

The Ontario Jockey Club, Limited - - - - - *Appellants*

v.

Samuel McBride - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 25TH JULY, 1927.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD WRENBURY.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WRENBURY.]

On the 23rd June, 1922, one Chas. Millar executed in favour of the respondent, McBride, a transfer of one share in the appellant company, the Ontario Jockey Club, Limited. The transfer was presented to the company for registration, but registration was refused on the ground that the provisions of the agreement and by-law presently mentioned had not been observed. Thereupon the respondent, on the 24th November, 1923, brought this action to enforce registration. The litigation ran its course, and resulted in an order dated the 20th November, 1925, and affirmed by the Supreme Court of Canada on the 15th December, 1926, by which the company was ordered to enter the name of McBride on the register. This is an appeal by special leave from the judgment of the Supreme Court.

The transferor Millar is not a party to the action. The order under appeal to put McBride's name on the register is necessarily an order to take Millar's name off. Apart from the merits of the case their Lordships had they been in favour of the respondent on this appeal would have found difficulty in affirming an order for rectification made in an action to which the transferor was not a party. But inasmuch as upon the merits they think that the order cannot be sustained, they have no difficulty in dealing

with the case in the absence of the transferor. They therefore proceed to deal with the case upon the merits.

The appellant company was incorporated on the 29th April, 1881, by letters patent issued under the then existing Ontario Company's Act, R.S.O., 1877, ch. 150, with a capital of \$20,000, divided into 200 shares of \$100 each. On the 28th June, 1909, Charles Millar was the registered holder of one share.

In 1910, before the increase of the shares from \$100 each to \$1,000 each and before the issue of the new shares presently mentioned, he obtained a second share. On the 10th November, 1910, the committee of the company passed and on the 30th November, 1910, the company ratified a by-law in the following terms :—

By-Law No. 37 :—

1. Save as hereinafter provided, no shares or interest in the Club shall at any time be transferred to any person not already a shareholder, until the Club has had an opportunity to find a purchaser for such share or interest as hereinafter provided.

2. Any shareholder desiring to sell his share or shares, or any portion thereof, shall give notice in writing to the Club that he desires to sell and transfer the same, and such notice shall constitute the Club such shareholder's agent for the sale of such share or shares to any purchaser at a price to be ascertained as hereinafter provided or at any lower price that may be fixed by the shareholder desiring to sell.

3. That if the Club shall within the space of thirty days after such notice find a purchaser desiring to purchase such share or shares and shall give notice thereof to the person desiring to sell, he shall be bound at such time within ten days thereafter as the Club shall appoint upon payment of the price named or to be ascertained as hereinafter provided to transfer such share or shares to such purchaser.

4. That if in any case the selling shareholder after becoming bound as aforesaid makes default in transferring such share or shares, the Club may receive the purchase money and shall thereupon cause the name of the purchaser to be entered upon the register as the holder of such share or shares, and shall hold the purchase money in trust for the selling shareholder, his executors, administrators or assignees and the receipt of the Club for the purchase money shall be a good discharge to the purchaser, and he shall not be bound to see to the application thereof and after the name of the purchaser shall have been entered in the register in purported exercise of the aforesaid power the validity of the transfer entry or the proceedings shall not be questioned by any person and the purchaser shall be deemed and taken to be the owner of the said share or shares.

5. That subject to the next succeeding paragraph the price to be paid by the purchaser, if no less price is fixed by the seller, shall be the par value of such share or shares plus the proportionate part of undivided profits, shown by the Annual Balance Sheet of the Club next prior to the giving of such notice,—Provided that if ~~instead of~~ there being undivided profits such balance sheet shows an **impairment** of Capital of the said Club then the proportionate part of such impairment shall be deducted from the par value of such share or shares in ascertaining the said price.

6. Notwithstanding anything contained in the foregoing provisions no shareholder shall sell and transfer any share or shares to any person not a shareholder for a price less than the amount to be ascertained as above until the Club shall first have been given an opportunity for five days to find a purchaser for such share or shares at such lower price.

At that date (the 10th November, 1910) the Ontario Act of the 20th April, 1907, was in force. Section 48 of that Act is in the following terms :—

48. The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act, the Special Act, the Letters Patent or by-laws of the company may be prescribed.

and Section 87 (a) is in the following terms :—

87. The directors may, from time to time, make by-laws not contrary to law, or to the Letters Patent of the company, or to this Act, to regulate :—

(a) The allotment of shares ; the making of calls thereon ; the payment thereof ; the issue and registration of certificates of shares ; the forfeiture of shares for non-payment ; the disposal of forfeited stock and of the proceeds thereof ; the transfer of shares ;

By-law 37 was made when these statutory provisions were in force.

On the 14th November, 1910, supplementary letters patent were issued increasing the company's capital to \$200,000 in 200 shares of \$1,000 each, and the supplementary letters patent provided that the new stock should be issued to the existing shareholders share for share, "and the amount paid by each shareholder on his present shares shall be applied on account of the new shares of such increased amount."

When these supplementary letters patent were issued, Chas. Millar received a certificate for two shares, each of \$1,000 in place of his original two shares of \$100 each, and without making any further payment upon them. The only payment he had made was \$30 on each of the two original shares of \$100. The balance of \$70 was paid up as a " stock dividend " on each of the two shares.

On the 18th December, 1910, after the issue of these supplementary letters patent, Chas. Millar, upon signing the agreement next set forth received a certificate, No. 37, for two shares of \$1,000 each in place of his two shares of \$100 each.

The agreement was in the following terms :—

" I hereby acknowledge the receipt of Certificate Number 37 for two shares of the Capital Stock of the Ontario Jockey Club, and I hereby agree to accept the said shares, subject to the conditions contained in By-law Number 37 of the Club, passed on the twenty-fourth day of November, 1910 ; which require that before any Shareholder can transfer a share to any person not already a shareholder of the Club, notice shall first be given to the Club of the desire of such shareholder to sell his share or shares and the Club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said By-law, or at any less price that may be fixed by the seller."

(Signed) CHAS. MILLAR.

There is no dispute that the by-law, here stated to have been passed on the 24th November, 1910, is the above by-law passed on the 10th November, 1910, and ratified on the 30th November, 1910.

Upon the certificate which Millar received was printed a copy of this agreement and also a footnote (hereinafter called for convenience the restrictive footnote) in the following terms :—

“The shares of the Capital Stock of the Ontario Jockey Club represented by this certificate are subject to the provisions of By-Law Number 37, of the Ontario Jockey Club, passed on the twenty-fourth day of November, 1910 ; which require that before any Shareholder can transfer a share to any person not already a Shareholder of the Club, notice shall first be given to the Club of the desire of such Shareholder to sell his share or shares, and the Club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said By-Law, or at any less price that may be fixed by the seller.”

Similar agreements were signed and similar certificates issued to every holder of shares in the company.

By the Ontario Act, 1912, the above section of the Act of 1907 was replaced by a section as follows :—

54.—(1) The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act, the Special Act, the Letters Patent, Supplementary Letters Patent or by-laws of the company may be prescribed.

(2) Subject to section 56, no by-law shall be passed which in any way restricts the right of a holder of paid up shares to transfer the same, but nothing in this section shall prevent the regulation of the mode of transfer thereof. *New.*

Section 56 is a section dealing with the case of a shareholder who is indebted to the company. It is for the present purpose not material.

By further supplementary letters patent dated the 14th November, 1916, the capital of the company was increased to \$600,000 by the creation of 400 new shares of \$1,000 each, and under these letters patent two of these new shares were issued to every shareholder for every share then held. Chas. Millar consequently became the holder of two shares with the addition of four shares, making six shares in all. The shares in the company were never identified by number or otherwise.

All the shareholders on the register at the date of the first supplementary letters patent signed an agreement in the terms above set forth, and received certificates with the restrictive footnote printed upon them. They were not required to sign again when they acquired the additional shares under the second supplementary letters patent. Every certificate, however, for shares in the company which is in issue has printed upon it the footnote above set out and called the restrictive footnote.

It was in this state of facts that the transfer of the 23rd June, 1922, was made by Chas. Millar to the respondent McBride.

Upon these facts the first question which presents itself is this :—On the 23rd June, 1922, could Chas. Millar execute in favour of McBride, who was not already a shareholder, the transfer of a share, tender in support of the transfer the certificate

which he held for six shares bearing upon its face the restrictive footnote, and call upon the company to register the transfer, notwithstanding the agreement which he had signed on the 18th December, 1910? An argument has been advanced that there was no consideration for that agreement. Their Lordships do not agree. It was a term of the arrangement under which the shares were issued under the supplementary letters patent of 1910 that the receipt and agreement which Millar signed on the 18th December, 1910, should be signed by Millar and by all other shareholders, and it was so signed. The issue of those shares was valuable consideration passing to the allottees, in exchange for which they gave their signatures. Whether By-law No. 37 was or was not binding as a by-law, it was competent to the shareholder to bind himself to the restriction expressed in it, and by signing the agreement he became, and by virtue of their signatures given on receiving the additional shares every shareholder became, bound by that restriction. It was urged, however, that even if this is so as regards the two shares, the same proposition is not true of the other four shares afterwards issued to Millar. It is true that the agreement was not signed again on the issue of the four shares, but the restrictive footnote was printed on the certificate for the six shares which was substituted for the certificate for the four shares, and the allottee received the certificate for the six shares as being a certificate of a body of six shares all of which were alike issued and accepted upon the terms on which the two shares were originally issued.

That restrictions may be placed upon a shareholder's right of transfer of his shares cannot be questioned. The cases are numerous in which such restrictions have been upheld. Shares are *prima facie* transferable. But there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to. It may be for the benefit of the company that, for instance, shares shall not be transferred to rivals in the company's trade. A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid. The restriction in the present case is of that kind. For these reasons their Lordships are of opinion that when the transfer, accompanied by the certificate bearing the restrictive footnote, was tendered for registration the company was entitled to refuse to register.

Under these circumstances it is unnecessary to express any opinion upon some interesting points of law which in the absence of this agreement it would have been necessary to decide. It is unnecessary to determine whether the Ontario Statute of 1912 is retrospective so as to invalidate a by-law valid under the Statute of 1907. It is unnecessary to determine whether the affirmative and operative word "restrictions" in both the Act of 1907 and that of 1912 is curtailed by the administrative word

"regulate" in each of those Acts. It is unnecessary to decide whether if there had been no agreement the by-law as a by-law would have been binding. It is unnecessary to consider whether the decision of this Board in *Canada National Fire Insurance Company v. Hutchings*, 1918, A.C. 451, extends beyond the case of an unrestricted power to disapprove transfers. It is unnecessary to call in aid the decision in *Lord Strathcona Steamship Company v. Dominion Coal Company*, 1926, A.C. 108, upon which Idington, J., relied as being in his opinion conclusive against the transferee. That case has, in fact, in their Lordships' judgment, little, if any, bearing upon this case. The question there was whether the purchaser who had got the ship was bound by the restriction as one attaching to the ship. The question here is whether the transferee who has not got the share, is by the restriction prevented from getting it. The present case falls to be decided on the ground that by the agreement of the transferor and of every other shareholder in this company, the shares in this company are transferable only subject to the right of pre-emption expressed in the language found in By-law No. 37.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the action dismissed with costs before this Board and below.

in the 19th Century

In the Privy Council.

THE ONTARIO JOCKEY CLUB, LIMITED,

v.

SAMUEL McBRIDE.

DELIVERED BY LORD WRENBURY.

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