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in the will the residuary trust fund was to be treated as capital moneys under the Settled Land Acts, as if it had arisen from the sale of part of the Maugersbury estate.]

Solicitors: *Bell, Brodrick & Gray, for Jones & Carr, East Retford; Prideaux & Sons; Rawle, Johnstone & Co., for E. W. Hewitt, Hull.*

H. C. H.

TOMLIN J. 1926 *April* 27; *May* 13.

DUKE OF SUTHERLAND *v.* BRITISH DOMINIONS LAND SETTLEMENT CORPORATION, LIMITED.

[1925. S. 4342.]

Practice—Interrogatories—Company—Refusal to register Transfer—Limited Power to do so under Articles—Interrogatories directed to ascertaining Grounds for Refusal—Bona fides.

Art. 27 of a company's articles of association was as follows: "The Directors may without assigning any reason, decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted or under any liability to the company." The plaintiff was the holder of 10,000 partly paid cumulative preference shares of 1*l.* each in the company, and in December, 1925, executed a transfer of 8000 of these shares to a transferee. Registration of the transfer was refused, and the plaintiff brought this action claiming a declaration that the defendant company was not entitled to refuse registration of the transfer and rectification of the company's register accordingly. Earlier in 1925 the company had issued debentures secured by a debenture trust deed, in which the company covenanted with the trustees that it would not in regard to 100,000 preference shares register until the shares were fully paid any transfer of any of them to any proposed transferee not approved by the trustees, and would not, except with the previous written consent of the trustees, release any of the holders of these shares from any moneys payable or which might become payable in respect of such shares. The plaintiff alleged by his statement of claim that the defendant company had wrongfully refused to register the transfer, that the directors did not exercise any proper discretion under the articles, and that they had abdicated their discretion by entering into the above covenant with the trustees. The defendants by their defence claimed to have exercised the discretion under the article bona fide.

The plaintiff now sought to interrogate the defendant company by asking:—

(1.) Whether the company said that the directors had declined registration in exercise of the power to decline to register any transfer

made to any person not approved by them or in exercise of the power to decline to register any transfer by a member jointly or alone indebted to the company;

(2.) Whether they said that the transfer was to a person of whom the directors did not approve;

(3.) Whether they said the plaintiff was in fact a person jointly or alone indebted to the company;

(4.) Whether the debenture trust deed was referred to by any one at any meeting at which the question of registering the transfer was discussed.

The Master had allowed requisition three, but refused the remainder:—

Held, that all the interrogatories were proper to be allowed. The defendant company was not entitled to refuse to state which of the grounds mentioned in the article the directors had acted under, although it might refuse to say what reasons influenced them in exercising their discretion upon that ground.

PROCEDURE SUMMONS.

This summons was taken out by the plaintiff, the Duke of Sutherland, in an action by him against the defendant company and Lieutenant-Colonel Walter Grant Morden claiming to administer certain interrogatories to the defendant company.

The action was brought by the plaintiff claiming: (1.) a declaration that the defendant company was not entitled to decline to register a transfer made by the plaintiff in favour of the defendant Morden of 8000 7½ per cent. cumulative preference shares of 1*l.* each in the capital of the company, and (2.) An order that the register of members of the defendant company should be rectified by the deletion of the plaintiff's name as holder of the 8000 shares, and by the insertion in lieu thereof of the name of the defendant Morden.

By his statement of claim the plaintiff alleged that the defendant Morden took an active part in the promotion of the defendant company, which was registered as a private company on July 25, 1924, and became a public company on September 11, 1924, and now had a capital of 750,000*l.* divided into 250,000 preference shares of 1*l.* each and 500,000 ordinary shares of 1*l.* each; that this defendant was an alternate director of the company, and was at all material times a member of the company's finance committee, and in these capacities attended all or the majority of the directors'

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meetings; and that he was at all material times the holder of 3000 preference shares of the company, and gave a guarantee to the defendant company to secure an overdraft.

By an amendment to the articles of association of the company, made on September 11, 1924, it was provided as follows:—

"The following article shall be substituted for art. 27, namely: The directors may, without assigning any reason, decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted or under any liability to the company."

The defendant company made an issue of debentures to the amount of 450,000*l.* secured by a debenture trust deed dated May 25, 1925.

By cl. 5 of this deed the defendant company assigned to the trustees of the deed (amongst other things) "all that the right to sue for recover and receive and give a good discharge for all moneys up to and not exceeding 80,000*l.* due and to become due in respect of the first 100,000 preference shares of the company which are allotted from time to time by the company which moneys are to be held by the trustees upon the trusts hereinafter declared concerning the same." And by cl. 8 the company covenanted with the trustees "That it will as and when the same become respectively payable under the terms of the applications that have been made therefore call up and if requested by the trustees recover payment of and immediately after the receipt thereof pay to the trustees all moneys payable in respect of" the above 100,000 shares "except such sums not exceeding in the whole 20,000*l.* as the company may desire to retain . . . . and that it will not until the same are fully paid register any transfer of any of the said shares . . . . to any proposed transferee not approved by the trustees and will not except with the previous written consent of the trustees forfeit any of the said shares or release any of the holders thereof from any moneys payable or which may become payable in respect of such shares."

In or about December, 1924, the plaintiff became the

registered holder of 10,000 preference shares of the company, which were shares not fully paid, but he alleged that he had duly paid all calls made in respect of them. On December 10, 1925, the plaintiff's solicitors presented to the defendant company a transfer of 8000 of these preference shares executed by himself and the defendant Morden in favour of the defendant Morden, and requested the company to accept and register this transfer. On October 1, 1925, the company refused to register the transfer.

By clauses 8 and 9 of the statement of claim the plaintiff alleged that the defendant company had wrongfully refused to accept or register the transfer, that the directors of the company did not exercise a proper or any discretion in refusing to accept or register the transfer, that he was not under any liability to the defendant company, and that the defendant Morden was not a person whom they could reasonably approve as the holder of these shares; and he alleged that the directors by entering into the agreement mentioned above in the debenture trust deed had abdicated their discretionary position, and made it impossible for themselves to exercise a proper or any discretion.

By cl. 8 of the defence the defendant company admitted that the transfer of 8000 preference shares was presented for registration, and by cl. 9 the defendant company denied that the directors had not exercised a proper discretion in declining to register the transfer, and alleged that they resolved to decline to register such transfer in pursuance of their powers under art. 27 of the articles of association and without having consulted the debenture trustees, and that in so resolving the directors had exercised a proper discretion and were acting solely in the interests of the defendant company.

In these circumstances the plaintiff sought to administer to the defendant company the following interrogatories: "1. Do you say that the directors of the defendant company declined to register the transfer of 8000 preference shares mentioned in para. 8 of the defence herein in exercise of the power to decline to register any transfer of shares not fully paid up made to any person not approved by them or in the

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exercise of the power to decline to register any transfer of shares not fully paid up made by any member jointly or alone indebted or under any liability to the company or do you say that they so declined in exercise of both the said powers ?

2. Do you say that the defendant Lieutenant-Colonel Walter Grant Morden, M.P., was in fact a person of whom the directors did not approve as a transferee of the 8000 shares mentioned in para. 8 of your defence herein ?

3. Do you say that the plaintiff was in fact a person who was either jointly or alone indebted or under a liability to the defendant company, and if yes, under what debt or liability was the plaintiff to the defendant company ?

4. Was the trust deed mentioned in para. 5 of your defence herein mentioned or brought forward or referred to [by any and what person who was present] at any and what [Board] meeting [or at any meeting of any and which] of [the] directors of the defendant company, at which the question of agreeing or refusing to register the transfer of the 8000 shares mentioned in para. 8 of your defence was discussed [by any and which members of the Board of directors of the defendant company] ? "

On the matter coming before the Master he refused the application to administer interrogatories except interrogatory No. 3. The plaintiff now claimed to be entitled to administer all the above interrogatories.

Greene K.C. and *St. John Field* for the plaintiff. The plaintiff's case in the action is that the directors of the defendant company did not exercise the discretion to refuse registration of a transfer conferred on them by art. 27. The defendant company claim that they did. Under art. 27 there are two different grounds on which the discretion can be exercised, and the first three interrogatories which the plaintiff asks liberty to administer are directed to ascertaining on which ground the defendant company claims to have acted. Further the plaintiff's case is that the directors have given up their discretion by virtue of the covenant

contained in the debenture trust deed, and the last interrogatory is directed to ascertaining whether regard was had to the obligation in the trust deed in refusing registration.

[TOMLIN J. I think the fourth interrogatory goes further than I should be prepared to sanction.]

The plaintiff is willing that this interrogatory should be modified by omitting certain words in it. (1) The Master had allowed the third interrogatory, but refused the remainder. The Court is asked to allow the whole of them. The principle governing the granting of interrogatories was discussed in *Attorney-General* v. *Gaskill* (2), and it was laid down that a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised. Applying that to the present interrogatories, they are all proper to be allowed.

J. B. Lindon for the defendant company. The Master was right in refusing all except the third interrogatory, which was allowed, because in the defence a special claim had been set up that the plaintiff was indebted to the company. The company has pleaded that the directors have exercised their discretion under art. 27, and this is all that the plaintiff is entitled to know. It is well settled that directors need not assign reasons for the exercise of their discretion: *In re Gresham Life Assurance Society* (3); *In re Bell Brothers, Ld.* (4) This is so even when the power to refuse registration is exercisable under the article only on particular grounds: *In re Coalport China Co.* (5); *In re Bede Steam Shipping Co.* (6), *In re Hannam's King (Browning) Gold Mining Co.* (7): see also Buckley on Companies, 10th ed., p. 40.

[TOMLIN J. In a case where the directors' bona fides are impugned, must they not explain their reasons?]

Not at any rate before the trial of the action. Art. 27 gives the directors a single power, which they claim to have

(1) This interrogatory was then altered by omitting the portions shown in square brackets above.
(2) (1882) 20 Ch. D. 519, 528.
(3) (1872) L. R. 8 Ch. 446.
(4) (1891) 65 L. T. 245.
(5) [1895] 2 Ch. 404.
(6) [1917] 1 Ch. 123.
(7) (1898) 14 Times L. R. 314.

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exercised. It is exercisable, it is true, on two different grounds, but it is a single power. The ground on which the directors acted is part of the defendants' case, and cannot be the subject of interrogation. Under the very words of art. 27 it is expressly provided that the reasons of the refusal to register need not be given. The plaintiff is really seeking by these interrogatories to shift the burden of proof. They are not relevant to the issue between the parties, which is not whether the directors acted under one branch or the other of the article, but whether they acted under the article at all. The first two requisitions are not therefore proper to be put: *In re Howel Morgan* (1); *Kennedy* v. *Dodson* (2); *Lever Brothers* v. *Associated Newspapers*. (3)

Again the fourth interrogatory is entirely irrelevant to any issue in this case. The only issue in connection with the debenture trust deed is whether the defendant company by entering into a particular agreement have bound their hands, so that the discretion under art. 27 could not be properly exercised. It is irrelevant to that issue what passed at any Board meeting of a subsequent date and whether at such a meeting the trust deed was mentioned.

Greene K.C. in reply. As regards the fourth interrogatory, it must be material to know whether the directors were influenced by the debenture trust deed in refusing registration. Otherwise it might be said that they in fact acted without giving consideration to any obligation under the deed.

Again the onus is no doubt upon the plaintiff to show that the defendants did not act bona fide under the article, but this does not mean that the plaintiff is not entitled to know the defendant company's case. The cases that have been cited to show that directors need not give reasons for the exercise of their discretion are all cases where it was contended that as the directors had refused at the trial to give reasons for the exercise of their discretion, this in itself was evidence that they had acted mala fide and that it was not therefore necessary for the plaintiff to prove mala

(1) (1888) 39 Ch. D. 316. (2) [1895] 1 Ch. 334, 340.
(3) [1907] 2 K. B. 626, 629.

fides affirmatively. It was held in those circumstances that the directors were not bound to go into the box and state their reasons. The decisions have nothing to do with interrogatories.

TOMLIN J. This is an application by the plaintiff in the action for liberty to administer certain interrogatories to the defendant company. [His Lordship then stated the nature of the action as shown by the pleadings and of the four interrogatories sought to be administered and continued :] Of those interrogatories the third interrogatory, relating to the question of the indebtedness of the plaintiff was allowed in Chambers, but the remainder were refused and the application has been adjourned into Court at the request of the plaintiff.

Interrogatories have very often a more useful function in an action than is always appreciated. I think there has been some variation from time to time in the practice of the Court with regard to the facility with which interrogatories have been allowed or have been disallowed. I doubt myself whether interrogatories are administered as often as it is desirable ; and although I should desire to keep interrogatories strictly within the legitimate limits within which they are permissible, the administering of interrogatories seems to me to be, speaking generally, a step which is more often desirable than undesirable and to be encouraged rather than to be discouraged, because they not infrequently bring an action to an end at an earlier stage than otherwise would be the case, to the advantage of all parties concerned. The function of interrogatories was stated by Cotton L.J. in *Attorney-General* v. *Gaskill* (1), where, after referring to the order of the Supreme Court which relates to the matter and dealing with r. 2, he said : " The right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the plaintiff himself already knows the fact, but that

(1) 20 Ch. D. 519, 528.

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is a mere play on the word 'discovery.' Discovery is not limited to giving the plaintiff a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on any issue which is raised between him and the defendant. To say that the pleadings have raised the issues, and that therefore the interrogatories should not be allowed, is an entire fallacy. The object of the pleadings is to ascertain what the issues are, the object of interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been." Lindley L.J. in *Kennedy* v. *Dodson* (1) cites the following passage from Wigram on Discovery, 2nd ed., p. 15: "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." And later he quotes a further passage of the learned author, in which it is said: "In determining whether particular discovery is material or not, the Court will exercise a discretion in refusing to enforce it, where it is remote in its bearings upon the real point in issue, and would be an oppressive inquisition."

That indicates generally, it seems to me, the lines within which, and I conceive them to be fairly broad lines, interrogatories are admissible. The issue in this particular case seems to me to be plain. The plaintiff alleges that the directors of the defendant company never exercised the power conferred on them by art. 27 at all. He says that they affected to exercise it by disapproving the transferee, but that in fact it was no exercise, because they were bound by contract to the trustees of the debenture trust deed in terms which made it impossible for them to exercise any real discretion at all. The defendants' answer is: We admit the contract with the debenture holder trustees, but none

(1) [1895] 1 Ch. 334, 340.

the less the directors acted in pursuance of the article in refusing registration of the transfer. We make no admission, however, as to what branch of the article they affected to act under, and we are not going to tell you anything about that until the moment comes when the matter is tried. That is what in effect the defendants say. It seems to me that on that the issues quite clearly are: Did the directors exercise their power at all, and if they did exercise it, under which branch of the article did they exercise it, and if they affected to exercise it under either branch did they or did they not exercise it bona fide having regard to the evidence in relation to the contract with the trustees for debenture holders? Leaving out of consideration for a moment the argument which has been addressed to me with regard to the discretionary powers of directors, I should have thought myself that it was plain that the plaintiff was entitled to know before the trial as a matter of pleading what the defendants' case was, and that he was entitled to put to the defendants interrogatories for the purpose of ascertaining what admission the defendants were prepared to make in regard to the matters alleged. It seems to me that interrogatories one, two and three are all clearly directed to the issues which I have indicated—namely, what branch of the power do the defendant company allege they acted under? and, if under the one branch of the power, do they say that Colonel Morden was a person of whom they did not approve, and if under the other branch of the power, do they say that the plaintiff was a person indebted to them? and I should have thought prima facie those were all matters in regard to which the plaintiff was fairly entitled upon the issues raised upon the pleadings to interrogate the defendants.

But it is said that when you are dealing with a company and its directors in regard to these matters of registration some wholly different considerations apply, and that you are not entitled to ask the directors anything at all in regard to the exercise by them of their discretion to refuse registration. Let me say, first of all, that I think on the construction of this article that grammatically the expression "without

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assigning any reason" clearly governs both branches of the article; but it seems to me that the reason for exercising the power is a distinct thing from the grounds which give rise to its exercise. If the indebtedness of the transferor is a ground for the exercise of the power, the power may be exercised one way or the other for one or more reasons; and in my opinion the words "without assigning any reason" have reference to the reasons which move the directors in coming to such conclusion as they may see fit to reach, and have not reference to the circumstances in which the power is exercisable. I think therefore on the construction of the article that the defendants are bound to say whether the directors declined to register because they do not approve of the transferee or because the transferor is indebted to the company, but that they are not bound to tell the plaintiff why in those circumstances the directors did not choose to register the transfer. But whether that be the true construction of the article or not, it seems to me that there is a misapprehension in regard to the directors' position in such cases. The cases which have been cited to me are all cases where, on the final hearing of an application or the trial of an action, there has been a judgment to this effect. Prima facie the directors are assumed to act bona fide just as ordinary trustees in exercising powers are assumed to act bona fide. If anybody alleges the contrary the onus is on him to prove it, and if in fact he adduces no evidence at the trial which justifies a conclusion either that there has been no exercise of the discretion or that there has been a mala fide exercise of the discretion, then the mere fact that the directors have refused to give any reason for the exercise of the power, and for the manner in which they have exercised it, throws no suspicion on them or in any sense shifts the onus of proof so as to put upon them the burden of justifying that which they have done. That seems to me to be the result of the cases to which I have been referred. They have nothing whatever to do with the question what in such a case as this the plaintiff is entitled to ask the defendants on an application for discovery; and an application for interrogatories is nothing

more than an application directed to one mode of obtaining discovery. It is I think impossible to say that in cases of this class some special rule applies. As in any other action the plaintiff is I think entitled when once the issue and relevant facts are ascertained to interrogate the defendants in relation to those issues and those facts for the purpose of obtaining discovery in the widest sense by extracting new information or obtaining admissions of matters within the knowledge of the plaintiffs for the purpose of shortening the trial, or possibly indeed of rendering a trial unnecessary, and of so diminishing the expense to the parties. That being my view I am quite satisfied in regard to the first three interrogatories that they were proper to be allowed.

I have felt more hesitation in regard to the fourth interrogatory, but I have come to the conclusion that it is proper to allow this interrogatory in the modified form accepted by the plaintiff. It seems to me that one of the issues is whether or not these directors fettered themselves by entering into a contract inconsistent with their duty under art. 27; and it is a relevant fact directly connected with that issue whether at those meetings at which they decided to refuse registration they had before them the very document in which their inconsistent obligation was contained. For that reason I propose also to allow the fourth interrogatory.

I will therefore make an order allowing all the interrogatories, and the costs of the application will be costs in the action.

Solicitors: *Lewis & Lewis; Ashurst, Morris, Crisp & Co.*

H. C. G.