IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 66/88

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

BETWEEN	BARNETT LIMITED	DEFENDANT/APPELLANTS
AND	PETER FRANCIS KERR-JARRETT	PLAINTIFF/RESPONDENT

D. Muirhead Q.C., & Charles Piper for Appellants

David Coore, Q.C., & W.R. Chin-See Q.C., for Respondent

December 12, 13, 14, 1988 & January 31, 1989

CAREY, J.A.:

Barnett Limited (hereafter called "the company") is and has always been a family company and as such, is a private company registered under the Companies Act. The respondent was at all material times a shareholder in, and a director of the company. The issued share capital of the company was $624,000.00 divided into 312,000 shares at $2.00 per share, which were held by the following persons:

"The [respondent]	49,920 shares
Ian Kerr-Jarrett	49,920 shares
Isabel Joyce Chadwick	49,920 shares
Christine A. Noble	49,920 shares
Doreen Whitman	49,920 shares
Estate - Marion Kerr-Jarrett (deceased)	49,920 shares
Sydney Winder	12,840 shares
	312,000 shares

At a meeting of the directors of the company held on 9th March, 1988, they considered notices given by each of the shareholders save the respondent, to sell all their respective shares at an agreed price of $30.71 per share. They resolved to notify the respondent of the offers made and to request him to intimate within 21 days of notification whether he was willing to purchase any of these shares and if so what maximum number thereof at the agreed price of $30.71 per share. The respondent complied with their request by a letter addressed to the directors. So far as is material, he stated as follows:

> "In the event that the purport of your said notice is to offer the shares of the several shareholders named therein individually and not en bloc, please be advised that I am prepared to purchase at the said price of $30.71 per share all the shares of:
>
> | | |
> |---|---|
> | Ian Kerr-Jarrett | 49,920 shares |
> | Christine A. Noble | 49,920 shares |
> | Sydney Winder | 12,480 shares |
> | | 112,320 shares |
>
> And please further be advised that this offer is indivisible to the intent that it shall extend to all the shares of all three said shareholders and not to one or two of them without the others or other. Here again, no difficulty should be experienced by you in allocating all of the shares to me as I am the only shareholder whose shares are not being offered for sale."

Thus far, the directors were complying scrupulously with the terms of article 30 and 31 of the articles of association of the company. The problem arose when at a meeting of the Board of Directors held on 5th April, 1988, the directors declined to allocate to the respondent the 112,320 shares for which he had applied. Instead they resolved to approve transfers of all the shares on offer viz., 262,080 to Barnett Holdings Limited.

The respondent filed suit against the company claiming (inter alia) a declaration that he was entitled to be allocated by the directors the shares he had requested. The matter came before Malcolm J., who entered judgment in his favour and granted the declaration sought and made other consequential orders.

The appeal is taken against that judgment, and we are required to construe articles 29 - 32 in order to see whether the directors exercised their discretion under the articles of association of the company consistent with their terms.

A number of grounds of appeal were filed on behalf of the appellant but Mr. Muirhead realized at a very early stage that to succeed before us, he needed to show that on a true construction of these articles the directors had acted properly as he contended. In order to understand the arguments he deployed, I propose now to set out the relevant articles which are at articles 29 - 32 of the company's articles of association. They are as follows:

> "29. Except as hereinafter provided no shares in the company may be transferred unless and until the right of preemption hereinafter conferred has been exhausted.
>
> 30. Every member who intends to transfer shares (hereinafter referred to as 'the vendor') shall give notice in writing to the Directors of his intention. Such notice constitutes the Directors his agent for the sale of the said shares, in one or more lots at the discretion of the Directors, to members of the company at a price to be agreed upon by the vendor and the Directors or, in default of agreement, at a price which the Auditor of the Company for the time being certifies, by writing under his hand, to be, in his opinion, the fair selling value thereof as between a willing vendor and a willing purchaser.
>
> 31. Upon the price being fixed as aforesaid, the Directors shall forthwith give notice to all the members of the company of the number and price of the shares to be sold, and invite each of them to state in writing, within twenty-one days from the date of the said notice, whether he is willing to purchase any, and if so what maximum number, of the said shares.

> "32. At the expiration of the said twenty-one days, the Director shall allocate the said shares amongst the members who have expressed their willingness to purchase as aforesaid, and so far as may be pro rata according to the number of shares already held by them respectively, provided that no member is obliged to take more than the said maximum number of shares so notified by him as aforesaid. When such allocation has been made the Vendor, on payment of the said price shall transfer the shares to the purchasers. If he makes default in so doing the Chairman for the time being of the Directors of the Company, or failing him one of the Directors duly nominated by resolution of the Directors for that purpose, shall forthwith be deemed to be the duly appointed attorney of the Vendor, with full power to execute, complete and deliver in the name and on behalf of the vendor a transfer of the shares to the purchasing members, and the Directors may receive and give a discharge for the purchase money on behalf of the Vendor, and enter the name of the purchasers in the Register of Members as holders by transfer of the shares purchased by them."

Mr. Muirhead argued that the directors had a power under article 30 to sell the shares offered in one or more lots. He did not shrink from saying that once the directors determined, in their discretion, to sell shares in one lot i.e. en bloc, in the best interests of the company, the court could not interfere. He said that all the shareholders appreciated that there was a need to replace the absentee shareholders and to inject new capital. The shareholders, he conceded, had a right of pre-emption but the directors as agents of vending shareholders had a right to sell in one lot or more than one lot. In the present case, there were 262,080 shares for sale and to give effect to that mandate of sale, the directors were obliged to sell those shares in one lot of 262,080.

He cited Re Smith & Fawcett Ltd (1942) 1 All E.R. 542 to illustrate the point that the court will not interfere with the exercise of the directors' discretion where such is conferred by the articles of association of the company provided the directors act bona fide in what they consider to be the best interests of the company. The headnote is the source of this citation:

> "The articles of association of a private company provided that 'the directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares.' The appellant as executor of his father, claimed to be reigstered in respect of 4,001 shares. The directors refused to register a transfer unless he was willing to sell 2,000 of the shares to a named director at a certain price, in which case they would register a transfer of the remainder:
>
> HELD: that having regard to the terms of the articles, the only limitation on the directors' discretion was that it should be exercised bona fide in the interests of the company. There was no ground for saying that the directors' refusal to register the transfer was not due to a bona fide consideration of the interests of the company as seen by them."

I did not find this case particularly helpful. Our concern is whether the articles on their true construction entitled the directors to act as they did. It was never suggested at any time in the present case that the directors had any collateral purpose.

He also relied on Ocean Coal Co., Ltd., v. Powell Duffryn Steam Coal Co. Ltd., (1932) [All E.R.] (Rep) 845. Again that case can be distinguished from the present for the terms of the respective articles are wholly dissimilar. Moreover the directors were not called upon to exercise any discretion nor were the shareholders required to state the number of shares they intended to purchase.

By articles 1 (a) of the articles of association of the T. company, a private company, a member desiring to transfer any of his shares to a third party must notify the board of the number, the price proposed, and the name of the proposed transferee. By article 1 (b) and (c) the board must offer to the other shareholders the number of the shares offered at that price, and, if the offer is accepted the shares must be transferred to the acceptors. By article 1 (d), if the shares or any of them were not so accepted, the holder might transfer them or any of them at the same or any higher price to third parties approved by the board. The capital of the T. company was £600,000 in 600,000 shares of £1 each, held in equal parts by the O and P companies. The P. company

notified the board that they desired to sell 135,000 of their shares to third parties at the price of £2 per share. The board offered the 135,000 shares to the O. comapny, and the O. company desired to exercise their option to purchase as regards 5,000 shares only at the proposed price. It was held on the true construction of the articles the 'price proposed' in article 1 (a) meant the price for the total number of shares proposed to be sold, and the 'offer' of the shares by the board in article 1 (b) meant an offer of the block of shares and not of individual shares up to the number in the block, and, therefore, the O. company was not entitled to purchase only part of the 135,000 shares offered and the P. company were entitled to sell those shares to a third party.

I can now consider the articles under debate. These articles provide a regime for the transfer of shares to shareholders and to third parties. Article 29 recognizes the restriction on the right to transfer shares in a private company, which is a point of difference with public companies. It however permits a transfer of shares but only after the vending - shareholder has exhausted the right of pre-emption.

The procedure for the exercise of that right is spelt out in articles 30 and 31. The vending - shareholder is required to give written notice of his intention to transfer shares. Thereupon the directors are constituted his agent for the sale of the shares which may at the discretion of the directors be sold en bloc or in several lots. The power thereby conferred upon the directors, it should be noted, is to sell to members. Provisions are made to fix the price. The directors thereafter must notify the other members of the company of the number of shares on offer and the price thereof and invite them to state in writing within a given time, the maximum number of shares each is willing to purchase, provided any are required.

The directors are constrained after the expiry of the prescribed period for receipt of acceptances from the non-vending shareholders, to allocate the shares among the willing non-vending shareholders. The directors are at liberty to allocate shares pro rata depending on present shareholding. The article is careful to state in most explicit terms that the directors cannot

compel a member to take more shares than he had intimated his willingness to purchase. After allocation, the vending shareholder then transfers upon payment of the price. At this juncture, the right of pre-emption would have been exhausted, which would allow the vendor to transfer any remaining shares. to third parties.

It is plain that as a family company, the restriction on transfer would be to keep the shares within the family. The carefully drawn provisions contained in articles 30, 31 and 32 were intended to secure that end. The right of pre-emption in these articles of the company would be exhausted when the directors have allocated all the shares to the willing non-vending shareholder either, to their full requirement or on a pro rata basis. The article prohibits transfer to third parties "unless and until" the non-vending shareholder has exhausted the right of pre-emption conferred by the article. That must be the plain meaning of those words in article 29. It is in my view equally plain, that the directors are constrained to allocate the shares requested by a willing non-vending shareholder. The discretion is to allocate pro rata if the situation demands it. Save for that limited exercise of a discretion, allocate they must, to the willing non-vending shareholder to the maximum he requires.

If then, the directors must allocate the shares requested by a non-vending member, it may be that the ultimate sale may be as to the whole of the shares on offer or a part only of the entire lot of the shares. In the nature of things, the directors could not before receiving an intimation from members of their intentions as to the offer, determine whether to sell in one or more lots. What I think is tolerably clear, is that the directors as agents for sale, have a discretion to sell in lots to members only. The directors in this company did not offer to sell in one lot to the respondent.

The arguments of Mr. Muirhead, as I understood them fail to recognize the right of the member to the shares he requires and also fails to recognize that the directors are not permitted to force a member to accept more shares than he has notified that he is willing to take. The obligation and

indeed the need to sell to a third party, only arises where the non-vending member has been given every opportunity as allowed by the articles to purchase such number of shares as he requires.

In my judgment to construe the articles to mean that the directors in this case had an absolute right to sell the shares in one lot to the respondent, a member of the company, who had complied with article 31, is to render wholly nugatory the right of pre-emption conferred on a non-vending shareholder under article 29. On the true construction of articles 29 - 33 the directors were obliged to allocate the shares requested by the respondent, and were not empowered to sell the shares on offer to a third party, ignoring the rights of the respondent. To do so, would be contrary to article 32 which requires that the directors - "shall allocate the said shares amongst the members who have expressed their willingness to purchase as aforesaid." Moreover, article 29 would also be breached because the requirement there, is, that no transfer to a third party may be allowed "unless and until" the right of pre-emption has been exhausted. That right as I have indicated, has been spelt out in articles 30 31 and 32 and it is not exhausted when the willing non-vending shareholder has stated the number of shares he requires. Articles 29 - 32 must be read as a whole.

For these reasons I came to the conclusion that the judgment of Malcolm J., should be affirmed as we announced in dismissing the appeal with costs on 14th December last when we promised to put our reasons in writing.

CAMPBELL, J.A:

I agree entirely with the reasoning of Carey, J.A. as constituting the basis for the dismissal of the appeal with costs on December 14, 1988. There is nothing further that I can usefully add.

FORTE, J.A:

I have read the judgment of Carey, J.A. and agree with his reasons for dismissing this appeal. Consequently I have nothing to add.