

## NELSON v APIA STEVEDORING CO. LTD.

High Court Apia  
31 May 1932  
Luxford CJ

COMPANY LAW (Shares) - Restrictions on transferability - Transfers restricted only by regulations of Company - s 30 Companies Act, 1908 (NZ).

PRACTICE AND PROCEDURE (Company law) - Refusal of registration of transfer of shares - Proper procedure for compelling registration is by motion for rectification of the share register naming the company as defendant and not the directors.

Plaintiff, a shareholder in defendant Company and one of its three directors, tendered a transfer of the major part of his stock to O.F. Nelson and Co. Ltd., of which he was also a large shareholder. The other two directors of defendant Company refused their consent to the transfer on the ground that the plaintiff had not offered the shares to them first.

Held: The action taken by the plaintiff against the directors of the Company to compel registration was improper, but by agreement of counsel the proceedings would be determined as a motion for rectification of the Register and the Company substituted as defendant in place of the directors.

The shares in the Company were transferable as personal property subject only to such restrictions as were imposed by its Articles of Association: s 30 Companies Act, 1908 (NZ). Accordingly, a provision in defendant Company's Articles requiring the unanimous consent of the directors to a transfer to any person not a member of the Company did not impose an obligation on the plaintiff to obtain their consent before tendering the transfer for registration: vide Re Copal Varnish Co. Ltd. [1917] 2 Ch 349, 87 LJCh 132; nor, in the absence of any such provision in the Articles did it compel him to first offer to sell his shares to the other directors; and the directors could not refuse their consent to the transfer on a ground which was not within their power under the Articles: Re Bede Steam Shipping Co. [1917] 1 Ch 123 at p. 132, applied.

Klinkmueller for plaintiff.  
Andrews for defendant.

LUXFORD CJ. The plaintiff is the registered holder of 5,810 shares in a private Company known as the Apia Stevedoring Company, which I will hereinafter refer to as the defendant Company. He is also a large shareholder in O.F. Nelson and Co. Ltd. Both Companies are incorporated under the laws of and carry on business in the mandated Territory of Western Samoa. The capital of the defendant Company is £10,000, divided into 10,000 shares of £1 each. The shareholders are the plaintiff, Peter Christian Ulberg and Isaac Railey. These three gentlemen are the directors of the Company.

The plaintiff entered into a contract to sell to O.F. Nelson and Co. Ltd. 4,810 of his shares in the defendant Company, and on the 25th day of May, 1932 placed the formal transfer, with the related Certificates of Title to shares attached, before the directors for an approval at a properly constituted meeting of directors. The directors declined to approve the registration on certain grounds which I will refer to more particularly subsequently. The plaintiff thereupon commenced the present proceedings against the three directors, including himself, wherein he prays:-

- (a) judgment that the said refusal be overridden;
- (b) an order that the said transfer of shares be registered by the defendants;
- (c) judgment for the costs of and incidental to this action;
- (d) such further or other relief as in the premises may be just.

The proceedings should have been commenced by way of motion for rectification of the Register, and the Company not the directors should have been the defendant. However, counsel have now agreed that the proceedings should be determined as if they were a motion for rectification and that the Company be substituted as the defendant in lieu of the three directors.

The evidence does not disclose the date on which the plaintiff contracted to sell the 4,810 shares to O.F. Nelson and Co. Ltd. The question of the sale came before the directors for the first time on the 4th May last when Mr. Kruse, the plaintiff's Attorney and proxy-holder, explained Mr. Nelson's intentions and asked for an expression of opinion. No opinion was expressed because Mr. Railey requested that the matter be held over for a few days.

The question next arose on the 19th May when the other two directors informed Mr. Kruse at a meeting of directors that they would not register the transfer because the shares should be offered to them first. They contended that they should have the option to buy them, and Mr. Ulberg said the transfer would mean another shareholder and another director.

I pause to remark that there is no point in Mr. Ulberg's observation. The extra shareholder followed of course on a transfer of part of one shareholder's holding. The appointment of an extra director was entirely a matter for the Company in general meeting.

The formal approval of the registration of the transfer came before the directors at the meeting held on the 25th day of May. The transfer duly executed with the share certificates attached was placed before the directors with a request that its registration be approved. This approval was refused.

Mr. Railey stated in evidence in chief:-

I considered the proposed transfer when it was brought before the directors. I considered it with Mr. Ulberg. I came bona fide to the conclusion that we could not approve the transfer and we acted in accordance with the Articles.

In cross-examination he stated:-

I talked the matter over after the meeting of 4th May with Mr. Ulberg. On 19th and 25th May we refused to approve the transfer because we considered that the shares should be offered to us first. I think that Mr. Ulberg said he did not want another member in the Company and another director.

It was not suggested that O.F. Nelson and Co. Ltd. was not a fit and proper person to be a shareholder of the Company.

Mr. Kruse also gave evidence in which he stated:-

I told them (meaning the other two directors) that Mr. Nelson valued the shares at £10 apiece and I wanted to know if the other shareholders were prepared to pay that price. Mr. Railey replied that the price should be fixed by arbitrator. I said there is no need for arbitration as Nelson and Co. Ltd. are prepared to pay that price. I demanded that the transfer be registered.

The minutes of the meetings are to the same effect as the facts deposed to by the witnesses except that they do not record Mr. Ulberg's remark about the extra shareholder and director. From a consideration of the evidence I find as a fact that the directors refused to approve the registration of the transfer of 4,810 shares from the plaintiff to

O.F. Nelson and Co. Ltd. on the ground that the plaintiff did not first offer the shares to the other two shareholders at a price to be fixed by arbitration.

Section 30 of the Companies Act, 1908 provides that "the shares or other interest of any member in a Company shall be personal property, capable of being transferred in manner provided by the regulations of the Company . . . ." The shareholder has a property in his shares and as was stated by the Master of the Rolls in Re Bede Steam Shipping Co. [1917] 1 Ch. 123 at p. 132, "a property which he is at liberty to dispose of subject only to any express restriction which may be found in the Articles of Association of the Company." So when the directors refuse to pass a transfer, and their refusal comes under the review of the Court, the test of the Court's right to interfere is whether the refusal is upon grounds on which the power is given to the directors. If the directors bona fide exercise their discretion to refuse a transfer within the powers given to them the Court will not override their decision.

The Articles of the defendant Company set out in detail (Articles 34 to 38, both inclusive) the form and procedure for the transfer of shares. Then follow several Articles which restrict the right to transfer and which I will set out in extenso:-

39. The directors may refuse to register or to permit any transfer of shares to a person of whom they do not approve without assigning any reason for such refusal.
40. No share shall be transferred to any person not a member of the Company without the unanimous consent of the directors.
41. The directors may refuse to register any transfer of shares upon which the Company has a lien.
42. No transfer of any share or shares other than fully paid up shares shall be made to an infant and no transfer shall be made to a person of unsound mind.

The defendant Company does not contend that the refusal to register the transfer is based on any power given by Articles Nos. 39, 41, or 42, but that Article 40 means that the plaintiff must give the other shareholders an opportunity to purchase the 4,810 shares at a reasonable price to be agreed upon or to be fixed by arbitration.

The defendant further contends that a transfer cannot be approved for registration except by the unanimous decision of the directors.

I am unable to agree with either contention. The provisions of Articles 39 and 40 must be read together. Article 40, in my opinion, means if any one director disapproves of a transferee of shares, who is not already a member of the Company, because there are personal objections to him, then the registration of the transfer shall be refused.

The provisions of Article 40 are the same as part of an Article considered by Eve J. in Re Copal Varnish Co. Ltd. [1917] 2 Ch. 349, 87 L.J. Ch. 132, except that the consent of the directors in that case did not require unanimity. The clause originally contained a number of provisions restricting registration of transfers, but was subsequently amended by adding to it the following words:-

No share shall be transferred to any person who is not already a member of the Company without the consent of the directors.

On a motion by the transferee for rectification of the register by inserting their names as holders of the shares, it was contended on behalf of the Company that a transfer executed without the previous consent of the directors was a nullity.

The learned Judge, on page 133 of the Law Journal report, says:-

But it is said that the addition to the Article that "no share shall be transferred to any person who is not already a member of the Company without the consent of the directors" imposes upon an intending vendor of shares an obligation to obtain the consent of the directors to the reception into the Company of

the proposed purchaser before he can proceed with the transaction to the point of executing the transfer . . . I cannot see anything in the Article which imposes any such obligation, and I think it would be an unreasonable construction to hold that there is any obligation to apply for the consent before the transfer is tendered for acceptance and registration. So long as prior to the completion of the transaction an opportunity is given to the directors sitting as a board to determine whether the proposed transferee is a person whom they are prepared to admit as a member of the Company the conditions imposed by the Article are in my opinion complied with, and the contract into which the Vendor on becoming a shareholder entered with his co-shareholders is sufficiently discharged.

I respectfully adopt the learned Judge's interpretation of the Article and in consequence I find that when the plaintiff submitted the transfer duly executed to the directors for approval of registration that he had not made any breach of the obligations imposed on him by the Articles.

It only remains now to consider whether the refusal to pass the transfer is upon ground on which the power is given to the directors.

The evidence in the case proves that the directors did not refuse to pass the transfer because they did not approve the proposed transferee but because they considered that the plaintiff should have first offered the shares to the other shareholders at a price to be agreed upon or if an agreement could not be reached then at a price to be fixed by arbitration.

It is quite common to find in the Articles of a private Company a provision that shares shall be offered on certain terms to other shareholders before they can be transferred to a stranger, and such a provision will be enforced by the Courts. But in the Articles of the defendant Company there is not any such provision, and the interpretation I have already placed on Article 40 precludes it from being interpreted in that way. The directors therefore refused to approve the registration of the transfer on grounds which were not within the powers given to them by the Articles. Consequently it is consistent with all the authorities, particularly Re Bede Steam Shipping Co. (supra), and the cases cited therein by the Master of the Rolls to say that this is a case in which the Court is entitled, and I think bound to interfere and to say that it is not competent for the directors to deprive their brother shareholder, as a shareholder, of his rights, and of the power to dispose of these 4,810 shares by refusing to register a transfer of them on grounds which are not within the powers given to the directors by the Articles of Association of the Company.

I therefore order:-

1. The rectification of the Share Register of the Apia Stevedoring Co. Ltd. by inserting the name of O.F. Nelson and Co. Ltd. in the place or in lieu of the name of Olaf Frederick Nelson in respect of the 4,810 shares mentioned and described in Certificates of Title to shares attached to the transfer of shares placed before the directors of the said Apia Stevedoring Co. Ltd. at their meeting held on the 25th day of May, 1932.
2. The costs of and incidental to these proceedings which I fix at £10.10.0 together with Court fees, witnesses' expenses, and disbursements shall be paid by the defendant Company to the plaintiff.
3. Leave is reserved to apply for such further or other order as may be necessary for the purpose of giving effect to this Judgment.