allen v. Gold Reefs of West Africa, Ld.* (1) the majority of the Court of Appeal sanctioned, as against the only holder of fully paid shares, a new article imposing a lien on fully paid shares. Lindley M.R. said: "The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 [now s. 13] is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded."

The question therefore is whether the enforcement of the proposed alteration on the minority is within the ordinary principles of justice and whether it is for the benefit of the company as a whole. I find it very difficult to follow how it can be just and equitable that a majority, on failing to purchase the shares of a minority by agreement, can take power to do so compulsorily.

1. [1900] 1 Ch. 656, 671.

The defendants contend that it is for the benefit of the company as a whole because in default of further capital the company might have to go into liquidation. The plaintiff is willing to risk that. The proposed alteration is not directly concerned with the provision of further capital, nor does it insure that it will be provided. It is merely for the benefit of the majority. If passed, the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the present benefit of this company.

The defendants relied on *Borland's Trustee v. Steel Brothers and Co.* (1) In that case however the present objection was not taken. The managers and assistants on whose exertions the success of the company depended were dissatisfied with their remuneration. New articles were adopted to get over this difficulty. Art. 58 provided that a person, other than a manager or assistant, holding ordinary shares might at any time be required by the directors to transfer them. It does not appear whether this article was in the original articles, but in any case Borland was a party to the passing of the new articles and bound by his bargain accordingly. Objections on the ground of repugnancy, perpetuity, and fraud on the bankruptcy law were raised and disposed of, but no case of any oppression of the minority by the majority was set up. The decision therefore in no way prevents me from criticising the proposal in the present case.

The defendants rely on the words of s. 13 providing that "any alteration .... shall be as valid as if originally contained in the articles," and say correctly that there could have been no objection to an original article in the form of art. 15A. They suggest that that is the test of the validity of a new article. But that is clearly not a valid test. Otherwise the arguments in *Allen v. Gold Reefs of West Africa, Ld.* (2) would have been unnecessary. The true meaning of this provision is that assuming the alteration is legal, it is as valid as if originally contained in the articles.

(1) [1901] 1 Ch. 279.; (2) [1900] 1 Ch. 656.

In the circumstances of the present case art. 15A is not an article that the majority are entitled to enforce on the minority and the injunction must go accordingly.

G. R. A.