

C.A. CIVIL PROCEDURE - ORIGINATING SUMMONS - DECLARATION
CONSTRUCTION OF ARTICLES OF ASSOCIATION - S.53(1) JUDICATURE (CIVIL
PROCEDURE CODE) LAW Appeal from Order of Zaccaria C.J.
granting declaration on Originating Summons -
Appeal dismissed

JAMAICA

Case referred to Lewis v Green (1905) 2 Ch 340 ✓ comp

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 3/88

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

BETWEEN

RACING PROMOTIONS LIMITED

DEFENDANTS/
APPELLANTS

AND

ROBERT DABDOUB

AND

THE ATTORNEY GENERAL

PLAINTIFF/
RESPONDENT

C. Rattray, Q.C., & Andrew Rattray for the appellants

R. Langrin, Q.C., D. Leys & R. Ashenheim for the respondent

March 21, 22, 23, 24 & May 24, 1988

CAMPBELL, J.A.

On December 10, 1987 the Attorney General by Originating Summons
on behalf of the Accountant General sought a declaration that -

"Pursuant to the Articles of Association and
relevant amendments of Racing Promotions
Ltd., the Accountant General as the holder
of shares issued by the said Racing
Promotions to the Jockeys Association of
Jamaica, the Thoroughbred Breeders
Association of Jamaica and the Jockey Club
of Jamaica Ltd., is lawfully entitled to
appoint 5 directors to the Board of Racing
Promotions Ltd., in accordance with the
said Articles."

By her affidavit of even date supported by exhibits annexed
thereto, the Accountant General deposed to the undermentioned relevant
matters namely:

1. That the respective share holdings in Racing Promotions Ltd., (hereafter called "RPL") of the Thoroughbred Breeders Association of Jamaica Limited, the Jockeys Association of Jamaica, and the Jockey Club of Jamaica Ltd., were transferred to her on October 24, 1985, November 7, 1985 and July 14, 1987 respectively by duly executed transfers which were deposited with and approved by the Board of Directors of RPL at their meeting on July 22, 1987. The executed transfers and the letter from RPL informing her of the approval of the transfer were duly exhibited.
2. That new share certificates in respect of the shares transferred were issued to her by RPL and she is in possession of the same. They are dated July 23, 1987 and are exhibited to her affidavit.
3. That pursuant to Article 82 of the Articles of Association of RPL as amended on March 29, 1976, she, in right of her holding of the transferred shares, became entitled to appoint and remove five directors, namely three in right of her holding of the shares originally held by the Jockey Club of Jamaica Ltd., and one each in right of her holding of the shares originally held by the Thoroughbred Breeders Association of Jamaica and the Jockeys Association of Jamaica.
4. That the three directors representing the Jockey Club of Jamaica Ltd., one of whom was then the Chairman of RPL, and the director representing the Thoroughbred Breeders Association resigned and she removed the director who was then representing the Jockeys Association of Jamaica.
5. That she exercised her right under the aforesaid Article 82 as amended, by appointing five new directors and notified RPL to that effect by submitting to RPL letters of appointment in relation to them.
6. That on November 30, 1987 her appointed directors acting on her request, requisitioned a directors' meeting for December 8, 1987 but she was informed by RPL that her appointments of the five directors were not valid and accordingly the requisition for the directors' meeting would not be implemented.

3.

7. That it is in the best interest of the company that the validity of her appointments of directors should be adjudicated upon, hence her Originating Summons.

In an affidavit in opposition sworn to by Mr. Robert Dabdoub on behalf of himself and RPL, he deponed to the undermentioned matters namely:

1. That he is a director of RPL and is duly authorised to depone to the matters in the affidavit on behalf of RPL and himself.
2. That 100 shares were issued by RPL to the Jockey Club and 100 shares each to the 'nominee share holders' of the Jockeys Association of Jamaica and the Thoroughbred Breeders Association of Jamaica being associations inter alia representing various racing interests.
3. That the transfer documents dated 24th October, 1985 and November 7, 1985 signed by the Thoroughbred Breeders Association of Jamaica Ltd., and by Messrs. S. Heslop and D. Lindo as Vice President and secretary of the Jockeys Association of Jamaica are not valid to effect transfers of the shares as required by Article 27 of the Articles of Association of RPL because Mr. Anthony Browne and Mr. Vernon Da'Silva who are the registered owners of the shares in question have not executed any transfer of them and they are the sole competent transferors.
4. That no valid extraordinary General Meeting was held on March 29, 1976 at which Article 82 of the Articles of Association of RPL had been amended, consequently the right to appoint directors given by the amendment does not exist. Alternatively even if such a meeting was held and the amendment was validly effected, the amended article nonetheless, on a true construction, conferred the right to appoint directors solely on the nominee/nominees of the relevant associations and on the Jockey Club of Jamaica Ltd., or its nominee. Since the Accountant General was not a nominee of these associations, she was not entitled to appoint directors even if she was a beneficial transferee of the shares in question.

In relation to the shares transferred to the Accountant General by the Thoroughbred Breeders Association of Jamaica Ltd., (hereafter called "Thoroughbred") Mr. Anthony Browne whom RPL set up as the entitled registered shareholder, deponed that he was admittedly the original nominee shareholder of Thoroughbred Breeders Association (hereafter called the "association"). However, in the month of April, 1985 he had transferred these shares to "Thoroughbred" and this transfer was forwarded to RPL under cover of a letter from "Thoroughbred" on April 15, 1985.

In relation to the shares of the Jockeys Association of Jamaica, Mr. Vernon Da'Silva deponed in an affidavit that to the best of his knowledge and belief he was, and still is, the registered holder of the relevant shares as the nominee of the Jockeys Association of Jamaica. He further deponed that he was registered as nominee shareholder in 1975 and has not signed any transfer. He has not authorised anyone to effect a transfer on his behalf. Further, the Jockeys Association of Jamaica has not requested nor authorised him to effect any transfer. In a further affidavit by the aforesaid Mr. Vernon Da'Silva he deponed that he was a director of RPL from September, 1975 until December, 1979. He attended a Board of Directors meeting on February 23, 1976 at which meeting it was agreed that certain proposed amendments to the Articles of Association should be put before an Extraordinary General meeting scheduled for March 29, 1976. He however received no notice to attend any such meeting and he is not aware of any meeting having been held. Had any meeting been held, he would, from circumstances mentioned by him, have indisputably become aware.

Mr. Alvin Hunter in an affidavit, deponed that he is the nominee registered shareholder of 100 shares in RPL on behalf of the Grooms' Association of Jamaica since 1975. He received no notice of any Extraordinary General Meeting of RPL held "on or around March 29, 1976" nor is he otherwise aware of any such meeting.

Finally, Mr. Paul Salter deposed in an affidavit that he is the manager of Horse Racing Promotions Limited and that on June 28, 1985 he was appointed receiver of RPL by the National Commercial Bank. His receivership ended on April 30, 1987. He further deposed that minutes of RPL dated March 29, 1976 show that there was an Extraordinary General Meeting convened by notices and that thereafter in a letter by RPL to its legal adviser Mr. Bryan L. Ashenheim dated February 3, 1977, RPL asserted the validity of the Extraordinary General Meeting. He said further that in relation to the Directors' meeting at which the transfers were approved, the minutes of the Directors' meeting dated 22nd July, 1987 revealed that Mr. Robert Dabdoub was present and the approval of the transfers was without dissent. Photocopies of the Minutes of the Extraordinary General Meeting dated 29th March, 1976, the letter of RPL to its legal adviser, and the minutes of the Directors' meeting held on July 22, 1987 were exhibited to Mr. Salter's affidavit.

The Originating Summons was heard by the Honourable Chief Justice between January 7 and 15, 1988 and a declaration was granted as prayed by the Accountant General. The findings of the learned Chief Justice are stated hereunder:

1. Extraordinary General Meeting held on 29th March, 1976 valid.
2. Resolution passed at Extraordinary General Meeting amending Article 82 valid.
3. At a meeting of the Board of Directors of RPL the transfers from the Jockeys Association, the Thoroughbred Breeders Association Ltd., and the Jockey Club of Jamaica Ltd., to the Accountant General were considered and accepted by the company. The company, RPL issued share certificates to the Accountant General stating that the Accountant General was now the Registered Holder of the respective shares.

- "4. The company cannot now contend that the Accountant General is not the holder of the shares specified in the three share certificates.
5. The fact that the company failed to place the name of the Accountant General in the Register does not affect the entitlement of the Accountant General to name Directors to the Board of RPL. The failure to register was due to neglect rather than refusal.
6. There is no restriction on the transfer of shares. The Accountant General as the holder of the shares issued to Jockey Club of Jamaica Ltd., the Thoroughbred Breeders Association Ltd., and the Jockeys Association is entitled to appoint three directors with respect to the Jockey Club of Jamaica Ltd., and one each in respect of the Jockeys Association and the Thoroughbred Breeders Association Ltd."

Against this judgment the defendants appeal on the undermentioned grounds namely:

- "1. That the learned Chief Justice erred in law in rejecting the preliminary point raised and argued by the Defendants/Appellants and in holding that the matter could be heard and determined on an Originating Summons brought for the purpose of the construction of the Articles of Association of Racing Promotions Limited and the amendments thereto, as it had no jurisdiction.
2. That the learned Chief Justice erred in law in granting the Declaration prayed and the remedies sought in that:
 - (a) The Accountant General was not 'the holder or holders of the shares in the company issued to the nominee or nominees' of the several associations referred to in the amended Article 82 (4) of the Articles of Association of Racing Promotions Limited.

" (b) The Accountant General is not a nominee of the several associations referred to in the amended Article 82 (4) of the Articles of Association of Racing Promotions Limited.

(c) In any event, the said amendment was invalid and of no legal effect.

3. That the learned Chief Justice erred in law in failing to exercise his discretion under Section 531 (d) of the Judicature (Civil Procedure) Code and in not refusing the Declaration and the remedies prayed in the Originating Summons.

4. That the findings of the learned Chief Justice as handed down in his decision on the 15th day of January, 1988 cannot reasonably be supported by the evidence adduced."

With regard to ground 1, Mr. Carl Rattray submitted that the form in which the Declaration is sought namely "as the holder of the shares", obscures the true situation, and is erroneous. Because of this obscurity, a situation is postulated which is pre-eminently suited to the procedure of an Originating Summons since if the postulate was correct, all that would be involved would be a construction of an instrument namely the Articles of Association of RPL more particularly Article 82 (1) as amended. He submitted, however that the correct situation is that in order to determine whether the Accountant General is entitled to appoint directors pursuant to Article 82 as amended, important questions of fact have first to be decided. Such facts are whether the Accountant General is the holder of the shares in question and whether there was in fact a valid Extraordinary General Meeting held on March 29, 1976 at which Article 82 of RPL had been amended. He said too, that the existence of a compelling need to determine these facts, which are disputed, makes the procedure by way of Originating Summons under section 531 of the Judicature (Civil Procedure Code) Law impermissible because the said section confers jurisdiction on a trial judge to entertain this procedure only where a pure matter of construction is involved and where the

declaration will settle the dispute between the parties. This principle is not affected notwithstanding Section 531 (c) which is to the following effect:

"531 (c) The application shall be supported by such evidence as the court or a judge may require."

Mr. Rattray relies in support of his submission on the principle enunciated by Warrington J., in Lewis v. Green (1905) 2 Ch. 340 which has been adopted and applied by Courts in our region. The principle is stated thus at page 343:

"In the first place the order is confined to questions of construction. Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute, but in order to raise any question of construction some facts must be proved or admitted. But for all that, the order is confined to enabling the court to decide questions of construction and nothing else, and the order does not enable the court to grant any relief, it can only determine the question of construction, and declare the rights of the parties."

It is clear however that Warrington J., was not laying down a principle as wide as that asserted by Mr. Rattray which would make the procedure inappropriate in every case where the determination of some facts in the course of the proceedings was a necessary exercise integral to the determination of the question of construction. What Warrington J., is saying is that if the question to be construed will not completely determine the litigation between the parties, the procedure by way of Originating Summons is inappropriate. This was the situation before him and his decision was manifestly justified from the facts in the case and from his analysis and acceptance of the contention of the respondent therein.

The facts were that Mr. Green, executor and trustee of a will in which the testator's nephew was given a gift of doubtful validity, executed a Deed dated December 10, 1897 under which he agreed to transfer certain securities to the nephew. The executor however demanded indemnity from the nephew in the event of the latter's interest under the will being successfully challenged before December 31, 1903. The nephew by way of indemnity gave a charge on the securities to the executor who in consequence retained the certificates thereof by way of charge while undertaking to deliver them to the nephew on December 31, 1903, if by then no challenge to the nephew's interest was received. The executor in addition, gave a guarantee to the nephew that the income and capital values of the securities would on December 31, 1903 be at least of certain values.

The nephew within a few months thereafter on March 9, 1898 and again on April 29, 1898 executed two successive mortgages to the same mortgagee, of his estate and interest in the Testator's estate and under the Deed dated December 10, 1897. In none of the two mortgage deeds was there any mention of the guarantee. By a Deed dated March 24, 1899 which recited the will, the Deed dated December 10, 1897, the guarantee, and the two mortgages of the nephew, the mortgagee conveyed to Lewis "all the premises comprised in and assigned" by the nephew under his mortgages, as the said premises were particularly described in an annexed schedule which though it listed securities, did not make any reference to the guarantee. In a further Deed executed on January 3, 1905, the mortgagee conveyed and assigned to Lewis by way of confirmation, all the premises comprised in the mortgages. Lewis issued writs first in the Kings Bench Division on November 4, 1904 against the executor Mr. Green claiming under the guarantee for the difference between the guaranteed values of the securities and the amounts received and realised. He discontinued this action on being advised by Mr. Green that it was an inconvenient action to be tried in the Kings Bench Division.

Mr. Lewis proposed to Mr. Green that he would proceed by Originating Summons in the Chancery Division. Mr. Green, through his solicitors, protested on the ground that questions of fact would arise and that the proper course was by writ. Mr. Lewis accordingly issued a writ on November 26, 1904 in the Chancery Division but following on the confirmation Deed executed in his favour by the mortgagee on January 3, 1905, he discontinued the proceedings by writ, and took out an Originating Summons against Mr. Green asking for a declaration that according to the true construction of the abovementioned Deeds, the benefit of the guarantee had been assigned to and was vested in him.

It is interesting to observe how the learned judge reviewed the contentions of the respondent who raised a preliminary objection to the procedure by way of Originating Summons. The learned judge having stated the principle recited above, proceeded thereafter as hereunder -

"This Originating Summons now comes on for hearing, and the objection is at once renewed which was made as soon as it was issued, that the procedure under Order Liv. A is not the appropriate procedure. What is said is this:

'The construction of the deeds will not settle the matter, because on a case of mixed fact and law, I, the respondent, have another defence to the action, namely, that the deed of January 3, 1905 in the circumstances which I shall prove, when the action comes on for trial, was in fact and in law quite independently of construction, ineffectual to pass the benefit of the guarantee to the applicant. Further than that, I shall say also when the matter comes on for trial that, even assuming that the benefit of the guarantee has passed to the applicant, I, the respondent, have a complete answer to the action, arising partly from the conduct of the person to whom the guarantee was given; and further, I have also a complete answer, because I shall have to call upon the applicant to prove damages for breach of the guarantee, which he will not be able to establish.'

"Now under those circumstances, the applicant persists in asking me to determine these questions of construction. In my opinion I ought not to do so. It seems to me that under such circumstances as those under which this summons was issued, Order Liv. A is not the appropriate mode of procedure."

In the present case, the facts which would require to be proved for purposes of construing the amended Article 82 namely the validity of the Extraordinary General Meeting and the acquisition of the shares by the Accountant General are all proved by the exhibits annexed to the relevant affidavits. There is no dispute about these matters between the appellant and the respondent as I will endeavour hereafter to show. In considering and determining this ground of appeal, ground 2 will substantially be determined also.

The minutes of the Extraordinary General Meeting dated March 29, 1976 are in evidence so also is the letter of RPL addressed to Mr. Brian L. Ashenheim its legal adviser dated February 3, 1977. RPL in that letter confirmed the following most pertinent facts namely:

- "1. A member of the company has sought to challenge the validity of the amendment passed at the extraordinary general meeting held on 29/3/76 not on the basis that no such meeting was held, but rather that the amendment was not validly passed because it had not been passed by at least three quarters of the members of the company.
2. The amendments were designed to give the various associations the right to appoint and dismiss the directors representing them.

"3. On 26th January 1976 the Board of Directors at their monthly meeting, discussed the method of appointing directors and agreed that the articles should be amended to give the shareholders the power to appoint and remove directors. The necessary draft amendments were to be prepared by the company's Attorneys, for consideration of the directors. That decision was recorded at minute No. 130.

4. On 23rd February 1976 the Board of Directors approved the draft amendments and gave instruction for an extraordinary general meeting of the company to be called on Monday 29th March, 1976 at a particular hour and place for the purpose of approving the said amendments.

5. Notices convening the meeting and embodying the proposed resolution were dispatched by post or to bearer on 1st March, 1976.

6. Two members only namely Mr. A.V. Hamilton as proxy for the Jockey Club and Mr. C.A.L. Browne representing the Breeders Association were present at the scheduled time of the meeting. No other members attended but as the two members constituted a quorum, the meeting was called to order and the resolution was put and passed by the two members present."

The abovementioned letter constitutes an admission in favour of the Accountant General that the meeting was in fact held and that the amendment to Article 82 was validly passed. Further, in so far as the letter states that there was a meeting of the Board of Directors on 23rd February, 1976 at which the draft amendments were approved for submission to an Extraordinary General Meeting, that fact is also confirmed by Mr. Vernon Da'Silva who admitted being present at that meeting.

As recently as July 22, 1987 the Board of Directors of RPL including Mr. Dabdoub referred to the amendments to Article 82 in terms implicitly authenticating them. Mr. Dabdoub did not dispute their validity. In the said minutes which were in evidence the following excerpts appear:

"Mr. Dabdoub informed the meeting that, he understood, prior to the amendment of the Articles of Association, that when the Amendment was made it included in its clauses that it would allow the Jockey Club three votes rather than one He then requested the chairman to clarify this amendment before the voting of the Jockey Club shares take place.

The Chairman in reply, stated that there is an amendment to the Articles of Association arising out of a resolution passed at an Extraordinary General Meeting of Racing Promotions Ltd held at 15 Lady Musgrave Road on 29th March, 1976."

The validity of the Extraordinary General Meeting and of the resolution amending Article 82 cannot under the Articles of Association of RPL be legally challenged by anyone. The provisions of the following Articles justify this view:

- "(a) Article 48 - provides that all general meetings other than the annual general meeting shall be called extraordinary general meetings;
- (b) Article 49 - provides that the directors may whenever they think fit convene an extraordinary general meeting;
- (c) Article 53 - provides that the accidental omission to give notice to any person entitled under the articles to receive notice of general meetings, or the non-receipt by any such person of such notice shall not invalidate the proceedings at that meeting.
- (d) Article 55 - provides that at any general meeting a quorum shall consist of not less than two members present in person or by proxy."

The affidavits of Vernon Da'Silva and Alvin Hunter provide no evidence capable of invalidating the general meeting held on March 29, 1976 because they have not asserted that they were deliberately and or intentionally excluded from the notice served, and in the absence of such an assertion non-service and/or non-receipt of notice, even if true, would be accidental and Article 53 would validate the proceedings at the meeting.

There is thus no basis shown on the record on which the validity of the Extraordinary General Meeting of March 29, 1976 and of the resolution passed thereat can be challenged. There is no plaintiff on the record disputing the validity of the said meeting and of the resolution because the Accountant General contrary to disputing the validity of the meeting, relies on the resolution passed thereat in support of her declaration. This leaves only the defendant RPL, supported by Mr. Dabdoub seeking to set up a dispute against itself which is an impossible situation because a person cannot have a dispute against himself. Thus, there was no dispute as to any fact relative to the circumstances leading to the amendment of Article 82 nor as to the validity of the amendment itself. Proof of all facts necessary for the construction of this amended Article are, as earlier stated, plainly and unambiguously disclosed in the exhibits.

Turning to the transfer of the shares to the Accountant General Mr. Rattray has properly conceded that the transfer of the shares by the Jockey Club Ltd is valid. He however submits that in relation to the other two transfers their validity is seriously disputed on the ground that they were not executed by or on behalf and with the authority of the competent transferors namely the registered holders of the shares who are Messrs Da'Silva and Browne.

The transfer by "Thoroughbred" cannot possibly provide disputed facts, even if there were clearly delineated disputants on the record. Mr. Browne in his affidavit deponed that as the original nominee shareholder of the "association" he had on April 15, 1985 transferred the shares of the association to "Thoroughbred" presumably on the occasion of the incorporation of the association into a Limited liability company. Mr. Browne further deponed that the executed transfer had been forwarded to RPL on the same day under cover of a letter from "Thoroughbred" the transferee. He deponed that he is a member and a former director of "Thoroughbred" and that the transfer of the shares on October 24, 1985

by "Thoroughbred" to the Accountant General was with his knowledge and approval. In the absence of any challenge to these facts as for example non-receipt of the transfer by RPL, the irresistible inference is that the name of Mr. Browne remained on the register of members of RPL due to oversight and/or neglect of RPL but certainly not because of a refusal to register "Thoroughbred" as the holder of the shares on and after April 15, 1985. This must be so because RPL has not contended that it had, pursuant to Article 30 of its Articles of Association communicated to "Thoroughbred" the transferee within two months of the date of lodgment of the transfer, or at all that it was refusing to register it as the new shareholder.

Thus, when "Thoroughbred" transferred the shares to the Accountant General on October 24, 1985, it transferred the entirety of the rights acquired from Mr. Browne albeit not then a registered holder. RPL cannot rely on its own neglect and or default in registering "Thoroughbred" as a ground for refusing to recognize the Accountant General as the lawful transferee from "Thoroughbred". It is not mandated by Article 11 to recognize only the right of a registered holder of its shares. That Article properly construed means that RPL can recognize unregistered rights in its shares though it shall not be bound nor can it be compelled to recognize such rights. It is not to be countenanced that RPL could while perpetuating a wholly unjustified and wilful default by not keeping its members register updated, exacerbate its wrongdoing by invoking the protection given by Article 11 that it shall not be bound or compelled to recognize rights in its shares other than those of registered holders.

The evidence on record in any case, discloses no dispute which RPL can possibly raise on its own behalf or on behalf of Mr. Browne even if such were permissible, on the validity of the transfer to the Accountant General. This is so, independently of the further evidence derived from the meeting of the Directors of RPL on July 22, 1987 when the transfer to the Accountant General of these shares was approved without dissent by them, including the present second defendant.

The transfer of the shares of the Jockeys' Association of Jamaica is challenged as invalid, and Mr. Vernon Da'Silva has filed an affidavit in support of the stand now being taken by RPL and Mr. Dabdoub that he Mr. Da'Silva is still the registered holder of the shares. In relation to this issue he deposes that neither has he executed any transfer in favour of the Accountant General nor has he authorised anyone to do so. I am clearly of the opinion that inasmuch as Mr. Da'Silva is not a party to the proceedings, his affidavit is irrelevant, because it cannot create a claim for RPL. Further, it cannot support RPL unless the latter had some legal or equitable right or interest in the shares as for example a lien for indebtedness to it by Mr. Da'Silva, which the Accountant General was resisting. There is no such claim by RPL in its own right to any interest in the shares and in my view it is not legally permissible for it to assert on behalf of a member against an applicant transferee, the continuing rights of the former as a shareholder, especially when the former member, apprised of proceedings affecting his purported rights, has not joined in the proceedings to defend the same. Quite apart from these substantive and procedural difficulties of both RPL and Mr. Da'Silva, the documentary evidence before the learned Chief Justice clearly revealed by irresistible inference that Mr. Da'Silva manifested his approval and/or authorisation of the transfer by the representatives of the Jockeys' Association of Jamaica, by signing and releasing the share certificate held by him in relation to the shares, to the aforesaid representatives.

The minutes of the directors' meeting dated July 22, 1987 disclosed that Mr. Samuel Heslop was present as a director with inter alia Mr. Robert Dabdoub. Mr. Heslop was the director representing the interests of the Jockeys' Association of Jamaica. This fact is established by paragraph 7 of the affidavit of the Accountant General and the exhibit "ST5" annexed to the affidavit. There is on record no dispute of this fact by RPL. A photocopy of the minutes of the Directors' meeting dated

July 22, 1987 annexed to the affidavit of Mr. Paul Salter as exhibit "PS3" contain the following excerpts relevant to the shares of the Jockeys' Association of Jamaica -

"The Chairman then produced to the meeting the four (4) Instruments of Transfer namely Jockey's Association The Chairman continued to say that -

'the Instrument of Transfer ought to be accompanied by a Share Certificate, which relates to the Shares and such other evidence as the Directors may reasonably require to show the right of the transferor to make the transfer.'

The Chairman stated that the Jockey's transfer was signed by the Vice President and Secretary of the Jockey's Association, Mr. Sammy Heslop and a Share Certificate signed by Mr. Vernon Da'Silva. He also stated that there were no connections between the transfer and Mr. Vernon Da'Silva. The Chairman then requested a resolution of the Jockey's Association. Mr. Dabdoub asked Mr. Heslop if it was not a fact that he had reported to a meeting that he had been threatened with a prison term if he did not transfer the shares because as a Director he would be liable to pay the back taxes. Mr. Heslop asked if Mr. Dabdoub wanted to get him in trouble. Mr. Heslop stated that he had been told by the Chairman of the JRC that if the Jockeys did not transfer the shares, racing would be closed and so they transferred the shares to prevent a closure. The Board accepted the transfer register by a vote of five members with one abstention."

From the above excerpts which have not by any affidavit of RPL been disputed as not correctly recording the transactions and exchange of views at the meeting, the Certificate covering the shares in question signed by Mr. Da'Silva was delivered to the Board of Directors as normally required by Article 29 which states so far as is relevant as follows:

"29. The directors may decline to recognize any instrument of transfer unless:

(a) a fee not exceeding fifty cents is paid to the company in respect thereof, and

(b) The instrument of transfer is accompanied by the certificate of the shares to which it relates and such other evidence as the Directors may reasonably require to show the right of the transferor to make the transfer."

The Board was thus aware of the fact that Mr. Da'Silva who signed the Share Certificate as the registered shareholder of RPL had not signed the transfer instrument but rather that it had been signed by one of its directors in his capacity as Vice President of the Jockeys' Association of Jamaica. He was not challenged that he lacked the necessary authority to execute a valid transfer. The irresistible and inescapable inference to be drawn from the above facts is that RPL by its directors was satisfied that Mr. Da'Silva by signing the Share Certificate had expressly authorised the transfer of the shares. Though he did not sign the transfer instrument, this was not considered necessary by the Directors because he had signed the Share Certificate and delivered it over into the possession of the Jockeys' Association of Jamaica and had thus by his conduct fully and effectively authorised and empowered the undisputed representatives of the said Association to execute the transfer. The execution of the transfer which was delivered to the Board, was, from the minutes, based on a resolution to that end by the Jockeys' Association. It was not suggested that Mr. Heslop operated a fraud on his co-directors by stealing the Share Certificate from Mr. Da'Silva. Significantly the latter, though he deponed that to the best of his knowledge and belief he was still the registered owner of the shares, did not say that he had been wrongfully deprived of or had lost the Share Certificate.

From the foregoing, there were, unlike Lewis v. Green (supra) no facts which were disputed. Such facts as would be required to be ascertained and determined in the process of construing Article 82 as amended, were proved and or admitted in the documents before the learned Chief Justice. The granting of the declaration sought by the Accountant General would also conclude all matters between her on the one hand and RPL and Robert Dabdoub on the other hand. Contrary to the submission of Mr. Rattray, that the Accountant General should instead of seeking a declaration have sought the equitable relief of rectification of the members register of RPL, this could not and would not be the appropriate relief because RPL had not communicated to the Accountant General within the time prescribed by Article 30 or at all, that it had refused to register her. To the contrary RPL by issuing share certificates to the Accountant General had by virtue of Article 12 confirmed to her that she had been registered as a member. The procedure by Originating Summons was accordingly appropriate, and the learned Chief Justice had jurisdiction to entertain the same and correctly refused to uphold the preliminary objection.

Ground 2 of the appeal contends that the Accountant General is neither the "holder of the shares" in the company which were issued to the Nominee or Nominees of the Thoroughbred Breeders Association of Jamaica and the Jockeys' Association of Jamaica nor is she the nominee of those bodies. Accordingly she should not have been granted the declaration that she was entitled under Article 82 as amended to appoint or remove directors. It is further contended that the amendment of Article 82 is in any case invalid.

In dealing with Ground 1, the validity of the amendment of Article 82 was fully considered and the opinion was expressed that not only was it valid but also that RPL could not itself dispute that which it had for the past twelve years upheld as valid and under which directors had been appointed.

On the question whether the Accountant General is the "holder of the shares" within the meaning of the Articles of Association of RPL, I have already found that the transfers by "Thoroughbred" and the Jockeys' Association of Jamaica were validly executed by the derivative title-holder namely "Thoroughbred", and with the authority of Mr. Da'Silva in the case of the Jockeys' Association of Jamaica. The transfers were thus genuine and RPL cannot refuse to register the Accountant General on the ground that no title passed to her under the transfers.

However, a further submission of Mr. Rattray is that even if the transfer is valid, the Accountant General cannot exercise any right to appoint directors because she is not the "holder" which he says means registered holder of the shares and until she is registered, RPL is not bound nor can it be compelled to recognize any rights in her including the right to appoint directors. Mr. Rattray relied on Article 11 which says that except as required by law the company shall recognize only the registered holder as having an absolute right to the entirety of the shares. This Article however has a further pertinent provision which says that "the company shall not be bound by or be compelled" ... to recognize any equitable interest in any share except only as by these articles otherwise provided. The meaning of this Article in my opinion is that although RPL ordinarily is entitled to recognize only the registered holder of its shares, as having rights in respect thereof, it will be bound and may be compelled to recognize the beneficial owner as a "holder" of the shares if any of its Articles otherwise so provided.

In this regard I do not agree with Mr. Rattray that the expression "holder of shares", wherever used in the Articles of Association, means "registered holder". The expression "registered holder" appears only in Article 11 and exist solely for the purpose of defining the "holders of shares" who alone, in the absence of special provisions in other articles, RPL shall be bound to recognize as having absolute rights in the shares by

virtue of registration. By such registration the holders of shares are constituted members of RPL under Article 12 and accordingly have the rights conferred on members. However, a person must logically first become a holder of shares in RPL before he can be a registered "holder of shares". That person, in my opinion becomes a "holder of shares" when, by a transfer instrument recognized as lawful, and executed in compliance with the Articles of Association of RPL, he acquires the beneficial ownership of shares in RPL. He becomes a registered holder, thereby annexing legal ownership to his beneficial ownership when he is in fact registered. By registration he becomes a member.

One of the rights of members by virtue of Articles 77 and the unamended Article 82 was that of appointing and removing directors in general meetings of RPL. None but registered shareholders were under the Articles entitled to attend and participate in proceedings to appoint and remove directors because they alone were members and as such entitled to attend and vote at general meetings. This situation proved unsatisfactory to RPL. This is manifested by the expressed intention stated in its letter to its legal adviser dated February 3, 1977 that the amendment of Article 82 was designed to give the various associations the right to appoint and dismiss the directors representing them. Pausing here, it seems clear that inasmuch as the nominee registered shareholders of the various associations were members of RPL and thus were the ones who prior to the amendment were entitled to appoint and remove directors, the object of the amendment was indisputably to divest them of this right, and to invest the associations with the right exercisable through their accredited executives to appoint directors to represent their beneficial interests.

The amended Articles 82 so far as is relevant is as follows:

"82. (1) The holder or holders of the shares in the company issued to the nominee or nominees of each of the bodies of persons referred to in paragraph 4 of this Article shall be entitled at any time and from time to time to appoint any one person a director of the company and to remove any such director from office.

(4) The bodies of persons referred to in paragraph (1) of this Article are:

The Jockeys' Association of Jamaica

The Grooms' Association of Jamaica

The Thoroughbred Breeders Association of Jamaica

The Jamaica Racehorse Owners Association

The Jamaica Racehorse Trainers Association

and for the purpose of this Article reference to each such association shall be deemed to include its successor from time to time."

If as is submitted by Mr. Rattray "Holder or Holders of the shares" meant in the above amended Article, "registered holders" as mentioned in Article 11, the whole amendment would be an exercise in futility because the "Holder or Holders of the shares" would on this submission mean the nominee shareholders who are the registered shareholders. Thus, the divestment from the nominees of the right to appoint and remove directors which is the very thing that RPL by its expressed intention had set out to do would be frustrated.

In my view, the expression "Holder or Holders of the shares" in Article 82 (1) in the case of the Jockeys' Association of Jamaica means that association acting through its accredited representatives. In the case of the "Association" it then meant its accredited executives. They having through Mr. Browne the registered nominee transferred their interest to "Thoroughbred", the latter became "holders of the shares." By the transfer by the Jockeys' Association of Jamaica and "Thoroughbred" of their respective beneficial ownership in the shares to the Accountant General she became "Holder of the Shares" in Article 82 (1) and therefore became entitled to appoint directors. Registration of the Accountant General as a member of RPL is thus not a condition precedent and

or a 'sine qua non' to the exercise by her of the right to appoint directors which hitherto was the exclusive prerogative of members.

The learned Chief Justice was accordingly not in error in granting the declaration sought by the Accountant General.

Ground 3 of the appeal complained of an error in law, constituted by the failure of the learned Chief Justice to exercise his discretion under Section 531D of the Judicature (Civil Procedure Code) Law in not refusing the Declaration and the remedies prayed in the Originating Summons.

Section 531D of the Judicature (Civil Procedure Code) Law provides as follows:

"531D. The Court or a judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

The basis for this complaint is that the matter was one of public interest and consequently it ought to have been adjudicated in a full open hearing that is to say in a public hearing.

Though it may be a matter of public interest that the Government through the Accountant General is seeking to acquire substantial rights in RPL and also a majority on the Board of Directors, I do not see that any public interest would be served by having a public hearing in open court when there are legally and also in reality no disputants and there are equally no facts which RPL or Mr. Dabdoub can genuinely dispute. Accordingly the learned Chief Justice was not in error in not dealing with the matter in a public hearing.

Finally, ground 4, complains that the findings of fact of the learned Chief Justice cannot reasonably be supported by the evidence adduced.

The burden of the analysis, undertaken in this judgment, of the affidavits and documents annexed thereto is to show that there was ample evidence, all derived from acts done by RPL, which supported the findings of fact of the learned Chief Justice. His finding which is specifically challenged namely that the failure by RPL to register the Accountant General was due to neglect rather than refusal is an inference drawn from the fact that RPL received the transfers from "Thoroughbred" and the Jockeys' Association of Jamaica from the latter part of 1985. It did not within the time prescribed by Article 30 or at any time thereafter notify the Accountant General, as transferee, that it was refusing to register the transfer. Thus the inference that it was a mere neglect why the Accountant General was not registered is eminently reasonable.

In conclusion and for the reasons herein given the appeal was dismissed on March 24, 1988 with costs to the respondent to be taxed if not agreed.

Rowe, P.

I entirely agree with the judgment of Campbell, J.A.

Forte, J.A.

I agree.