

seems to me that it amounted to a cancellation of the power of attorney as between the parties (see *Smale v. Burr* (1)). Consequently, the proviso to the power of sale in the power of attorney was no longer subsisting, and the action was therefore rightly dismissed.

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Appeal dismissed with costs.

Solicitors for the appellant, *Hamilton & Nielson*, Bundaberg, by *Morris, Fletcher & Cross*.

Solicitors for the respondent, *Thornburn & Thornburn*, Bundaberg, by *J. Nicol Robinson, Fox & Edwards*.

J. L. W.

Appl T C Newman (Old) Pty Ltd v D H A Rural (Old) Pty Ltd 2 ACLR 257	Foll T C Newman (Old) Pty Ltd v D H A Rural (Old) Pty Ltd [1988] 1 QdR 308	Dist FAI Insurances Ltd v Urquhart 11 ACLR 25	(1) (1872) L.R. 8 C.P., 64.	Appl Geneva Finance Ltd, Re: Quigley v Cook (1992) 7 ACSR 415	Appl Geneva Finance Ltd, Re: Quigley v Cook (1992) 7 WAR 496
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[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN METROPOLITAN LIFE
ASSURANCE COMPANY LTD. } APPELLANT;
RESPONDENT,

AND

URE AND OTHERS } RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE SUPREME COURT OF
QUEENSLAND.

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BRISBANE,
June 12, 13.
SYDNEY,
Aug. 2.

Company—Shares—Transfer—Refusal to register transfer—Discretion of directors—
Articles of association—Companies Act 1863 (Q.) (27 Vict. No. 4), secs.
21, 34.

One of the articles of association of a company provided that the directors might refuse to register any transfer whatever of any shares without assigning any reason therefor. A member of the company purchased certain additional

Knox C.J.,
Isaacs and
Starke JJ.

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shares, and duly forwarded to the company transfers to her nominees of those shares with the request that the names of the transferees be entered in the register of members. Registration was refused by the directors, and no reason for the refusal was given. The members of the company were divided into two sections. One section was supported by all the directors except one. If the transfers had been registered the other section, which was supported by the purchaser, would have obtained a controlling voting power, and by the exercise of that power would probably have been able to secure the election as director of the purchaser's husband, who had once been a solicitor of the Supreme Court of Queensland but had been struck off the roll. After the refusal to register, the directors gave notice of a proposed resolution authorizing the issue of new shares of which a number were to be disposed of to such persons as the directors might decide. If that resolution were passed and shares issued to supporters of the first section, that section would probably have retained a majority of voting power notwithstanding that the transfers in question were subsequently registered.

Held, that the onus of proving that in exercising their power of refusal the directors had not acted honestly or bona fide in what they considered the interests of the company, was on the person challenging their decision, and that no inference of impropriety could be drawn from their refusal to give reasons for their decision.

Held, on the evidence, that the purchaser had not discharged that onus, and, therefore, that the Court had no jurisdiction to interfere.

The necessary allegations and admissible evidence where want of bona fides in exercising a power is relied on, discussed.

Decision of the Supreme Court of Queensland (*Lukin J.*): *In re Australian Metropolitan Life Assurance Co. Ltd.*, (1923) S.R. (Q.), 120, reversed.

APPEAL from the Supreme Court of Queensland.

The Australian Metropolitan Life Assurance Co. Ltd. was incorporated in 1895 in the State of Queensland under the Companies Acts with capital of £10,000 divided into 5,000 shares of £2 each. In 1897, by a special resolution of the Company duly confirmed, the capital of the Company was increased to £12,000, divided into 6,000 shares of £2 each by the creation of 1,000 new shares of £2 each. On 20th April 1905 a further increase of capital was authorized by the following resolution: That the capital of the Company be increased to £100,000 by the creation of 44,000 shares of £2 each, such shares not to be issued until the Company in general meeting shall hereafter by special resolution so authorize such issue, provided such shares shall be first offered pro rata to the members in proportion

to their existing holdings. Pursuant to this resolution the Company issued another 4,000 shares at £2 each. The articles of association, as amended in 1908, provided (*inter alia*):—7. No person shall exercise any rights or privileges of a member until his name shall have been registered in the register of members. 21. The directors may refuse to register any transfer whatever of any shares without assigning any reason therefor. 44. The Company may from time to time by ordinary resolution increase the capital by the creation of new shares. Such shares shall be of such amount and shall be issued on such terms and conditions as the Company in general meeting may direct, or in default of any such direction, on such terms and conditions as the directors may think expedient. 45. The Company in general meeting may before the issue of any new shares determine that the same or any of them shall be offered in the first instance to the members in proportion to the existing shares held by them, or make any other arrangement as to the issue and allotment of new shares. 46. All new shares shall be offered sold or otherwise disposed of at par or at a premium in such quantities and on such terms and conditions as the general meeting authorizing their issue may direct, or in default of any such direction on such terms and conditions as the directors may deem expedient.

John Francis Ure and his wife, Frances Stephanie Ure, were members of the Company. Ure was formerly a solicitor of the Supreme Court of Queensland, but had been struck off the roll. In February 1922 he gave notice of his candidature for membership of the Board of Directors of the Company. In 1922 the members of the Company were divided into two sections, one of which supported the directors and had control of 4,155 shares, and the other consisted of members and friends of the Ure family, who held 3,710 shares. In addition to these shares, 1,720 shares were held by the executors of Victor Ethelbert Ludlow and by Margaret Ludlow. In October 1922 Arthur Wigram Allen, who was a partner of A. M. Hemsley, one of the directors, transferred 510 shares to A. M. Hemsley, 1,000 shares to his son, A. D. W. Allen, and 400 shares to his brother, R. C. Allen, and on application these transfers were registered. In 1922 Frances Stephanie Ure purchased the said 1,720 shares, and she forwarded transfers of those shares to the Company

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for registration, first, in February to herself and two nominees, and again, in October to her three nominees. The directors on each occasion refused to register the transfers, and did not give any reason for their refusal. On 17th November 1922 the Board of Directors gave notice that an extraordinary general meeting of the Company would be held for the purpose of considering, and if thought fit, passing the following resolution :—That notwithstanding the provisions of the resolution of 20th April 1905 the directors be and they are hereby authorized to issue 10,000 shares of £2 each in the Company at a premium of 2s. 6d. per share in the manner following: 5000 of such shares are to be offered in the first instance to the members in proportion to the existing shares held by them, and such members shall when making application for the proportion to which they are entitled pay the sum of £1 2s. 6d. per share applied for; of the remaining shares authorized, 2,000 are to be reserved for issue to members of the staff of the Company at such time and on such terms as the directors may decide, and 3,000 shares are to be disposed of to such persons at such time and in such manner as the directors think most beneficial to the Company: the shares above mentioned are not to participate in any interest, bonus or dividend which may be paid or declared before 1st May, 1923.

On motion under sec. 34 of the *Companies Act of 1863* (Qd.), made on behalf of Frances Stephanie Ure and her three nominees, *Lukin J.* ordered that the Company register the transfers of the 1,720 shares, and that the register of the Company be rectified accordingly: *In re Australian Metropolitan Life Assurance Co. Ltd.* (1).

From that decision the Company now appealed to the High Court. Other material facts are stated in the judgments hereunder.

Feez K.C. (with him *Real*), for the appellant. The whole question is whether there was any evidence to support the conclusion of the learned Judge. He was wrong in inferring that the registration of Allen's transfers and the refusal to register the respondent's transfers was evidence of capricious or arbitrary action. There was no evidence that Allen's transfers were not genuine. By art. 21 the directors have a right to refuse registration of any transfer; and, in

the absence of affirmative evidence of dishonesty or impropriety, or of capricious or arbitrary conduct, that right is unchallengeable. (*In re Alfred Shaw & Co.* ; *Hughes's Case* (1) ; *Weinberger v. Inglis* (2)).

[ISAACS J. referred to *Re Bell Bros.* ; *Ex parte Hodgson* (3), and *In re Bede Steam Shipping Co.* (4).]

The refusal to give reasons must be entirely disregarded (*In re Gresham Life Assurance Society* ; *Ex parte Penney* (5)). The respondents must show that the attitude of the directors was inconsistent with any view except that they had acted mala fide ; and no inference may be drawn from the fact that the directors stated no reasons for their decision. The directors had a discretion to refuse a registration which was sought only for the purpose of increasing voting power (*Manning River Co-operative Dairy Co. v. Shoesmith* (6)). They would also be justified in exercising their discretionary power to prevent the election of a person whose reputation would, in their opinion, probably be detrimental to the interests of the Company. At the most, the evidence only suggests the possibility of illegal action on the part of the directors ; but the consideration of the directors' conduct as an ordinary business matter precludes, in the circumstances, any conclusion that their refusal to register the transfers was not quite consistent with a bona fide decision made in the interests of the Company. Having regard to the terms of art. 21 and to the fact that the respondents have failed to discharge the onus of proof that lies upon them of showing that the directors have so acted as to have deprived themselves of the power given them by that article, the Court has no jurisdiction to interfere. [Counsel also referred to *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society* (7).]

Macrossan (with him *McGill*), for the respondents. The refusal to register had the effect of retaining the greater voting power in the section of members supporting the directors, and would therefore secure the passing of the proposed resolution ; and such resolution,

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(1) (1895-96) 21 V.L.R., 599 ; 17 A.L.T., 228.
(2) (1919) A.C., 606.
(3) (1891) 65 L.T., 245.
(4) (1917) 1 Ch., 123.
(5) (1872) L.R. 8 Ch., 446, at p. 451.
(6) (1915) 19 C.L.R., 714.
(7) (1919) A.C., 548.

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when passed, would enable the directors, by the issue of shares, to keep the control of the affairs of the Company in their own hands, notwithstanding that the transfers might afterwards be registered; and the directors could thus prevent the election of John Francis Ure against the voting power of the majority of members which, but for the directors' action, would be exercisable. Directors have no power to refuse to register transfers in order to prevent the majority from carrying out their wishes. Their actions were capable of resulting and would probably result in the control of the Company by a minority. The respondents having presented to the Court a case of reasonable probability that the directors were acting improperly, the onus was thrown upon the appellants to justify their conduct, and, as they have attempted no explanation, an irresistible inference arises that their refusal was not bona fide in the interests of the Company. Although the respondents must show that there was no sufficient reason for the refusal to register, the Court has power to draw inferences of fact from the circumstances (*New Lambton Land and Coal Co. v. London Bank of Australia Ltd.* (1)); and upon the whole of the circumstances here the conclusion should be drawn that the directors were not acting honestly and bona fide in what they believed to be the interests of the Company (*In re Alfred Shaw & Co.; Hughes's Case* (2)). The power conferred by art. 21 to refuse to register transfers without giving reasons does not apply to a refusal for an improper reason, or for a collateral purpose, nor does it allow the right of transfer to be defeated altogether. That power, although discretionary, is of a fiduciary character, and must be exercised for the benefit of the Company and with due regard to the rights of transferors and transferees.

Cur. adv. vult.

Aug. 2.

The following written judgments were delivered:—

KNOX C.J. This is an appeal from an order of *Lukin J.* directing the appellant to register three transfers of shares from the executors of the will of Victor Ethelbert Ludlow and Mrs. Ludlow to Frank

(1) (1904) 1 C.L.R., 524.

(2) (1895-96) 21 V.L.R., 599; 17 A.L.T., 228.

Howard Russell, James Curwen Penny and Mary Bligh O'Connell, respectively. The total number of shares covered by these transfers is 1,720; and the transferees are nominees of the respondent Frances Stephanie Ure, who is the beneficial owner of the shares. The articles of association of the appellant provide (art. 21) that the directors may refuse to register any transfer whatsoever of any shares without assigning any reason therefor, and the directors of the appellant have abstained from assigning any reason for their refusal to register the transfers now in question. The law with regard to the right of a proposed transferee to challenge in a Court of law the action of directors, under an article such as this, in refusing consent to a transfer without assigning any reasons, has recently been discussed in two cases in the House of Lords. In *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society* (1) Lord *Atkinson* says:—"For all practical purposes this rule places the shareholder absolutely at the mercy of the committee, and at their option binds him to the society for life. Even if they were prima facie compellable to consent to a transfer, they are not compellable to do so if they bona fide refuse to consent to it in what they believe to be the interest of the society, and if they refuse to state their reasons it is to be assumed that they refused bona fide for reasons they deemed sufficient." And Lord *Shaw* said (2):—"His release is at the option of a committee for whose conduct no reason need be assigned, and against whose conduct no challenge can be made except that it was moved by bad faith. And the onus of establishing this grave charge would rest upon the appellant." In *Weinberger v. Inglis* (3) Lord *Atkinson*, speaking of the authorities on this question, said:—"What are the principles established by these last-mentioned authorities? They are, it appears to me, the following:—First, that directors refusing to consent to the transfer are not bound to state their reasons for so refusing. Second, that if they do not state their reasons it must, in the absence of all evidence to the contrary, be assumed that they have acted bona fide and honestly for the furtherance, in their belief, of the interests they were bound to protect; and, thirdly, that in order to vitiate

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(1) (1919) A.C., at p. 583.

(2) (1919) A.C., at pp. 588-589.

(3) (1919) A.C., at p. 626.

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the exercise of their powers it must be shown by evidence that their action was arbitrary and capricious." And Lord *Wrenbury* said (1):—"If they comply with these requirements they and they alone are the persons to determine whether the member shall be re-elected or not. They are not bound to give their reasons. The plaintiff's counsel did not dispute that. If they take the matter into their consideration and act honestly and bona fide, their decision cannot in my judgment be reviewed in any Court. The Court will draw no inference against them because they do not state their reasons. The very purpose of provisions such as these is that the body entrusted with the power shall, while acting honestly, enjoy for the benefit of the society which is their principal the unassailable right to give effect to their own considered judgment and opinion without disclosing their reasons. These principles were stated many years ago in *Ex parte Penney*, a decision with which I entirely agree." The reference to *Ex parte Penney* (2) shows that his Lordship was referring in this passage to the action of directors in refusing consent to a transfer of shares. As I understand these observations, the onus is on the applicant in a case like the present to establish that the directors have not acted honestly or bona fide in what they believe to be the interests of the Company in exercising their power of rejection, and no inference unfavourable to the directors is to be drawn from their refusal to give reasons for their decision. It is said that it is sufficient to vitiate the exercise of the power if the applicant shows by evidence that the action of the directors was arbitrary and capricious; but it seems to me that this means no more than that action by the directors which is "arbitrary and capricious" cannot be regarded as a bona fide exercise of the power which is entrusted to them for the benefit and protection of the Company and should only be exercised for those purposes.

The question for consideration in the present case, therefore, is whether the respondents have established by evidence that the directors, in refusing consent to these transfers, were not exercising their powers honestly or bona fide in what they believed to be the interests of the Company.

The facts proved are as follows:—Before 23rd February 1922

(1) (1919) A.C., at p. 641.

(2) (1872) L.R. 8 Ch., 446.

John Francis Ure, the husband of the respondent Frances Stephanie Ure, had given notice that he was a candidate for election as a director of the Company at the meeting to be held on 17th March 1922. John Francis Ure had formerly been a solicitor on the roll of the Supreme Court of Queensland, but his name had been removed from the roll. The cause of his removal is not explicitly stated in the evidence; but it was not denied by counsel for the respondents that he had been "struck off the roll." A retiring director, Dr. Alexander Murray-Will, was also a candidate for the vacant seat on the Board. On 27th February the solicitors for Mrs. Ure wrote to the appellant requesting registration of transfers enclosed, namely, 1,000 shares from Ludlow's executors to Mrs. Ure, 400 shares from Mrs. Ludlow to Mary Bligh O'Connell, and 320 shares from Ludlow's executors to John Congreve. Apparently the next meeting of directors was on 3rd March; and on that day the general manager of the appellant replied by letter that consideration of the transfers submitted had been deferred, the transfer books having been closed in accordance with the articles. On 25th March the solicitors inquired whether the transfers had been registered, and on 10th April the general manager informed them by letter that registration had been refused. The solicitors then inquired on what grounds registration had been refused, and were informed that the directors, having acted bona fide in the exercise of their powers, declined to discuss the matter. On 12th July the transfers were again submitted, and the Board again refused to register them. On 30th October fresh transfers of 1,320 of the same shares—1,000 to Frank Howard Russell and 320 to James Curwen Penny—and the original transfer of 400 to Mary Bligh O'Connell were submitted for registration; and on 10th November the solicitors were informed by letter that registration had been refused.

The case made in support of the application to the Supreme Court was that the power of rejection was not exercised bona fide but arbitrarily, capriciously and wantonly for the purpose of enabling the directors other than James Canning Ure to keep themselves on the directorate and in conjunction with their friends to exercise the powers of a majority though in fact a minority of the shareholders, and of enabling them to secure the passing of a proposed

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resolution for the issue of new shares of which notice was given on 17th November 1922, the suggestion being that by exercising their powers under that resolution they would secure control of the Company notwithstanding any transfers which might subsequently be registered. In order to understand this contention, it is necessary to refer to some events in the history of the Company.

The Company was originally incorporated in the year 1895 with a capital of £10,000 divided into 5,000 shares of £2 each. In 1897 the capital was increased by special resolution to £12,000 by the creation of 1,000 new shares of £2 each. On 20th April 1905 a special resolution authorizing a further increase of capital was duly passed and confirmed. The resolution is as follows:—"That the capital of the Company be increased to £100,000 by the creation of 44,000 shares of £2 each, such shares not to be issued until the Company in general meeting shall hereafter by special resolution so authorize such issue, provided such shares shall be first offered pro rata to the members in proportion to their existing holdings." Pursuant to this authority 4,000 new shares were issued, making the capital £20,000 divided into 10,000 of £2 each. By special resolution passed and confirmed in November 1908, the memorandum and articles of association were altered. In the amended memorandum the capital was stated to be £100,000 divided into 50,000 shares of £2 each. Clauses 44, 45 and 46 of the amended articles were in the following words:—"44. The Company may from time to time by ordinary resolution increase the capital by the creation of new shares. Such shares shall be of such amount and shall be issued on such terms and conditions as the Company in general meeting may direct or in default of any such direction on such terms and conditions as the directors may think expedient. 45. The Company in general meeting may before the issue of any new shares determine that the same or any of them shall be offered in the first instance to the members in proportion to the existing shares held by them or make any other arrangement as to the issue and allotment of the new shares. Such offer if made shall be by notice specifying the number of shares to which the member is entitled and limiting the time within which the offer if not accepted will be deemed to be declined and after the expiration of such time or on receipt of an intimation in writing from the member

to whom such notice is given that he declines to accept the shares offered the directors may dispose of the same in such manner as they think most beneficial to the Company. 46. All new shares shall be offered sold or otherwise disposed of at par or at a premium in such quantities and on such terms and conditions as the general meeting authorizing their issue may direct or in default of any such direction on such terms and conditions as the directors may deem expedient." In effect these alterations superseded the special resolution of August 1905 set out above, and placed the issue of new shares in control of the Company in general meeting, and in certain events in the control of the directors. On 27th October 1922 Arthur Wigram Allen transferred 1,000 shares to his son A. D. W. Allen, 510 shares to his partner A. M. Hemsley, and 400 shares to his brother R. C. Allen; and these transfers were registered. It does not appear from the evidence whether these transfers were voluntary or for value.

On 17th November 1922 notice was given by the Board of an extraordinary general meeting to be held on 27th November for the purpose of considering, and if thought fit of passing, the following resolution:—"That notwithstanding the provisions of the resolution of 20th April 1905 the directors be and they are hereby authorized to issue 10,000 shares of £2 each in the Company at a premium of 2s. 6d. per share in the manner following: 5,000 of such shares are to be offered in the first instance to the members in proportion to the existing shares held by them, and such members shall when making application for the proportion to which they are entitled pay the sum of £1 2s. 6d. per share applied for; of the remaining shares authorized, 2,000 are to be reserved for issue to members of the staff of the Company at such time and on such terms as the directors may decide, and 3,000 are to be disposed of to such persons at such time and in such manner as the directors think most beneficial to the Company: the shares above mentioned are not to participate in any interest, bonus or dividend which may be paid or declared before 1st May 1923." The respondents suggested that this resolution was intended to secure to the majority of the Board and their friends the control of the affairs of the Company; and they alleged that the reason for rejecting the transfers now in question was to ensure the passing of the resolution. This suggestion was apparently

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H. C. OF A. based on a statement in the affidavit of John Francis Ure that if the
 1923. proposed resolution for the issue of further shares were validly
 AUSTRALIAN passed, then the directors of the Company would be put in such a
 METRO- position that, by the issue at their discretion of 3,000 of such new
 POLITAN capital to themselves or their nominees, they would have or control
 LIFE an absolute majority of the total votes of the Company.
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Proceedings have been instituted in the Supreme Court of Queensland in which John Francis Ure, James Canning Ure, Paul Jenner Ure, and the respondents Frances Stephanie Ure, James Curwen Penny and Mary Bligh O'Connell are plaintiffs, and the appellant and its directors other than James Canning Ure are defendants, to restrain the holding of the proposed meeting and the issue of any shares without the leave of the Court.

On the hearing of the motion *Lukin J.* accepted the suggestion of the respondents that the directors refused to register the transfers for the purpose of keeping their section of members in a majority and advancing their interests to the prejudice of other shareholders. It appears, from his reasons for judgment, that in arriving at this conclusion he drew an inference unfavourable to the directors from their omission to meet the suggestion made by John Francis Ure in his affidavit referred to above. In drawing this inference I think he failed to observe the rule, as stated by Lord *Wrenbury* (1), that the Court will draw no inference against directors because they do not state their reasons for refusing registration of a transfer. In this case the respondents have, in my opinion, failed to show affirmatively any want of bona fides or anything capricious or wanton in the refusal of the directors to register these transfers. The whole case for the respondents is built up on the proposed resolution for the issue of new shares. It is true that this resolution will, if passed, give the directors power to allot 3,000 shares in their discretion; but this does not warrant the conclusion that the object of the proposal is to enable the directors to acquire an unfair advantage over other shareholders. I may add that, having regard to the fact that under the resolution of April 1905 the issue of new shares requires the authority of a special resolution, I do not agree that the form of the proposed resolution of November 1922 affords any substantial

(1) (1919) A.C., at p. 641.

reason for thinking that the object of its proposers was to obtain control of the new shares ; nor do I agree that no sufficient reason is disclosed for superseding the earlier resolution.

The learned Judge appears to have attached some importance in this connection to the registration of the transfers of Arthur Wigram Allen's shares mentioned above, and to have inferred that these transfers were not genuine but were made merely for the purpose of increasing the voting power of the transferor. In my opinion the evidence does not support this conclusion. It may be that the transferees are merely nominees of the transferor ; but, on the other hand, it is consistent with the evidence that they gave full value for the shares and hold them for their own benefit.

It is not necessary to decide in this case that, where no reasons are given by directors for a refusal to register transfers and no facts are disclosed which they might reasonably have regarded as justifying that refusal, the Court will not interfere ; for, on the facts proved in this case, the directors may well have taken the view that it was detrimental to the interests of the Company that John Francis Ure should be a director, and that, having regard to the date at which registration of these transfers was first sought and to the fact that the real purchaser of the shares was the wife of John Francis Ure, the object of obtaining registration of the transfers was to ensure his election. It is obvious that the character of the individual directors of a Company—especially of a Company with inadequate capital doing an extensive business in life insurance—is a matter of vital importance to the Company and to the policy holders. The paid up capital of the appellant is £11,843 15s., and there is uncalled on the shares at present issued £8,157 5s. The evidence does not show the extent of the liability of the Company on policies in force, but it must be considerable, for the report of the Company's operations for the year 1922 shows that in the year 1921 proposals were accepted to the amount of £692,383. In these circumstances it is clear that it is desirable, if not absolutely necessary, that further capital should be raised with as little delay as may be by the issue of new shares in accordance with the articles of association, and there is therefore the less reason for imputing sinister motives to those supporting the proposed resolution. It is noticeable that

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James Canning Ure, who is himself a director of the Company but is said to be hostile to the other directors, and who is one of the plaintiffs in the action to restrain the passing of the proposed resolution, although he makes an affidavit for the respondents, states no facts which tend to support the suggestions made as to the objects or motives of the directors either in proposing the resolution or in rejecting the transfers. This is the more remarkable as the evidence shows that James Canning Ure was present at the meeting of directors when it was decided to hold the extraordinary general meeting on 27th November 1922 at which the proposed resolution was to be submitted. At that time the registration of these transfers had apparently been finally refused, and it is difficult to believe that he was not cognizant of the reasons which actuated his co-directors in refusing to register their transfers, or of the fact, if it were a fact, that they acted without any reasons, and therefore arbitrarily or capriciously. And even if he did not acquire information on these points from the proceedings at the Board meetings, one would naturally expect that he would ask some questions of his co-directors or of the general manager. His silence now that he is supporting the respondents and acting in opposition to his co-directors in my opinion tends to show that in refusing registration of the transfers the directors were acting in what they believed to be the interests of the Company, and not arbitrarily or capriciously.

On a consideration of the whole of the evidence I think the appeal should be allowed.

ISAACS J. This is an appeal from the decision of *Lukin J.* upon an application, under sec. 34 of the Queensland Companies Acts 1863 to 1913, by which it was ordered that the appellant Company should register certain transfers of shares.

There are four respondents, who were all moving parties on the application to *Lukin J.* Three of them, Penny, Russell and O'Connell, are the respective transferees; the leading respondent, Mrs. Ure, is not a transferee, but it was at her instance (whether she herself acted independently or at the behest of her husband) that the transferors, who are executors, executed the transfers to the other three respondents. The fact is not only evident, but is common

ground, that Penny, Russell and O'Connell have no real interest whatever in the matter, they having accepted the position of transferees merely to accommodate Mrs. Ure, and to facilitate securing the registration of the transfers ; so that, in effect, we may treat them as her agents. The only advantage she can possibly claim from their position as transferees is that they are respectively perfectly solvent, responsible persons ; and no objection to registration could be or is rested on their inability to meet any liability in respect of the shares or on any other ground affecting them personally. This appeal depends on other considerations ; and so I treat the matter as if Mrs. Ure were the transferee, but admittedly unobjectionable from a pecuniary standpoint, or from any other standpoint other than the probability of her husband thereby being placed on the directorate. The directors have steadily refused to register the transfers she has tendered, and have refused to assign any reason for their refusal.

The learned primary Judge considered the facts with great care and minuteness, and gave an opportunity to the appellant Company to have a trial of issues in accordance with sec. 34—an opportunity which was declined. The case must therefore be determined on the facts as they appeared before his Honor.

The learned Judge, upon an analysis of the facts so appearing, came to the conclusion that the refusal was not in good faith, but for the collateral purpose of unfairly keeping the directors' section of members in a majority and advancing their interests to the prejudice of the other shareholders, and not in the interests of the Company or with due regard to the shareholders' right to transfer or to the rights of the transferee. His Honor was led to that conclusion from a consideration of the way in which the shares in the Company are held, the way in which Mrs. Ure purchased the shares transferred, the circumstances of the application to transfer and the proposed resolution to issue and distribute new shares, the explanation in par. 4 of the affidavit of Judge Hamilton (a director) as to the object of the directors in proposing the resolution, and the unexceptionable pecuniary position of the transferees. Finally, and accepting the guidance of two cases in this Court (*New Lambton Land and Coal*

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Co. v. London Bank of Australia (1) and *Manning River Co-operative Dairy Co. v. Shoesmith* (2)), the learned Judge said : “ It is of course possible that some sound reason may exist for the action of the Board in refusing these transfers in every case, but in the absence of any refutation of what appears to me to be the real cause for their attitude I feel compelled to accept the argument and contention of the applicants.” And so the conclusion referred to is reached.

With the learned Judge’s statement of the law, so far as he has stated it, I am in complete accord. With his legal implications which are involved in his affirmative conclusions I am also in accord ; because, if those conclusions are properly reached, the decision must stand.

But there are some inferences of fact and some legal considerations, which I think have arisen and require statement. Treating Mrs. Ure as the real moving party—relatively to Penny, Russell and O’Connell, the question is whether in the proved circumstances she can demand of the *Company* (see *In re Keith Prowse & Co.* (3)) registration of the transfers notwithstanding art. 21 of the Company’s regulations. Mrs. Ure is the wife of John Francis Ure. Her own account of her purchase shows that it was a dealing conducted through her husband ; that she did not see the transferors ; that she borrowed the money to pay for the shares from a Mr. Congreve on the security of the shares and some promissory notes—the borrowing I take to have been negotiated by her husband ; that at present she has not the means of payment, but is entitled on the death of her mother, now eighty, to a half share in an estate worth over £12,000 ; and she says she made the purchase to make provision for her children and herself. She stated also that her communications with the Company with reference to the transfers were made on the advice of her husband, who was seeking election to the directorate. No doubt is left in my mind—and nothing contrary thereto is stated by the learned primary Judge, at all events nothing in the nature of the case or the evidence prevents me from forming my own independent opinion, which I am therefore bound to do—that Mrs. Ure is obediently following and would obediently follow the

(1) (1904) 1 C.L.R., 524.

(2) (1915) 19 C.L.R., 714.

(1) (1918) 1 Ch., 487.

course desired by her husband ; and that this course is directed to the object of his wielding a commanding interest in the Company and controlling sufficient votes to place him on the directorate of the Company. It is also necessary to remember, and it is in my view one of the governing facts in this case, that Mr. Ure was once a solicitor of the Supreme Court of Queensland and has been struck off the rolls, for some reason not disclosed, and has no intention of ever seeking reinstatement as a solicitor. That circumstance is left without further explanation. At this point I would express regret at the very indirect way the Court has been left to gather the true position of Mr. Ure in relation to the unfortunate circumstance alluded to. As it is, the broad facts stated have to be taken just as they are for both sides. Now, there is nothing, in my opinion, to show affirmatively that the directors acted from any sinister or improper motive, or from any motive other than the circumstance that Mrs. Ure was in all probability endeavouring to procure registration of the transfers for the purpose (it may even have been for that purpose among others) of enabling her husband by force of numbers to become a director, and the further probability, in their opinion, that if he did become a director a very difficult position with respect to the administration of the Company might present itself. A Judge who is a director might well feel embarrassed to sit upon the same directorate ; other directors might well have similar personal disinclination ; all the directors might well believe, rightly or wrongly but certainly not unreasonably, that on the whole Mr. Ure's presence as a director would prejudicially affect the Company's in the mind of the public. It is, to say the least of it, very possible from a business standpoint that, having in view the interests of the Company and of the shareholders as a whole, their refusal was based on these considerations.

Then the question of law arises, what conclusion should the Court draw and what course should the Court adopt in such a possible state of affairs ? The appellant contended that the refusal was *prima facie* covered by the words of art. 21, which says "the directors may refuse to register any transfer whatsoever of any shares without assigning any reason therefor" ; and that there was no evidence upon which the Court could properly conclude the directors had not

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acted bona fide. The validity of that contention depends partly on the facts and partly on the proper rule of law to ascertain the ultimate fact. The respondents contended that the refusal could not be supported because it was plain that the directors had determined not to transfer to Mrs. Ure or any representative of hers, and that the object of the directors was to prevent the proposed resolution, of which notice was given on 17th November 1922, from being defeated. They also contended that, a share being property and transferable and the proposed transferees being solvent, responsible persons, and in themselves unobjectionable, there could be no legitimate reason for declining to register. As to the proposed resolution I should like to say that I go a great way with *Lukin J.* in not accepting the suggested explanation of it in the chairman's affidavit as a complete or adequate explanation. The date of the notice, just a week after the letter notifying refusal to register, the terms of the notice itself and the general bearing of all the relevant circumstances would lead me to reject the explanation of its "sole object," and to think, not that the refusal to register was for the purpose of defeating the resolution, but that the resolution was at all events very largely for the purpose of defeating the ultimate object of the transfers, namely, the election of Mr. Ure as director should it be found they were compulsorily registrable. If the determination of this appeal hinged on the acceptance of the suggested explanation as entirely satisfactory, I should feel very great difficulty in coming to a decision in favour of the appellant. But the case does not turn on that, because I regard the refusal to transfer as primary, and the proposed resolution as secondary and merely as assistant to and not the impelling motive of the refusal.

The right to challenge the decision of directors in such cases as this is a very important matter. A share in a limited company is personal property, and the right to deal with it, to sell and to buy it is absolute, except so far as that right is lawfully restricted by the regulations of the Company. Sec. 21 of the Queensland Act is typical of the statutory enactments as to this. Judicial authority is clear—as *Poole v. Middleton* (1); *In re Liverpool Marine Assurance Co.*; *Greenshield's Case* (2), and *In re Copal Varnish Co* (3).

(1) (1861) 29 Beav., 646.

(2) (1852) 5 De G. & Sm., 599.

(3) (1917) 2 Ch., 349, at p. 353.

A regulation such as art. 21 entrusts to the directors a corporate power, which is exercisable by them as agents of the Company. But, although it is a power which necessarily involves some discretion, it must be exercised, as all such powers must be, bona fide—that is, *for the purpose for which it was conferred*, not arbitrarily or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole. It is sufficient to mention some of the more important cases supporting this, namely, *In re Gresham Life Assurance Society*; *Ex parte Penney* (1); *Automatic Self-cleansing Filter Syndicate Co. v. Cuninghame* (2); *Re Bell Bros.*; *Ex parte Hodgson* (3); *Salmon v. Quin & Axtens Ltd.* (4); *Gramophone and Typewriter Ltd. v. Stanley* (5); *Bennett's Case* (6); *Allen v. Gold Reefs of West Africa Ltd.* (7); *Free Church of Scotland v. Overtoun* (8); *British Equitable Co. v. Baily* (9); *Weinberger v. Inglis* (10). The general character of such a regulation is clear, but the ambit of the purpose of the power of course varies with the circumstances of each particular case. The nature of the company, its constitution and the scheme of its regulations as a whole must all be taken into account in determining whether a given factor comes within its range. Solvency of a transferee is, of course, important; for otherwise the mutual undertaking to contribute would be ineffectual, and creditors would be unjustly dealt with. But his solvency is not necessarily the only consideration. The reputation of the company may be an essential element of success, and where, as in the present case, the corporation is one appealing to the public for its confidence and transfers are presented which are of such magnitude as to control the whole administration of the company, the maintenance of a board of directors against whom not even a suggestion of reproach can be made is manifestly a high business consideration, which no person charged with the beneficial administration of the corporate affairs would be likely to overlook, in the interests of the shareholders as a whole. It is necessary to notice here an argument very strenuously pressed by Mr.

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(1) (1872) L.R., 8 Ch., at pp. 449, 451.
(2) (1906) 2 Ch., 34, at p. 45.
(3) (1891) 65 L.T., at p. 246.
(4) (1909) 1 Ch., 311, at p. 319.
(5) (1908) 2 K.B., 89, at p. 106.

(6) (1854) 5 DeG. M. & G., 284, at p. 295.
(7) (1900) 1 Ch., 656, at p. 671.
(8) (1904) A.C., 515, at p. 695.
(9) (1906) A.C., 35, at p. 42.
(10) (1919) A.C., 606.

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Macrossan. He urged that directors had no right to refuse a transfer to prevent a majority from carrying its way. That is true, but not completely true. The accuracy of the statement has its limits. A majority has not the right to destroy or injure the common property or otherwise deprive the minority of their rights (see *Dominion Cotton Mills Co. v. Amyot* (1)). If directors, possessing by the regulations the power of protecting and guiding the company's affairs that the regulations of this Company provide, honestly come to the conclusion that general destruction or injury will ensue by reason of a proposed transfer of shares, it cannot be said that, because the transfer if effected by registration would enable a majority to effect its will, they are bound to register. Directors may be regularly displaced, or the articles may be regularly altered. But until that is done, the position is not doubtful. Directors obtain their powers from the consensus of *all* the shareholders as expressed in the articles because the primary maxim of corporate action is *ubi major pars ibi totum*, that is, the whole corporation (*Grant on Corporations*, p. 68). The duty of directors is consequently primarily to the company itself (*Allen v. Hyatt* (2), per Viscount *Haldane* L.C. for the Privy Council). The consensus of the shareholders is therefore not as individuals, and even if the whole of them were unanimously to attempt to withdraw the powers of the directors, it would be ineffectual unless done in the way prescribed by law. So long as the articles stand (and see particularly art. 109) the directors, and not the Company by its general body of shareholders, have the power to manage the corporate affairs unless some provision to the contrary is found (*Automatic &c. Co. v. Cuninghame* (3); *Gramophone &c. Ltd. v. Stanley* (4); *Salmon v. Quin & Ardens Ltd.* (5)). It follows that if the directors honestly acted upon the business consideration mentioned, it was within their power, even though a transient majority thought differently or desired differently. It is *possible*, of course, that the directors were not really moved by that legitimate consideration, but acted upon some extraneous reason, perhaps some unworthy reason. If they did, then their power is gone, and

(1) (1912) A.C., 546.

(2) (1914) 30 T.L.R., 444.

(3) (1906) 2 Ch., at p. 43.

(4) (1908) 2 K.B., at p. 105.

(5) (1909) 1 Ch., at p. 319; (1909) A.C., 442, at p. 443.

the Court would, as in *Bell Bros.' Case* (1), hold that the right had become absolute and would direct registration. That depends on the facts, and the first thing to ascertain is the proper approach to them.

It is well established that the onus of showing that a power has not been properly exercised is on the party complaining (see *In re Hannan's King (Browning) Gold Mining Co.* (2); *Gresham Society's Case* (3); *Cassel v. Inglis* (4); *Weinberger v. Inglis* (5)). The point came up directly for decision recently. In *Hindle v. John Cotton Ltd.* (6) an action was brought to obtain, in effect, a declaration that a resolution of the board of directors resolving that the plaintiff who was its manager, should cease to be a member of the company, and a consequent appropriation of his shares, was void. Art. 36 of the company's regulations gave literal power to do what had been done and was complained of. On what is equivalent to a demurrer the case came before the Scottish Courts, and the First Division held that the action must fail, on the ground that there were not sufficient allegations of want of good faith on the part of the directors. On appeal the case came before the House of Lords (Viscount *Finlay*, Viscount *Cave*, and Lords *Dunedin*, *Shaw* and *Wrenbury*), when the decision was reversed on the ground that the allegations were sufficient. Viscount *Finlay* said on this point (7):—"I quite agree that a mere bald allegation of fraud, introducing the adjective 'fraudulent' or the adverb 'fraudulently,' will not make a case which should go to proof; there must be an averment of the circumstances with reasonable particularity which it is said constitute fraud. . . . There is an allegation not only in general terms but supported by specific details that the directors did not act in the matter in good faith." Viscount *Cave* and Lord *Dunedin* concurred. Lord *Shaw* said (*inter alia*):—"The substantial averment of the pursuer in this case is this, that the *moving cause* of the resolution to dismiss the pursuer was not *the interests of the company*, but was the aggrandisement of the directors themselves. Directors in view of the opportunity of such personal gain must of

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(1) (1891) 65 L.T., 245.

(2) (1898) 14 T.L.R., 314.

(3) (1872) L.R., 8 Ch., at p. 450.

(4) (1916) 2 Ch., 211, at p. 229.

(5) (1919) A.C., 606.

(6) (1919) 56 Sc.L.R., 625.

(7) (1919) 56 Sc.L.R., at p. 630.

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itself.” Lord *Wrenbury* agreed.

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It is provided by art. 21 that the directors need not assign any reason for their refusal to register. They have preserved silence in this case. The authorities just cited establish that their silence is not a sufficient circumstance in itself on which to base an inference of impropriety. Indeed, it is part of the basic contract that no reason need be assigned. (See per Lord *Wrenbury* in *Weinberger v. Inglis* (1).) But an applicant is not helpless ; nor is the Court deprived of its power to do justice in a proper case. The Court will judge of circumstances, and form its conclusions on reasonable probabilities. It is for the applicant to place, if he can, such circumstances before the Court as will reasonably lead to the conclusion that in some way an improper use has been made of the power, so that the discretion committed to the directors has not been exercised. The case of *Weinberger v. Inglis* is decisive on this point, once the ambit of the power is ascertained (see the observations of Lord *Birkenhead* L.C. (2), of Lord *Buckmaster* (3), of Lord *Atkinson* (4), of Lord *Wrenbury* (5)). In the House of Lords case, *Hindle v. John Cotton Ltd.* (6), Viscount *Finlay* said :—“ Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason. That is a subject which must be inquired into, and unless all the authorities which lay down that directors must exercise their powers honestly and for the purposes for which those powers were given are wrong, an inquiry where relevant circumstances are alleged must take place.” It is not out of place to add some further observations

(1) (1919) A.C., at p. 641.

(2) (1919) A.C., at p. 617.

(3) (1919) A.C., at p. 621.

(4) (1919) A.C., at pp. 625-626.

(5) (1919) A.C., at p. 643.

(6) (1919) 56 Sc.L.R., at pp. 630-631.

of Lord *Finlay* as an illustration of the scope permissible when the interests of the company are legitimately considered. His Lordship said:—"Now the Lord Advocate has referred us at some length to condescendence 10, and has argued that the allegations there are not sufficient. I am not prepared to deal with the case upon the footing on which the Lord Advocate attempted to put it. With regard to that condescendence, it appears to me that if this matter goes to proof it will be for the tribunal to inquire into the question whether, whatever it was the directors alleged as the reason for the dismissal—whether it was conduct in 1914, or, as the Lord Advocate says, later relations with the girl which resulted in the birth of a child in March 1916—it will be for the tribunal to consider whether the directors honestly acted with reference to these matters in the interests of the company, considering that it was misconduct which would prejudicially affect the interests of the company."

While silence *per se* is no starting-point from which to infer impropriety, silence preserved when once a *prima facie* case of impropriety is presented may be entirely different. There is no initial duty to speak created by the mere refusal to register, but such a duty may arise from proof of circumstances pointing in themselves, if unexplained, either affirmatively to the existence of an unjustifiable reason or negatively to the absence of any legitimate reason. Applying those rules of guidance to the circumstances of this case, I am clear that the applicant has not discharged the required onus. On the contrary, I am morally clear, notwithstanding the official silence of the directorate as to their reasons, that the basic ground of objection was the genuine apprehension of, humanly speaking, the certain results that would follow upon registration, namely, first the election of Mrs. Ure's husband to the directorate through the commanding voting power that she, moved by her husband, would exert through her agents, and then the disruption of the directorate, a want of harmonious co-operation, and possibly a general prejudicial effect on the Company as a whole. That being so, the matter was one which by the terms of the social compact rested within the uncontrolled discretion of the directors. Acting entirely within the scope of their power, honestly basing their action on their own business opinion, they were exercising a function with

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which no Court can interfere, and over which no Court has any jurisdiction of review or appeal.

The applicants failed to sustain the onus resting upon them, and this appeal should be allowed.

I would add a word. Discussion took place during the argument of this appeal as to proxy voting, independently of registration of the transfers. My judgment is entirely free from all consideration of that matter; and I neither express, nor must be taken as holding, any formed opinion on the subject.

STARKE J. The appellant is a company limited by shares, and incorporated pursuant to the *Companies Act* 1863-1896 of Queensland. One of its objects is to issue policies for life assurance or endowments or annuities, or for assurance against death or injury by accident or against bodily or mental incapacity arising from accident or disease, or against the liability of an employer for an accident to an employee whether at common law or under any statute. The capital of this Company is £100,000, divided into 50,000 shares of £2 each. But the subscribed capital is only £20,000, of which £8,402 10s. has been paid up, and £3,441 5s. has been paid in advance of calls. Art. 21 of the articles of association of the Company provides: "The directors may refuse to register any transfer whatsoever of shares without assigning any reason therefor."

As was said in the Court below, "the members of the Company seem to be divided into two opposing sections." One section, which may be called the "directors' section," had control of 4,155 shares; the other, which may be designated the "Ure section," had control of 3,710 shares. But there were, in addition, 1,720 shares registered in the name of Victor Ethelbert Ludlow and Margaret Mary Ludlow. About February 1922 the respondent Mrs. Frances Stephanie Ure purchased these shares, and, pursuant to the *Companies Acts* and the articles of association of the Company, presented transfers of the same for registration, first, on 22nd February 1922, to herself and her nominees, and again, on 30th October 1922, to her nominees. The directors of the Company refused, on each occasion, to register the transfers, and a motion was then made to the Supreme Court to compel the registration by the Company of the transfers presented

on 30th October 1922. *Lukin J.*, who heard the motion, ordered the Company to register the transfers, and based his order on the conclusion that the directors had not exercised their powers under the articles of association in good faith, but for the collateral purpose of unfairly keeping their section in a majority and advancing their interests to the prejudice of the other shareholders. Against this order the Company has appealed to this Court. And it relies upon art. 21 of its articles of association, already set out.

The authority given to the directors by art. 21 is a fiduciary power, to be exercised for the benefit of the Company and with due regard to the rights of the transferor and transferee. "The discretionary power of refusal can only be exercised upon grounds relevant to some matter which the directors are authorized to take into consideration. If it is exercised on grounds not relevant to such a matter the exercise is not within the power, and the Court will enforce" the registration of the transfer. "But unless it so appears the Court will not interfere with the exercise of their discretion" (*Manning River &c. Co. v. Shoesmith* (1), per *Griffith C.J.*; *New Lambton &c. Co. v. London Bank of Australia* (2); *McEllistram v. Ballymacelligott &c. Society* (3); *Weinberger v. Inglis* (4)). As was said by Lord *Wrenbury* in *Weinberger's Case* (5), "the very purpose of provisions such as these is that the body entrusted with the power shall, while acting honestly, enjoy for the benefit of the society . . . the unassailable right to give effect to their own considered judgment and opinion without disclosing their reasons." In the present case the directors gave no reasons for their refusal to register the transfers. So the respondents must show by evidence that the action of the directors was arbitrary or capricious, or due to some irrelevant consideration. Much weight must be given to the finding of the learned Judge who heard the motion. But, as the evidence is mainly upon affidavit, and little depends upon the credibility of Mrs. *Ure*, who was cross-examined upon her affidavit and was the only deponent who gave evidence *viva voce*, this Court is, I apprehend, bound to reconsider the evidence and give judgment according to its own opinion (*Dearman v. Dearman* (6); *London Bank v. Kendall* (7)).

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(1) (1915) 19 C.L.R., at p. 718.

(2) (1904) 1 C.L.R., 524.

(3) (1919) A.C., at p. 583.

(4) (1919) A.C., at pp. 625-626, 637, 641.

(5) (1919) A.C., at p. 641.

(6) (1908) 7 C.L.R., 549.

(7) (1920) 28 C.L.R., 401.

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Now, I agree with the learned Judge that the persons nominated by Mrs. Ure as transferees were respectable, responsible and solvent persons. And I also agree with his conclusion that the directors desired to keep the control and management of the Company out of the hands of the Ure section. On probing the facts, however, we find that Mr. John Francis Ure, who was the husband of the respondent Mrs. Frances Stephanie Ure, had, about February 1922, given notice of his candidature for membership of the Board of Directors of the Company. Now Mr. John Francis Ure had been on the roll of solicitors in Queensland, and had apparently been removed from that roll for misconduct. The evidence on the point is contained in the affidavit of Hugh Montgomery Hamilton, who deposed to a conversation with Mr. Ure in March 1922, in the following terms:—"I asked the said John Francis Ure what price he was to get from the Melbourne Company, and he informed me that it was £25,000 for the shares other than those which had belonged to Dr. and Mrs. Ludlow, and £5,000 for the latter. I said I supposed he wanted his share of the money in order to meet his liabilities *with a view* to an application to be restored to the roll of solicitors. In reply he said he had already paid all his debts, but had no intention of ever seeking reinstatement as a solicitor." The respondent Mrs. Ure purchased the Ludlow shares in February 1922, and forwarded transfers for registration on 27th February 1922. As a matter of fact the husband negotiated the purchase of the shares, and apparently also an advance at the bank to pay for them, as Mrs. Ure had no funds available for payment of the purchase-money. The directors rejected the transfers. At this point it would be difficult to say that honest and reasonable men might not consider the registration of the transfers presented in February 1922 to be detrimental to the interests of the Company. Registration would have given to the Ure section control of 5,430 shares, and might well lead the directors to fear the election of Mr. John Francis Ure as a director. It is not for the Court to say that such an election would have affected the credit and reputation of the Company; but that it was a consideration relevant to the exercise by the directors of their discretion under the articles cannot be denied. Further, the chairman of the Board of Directors was Mr. Hugh Montgomery

Hamilton, one of the District Court Judges of New South Wales, and another director was Mr. A. M. Hemsley, a solicitor of that State. Again, it is not for the Court to say that it would have been impossible for these gentlemen to sit with Mr. John Francis Ure, or that his inclusion in the Board would have created unharmonious relations. It was a situation, however, calling for the judgment and opinion of the directors. And shareholders who have agreed to abide by the decision of the directors cannot challenge that decision unless they prove some dishonest, arbitrary or capricious action. So far, in my opinion, there is no such evidence.

But the respondents rely upon further facts. About August 1922 the respondent Mrs. Ure inquired whether the Board would be prepared to accept certain named persons as the transferees of the shares purchased by her from the Ludlows. The secretary replied that if transfers were sent they would be submitted to the Board. The transfers, which are the subject of the present motion, were presented on 30th October 1922, and registration was refused on 10th November 1922. On 27th October 1922 Mr. Arthur Wigram Allen, with the consent of the Board of Directors, transferred to his partners Hemsley and R. C. Allen and his son A. D. W. Allen 1,910 out of 2,910 shares held by him. And on 17th November 1922 the Board gave notice of the holding of an extraordinary general meeting for 27th November 1922 for the purpose of considering, and if thought fit, passing, the following resolution:—"That notwithstanding the provisions of the resolution of 20th April 1905 the directors be and they are hereby authorized to issue 10,000 shares of £2 each in the Company at a premium of 2s. 6d. per share in the manner following: 5,000 of such shares are to be offered in the first instance to the members in proportion to the existing shares held by them, and such members shall when making application for the proportion to which they are entitled pay the sum of £1 2s. 6d. per share applied for; of the remaining shares authorized, 2,000 are to be reserved for issue to members of the staff of the Company at such time and on such terms as the directors may decide, and 3,000 shares are to be disposed of to such persons at such time and in such manner as the directors think most beneficial to the Company: the shares above mentioned are not to participate in

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any interest, bonus or dividend, which may be paid or declared before 1st May 1923." The learned Judge in the Court below found that Mrs. Ure's nominees were personally unobjectionable, that Allen's shares were split in order to give the directors' section greater voting power by some 191 votes, and that if the resolution, of which notice was given on 17th November 1922, were passed, the directors could secure for themselves and their friends an absolute majority, even if the transfers now in question were registered. And he pointed out that if the "sole object" of the resolution had been to strengthen the financial position of the Company, then the Board could have called the unpaid capital on shares already issued, or proceeded to call up further capital on a resolution passed on 20th April 1905, in the following terms: "That the capital of the Company be increased to £100,000 by the creation of 44,000 shares of £2 each, such shares not to be issued until the Company in general meeting shall hereafter by special resolution so authorize such issue, provided such shares shall be first offered pro rata to the members in proportion to their existing holdings." Therefore, he finally concluded, the directors had refused the registration of the transfers presented by Mrs. Ure for the purpose of advancing their interests to the prejudice of the other shareholders.

I agree that Mrs. Ure's nominees were, in themselves, unobjectionable. But the learned Judge omits, I think, to consider whether the circumstances under which the shares mentioned in the transfers were originally acquired, and the position of Mr. John Francis Ure in relation to those shares, were not relevant facts for honest and reasonable directors to take into consideration in the exercise of the discretion vested in them under art. 21. Might not the same consideration apply to these transfers as to the transfers of February 1922? Clearly, in my opinion, that consideration was relevant, and unless the respondent Mrs. Ure can establish a dishonest, arbitrary or capricious action on the part of the directors, she must fail. Such a conclusion cannot be reached if a state of facts exists, as in this case, which is consistent with an honest and proper exercise of the discretion vested in the directors. As to the transfers of Allen's shares, the only evidence is that they were transferred to his partners and his son. But consideration of the circumstances under which, the

time when, and the persons to whom, the same were transferred, justifies the finding that the shares were transferred for the purpose of obtaining greater voting power. The learned Judge added that the Board could hardly, in fairness, disapprove of Mrs. Ure's obtaining, for a similar purpose, transfers of shares purchased by her, into the names of her nominees. The fact, however, that one set of transfers was allowed is not, *per se*, ground for concluding that the other set was capriciously or arbitrarily disallowed. And, as I have endeavoured to show, the other evidence in the case established facts which the directors might reasonably take into consideration for the purpose of exercising their discretionary power in relation to the transfers presented by Mrs. Ure. Under these circumstances, the Court cannot assume a dishonest or an arbitrary, capricious or unlawful exercise of power, and the respondent fails to show by evidence that the action of the directors was unlawful.

Again, the finding of the learned Judge, in so far as it is based upon the resolution of April 1905 and the proposed resolution of March 1922, does not appear to me to give sufficient weight to some very important considerations. Some time after the resolution of April 1905, namely, about November 1908, the Company altered its memorandum of association, and adopted a new set of articles of association. The memorandum now provided that the capital of the Company be £100,000, divided into 50,000 shares of £2 each. And by art. 44 it was provided that the Company might from time to time by ordinary resolution increase the capital by the creation of new shares, and that such shares might be of such amount and issued on such terms and conditions as the directors might think expedient. Clearly, this memorandum and the articles departed from the resolution of April 1905: they are inconsistent with its terms and appear to supersede it. The learned Judge thought the directors might have proceeded to raise new capital under the resolution of April 1905, but the circumstances are such that no sinister intention can be attributed to the directors from the fact that they did not act upon it, and proceeded under the existing articles of association "notwithstanding the provisions of the resolution of 20th April 1905." It was a prudent and business-like course of action. Further, the learned Judge

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thought that the proposed resolution of November 1922 bore a sinister aspect; and here I venture to disagree. The subscribed capital of the Company was, as has been seen, £20,000, of which only £11,843 was paid up in calls or in advance of calls. Yet its assurance funds were, on 31st December 1921, £310,269, and it wrote new business for the year ending on that date amounting to £600,000. Calling up the subscribed capital would strengthen the cash position of the Company, but it could hardly strengthen its financial position. It is clear, to my mind, that there was ample ground upon which honest and reasonable business men might conclude that a further issue of capital was desirable and necessary in the interests of the Company; and indeed, a more drastic proposal might appear to be wise. But taking the resolution as it stands, the proposal to issue 5,000 shares to shareholders in proportion to their existing holdings, and 2,000 shares to members of the staff of the Company—which was really an incentive to the staff in the performance of their duties—affords no evidence of any collateral purpose on the part of the directors, namely, to keep their section of the members in a majority and to advance their interests to the prejudice of other shareholders. So that the case comes down to a consideration of the proposal to issue 3,000 shares to be disposed of to such persons at such time and in such manner as the directors think most beneficial to the Company.

This provision is explicable upon ordinary business considerations, and there is therefore no reason for concluding that the refusal to register the transfers and the passing of the resolutions were allied means directed to the same end, namely, the acquisition of majority power on behalf of the directors' section of the Company. Facts are proved in the case which establish legitimate grounds for the exercise by the directors of their discretionary power under art. 21, and ordinary business considerations found the proposed resolution of November 1922. Directors are entitled to the presumption of honesty, and the shareholders of the Company are also entitled to the benefit of the judgment of the directors under art 21. The shareholders have agreed by their articles to abide by the directors' decision until some dishonest, arbitrary, capricious or unlawful act

has been proved ; and, as the respondent Mrs. Ure has failed in this proof, the decision of the directors cannot be canvassed in a Court of law.

The appeal ought to be allowed.

*Appeal allowed. Order of Lukin J. discharged.
Application dismissed with costs. Respondents to pay costs of appeal.*

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Solicitors for the appellant, *Feez, Ruthning & Baynes.*  
Solicitors for the respondents, *Hawthorn & Lightoller.*

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LUCY . . . . . PLAINTIFF ;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

*Public Service (Commonwealth)—Officers in transferred Departments—Rights pre-  
served—Removal on account of age only—Remedy of officer—Damages for wrongful  
dismissal—Measure of damages—The Constitution (63 & 64 Vict. c. 12), sec. 84—  
Commonwealth Public Service Act 1902-1918 (No. 5 of 1902—No. 46 of 1918),  
secs. 60, 73, 74, 76—Civil Service Act 1874 (S.A.) (37 & 38 Vict. No. 3), secs. 22,  
28, 32—Civil Service Amendment Act 1881 (S.A.) (No. 231), sec. 4.*

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9, 1923.

The plaintiff, who was an officer of the Postal Department of South Australia at the time that Department was transferred to the Commonwealth pursuant to sec. 69 of the Constitution, remained in the Public Service of the Commonwealth in that Department until 1919, when he was removed from that Public Service by reason only of the fact that he had attained the age of sixty-five years. The removal of the plaintiff was admitted to be unlawful.

Knox C.J.,
Isaacs, Higgins
and Starke JJ.