

ON APPEAL FROM THE SUPREME COURT OF THE

BAHAMA ISLANDS

B E T W E E N : THE MONTAGU PARK RACING
ASSOCIATION *LIMITED*

Appellants
(Plaintiffs)

- and -

THE HONOURABLE DR. RAYMOND
WILSON SAWYER

Respondent
(Defendant)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
6 - DEC 1971
25 RUSSELL SQUARE
LONDON W.C.1

(AND CROSS-APPEAL CONSOLIDATED)

Dr Sawyer
CASE FOR THE RESPONDENT

Line
No.

Record:

- 1. This is an appeal from a judgment of the Supreme Court of the Bahama Islands (The Honourable Mr. R. A. Campbell Chief Justice) delivered on two days and dated 6th May 1964 and 21st May 1964. p.26
- 5 2. The action was brought by the Appellants as Plaintiffs on the 5th February 1959 to recover £26,972.16.7. monies withdrawn by various cheques specified in the Statement of Claim from the Appellants by the Respondent between 30th April 1954 and 1st May p.44
- 10 1957 during a period when the Respondent was managing director and the only shareholder entitled to profits in the Appellants. The Respondent as defendant counterclaimed for £10,000 monies loaned by him to p.23
- 15 the Company in May, 1954. The sum of £3,000 was owing by the Appellants to the Respondent in respect of salary due and credit for this sum was given in the Appellants claim. There is now no dispute as to the

facts of payment but only as to ~~this~~^{the} character.

3. The issues involved in the Respondent's appeal are

p.634 (i) whether he is entitled to recover a loan to the Appellants by enforcing a promissory note dated 27th May 1954 sealed by the Appellants and signed by himself as a director and the Appellant's secretary and ratified by a general meeting for payment of the sum of £10,000; 5

(ii) whether he is entitled to recover this sum as a loan apart from the promissory note 10

(iii) whether he is entitled to retain withdrawals of monies from the Appellants made after 30th April 1956 because they were agreed to by all the shareholders of the Appellants but not formally passed by a meeting of the board of a general meeting 15

p.624 (iv) whether he is entitled to retain these withdrawals of monies from the Appellants under the implied term of contracts made between himself and Mr. Alexis Nihon.

and 20

(v) whether such contracts bind the Appellants

FACTS:-

p.614A 4. On the 6th May 1953 Mr. Alexis Nihon entered into an agreement with the Respondent for the sale of 297 out of the total 300 shares issued of the Appellants. 25

p.446A At the time of entering into the agreement Mr. Nihon was President, Treasurer and a director of the Appellants. Mr. Nihon who then owned beneficially all the issued capital retained one share himself and one

for his wife as his nominee. One share was necessarily left outstanding because the member concerned a Mr. Murphy had died and no one had been registered in his place. The Agreement provided that Mr. Nihon's two shares should not participate in profits and they were retained by him so that he and his nominee could act as directors. The price for the shares was £60,000 to be paid by the Respondent by the conveyance of a piece of land and the balance by cash instalments spread over 5 years and carrying interest. The shares were deposited at Barclays Bank to secure payment of the purchase price. The Appellants owned leasehold a race-course in Nassau which they operated known as "Hobby Horse Hall".

p.38D

p.26B

p.26B

Clause 8 of the agreement provided for the payment of a fixed percentage out of part of the gross income of the Appellants to Mr. Nihon as follows :

p.618

"The Purchaser agrees to pay to the Vendor Three (3) per cent of the gross sums paid into the pari-mutuel pool as defined in the Racecourse Betting Act, 1952 on each and every race day and to pay such sum over to the Vendor on the third day following each day during the racing season. For example, if the pari-mutuel pool totals Twenty Thousand Pounds (£20,000) on any given race day then and in such event the Purchaser shall receive the sum of Two thousand pounds (£2,000) or ten per cent thereof and the Vendor Six hundred pounds (£600) or three per cent thereof. In the event the figure of Thirteen per cent to the licensee

of the Montagu Park Racing Association Limited is reduced or increased by the Legislature of the Bahamas then and in such event the said figure of Ten per cent and Three per cent shall be reduced or increased proportionately."

By Clause 16 a restriction was placed on the operation of the Appellants in the hands of the Respondent. It was agreed that the Purchaser would not cause the Appellants to become indebted to any person or persons for more than the sum of £10,000. After the transaction the operation of the Appellants was managed by the Respondent and considerable profits were made from the Hobby Horse Hall. Mr. Nihon was paid the 3% provided for under the Agreement. The Respondent, although no dividends were formally declared, drew sums from the company in which he now owned all shares entitled to dividend. The amounts drawn both by Mr. Nihon and the Respondent were entered in the 1954, 1955 and 1956 accounts as "shareholders withdrawals".

By May 1954 the Respondent according to his evidence as a result of putting the race-course buildings, track and equipment in repair and paying instalments of the purchase price of the shares to Mr. Nihon was in financial difficulties. There is a conflict of evidence as to the transaction which then took place. It is agreed that he borrowed £10,000 from Mr. Nihon on the security partly of a second mortgage of his house and paid this sum to the Appellant's account. On 25th May 1954 it is not disputed he signed a letter addressed to Mr. Nihon in connection with this loan of £10,000. The conflict of

evidence is as to the intention of the Respondent at the time and the meaning of this letter. The letter reads as follows :-

p.40C

"Dear Mr. Nihon

p.633

5 I agree to place to the account of the Montagu Park Racing Association Limited the sum of Ten thousand pounds (£10,000) which you are loaning to me by way of a second mortgage on the security of my home in Montagu Heights Sub-division and by way
10 of a first mortgage on the furniture goods chattels and effects belonging to the buildings on the said property.

Of this sum, approximately £7,000 will represent moneys which I realise I should not have
15 withdrawn from the Bank account of the Montagu Park Racing Association Limited.

I hereby agree not to make any more withdrawals of this nature in future from the said Company's Bank account.

20 I further agree that this money will be used to pay all the outstanding accounts to date.

Yours faithfully,

Raymond W. Sawyer."

The Respondent said in evidence that he intended
25 by the admission in the second paragraph to refer to withdrawals which had caused the indebtedness of the Appellants to exceed £10,000 contrary to clause 16 of the Agreement of 6th May 1953. The Respondent also said
p.194A
p.250B that he intended by the third paragraph to mean he agreed

p.251A not to make future withdrawals for further improvements
to the race-course which would cause the indebtedness of
p.252A the Appellants to exceed £10,000 again contrary to
clause 16. The Respondents' evidence was finally as to
this that he understood by the fourth paragraph that he 5
was to lend on the money being lent to him to the Appel-
lants in order for them to pay off their outstanding
debts. Mr. Nihon's evidence was to the effect that he
p.53B regarded this letter as an admission that £7,000 had
been withdrawn from the Appellants without authority by 10
p.85B the Respondent. He said that he thought that in the
agreement to make no further withdrawals the words "of
this nature" meant any withdrawals for the Respondent's
personal use. He said in evidence that he intended to
make the loan so that the Respondent should repay 15
p.121A wrongful withdrawals to the Appellants.

5. At the same time as he made the payment of £10,000
to the Appellants the Respondent himself signed and
received a promissory note made in his favour dated 27th
May 1954 payable on demand under the seal of the 20
Appellants for payment of this sum. The note was sealed
p.634 by the Appellants and also signed by their Secretary and
p.452 ratified at the Annual General Meeting of the Appellants
p.41C held on 6th September 1954. The learned Chief Justice
found that "the making of the promissory note was an 25
afterthought."

6. The learned Chief Justice also found that this
p.40D letter of 25th May 1954 was equivocal. The only guid-
ance to the intent of the parties at the time of the

transaction he found was in the second paragraph of the letter. He found that figure of £7,000 mentioned evidenced that the Respondent intended to repay £7,000 to the Appellants as replacement of his withdrawals. He found no other guidance on the evidence as to the intention of the Respondent, Mr. Nihon or the Appellants with regard to the payment of the £10,000 to the Appellants by the Respondent.

10. The learned Chief Justice therefore held that the balance of £3,000 was a loan by the Respondent to the Appellants which he is entitled to counter-claim and was credited with against the Appellant's claim. p.41C

7. By February 1956 the Respondent was in default in his instalment payments of the purchase price under the 1953 Agreement in the total sum of £30,000 and Mr. Nihon briefly took re-possession of the shares. A fresh agreement was then entered into between the Respondent and Mr. Nihon, which they signed on 29th February 1956. At this time the Respondent was Managing Director Treasurer and President of the Appellants and Mr. Nihon was a Director. Under this second agreement the original contract was cancelled and Mr. Nihon now sold only 149½ shares of the total 300 in the Appellants to the Respondent for the sum of £60,000, payable by instalments. The shares he retained were, it was agreed, not to share in profits of the Appellants. By clause 8 of the new agreement Mr. Nihon's share of income was expressed in slightly different terms was to receive 3% of the gross sum paid into the pari-

15 p.27D

20 p.624A

p.453C

p.454A

25 p.624B

p.627D

mutuel or one-half of net profits whichever should be greater. Clause 8 reads as follows :-

"Nihon shall receive Three (3) per cent of the gross sum paid into the pari-mutuel pool as defined in the Race-course Betting Act, 1952 on each and every race day on the third day following each meet during the racing season, or one half of the net profits of the Montagu Park Racing Association Limited, whichever sum is greater. For example, if the pari-mutuel pool totals Twenty thousand pounds (£20,000) on any given race day then and in such event Nihon shall receive the sum of Six hundred pounds (£600) or three per cent thereof. In the event of the figure of Thirteen per cent to the Licensee of the Montagu Park Racing Association Limited is reduced or increased by the Legislature of the Bahamas then and in such event the said figures of Ten per cent and Three per cent shall be reduced or increased proportionately."

8. A further clause in the agreement, Clause 9, provided for this provision to be physically marked on the shares of the Appellants and for a minute of a meeting of the Board of Directors of the Appellants in respect of a meeting on the 6th May 1953 to be amended.

p.628A

Clause 9 of the 1956 Agreement reads as follows :-

"As a consideration for the excellent services rendered this company by the President, Alexis Nihon be it resolved that, in the event of the purchase of the assets of Montagu Park Racing Association

Limited by the Purchaser he retain Three per cent
of the Thirteen per cent granted to the Licensee on
the pari-mutuel pool and one half of the gross pro-
ceeds by the Montagu Park Racing Association Limited
5 as their percentage for promoting and organising any
sweepstake lottery or drawing in connection with
racing of any kind held at Hobby Horse Hall should be
amended to read as follows :-

"As a consideration for the excellent services
10 rendered this company by Alexis Nihon, be it resolved
that Alexis Nihon his executor, administrator or
assigns, retain Three per cent. of the Thirteen per
cent granted to the Licensee on the pari-mutuel pool
and Sawyer agrees that it becomes a part of this
15 agreement. Further it is hereby agreed that the
contractual obligations on Clause Eight of this
agreement will be marked on the shares".

9. The 1956 Agreement also purported by Clause 10 p.628D
to give Mr. Nihon the right to nominate three directors
20 to the Board of the Appellants, to limit the total
number of directors to five and to fix a quorum of three.

10. After the signing of the second Agreement the p.36A
Appellants continued to operate under the management

of the Respondent. Mr. Nihon continued to draw his p.30A

25 3%. Dr. Sawyer continued to draw sums for his own p.30A
use.

11. Annual accounts were prepared for the Appellants p.137D
by its internal accountant Mr. Deal for the financial pp.597,
years ending 30th April 1954, 1955, 1956 and 1957. 586,
576
564

p.37A 12. At the Annual General Meeting of the Appellants
held in the first three of these years the accounts were
pp.452, passed together with a resolution that "each and all
454 and of the acts transactions and proceedings of the Direc-
460 tors and Officers of the company to this date be and 5
they are hereby sanctioned, approved, ratified and
confirmed. The learned Chief Justice found that Mr.
p.37A Nihon was sent notice of all three meetings and was
present at the 1956 meeting. The Respondent by his
Defence contended that those resolutions estopped the 10
Appellant from denying that the payments in the rele-
p.459A vant accounting periods were authorised.

13. The learned Chief Justice held that the resolu-
tions of the Appellants in general meeting were
effective to authorise all payments to or on behalf of 15
the Respondent up to 30th April 1956. Payments there-
after in the total sum of £10,481. 1. 6d. he found were
unauthorised and repayable. This figure is constituted
first by £2,107.15. 8. which appears as part of the sum
of £5,481.10.2. of the Respondents personal account in 20
the 1957 Accounts. This sum is not disputed in the
appeal. Secondly it is made up of £6,743.16. 9. the
total of the four cheques drawn prior to 30th April
1957, referred to in the next following paragraph.
Thirdly it is made up of the sum of £1,629.9.1. also 25
referred to in the next following paragraph.

14. Early in 1957 arrangements were made with the
Appellants' bank at the instigation of Mr. Nihon to
the effect that the Respondent's signature alone was no

longer sufficient authority to the Bank to pay cheques
drawn on behalf of the Appellants but they had to be p.56D
countersigned by Mr. Nihon or Mr. Deal. Thereafter four
cheques were signed by both the Respondent and Mr. Nihon
5 in favour of the Respondent but with the intention as p.56D
in fact happened that they find their way into Mr. Nihon's
pocket. The evidence of Mr. Nihon contradicted by the
Respondent was that these cheques were made in respect
of loans from the Appellants to the Respondent. The
10 cheques were applied by the Respondent in payment of p.57A
principal and interest under the terms of the 1956
Agreement to Mr. Nihon and Mr. Nihon necessarily signed
and received the cheques knowing this. These are the
cheques referred to in the Statement of Claim dated 1st p.125A
15 February 1957 for £2,323.5.9., 1st March 1957 for
£1,130.8.3., 1st April 1957 for £1,640.2.9. and 1st May p.101B
1957 for £1,629.9.1. In addition Mr. Nihon received a p.20A
cheque dated the 1st May 1956 for £1,650 also for pay-
ment under the 1956 Agreement. Liability to repay these
20 five cheques is disputed in this Appeal by the Respond-
ent. The earlier four cheques together constituted
the sum of £6,743.16. 9. referred to in the draft
accounts prepared by Mr. Deal for the period ending 30th
April 1957 "as shareholders withdrawals" side by side
25 with the sum of £11,301.19. 7. in respect of 3% of the p.666
pari-mutuel proceeds paid to Mr. Nihon. Mr. Nihon saw p.76A
a copy of the draft accounts and on 26th September 1957 p.75A
approved sending them as a true account to the Bahama
Islands Racing Commission. The draft accounts were p.75A

seen and approved by the Respondent. Although at some
later time different accounts were prepared the Respon-
p.184D dent at no time before the proceedings saw any other
p.185D accounts for the period. The payments to the Respondent
in this form were thus approved by all shareholders. In 5
the entire history of the Appellants on the uncontra-
p.170B dicted evidence of the Respondent and of Mr. Deal it was
normal for profits to be taken out by shareholders
without formal declaration of dividend and only on one
occasion was a dividend formally declared. Mr. Nihon 10
p.188C also when himself the sole owner of the shares of the
Appellants withdrew profits of £23,000 odd without a
p.188C formal declaration of dividend. These circumstances
confirm that these payments were agreed to be treated
as shareholders' withdrawals. This part of the Res- 15
pondents' case was not dealt with in the judgment.

15. In 1957 the Legislature of the Bahama Islands
statutorily reduced the percentage of the pari-mutuel
pool which the Appellants might lawfully retain from 13%
p.194D to 7% and made compensating provisions. By virtue of 20
Clause 8 of the 1956 Agreement this enactment effected
a proportionate reduction of the 3% mentioned there to
1.6% as Mr. Nihon's entitlement. Mr. Nihon on the un-
contradicted evidence of the Respondent refused to
accept a cheque made up on this figure in 1957 but on 25
his instructions was paid by the Appellants a sum for
p.194D 3%. For the 1957 season as a matter of arithmetic the
difference was between a sum of approximately £6,032
and £11,301.19.7. Under Clause 8, Mr. Nihon was

entitled to whichever was the greater of the percentage of the pari-mutuel pool properly calculated and one half of the net profits of the Appellants. The net profits of the Appellants for the year ending 30th

p.600

5 April 1957 were £10,377.10.5. and one half of this amounts to £5,199.15. 2½d. Therefore under Clause 8 Mr. Nihon was in fact only entitled to approximately £6,032 leaving a balance of profit available for distribution to the Respondent of the difference between £6,032 and
10 £10,377.10.5. namely £4,345.10.5. The learned Chief Justice did not deal with this aspect of the Respondents case in the judgment because he held that the construction of the agreements did not create a right in the Respondent to withdraw money from the Appellants.
15 That decision is respectfully disputed in this appeal and the effect of the Legislature's action therefore is relevant.

16. The holding of race meetings by the Appellants
was brought to an end by a fire early in 1958 which des-
20 troyed the Appellants racing facilities. Only £6,000 insurance monies were recovered due to the insurers disputing that the Appellants had an insurable inter-
est. At the trial the Appellants were said to have
no assets and Mr. Nihon was said to be its sole creditor
25 for debts of about £16,000. Thus, he was effectually the real Plaintiff in the action and is claiming to be awarded twice what has already been paid to him.

p.59C

p.30B

17. Evidence was given in addition to that of the Respondent and Mr. Nihon:

p.168B

by (1) The Accounts for 1957 were agreed.

Mr. Deal, the Appellant's accountant as to how payments were made to the Respondent and Mr. Nihon, how the accounts were made up, and creditors paid off at the end of the Appellants' business activities. His evidence was that the draft accounts for 1957 were approved both by the Respondent and Mr. Nihon. These were accounts showing the Respondent's withdrawals as shareholders withdrawals. He gave evidence that in May 1954 the Respondent instructed him to give him credit in the Appellants accounts for a loan to the Appellants of £10,000.

5

10

Ownership of the R.G. Murphy share

(2) Sir Stafford Lofthouse Sands, Member of the House of Assembly, member of the Cabinet, Minister for Finance and Tourism and Attorney-at-Law that he acted on two occasions when the equity of the Appellants was sold. On the first in 1946 the Hon. C.W.F. Bethell and his brother purchased the Appellants' share capital from George Murphy. One share at that time was registered in the name of Robert Emmet Murphy who he understood was the then vendor's nominee. He advised that the share was not paid for and was forfeitable. The second sale was when the Bethell brothers sold the equity to nominees of Mr. and Mrs. McCauley. On that occasion the old share certificate was handed over to the purchasers and he formed the opinion that beneficial ownership passed also.

15

20

25

The Respondents drawings were from profits.

(3) Mr. Kenneth A. Cookson, Chartered Accountant, as an expert. His evidence was that profits in the accounts for the periods ending in 1954, 1955, 1956, 5 1957 and 1959 were in excess of shareholders withdrawals in each period, that it was in his opinion proper for a company with a profit surplus to borrow if necessary the cash necessary to pay dividends, that the charges to the Respondent of £5,281.10.2. and p.324C
10 £6,743.16. 9. in the final 1957 account were wrong and should have been shown as shareholders withdrawals, that he was familiar with companies with one p.329A
15 or two people participating in profits where profits were withdrawn without formal declaration of dividend and that in his opinion it was right on the basis of p.353B
the contract between Mr. Nihon and the Respondent to put down Mr. Nihon's 3% as a shareholder's withdrawal. p.373C

Ownership of the R.E. Murphy share.

(4) Mr. C.W.F. Bethell, Member of Senate, Member of 20 Cabinet, that he and his brother owned all the shares of the Appellants for about two years from 1946 and p.374A
during this time no notices were sent in respect of p.374C
the single share registered in the name of the estate of Robert Emmet Murphy and nothing was heard
25 from anyone in respect of this share. They operated the Appellants as if it did not exist. p.374D
p.375A

Established practice of taking out profits.

(5) Mr. H. Newell Kelly, who was employed by the late George Murphy from 1929-38 and between 1938

p.381B and 1948 was president, member and director of the
Appellants, that he knew Robert Emmet Murphy, that
p.381C his share was held as nominee for George Murphy, he
played no part and took no interest in the Appell-
ants and that profits were paid to George Murphy 5
p.381D without any formal declaration of dividend.

Draft Minutes of Board Meeting of 24th January 1957

(6) The Honourable Godfrey Kenneth Kelly, attorney-
at-law, Member of the House of Assembly, Member of
Cabinet and Minister for Education that he was 10
p.383B elected a director of the Appellants in May 1956,
that his understanding of the two agreements was that
Mr. Nihon was to receive 3% of gross income and the
balance of profits was to be paid to the Respondent,
p.383D that he explained this to Mr. Nihon who did not 15
fully accept this until May in 1956 or 1957. With
reference to a Board Meeting on 24th January 1957
when the Respondent, Mr. Nihon and he were present
he prepared a minute containing the Resolutions set
out at p.386 A - D of the Record (which provided for 20
payments direct to Mr. Nihon from the Appellants in
respect of the Respondent's obligations under the
1956 agreement and for the balance of profits after
payment of Mr. Nihon's 3% to be the Respondent's)
but these were struck from the draft by Mr. Nihon. 25
p.387A His evidence was that no notices were sent out in
respect of the R.E. Murphy share.

Memorandum and draft letter of agreement of 24th
January 1957

(7) The Honourable Foster Clarke, attorney-at-law,

Member of the House of Assembly, Member of Cabinet
and Minister for Health that he attended a meeting p.394A
of the Board on 24th January 1957 when he proposed
the contents of a Memorandum on behalf of the p.395A
5 Respondent. This Memorandum is set out at pp.664- pp.664-
666 of the Record. It is an objection to the 666
Banking Resolution, altering the cheque authorisa-
tion procedure of the Appellants, and makes proposals,
if that Resolution be passed, for the payment of the
10 net profits of the Appellants to the Respondent. He
submitted a copy of the Memorandum to Mr. Godfrey
Kelly the Appellants' attorney after the meeting.
He gave evidence that a draft letter attached to p.395A
the draft minute of 24th January 1957 was presented
15 to the meeting by the Respondent. This draft
letter is set out at p.663 of the Record and p.395D
contains an agreement by the Appellant and Mr.
Nihon that the Appellants pay Mr. Nihon his pur-
chase price under the 1956 Agreement from the
20 Respondent's share of the net profits of the
Appellants. His evidence was that at first he
thought the meeting agreed the letter but after
the draft minutes were prepared he had reason to p.395D
think otherwise. He was sure that the Respondent
25 and Mrs. Sawyer did not sign the final minutes of
the meeting. He said that the Respondent wanted p.396B
the proposals passed because he could no longer
sign cheques alone, Mr. Nihon having required that
he or Mr. Deal must countersign the Appellants'

p.400A.

cheques.

18. The learned Chief Justice found as facts:

(1) that all the sums paid to the Respondent were from the legally divisible profits of the Appellants and available for distribution as dividends. 5

p. 33

(2) that all necessary notices were duly sent and the Annual General Meetings of the Appellants approving the accounts for the periods ending 1954, 1955 and 1956 were validly held.

p. 37B

(3) that the Respondent accepted £7,000 from Mr. Nihon on 25th May 1954 for the purpose of repaying money withdrawn from the Appellants and paid this sum to the Appellants with this intention. 10

p. 41B

(4) that the Respondent lent £3,000 to the Appellants of the £10,000 borrowed from Mr. Nihon on the 25th May 1954. 15

p. 41C

(5) the Respondent's unauthorised withdrawals between 1st May 1956 and 1st May 1957 amounted to £10,481.1.6.

p. 45A

19. The Learned Chief Justice gave the following reasons for the judgment :- 20

(1) the Respondent's withdrawals were not ultra vires the Appellants as payments out of capital

(2) the agreements of 1953 and 1956 did not of themselves empower the Respondent to make with- 25

drawals other than in the normal way for payments of dividends to shareholders as provided by the Articles of Association of the Company, namely by declaration of the company in general meeting

of its board of directors under Article 71. p.34B

(3) Article 71 was complied with by the Annual General Meetings of 1954, 1955 and 1956 which sanctioned the Respondent's withdrawals. p.37B

5 (4) failure to notify the owners of the one share registered in the name of "the estate of R. E. Murphy" did not invalidate the meetings because no personal representatives had applied for registration in respect of the share

10 (5) payments of £10,481.1.6. to the Respondent after the end of the period of account sanctioned p.39B by the meeting of 12th May 1956 namely 30th April 1956 were not validly sanctioned in any way and the Appellants were entitled to be repaid those sums.

15 (6) the payment of £10,000 to the Appellants by the Respondent in May 1954 was a loan so far as £3,000 was concerned and a repayment so far as the balance was concerned on the evidence of the letter dated 25th May 1954, second paragraph. p.41B

(7) the promissory note of 27th May 1954 was ineffective because it was an afterthought. p.41C

20 (8) the Respondent was as a creditor entitled to set off his loans to the Appellants against their claim and therefore was entitled to credit for p.44A the sum of £3,000 against his obligation to repay the unauthorised withdrawals after 30th April 1956 of £10,481.1.6.

20. The Respondent submits that the judgment of the Supreme

Court should be reversed in so far as it orders the payment of £10,481.1.6d. by the Respondent to the Appellant and disallows £7,000 of the Counterclaim for the following (among other)

REASONS

5

(1) BECAUSE the agreement of 1956 contained an implied term that the profits of the Appellants were to be available to the Respondent to provide for the payments to Mr. Nihon and otherwise for the Respondent's personal purposes and Mr. Nihon and the Respondent were bound to and could procure the Appellants to give effect to such term.

10

(2) BECAUSE alternatively the agreement of 1956 contained an implied term that such of the profits of the Appellants as were not disposed of to Mr. Nihon under the terms thereof were to be at the disposal of the Respondent and Mr. Nihon and the Respondent were bound to and could procure the Appellants to give effect to such term.

15

(3) BECAUSE withdrawals of £4,345.10.5d. (being the sum mentioned in paragraph 15 of this case) for the year ended 30th April 1957 were by the terms of the agreement of 1956 by the Respondent authorised withdrawals of dividend and the Appellants are bound by these terms considering that Mr. Nihon and the Respondent were bound to and could procure the Appellants to give effect to such terms.

20

(4) BECAUSE of the payments of £10,481.1.6d. sums amounting to £8,373.5.10d. were agreed to be paid as dividends to the Respondent by the beneficial owners of all the issued shares of the Appellants or alternatively by the holders of all shares in the Appellants for the time

25

being conferring the right to attend and vote at general meetings of the Appellants.

5 (5) BECAUSE of the payments of £10,481.1.6d. sums amounting to £6,723.5.10d. were made by cheque signed by Mr. Nihon and represented moneys paid to Mr. Nihon and in the circumstances as Mr. Nihon necessarily signed such cheques and received the sums comprised therein knowing of their nature and as Mr. Nihon and the Respondent were the beneficial owners of all the shares in the Appellants or of all such
10 shares conferring the right to attend and vote at general meetings of the Appellants, the Appellants are estopped from recovering such sums.

(6) BECAUSE the ratification of all prior acts of the Directors made at the Annual General Meeting held on the
15 12th May 1956 included ratification of the payment of £1,650 made by cheque dated the 1st May 1956.

(7) BECAUSE the agreement of 1956 authorised the payment of the whole of the said sum of £10,481.1.6d. by way of dividend and complied with Article 71 of the Articles of
20 Association of the Company.

(8) BECAUSE by long settled practice in the Appellants all dividends (with the exception of one) were paid informally in the same manner as the payments in issue in this appeal and such practice is binding on the Appellants generally
25 and in particular in relation to the payments in issue by reason of the fact that the same were approved by the beneficial owners of all the shares in the Appellants or of all shares conferring the right to attend and vote at general meetings of the Appellants.

(9) BECAUSE the promissory note of the 27th May 1954 is valid and binding and entitles the Respondent to payment of the sum secured thereby

(10) BECAUSE the Respondent is in any event entitled to the whole of the £10,000 lent by him to the Appellant 5 including the £7,000 disallowed by the learned Chief Justice.

(11) BECAUSE there is no ground in law for any Order whereby the Respondent is ordered to pay any sum to the Appellants. 10

(12) BECAUSE in the circumstances the claim by the Appellants is a claim by Mr. Nihon as the sole creditor of the Appellants to recover double payment of sums he has already received.

Signed: 15

R. A. K. WRIGHT

(R. A. K. Wright)

No. 21 of 1967.

IN THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME
COURT OF THE BAHAMA ISLANDS

THE MONTAGU PARK RACING
ASSOCIATION *LIMITED*

- and -

THE HONOURABLE DR. RAYMOND
WILSON SAWYER.

C A S E

- for -

~~THE RESPONDENT.~~

Dr Sawyer

LOVELL, WHITE & KING,
1, Serjeant's Inn,
Fleet Street,
London, E.C.4.