

17/2

Appeal reported

NZLR X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.93/83

57

BETWEEN RICHARD JOHN CURTIS of
Wellington, company director

Plaintiff

AND J. J. CURTIS & COMPANY LIMITED

Defendant

AND R.C.J. BROAD & OTHERS

Third Parties

Hearing 17-18 October 1983

Counsel J. R. Wild for Plaintiff
I. R. Millard for Defendant
R. A. Dobson for Third Parties

Judgment 15/2/84

JUDGMENT OF ONGLEY J

The plaintiff in this action seeks two forms of injunction against the defendant company of which he is a member. The first requiring the defendant and its directors to offer for sale a number of shares to members (including himself) in accordance with the relevant provisions of the company's Articles of Association; the second restraining the directors from registering the transfer of the same shares to any other persons. The owners of the shares who have been joined as third parties in the action join with the defendant in resisting both such proposed injunctions and themselves seek an injunction requiring the defendant to register the transfer of their respective shareholdings to a company known as Hotspur Holdings Limited.

The defendant company has a nominal share capital of \$78,652.00 divided into 78,652 shares of the nominal value of \$1.00 each. It was originally a family company founded last century and incorporated as a public company in 1901 by the plaintiff's greatgrandfather. Its principal objectives were to carry on the business of a common carrier and to conduct the associated business of a customs agent. Control of the business passed to the plaintiff's grandfather and in time to the plaintiff's father who still holds 20,516 shares which he inherited from his own father. In the course of time the plaintiff's father became manager of the company, and in turn the plaintiff succeeded him in that office.

The plaintiff holds only 1,000 shares in the company in his own name.

For whatever reasons the profitability of the company declined in or about the years from 1976 to 1978 and in 1980 it ceased trading altogether and was re-registered as a private company. So as to reduce losses the carrying side of the business was sold off and the sole remaining asset of any magnitude is a commercial building situated at Thorndon, Wellington. The plaintiff had been a director since about 1975 but did not take an active part in its management until his father retired from active involvement in 1979. As well he conducts a separate business of his own in manufacturing and in the import and export of goods. In about the middle

of 1982 he became interested in making a takeover bid for the shares in the defendant company and in this enterprise found himself in competition with the company I have already mentioned, Hotspur Holdings Limited.

During late 1982 and into the early months of 1983 a series of competitive offers was made to the shareholders of the defendant company culminating in the acceptance in late December and early January of the following year by the holders of a total of 45,290 shares of a price of \$2.55 per share offered by Hotspur Holdings Limited.

On 13 January 1983 Hotspur Holdings Limited forwarded to the Secretary of the defendant company, Mr Barnaby, notices signed by 12 individual shareholders indicating their intention to transfer their shares to Hotspur Holdings Limited. That company recognised the necessity for compliance with the defendant company's Articles of Association regulating the transfer of shares and so requested the Secretary to "initiate the procedures necessary in respect of these transfer notices."

The relevant Articles of Association were the following:

"2. Subject to the provisions hereinafter contained no share or shares in the Company save as provided by sub-clause (g) of Clause 3 hereof shall be transferred to a person who is not a member so long as any member or any person selected by the Directors as one who it is desirable in the interests of the Company to admit to membership is willing to purchase the same at a fair value.

3. (a) In order to ascertain whether any member is willing to purchase such share or shares the person proposing to transfer the same (hereinafter called "the retiring member") shall give notice in writing (hereinafter called "the transfer notice") to the Directors that he desires to transfer the same; such notice shall specify the sum the retiring member fixes as the fair value for such share or shares and shall constitute the Company his agent for the sale thereof to any member of the Company or person selected as aforesaid at the price so fixed or at the option of the Purchaser at the fair value to be fixed as hereinafter provided. The transfer notice may include any number of shares and in such case shall operate as if it were a separate notice in respect of each share. The transfer notice shall not be revocable except with the sanction of the Directors.

(b) If the Directors shall within the space of one calendar month after being served with such notice find a member or members or person selected as aforesaid willing to purchase (hereinafter called "the purchasing member") the share or shares or any of them and shall give notice thereof to the retiring member such retiring member shall be bound upon payment of the fair value to transfer the share or shares or the number agreed to be sold to the purchasing member.

(c) In case any difference arises between the retiring member and the purchaser as to the fair value of any share the difference shall be referred to the decision of two Arbitrators or their umpire pursuant to the provisions of "The Arbitration Act 1908".

(d) If the retiring member after having become bound as aforesaid makes default in transferring the share or shares so sold and purchased the Company may receive the purchase money and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of the said share or shares and shall hold the purchase money in trust for the retiring member. The receipt of the company shall be a good discharge for the purchasing member and after his name has been entered in the register in purported exercise of the aforesaid power the validity of the proceedings shall not be questioned by any person.

(e) If the Directors shall not within the space of one calendar month after being served with the Transfer Notice find a member or members or person selected as aforesaid willing to purchase the share or shares and give notice in the manner aforesaid the retiring member shall be at liberty subject to clause 5 hereof to sell and transfer the shares or those not placed to any person at any price.

(f) The shares comprised in any transfer notice shall be offered in the first place to the members other than the proposing transferor in proportion to the shares held by them and so that if any shares cannot be so apportioned such shares shall be offered to them in order determined by lot and the Directors shall cause lots to be drawn accordingly and any share not taken up by any members as aforesaid shall be offered to the other members in such order as shall be determined by lots drawn in regard thereto and the lots shall be drawn in such manner as the Directors shall think fit.

(g) Any share may be transferred by any member to any other member or to any son grandson daughter grand-daughter son-in-law daughter-in-law nephew niece uncle aunt brother sister parent wife or husband of such member and any share of any deceased member may be transferred by his executors or administrators to any son grandson daughter grand-daughter nephew niece son-in-law daughter-in-law brother sister parent widow or widower of such deceased member (to whom such deceased member shall have specifically bequeathed the same) and shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to trustees for the time being of such will and c use 3 hereof shall not apply to any transfer authorised by this clause.

4. Any form of transfer of shares shall be sufficient if deemed by the Directors to be to the effect of the form of transfer prescribed by Table "A" and whether the formalities indicated by that form shall have been followed or not.

5. The following shall be added to Clause 26 of Table "A": the Directors may decline to register any transfer of shares where the transferee is not a desirable person to admit to membership in respect of such shares AND the Directors may refuse to register any transfer of shares without assigning any reason whatever for such refusal".

In consultation with Mr Wood, one of the two directors then holding office, Mr Barnaby determined upon the form of a notice to be sent to all shareholders other than those who had signified their intention of selling. The notice dated 28 January 1983 and presumably posted on that date was in this form:

" J J CURTIS & CO LIMITED

Dear Shareholders,

The Company has received notification from the enclosed list of shareholders that they wish to transfer their shares at a price of \$2.55 per share, to Hotspur Holdings Limited.

The Articles of Association give existing shareholders preemptive rights to acquire these shares at the fair value stated, if they so desire.

Should any of you wish to purchase all or any of the shares being offered, you should notify the Company in writing, no later than 14 February 1983. In terms of the Articles, any notification later than 14 February 1983 cannot be considered by the Directors.

Should you require any further information, please contact the writer.

Shares offered for Transfer

<u>Shareholder</u>	<u>Number of Shares</u>
R C J Broad	16,000
R Wetherill	4,032
J S Sloman	5,339
J M Barraud	750
D M Curtis	7,500
Est. W H J Christie	1,500
C A Wright	882
B M Lewis	708
S D Sloman	5,339
B H Laurenson	2,500
N R Feast	690
H I Lyford	690
Total shares offered for transfer	<u>45,930</u>

Yours faithfully,

"Paul Barnaby"

Paul Barnaby
Secretary "

On 7 February the plaintiff delivered to Mr Barnaby
a letter in these terms:

"7th February 1983

Mr P Barnaby,
J.J. Curtis & Co Ltd,
Box 168
WELLINGTON.

Dear Mr Barnaby,

This letter is to advise, that as a
shareholder of J.J. Curtis & Co Ltd, I wish to
exercise my rights under the Preemptive rights
to acquire some of the 45930 shares tendered
for transfer.

This is a formal notification only and
I will make contact with you in the near future.

Yours sincerely,

"R J Curtis"

R.J.CURTIS. "

Following a discussion with Mr Barnaby the plaintiff
returned to the company's office on 11 February 1983 and
delivered to the Secretary a copy of his earlier letter on
which was endorsed the following handwritten text:

"11-2-83

Dear Mr Barnaby,

I wish specifically to buy shares
held by R C J Broad being 16000 shares
and B H Laurenson 2500 shares
so total shares being 18500 units

WITNESSED BY:
Nina L. Styles
12 Miro Street
Upper Hutt. 11/2/1983

Sincerely,
R.J.Curtis.

"

There is some difference in recollection between Mr Barnaby and the plaintiff as to what passed between them. The plaintiff's recollection is that he was told to indicate which particular shares he wished to purchase whereas Mr Barnaby says that he told him that he would only have to indicate the total number he required. That was a misunderstanding which could easily have occurred and I attach no importance to it. In point of fact either version would have represented bad advice because what the plaintiff would have been required to do to ensure compliance with the Articles would have been to call for a formal offer to him of the proportion of shares which he was entitled to buy from each proposed transferor. Whether Mr Barnaby realised that or not I am unable to say but it is clear that he was seeking a short-cut through the formalities in order to reduce the amount of paper work which was being thrust upon the shareholders and himself by reason of the succession of competing offers.

By midday on 14 February 1983 no other existing shareholder had signified an intention of purchasing any of the shares which had been offered for sale and Mr Barnaby conveyed that information by telephone to Mr Fraser, the manager of Hotspur Holdings Limited, sometime during the afternoon of that day. The time for taking up the shares by members of the defendant company did not expire in terms of the notice until the end of that day and it may have been less than prudent of Mr Barnaby to inform the competitive buyer of

the internal affairs of the company at that stage. Mr Barnaby left his office before 5 pm on the 14th and when he returned next morning found a letter signed by another shareholder, Mr D. M. Curtis, expressing a wish to purchase exactly the same shares as the plaintiff had stated he wished to buy. It is said that the envelope enclosing Mr D. M. Curtis' letter was noted that it had been delivered at 4.58 pm on 14 February. There is evidence to support that contention and if it were a critical matter I would find that the date of receipt of the notice was 14 February but I do not so regard it because as an attempt to comply with the Articles of Association it was no more successful than was the plaintiff's attempt.

The right of a member of the defendant company to sell his shares is restricted only by the Articles of Association numbered 2 and 3 which contain the pre-emptive rights and by Article 5 under which the directors may declare any proposed transferee to be not a desirable person to be admitted to membership. The same Articles which restrict the rights of a member to transfer shares confer upon other members a right to acquire shares upon ascertainable terms and by a specified machinery. That is the only machinery by which the directors may properly exercise the power to restrict the transfer of shares and equally it is the only machinery by which they may enable members desirous of exercising pre-emptive rights to purchase shares to do so. It is not open to the directors to

devise methods of their own to bring about what they may believe are equitable results by apparently more convenient and expeditious procedures.

The converse of this proposition is that the directors, being required to act in a certain manner for their actions to be effective, have a corresponding duty to members to act in that way. If they do not act in conformity with the regulations which govern their powers the result may be that some members will be wrongly deprived of their rights. It is a matter of no consequence here whether the directors believed mistakenly that they were acting in conformity with the Articles of Association in instructing the Secretary to write the letter to shareholders of 28 January 1983 or whether they knew that they were avoiding them. The result of their action is the same either way. So far as the letter purported to give to shareholders a right to purchase the shares of those other shareholders who had given notice of their desire to transfer shares was concerned it was clearly irregular. The directors were required by the Articles to offer a proportionate part of each parcel of shares in each notice of transfer rateably to all shareholders other than the proposed transferor as a first step and if all were not taken up offer those remaining in order determined by lot.

The failure of the directors to act in conformity with the relevant Articles of Association has brought about

a situation in the company near to an impasse. The plaintiff has not had the opportunity of purchasing shares which should have been available to him; the third parties claim an unrestricted right to transfer their shares to the purchaser of their choice by reason of the expiry of the restrictive period of one month; the directors though recognising their obligations to act even handedly between members, contend that they have properly fulfilled their functions in relation to the transactions. This latter contention I reject and find that as a result of their failure all parties to these proceedings have suffered disadvantage.

The disadvantage accruing to the plaintiff is clear enough. He wishes to acquire a greater shareholding with a view to enhancing or protecting his present investment in the company and so far has been prevented from doing so. The third parties will be prevented from selling their shares to the purchaser of their choice in the event of the Court intervening to assist the plaintiff. The company has been unable to resolve the issues in general meeting and so has become involved in this litigation. To my mind the plaintiff's position would be more adversely affected should he not be able to acquire the additional shares than that of the third parties would be if they were required to offer their shares again to the directors to permit them to find a buyer. Either way the third parties would receive the same price and the identity of the purchaser cannot be of crucial concern to them.

The issues arising on these proceedings cannot, however, be determined by balancing the advantages and disadvantages to which the various groups of shareholders may be subjected by reason of the directors' failure to comply with the Articles of Association. A shareholder in a private company has a right to dispose of his shares subject to any express restrictions which may be found in the Articles of Association of the company; re Copal Varnish Co. Ltd [1917] 2 CH. 349. Prima facie there is a right to transfer shares to whom the shareholder pleases. If this right is to be cut down it can only be done in compliance with the Articles of Association. The shareholders wishing to transfer their shares in this instance were required to give notice to the directors of their desire to do so, which they did in conformity with Article 3(a). The company thereupon became the agent of each of those shareholders for the sale of their shares. It could sell only to a member of the company or a person selected by the directors under Article 2 as one they regarded as desirable to admit to membership. The directors do not appear to have addressed themselves to the finding of a new member which meant that available purchasers, if they were to be found, had to be found amongst the existing members. The machinery by which that was to be done was provided in Article 3(f). That machinery was not put into motion and because of the resulting confusion no valid notice was sent to any of the shareholders desirous of

selling their shares that a buyer or buyers had been found for their shares or any of them. Letters were in fact sent to the two shareholders, Broad and Laurenson, notifying them of the intention of the plaintiff to acquire their shares. The probability is that those letters were not received until after the expiry of the period of one month from the date of the receipt by the directors of the Share Transfer Notices and were ineffective for that reason, if for no other. An oral communication said to have been transmitted by Mr Barnaby to a Mr Bengé, accountant for the two shareholders, through Mr Wood could not be taken to be an effective notice under the Articles of Association even had its receipt by Mr Bengé been satisfactorily proved which I do not accept it has been. In these proceedings neither the plaintiff nor the third parties, Broad and Laurenson, rely upon the letters dated 14 February as being effective to compel the transfer of the shares referred to therein in accordance with the Articles of Association, and I do not think it could be successfully contended that they could have that effect.

In the result those shareholders who had given valid notice of their desire to transfer their shares on 14 January 1983 on the expiry of one calendar month from that date became at liberty by virtue of Article 3(e) to transfer their shares to whom they wished. Although the directors have acted irregularly in a way which has

deprived some shareholders of their right to purchase additional shares I am of the opinion that shareholders who have given the appropriate notice now have an unrestricted right to sell. It is too late in my view to comply with Article 3(f) and the unrestricted right to sell and transfer pursuant to Article 3(e) is effective.

The relief sought by the plaintiff must therefore be declined. It is not necessary for me to deal with any of the alternative defences.

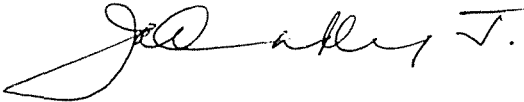
The interim injunction granted on 30 March 1983 is discharged.

There is now therefore no bar to the registration of transfers of shares by the Third Parties but I do not believe that an order of the Court is necessary to achieve that at this stage. I reserve leave to apply further should any question require to be resolved in connection with the registration of the transfers.

The defendant is allowed the sum of \$500.00 costs against the plaintiff together with witnesses' expenses and disbursements to be fixed by the Registrar.

The costs of the Third Parties are reserved.

Solicitors:


Roache Cain & Chapman, Wellington, for the Plaintiff
Young Swan Morison McKay, Wellington, for the Defendant
Stone & Co., Wellington, for the Third Parties

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