

**The Montagu Park Racing Association Limited**      -      -      *Appellants*

v.

**The Honourable Dr. Raymond Wilson Sawyer**      -      -      *Respondent*  
**(And Cross-Appeal Consolidated)**

FROM

**THE SUPREME COURT OF THE BAHAMA ISLANDS**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 13TH APRIL 1970

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*Present at the Hearing :*

LORD MORRIS OF BORTH-Y-GEST  
LORD PEARSON  
LORD DIPLOCK

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[*Delivered by* LORD PEARSON]

The general facts of the case have been stated by the Chief Justice in the judgment appealed from and there is no need to repeat them. It will be sufficient to refer to the main facts which bear directly on the questions at issue in the appeal.

The Company brought the action against Dr. Sawyer claiming to recover sums withdrawn by Dr. Sawyer from the Company's funds in the period from 1953-57 when he was in control of the Company. The Company's accounting year ended on 30th April, and the withdrawals took place in the years 1953-54, 1954-55, 1955-56 and 1956-57 together with one withdrawal on 1st May 1957. The amount of the Company's claim was £26,972 16s. 7d. This was a net sum after giving certain credits. There is no dispute as to the fact of the withdrawals having been made, but there is dispute as to their character.

The Chief Justice allowed only a comparatively small part of the Company's claim. He held that the earlier withdrawals, made in the three years 1953-54, 1954-55 and 1955-56, though lacking initial authorisation, were sanctioned and ratified at general meetings of the Company, and consequently formed part of "shareholders' distributions" tantamount to dividends, and were not recoverable. On the other hand he held that the later withdrawals, made in the year 1956-57 and on 1st May 1957, equally lacking initial authorisation, were not sanctioned or ratified and therefore were recoverable subject to proper deductions. The gross amount of these later withdrawals was £15,481 1s. 6d. It was not disputed that for Dr. Sawyer's salary as managing director there should be deductions amounting to £8,000 (£5,000 for 1956-57 and £3,000 for the remaining months of 1957). Thus the figure of £15,481 1s. 6d. was reduced to £7,481 1s. 6d. The Chief Justice made a further deduction of £3,000 on the basis that Dr. Sawyer had made a

loan of £3,000 to the Company in May 1954 and that such loan was still outstanding. Accordingly he gave judgment in favour of the Company for £4,481 1s. 6d.

Both parties are appealing against the judgment.

The Company's main contention in this appeal is that the earlier withdrawals (those in the years 1953-54, 1954-55 and 1955-56) were not validly sanctioned or ratified and were and remained recoverable by the Company from Dr. Sawyer, and consequently the Company should have judgment against Dr. Sawyer for the full amount claimed, namely £26,972 16s. 7d. The Company have a secondary contention that, if their main contention fails, they are entitled to judgment for £7,481 1s. 6d. instead of £4,481 1s. 6d. on the ground that there was no outstanding loan of £3,000 from Dr. Sawyer to the Company and consequently no deduction should have been made on that account.

Dr. Sawyer opposes the Company's main contention in their appeal. He says that the earlier withdrawals are not recoverable, and that the Chief Justice's decision on that point should be upheld. Dr. Sawyer also has a cross-appeal, contending that the later withdrawals were authorised or valid as dividends and so they too are not recoverable. If his cross-appeal succeeded, the Company's claim would fail in its entirety and the judgment in favour of the Company should be reversed.

As will be explained later, it became clear in the course of the hearing of these appeals that the Company's secondary contention—that there was no outstanding loan of £3,000 from Dr. Sawyer to the Company and no deduction should have been made on that account—is well founded and could not be effectively disputed on behalf of Dr. Sawyer. Therefore if both the Company's main contention in their appeal and Dr. Sawyer's cross-appeal are unsuccessful, the judgment in favour of the Company should be increased from £4,481 1s. 6d. to £7,481 1s.6d. and the Company's appeal should be allowed to that extent.

#### *The earlier withdrawals (1953-56)*

The earlier withdrawals were made in 1953-54, 1954-55 and 1955-56. Dr. Sawyer was withdrawing money from the Company's funds for several purposes. First, he was as the Company's managing director entitled to and receiving a salary of £5,000 per annum, and a substantial part of his withdrawals must be attributed to his salary. Secondly, having bought shares in the Company from Mr. Nihon for a price payable by instalments, he was for payment of the instalments drawing Company cheques in his own favour and endorsing them to Mr. Nihon. Thirdly, he was drawing other sums for other purposes. He was however the holder of shares in the Company and entitled by virtue of his shareholding to participate in the profits of the Company. The Chief Justice found that the sums withdrawn were from the divisible profits of the Company. By the 1953 agreement with Mr. Nihon Dr. Sawyer bought 297 of the 300 shares in the Company, and the shares retained by Mr. Nihon (described as "the two remaining shares" for reasons which will be mentioned later) were not to participate in any profits made by the Company except as provided in certain clauses of the agreement. The relevant provision, so far as now material, was that Mr. Nihon should receive 3 per cent of the gross sums paid into the pari-mutuel pool. After Dr. Sawyer had made default in payment of the instalments of the purchase price of the 297 shares, these shares were forfeited and reverted to Mr. Nihon and a new agreement was made between Dr. Sawyer and Mr. Nihon in 1956. Under the 1956 agreement Dr. Sawyer bought 149½ shares of the Company, but the shares retained by Mr. Nihon (described as 149½ shares for reasons which will be mentioned later) were only to participate in the profits made by the Company as provided

in clause 8 of the agreement. The relevant provision in clause 8, so far as now material, was that Mr. Nihon should receive 3 per cent of the gross sum paid into the pari-mutuel pool.

The effect and nature of these arrangements appear clearly from the Company's annual accounts and balance sheets in conjunction with other evidence. In the balance sheet of 30th April 1954, on the side of "liabilities and capital", the surplus was shown as follows:

<i>Surplus</i>		£	s.	d.	£	s.	d.
Balance—6th May 1953	... ..	39,949	3	10			
Add—Net profit for period 7th May 1953 to 30th April 1954	... ..	15,018	17	9			
		<hr/>			54,968	1	7
Less—shareholders' withdrawals	... ..	24,527	17	9			
		<hr/>			30,440	3	10
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The figure given for "shareholders' withdrawals" can be analysed into its two component parts. The Company's "track percentage", which was 13 per cent of the gross sums paid into the pari-mutuel pool, was £52,578 6s. 3d. It follows arithmetically that Mr. Nihon's 3 per cent was £12,133 9s. 0d. The residue of the £24,527 17s. 9d. was £12,394 8s. 9d., being (as is not disputed) the amount of Dr. Sawyer's withdrawals in 1953-54 apart from his salary. Thus the Company's balance sheet for 30th April 1954 was drawn up on the basis that the shareholders were making withdrawals from the Company's accumulated surplus of profits. Mr. Nihon's 3 per cent of the gross takings of the pari-mutuel pool was treated not as an expense of the Company's trading but as his participation in the Company's profits. Similarly Dr. Sawyer's withdrawals were treated as his participation in the Company's profits.

At the Annual General Meeting of the shareholders of the Company on 6th September 1954 the Treasurer presented the accounts and balance sheet of the Company as at 30th April 1954 and on motion they were approved. Then it was "resolved that each and all of the acts, transactions and proceedings of the Directors and Officers of the Company to this date be and they are hereby sanctioned, approved, ratified and confirmed". The words "to this date" must mean to 30th April 1954, as the accounts and balance sheet which had been approved related to the acts, transactions and proceedings of the Company up to that date.

In the balance sheet and accounts of the Company as at the 30th April 1955 and at the Annual General Meeting of 21st November 1955 a similar procedure was followed. In the balance sheet the shareholders' withdrawals during the year were deducted from the surplus, which consisted of the opening balance and the net profit for the year. The balance sheet and accounts as at 30th April 1955 were presented to the Annual General Meeting and were on motion approved, and then it was resolved that the acts, transactions and proceedings of the directors and officers of the Company to this date be sanctioned, approved, ratified and confirmed.

There was however a special feature in the amount shown for "shareholders' withdrawals". This affects the alleged loan of £3,000 by Dr. Sawyer to the Company, and in order to explain the position it is necessary to go back to May 1954. Evidently it was agreed between

Dr. Sawyer and Mr. Nihon that Dr. Sawyer's withdrawals in 1953-54 had been excessive. Dr. Sawyer borrowed from Mr. Nihon the sum of £10,000 and paid it to the Company, and he wrote to Mr. Nihon the letter of 25th May 1954 which is set out in full in the judgment of the Chief Justice. The Chief Justice inferred from the letter that of the sum of £10,000 which Dr. Sawyer borrowed from Mr. Nihon and paid to the Company only £7,000 was in reduction of withdrawals and the remaining £3,000 was a loan by Dr. Sawyer to the Company. But in the balance sheet and accounts for the year ending 30th April 1955, approved at the Annual General Meeting of 21st November 1955, the whole of the £10,000 was applied in reduction of withdrawals. Mr. Nihon's 3 per cent of the pari-mutuel takings was approximately £10,395. Dr. Sawyer's actual withdrawals were approximately £7,789. Thus the total would have been approximately £18,184. But the whole of the £10,000 was subtracted, and the figure shown in the balance sheet for "shareholders' withdrawals during the year" was £8,184 9s. 2d. Dr. Sawyer was President and managing director of the Company and took the chair at the Annual General Meeting of 21st November 1955. Whatever might be the effect of the accounting as between Dr. Sawyer and Mr. Nihon, it is clear that as against the Company Dr. Sawyer cannot treat any part of the £10,000 as applied otherwise than in reduction of the withdrawals, and so he cannot treat £3,000 of it as a loan to the Company.

The balance sheet of the Company as at 30th April 1956 was in some respects similar to its two predecessors, but there were important differences. The "shareholders' withdrawals" were again deducted from the surplus, which consisted of the opening balance and the net profit for the year. But the "shareholders' withdrawals" contained two items—£11,565 13s. 10d. and £5,933 18s. 9d. The £11,565 13s. 10d. was Mr. Nihon's 3 per cent of the pari-mutuel takings. The £5,933 18s. 9d. was part of Dr. Sawyer's withdrawals in the year, but only a part. The total of his withdrawals in the year was £9,307 13s. 3d. The remainder, £3,373 14s. 6d., was put on the assets side of the balance sheet. The entry "Dr. Raymond W. Sawyer £3,373 14s. 6d." on the assets side must mean that the sum of £3,373 14s. 6d. was repayable by Dr. Sawyer to the Company. In effect it was treated as a loan. At the Annual General Meeting on 12th May 1956 Dr. Sawyer was still President of the Company and he took the chair. The accounts and balance sheet were presented and approved, and the usual resolution approving the acts of the directors and officers "to this date" was passed. Thus at the end of this third year—1955-56—there was a consideration of Dr. Sawyer's withdrawals in the year and a discrimination was made between those allowed to rank as shareholder's participation in profits and those treated as loans to be repaid by him.

The course of dealing seems quite clear. The two persons effectively interested in the Company and entitled to participate in the distribution of the Company's profits were Dr. Sawyer and Mr. Nihon. Mr. Nihon was placed in an advantageous position, taking a sum equal to 3 per cent of the pari-mutuel receipts as his share of the Company's profits. Dr. Sawyer was entitled to draw £5,000 a year from the Company's funds as his salary, and no question is raised with regard to that. He also in fact made further withdrawals from the Company's funds for his own purposes in the course of each year. The character of the withdrawals (apart from those attributable to the salary) was not determined until after the end of the Company's accounting year. They were tentatively or provisionally appropriations of Company profits to Dr. Sawyer as shareholder, but they needed confirmation or ratification by the Company in general meeting after the end of the accounting year. If they were so confirmed or ratified, they became definitely appropriations

of profits to Dr. Sawyer as shareholder. If they were not so confirmed or ratified, they had to be treated as sums borrowed from the Company by Dr. Sawyer and repayable by him.

As has been stated, the Company's main contention was that Dr. Sawyer's withdrawals (other than those attributable to his salary) in the years 1953-54, 1954-55 and 1955-56 had not been validly confirmed or ratified and were recoverable. This contention was supported by three arguments, namely (1) that the withdrawals were *ultra vires* of the Company and so could not be validly confirmed or ratified (2) that the alleged confirmation or ratification was invalid because it was not a declaration of dividend (3) that the alleged confirmation or ratification was invalid because the rights of the holder or holders of one share, referred to as "the Murphy share", were disregarded.

(1) It was said that these withdrawals were gifts by the Company to Dr. Sawyer and not for the benefit of the Company and so *ultra vires* of the Company. *Hutton v. West Cork Railway Company* (1883) 23 Ch. D. 654 and *In re George Newman & Co.* [1895] 1 Ch. 674, and other cases were cited. This argument however breaks down on the facts. The withdrawals were not gifts by the Company to Dr. Sawyer. The natural inference from the documentary evidence to which reference has been made is that they were tentative or provisional appropriations of profits to Dr. Sawyer as shareholder. There was therefore ample evidence to support the Chief Justice's findings of fact, which were as follows:

"I do not think that these payments were *ultra vires* the company in the circumstances of this case. It is plain that the sums withdrawn could have been called 'dividends' and could have gone into no other than the defendant's pocket. If a general meeting or a directors' meeting had been called once a week each payment could have been called an interim dividend and handed to the defendant. What was done was that all the payments were added together and called 'shareholders' withdrawals' in the annual accounts and the shareholders passed this method of accounting. On the evidence it is clear that they knew exactly what had been done. Mr. and Mrs. Nihon, though sent notices, did not attend the 1954 and 1955 meetings or send proxies. This cannot affect the validity of such a meeting: a shareholder cannot abstain and then complain about what has been resolved at a meeting. If one of the shareholders had objected to the balance sheet and accounts the money would have had to be repaid and then paid back again to the defendant in the form of a formally declared dividend. Article 71 of the Articles of Association was not violated. It allowed payments of dividend. What the shareholders did was to confirm the payment of dividends which had been paid out too soon and without sanction at the time and without using the word 'dividend'. They sanctioned the payments being given the name 'shareholders' withdrawals' instead of 'dividend'."

(2) It was said that the confirmation or ratification at a general meeting of the Company was not valid because it was not a declaration of dividend as required by the Company's Articles of Association. In their Lordships' opinion this point is correctly dealt with in the passage which has been cited from the judgment of the Chief Justice. The shareholders in general meeting might have declared a dividend in due form, and then it would have been paid to Dr. Sawyer and Mr. Nihon and reallocated by them between themselves in accordance with their agreements of 1953 and 1956. The same result was achieved more simply and conveniently by confirming or ratifying the withdrawals made

as appropriations of profits to the shareholders. In such circumstances effect will be given to the manifested intention of the shareholders notwithstanding the informality of the procedure. Recent illustrations of the principle will be found *In re Duomatic Ltd.* [1969] 1 A.E.R. 161, 167-8 per Buckley J. and *Bamford v. Bamford* [1969] 1 A.E.R. 969, 972, 976 C.A.

(3) There was the argument based on "the Murphy share". The agreement of 1953 had dealt with only 297 plus 2 shares, and the agreement of 1956 dealt only with 149½ plus 149½ shares, although there were 300 shares in the Company. When Mr. George Murphy formed the Company, one share was allotted to Mr. Robert Emmet Murphy, but he was a mere nominee and did not pay for his share. The beneficial ownership of it belonged to Mr. George Murphy and passed through several intermediate purchases to Mr. Nihon, and the share certificate in respect of it was handed over to Mr. Nihon, though there was no formal transfer of the share to him. With regard to the "Murphy share" the Chief Justice said this:

"The point is also taken that the ratification of the shareholders is not complete as the 'Murphy share' was excluded. It appears that on the 23rd November 1933, there was a share registered in the name of R. E. Murphy who is now dead. He did not pay for the share and it is not profit-participating but it has never been formally declared to be forfeited. It is registered in the name of 'the estate of R. E. Murphy'. No address was known to which to send a notice of meeting. Moreover, the share is wrongly registered since only a 'person' can hold a share and an estate is not a person. I do not think it was required or possible to send out a notice in respect of the Murphy share as there was no valid holder or address on the register. The personal representative of R. E. Murphy deceased should have applied to be put on the share register. Until that is done the rights of the holder of the share are in suspense. It is impossible to hold that failure to notify the owner of the Murphy share rendered all the shareholders' meetings useless and made their resolutions invalid. Its existence can be disregarded."

Thus notice of the Company's meetings could not be given to the registered holder of the "Murphy share", because there was no registered holder. The appropriations of the Company's profits to Mr. Nihon and Dr. Sawyer by the "shareholders' withdrawals" did not involve any fraud or injustice or prejudice against whoever might be the holder of the "Murphy share" because he would be only a nominee holder, the beneficial ownership having passed to Mr. Nihon.

The decision of the Chief Justice to the effect that Dr. Sawyer's withdrawals in the years 1953-54, 1954-55 and 1955-56 were duly confirmed and ratified as shareholders' withdrawals tantamount to dividends, and so are not recoverable by the Company, should be upheld.

There was in relation to this period another point sought to be taken on behalf of the Company but rejected by their Lordships as not admissible in this appeal. In the balance sheet as at 30th April 1956 Dr. Sawyer was allowed as "shareholders' withdrawals" only £5,933 18s. 9d., and another sum of £3,373 14s. 6d. was placed on the assets side of the balance sheet as a sum owed to the Company by Dr. Sawyer. This sum of £3,373 14s. 6d. was not claimed by the Company in their Statement of Claim or in the Particulars thereunder or at the hearing or in the appellants' case for this appeal. The evidence does not appear to show why this sum was not claimed, but there may well have been a good reason which would have been brought out in

evidence if such a claim had been made at the proper time. Such a claim cannot properly be made for the first time at the hearing of this appeal.

*The later withdrawals (1956-57)*

These withdrawals took place in the Company's accounting year ending on 30th April 1957 except that there was one further withdrawal on 1st May 1957. The figures have already been stated. The main question is whether these were authorised withdrawals. As Dr. Sawyer and Mr. Nihon had quarrelled there was no confirmation or ratification of these withdrawals at any meeting of the Company or in any way. Therefore unless they were initially authorised or valid as dividends, formal or informal, they are repayable by Dr. Sawyer to the Company. In their Lordships' view the course of dealing as described above is decisive of this question. The withdrawals when made were merely tentative or provisional appropriations of profits to Dr. Sawyer as shareholder. They needed confirmation or ratification to make them valid as such appropriations. In the absence of confirmation or ratification they would be repayable and would have to be treated as loans. Consequently they are repayable. The decision of the Chief Justice on this question should be upheld.

Counsel for Dr. Sawyer, in support of his argument that these later withdrawals were initially authorised or valid as dividends, sought to rely upon the fact that all or some of them were drawn by means of cheques signed by Dr. Sawyer and Mr. Nihon, being the only persons entitled to participate in the Company's profits. This fact was not included in the relevant particulars under the Defence, and though an application was made, in the course of the hearing before the Chief Justice, for leave to amend the particulars so as to include this fact, leave was apparently not given and the particulars were not so amended. In the circumstances it would not be right to take this fact into account in this appeal. But if it were taken into account, it would not assist the argument on behalf of Dr. Sawyer. It would only show Mr. Nihon's assent to sums being drawn from the Company's funds by Dr. Sawyer. It would not show any assent by Mr. Nihon to these sums being treated as appropriations of profits to Dr. Sawyer as shareholder. For these purposes confirmation or ratification by a Company meeting after the end of the accounting year would be required according to the course of dealing.

Counsel for Dr. Sawyer made another point with regard to the first of the withdrawals in this period. On 1st May 1956 a sum of £1,650 was drawn by Dr. Sawyer from the Company's funds. At the Annual General Meeting held on 12th May 1956 the accounts and balance sheet as at 30th April 1956 were accepted and the acts of the officers and directors up to "this date" were confirmed and ratified. It is said that therefore the drawing of the £1,650, as it took place before 12th May 1956, was confirmed and ratified. This argument can be rejected on the ground that as a matter of construction "this date" in the minutes of the meeting should be read as referring not to the date of the meeting, but to 30th April 1956 being the date as at which the accounts and balance sheet were made up. In any case the confirmation or ratification, if applicable to the withdrawal made on 1st May 1956, could only confirm it as a withdrawal and not as having the character of a shareholder's appropriation of profits. The character of the withdrawal would have to be shown in the draft of the next balance sheet and considered at the next Annual General Meeting.

Dr. Sawyer's cross-appeal fails.

*Deductions*

As has been pointed out above, an error was made in arriving at the figure of £4,481 1s. 6d. as the net sum for which judgment was given in favour of the Company. In the judgment a sum of £3,000, part of £10,000, was deducted on the footing that it was an outstanding loan from Dr. Sawyer to the Company. But it became clear in the course of this appeal that the whole of the £10,000 had been with the consent of Dr. Sawyer applied in reduction of the shareholders' withdrawals in the balance sheet as at 30th April 1955. Consequently the amount of the judgment should be increased to £7,481 1s. 6d.

Their Lordships will humbly advise Her Majesty that the appellant Company's appeal should be allowed to the extent of increasing the judgment in their favour to £7,481 1s. 6d., and that the cross-appeal by the respondent Dr. Sawyer should be dismissed. The respondent Dr. Sawyer must pay one-quarter of the appellant Company's costs of the appeal and cross-appeal.





**In the Privy Council**

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**THE MONTAGU PARK RACING  
ASSOCIATION LIMITED**

v.

**THE HONOURABLE DR. RAYMOND  
WILSON SAWYER  
(And Cross-Appeal Consolidated)**

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DELIVERED BY  
LORD PEARSON