

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT COURT REGISTRY

GENERAL DIVISION

G4 of 1989

CORAM: VON DOUSSA J

6 February 1989

QUANTILE PTY LTD v L R & E J CONNELL (FIRST RESPONDENTS),
COMMERCIAL BLOODSTOCK SERVICES PTY LTD (SECOND
RESPONDENT), NOEL WILLIAM CARTER (THIRD RESPONDENT)
AND TRISTAN VENUS ANTICO, JOHN GIGANTE, JAMES
BESTER, D M ANTICO, JOHN PEATFIELD, JOHN SYMOND AND
MARK GERARD O'DONOGHUE (FOURTH RESPONDENTS).

INTERLOCUTORY INJUNCTION — contract for sale of interest in horse
— contract in breach of rights of pre-emption in syndicate agreement — effect
of right of pre-emption — no real prospect of applicant succeeding in claim for
specific performance — interlocutory injunction refused.

Trade Practices Act 1974, s 52

Fair Trading Act 1987, s 56

Grant v John Grant & Sons Pty Ltd (1950) 82 CLR 1 at 29

Lyle Scott Limited v Scotts Trustees [1959] AC 763

Greenhalgh v Mallard [1943] 2 All ER 234 at 237

W & S Moodie v W & S Shepherd (Bookbinders) [1949] 2 All ER 1004 at 1051

Hunter v Hunter [1936] AC 222 at 261

Noranda Australia Ltd v Lachlan Resources NL & Ors (unreported) Bryson J,
29 July 1988

American Cyanamid Co v Ethicon Ltd (1975) AC 396 at 407

Dearle v Hall (1824) Russ 1.

Pritchard v Briggs (1980) Ch 338

Dougan v Ley and Another (1946) 71 CLR 142 at 149

REASONS FOR JUDGMENT

Application for interlocutory injunction.

VON DOUSSA J: The primary claim of the applicant is for specific performance of an agreement alleged to have been made on 22 December 1988 whereby the first respondents (Connell) agreed to sell and the applicant agreed to purchase for \$55,000 together with \$5,000 commission payable to the second respondent (Bloodstock Services) one share or interest held in a thoroughbred stallion named Red Anchor.

The applicant, by its statement of claim and supporting affidavits, makes the following allegations. Red Anchor is owned by a syndicate of persons, firms and corporations as tenants in common in proportion to their respective "Interests" or shares held in the syndicate. Connell held one interest. The applicant in South Australia carries on the business of breeding and racing thoroughbred horses. On about 21 December 1988, the applicant engaged Mr W J Hawkes from Australian Breeders Co-operative Society Ltd to seek the purchase of one interest in Red Anchor. Bloodstock Services carries on business in Western Australia as agents for owners of thoroughbred horses. The third respondent (Carter) is a salesman who works for Bloodstock Services. In the course of a telephone conversation on 22 December 1988 with Carter on an unrelated matter, Hawkes informed Carter that he had been engaged to purchase an interest in Red Anchor. Carter said that he might have someone wishing to sell one. Later that day Carter telephoned Hawkes and said words to the effect of "I have possibly got a Red Anchor share that I can get my hands on. Possibly \$55,000 to \$60,000 would buy it." Hawkes said "We'll buy it for \$60,000" whereupon Carter said "sold". Arrangements were made for a written agreement to be drawn up. This was done, and counter-parts signed on behalf of the applicant and Connell were exchanged by facsimile transmission on 23 December 1988.

In the course of the telephone conversations, Carter apparently said that the Interest in question was owned by Connell, that Connell had given notice to all existing members of the syndicate as required by the syndicate agreement advising of Connell's intention to sell the Interest; and that no syndicate member had expressed a desire to purchase it. The applicant's affidavits leave the precise terms of these aspects of the conversations and their timing in relation to other parts of the conversations, vague but I think nothing turns on that. Each party to the conversation seems to have assumed that the other would know that the Red Anchor syndicate would require notice by a syndicate member intending to sell an Interest and would give pre-emptive rights to other syndicate members. There is no suggestion in the applicant's affidavits that the conversation went into more detail about the requirements of the Red Anchor syndicate than I have just related.

On 28 December 1988, Carter advised the applicant's agent that notification of a desire to purchase the Connell Interest in Red Anchor had been received from several of the "shareholders" in the syndicate, and accordingly that Connell no longer intended to be bound by the terms of the agreement of 22 December 1988. In subsequent correspondence between solicitors for the applicant and Carter, it was revealed that four members of the syndicate had given Notice of Intention to Purchase the Connell Interest in accordance with cl 13 of the syndicate agreement, and the terms of that clause were provided. The first five paragraphs of cl 13 read:

- 13.1 If an Owner wishes to sell his Interest he shall comply with the requirements set out hereunder and, in particular, shall not offer such Interest for sale by Public Auction until those requirements have been complied with.
- 13.2 If an Owner (Seller) wishes to sell all or any of his Interests in the Horse (Offered Interests), he shall first give to the Management Committee (who shall forthwith distribute to the other Owners and any Lessee notified to it) notice in writing (Notice of Sale) of the number of Interests to be sold, the price, terms and conditions of the proposed sale, and the name of the proposed purchaser (Proposed Purchaser).
- 13.3 An Owner or Lessee may purchase all (but not part) of the Offered Interests for the price and on the terms and conditions set out in the Notice of Sale by giving to the

Management Committee written notice (Notice of Purchase) of his intention to do so, within 21 days after receipt of the Notice of Sale.

- 13.4 If more than one Owner or Lessee gives a Notice of Purchase, the Offered Interests shall be auctioned amongst those Owners or Lessees, and the highest bidder shall purchase the Offered Interests. The price, terms and conditions of purchase shall be at least as attractive to the Seller as the price, terms and conditions set out in the Notice of Sale.
- 13.5 If no Owner or Lessee gives a Notice of Purchase pursuant to cl 13.3, the Seller may within 30 days after the expiration of the 21 days referred to in cl 13.3, sell the Offered Interests to any purchaser for a price not less than, and on the terms and conditions not more favourable than, set out in the Notice of Sale. The Proposed Purchaser shall agree to be bound by the provisions of this Agreement.

Solicitors for the fourth respondents then came into the picture. The fourth respondents are the members of the Management Committee of the Red Anchor syndicate. The fourth respondents indicated their intention to hold the auction required by cl 13.4 on 20 January 1989 and refused to defer the auction at the request of the applicant. These proceedings were commenced on 19 January 1989.

The statement of claim pleads against Connell that Bloodstock Services and Carter were authorised by Connell to enter into the agreement of 22 December 1988 with the applicant and that in breach of the agreement Connell has manifested an intention not to be bound by it. In the alternative it is pleaded that if Bloodstock Services and Carter did not have authority to sell the Connell Interest that Bloodstock Services engaged in deceptive and misleading conduct or conduct which was likely to deceive and mislead contrary to the provisions of s 52 of the *Trade Practices Act* 1974 and contrary to the provisions of s 56 of the *Fair Trading Act* 1987, and that Connell and Carter were persons directly or indirectly knowingly concerned in or party to the contravention of s 52. Against the fourth respondents injunctive relief is claimed to prevent the Management Committee from proceeding with the proposed auction or otherwise dealing with the subject Interest in Red Anchor.

On 19 January 1989, the applicant sought an interim injunction. When the application came on for hearing only the fourth respondents had been served, and they were represented by counsel who opposed the grant of the injunction. The application against the first, second and third respondents was made ex parte. As the argument proceeded, it became apparent that both the applicant and the fourth respondents wished to rely on facts not then revealed by the affidavits before the court. As it appeared no substantial inconvenience would be suffered by the fourth respondents if they were restrained for a few days from conducting the proposed auction, I granted an interim injunction restraining the respondents from disposing of or otherwise dealing with the subject Interest until 5 pm on 31 January 1989 and adjourned the further hearing of the application until 10.15 am that day. The proceedings were served on Bloodstock Services and Carter on 24 January 1989. Attempts to serve Connell personally proved unsuccessful. On the resumed hearing only the fourth respondents appeared and counsel on their behalf again opposed the injunction upon the basis of facts disclosed in an affidavit by Mark Gerard O'Donoghue filed on 25 January 1989. O'Donoghue is the secretary of the Red Anchor Management Committee. One of the exhibits comprises the syndicate agreement in May 1985. O'Donoghue deposes to the following facts. At all times material to this action there were eleven "Owners" and six "Lessees" as defined by the syndicate agreement who comprised members of the syndicate. Between them the members collectively owned forty-two Interests in Red Anchor. On 29 November 1988, a notice of intention to

sell one Interest was received by O'Donoghue on behalf of the Management Committee from Connell. On 30 November 1988, he caused to be sent to each syndicate member (other than Connell) a Notice of Sale in purported compliance with cl 13.2. I say in purported compliance because neither the notice received by the Management Committee from Connell, nor the notice distributed to the syndicate members, stated "the name of the proposed purchaser". For reasons which later appear, this omission is, in my view, of no relevance to the outcome of the present application. On 2 December 1988, O'Donoghue by letter informed Connell that the Notices of Sale had been distributed. The Notice of Sale included a statement that "the closing time for the receipt of Notices of Intention to Purchase will be set as 5 pm on Thursday 22nd December 1988".

The Management Committee received four responses from members of the syndicate; from one member on 12 December 1988, from two members on 19 December 1988, and from one member on 21 December 1988. On 23 December 1988 at 3.30 pm, O'Donoghue sent by facsimile transmission advice to Connell that four notices of intention to purchase had been received and, that pursuant to cl 13.4, an auction would be conducted. Presumably this advice was received by Connell or his agent after the agreement with the applicant had been reduced to writing and signed. By reason of the interim injunction granted on 19 January 1989 the Management Committee has not yet conducted the auction.

The applicant contends that, by the agreement of 22 December 1988, the applicant acquired an equitable interest in the Connell Interest and that there are serious questions to be tried whether that equitable interest should have priority over the interests of the syndicate members and, in particular, over those of the syndicate members who had expressed a desire to purchase the Connell Interest. Further, it is contended that although the subject matter of the contract is an interest in a chattel, the contract is a proper one for specific performance as Red Anchor is a horse of unique quality whose potential service as a sire has special value to the applicant's breeding programme, such that damages would not be an adequate remedy for non-performance.

The fourth respondents opposed the grant of an interlocutory injunction on several grounds. The first and principal contention is that cl 13 gives to the syndicate members pre-emptive rights to acquire an interest in the event that a member wishes to sell. A restriction on the right of a member to sell his interest otherwise than in accordance with cl 13 has the effect that no interest, legal or equitable, could be, or was conveyed to the applicant by the agreement of 22 December 1988. Accordingly, so it is argued, the agreement of 22 December 1988 is incapable of being specifically performed and unless the applicant can establish a serious question to be tried as to whether specific performance should be granted there is no basis on which injunctive relief can be sustained. In my opinion this submission is correct.

Restrictions contained in articles of association on the right of a member of a private or proprietary company to dispose of his shares, which are in terms similar to cl 13, have received the attention of the courts on many occasions. In *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 29 Williams J (with whom McTiernan and Kitto JJ agreed) said of such an article:

This article gives the members of the company a pre-emptive right over the shares of any member or other person proposing to transfer any shares in the company to a non-member (*Greenhalgh v Mallard* [1943] 2 All ER 234; *W & S Moodie v W & S Shepherd (Bookbinders) Ltd* (1949) W N (Eng) 482; [1949] 2 All ER at 1051; *Delavenne v Broadhurst* [1931] 1 Ch 234).

Shares might be sold to any member so that no member can place this right any higher than a right to have the shares offered to him at their fair value before they are offered to a non-member. This is an individual right sufficient to entitle any shareholder to maintain a suit against the company to restrain shares being transferred to non-members in breach of it or, if the shares have been transferred, to have the register rectified (*Davis v Commercial Publishing Co of Sydney Ltd* [1901] 1 SR (NSW) Eq 37; *Hunter v Hunter* [1936] AC 222).

The plaintiffs in that case were seeking rectification of the share register and the above passage should be read in that context. In *Lyle Scott Ltd v Scotts Trustees* [1959] AC 763, the House of Lords upheld a declaration, in favour of a company against shareholders who had purported to sell their shares to a non-member, that they were bound to implement the procedure for sale contained in the articles. Such shareholders could not otherwise convey an interest in their shares. The implementation of the procedures for sale was likely to result in other members of the company, not the proposed purchaser with whom the vendor shareholders had sought to contract acquiring the shares. In *Greenhalgh v Mallard* [1943] 2 All ER 234 Lord Greene MR (with whom the other members of the Court of Appeal agreed) said, at 237:

[I]n the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is prima facie transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.

The Master of the Rolls approached the question of construction of the article in that case on the assumption that clear language could fetter the right or capacity of the shareholder to transfer his shares. In *W & S Moodie v W & S Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1004 at 1051, Lord Normand described a right of pre-emption in an article as “a heavy burden on the rights of shareholders”. The fetter imposed by such an article on the right or capacity of the shareholder to transfer his shares means that an attempt to do so otherwise than in accordance with the article will be invalid and inoperative, and convey no interest in the share, legal or equitable: see *Hunter v Hunter* [1936] AC 222 at 261 per Lord Atkin; *Lyle Scott Ltd v Scotts Trustees*, above, at 778 and 785. These principles are not, in my view, confined to restrictions in articles of association of corporations. They apply for example to restrictions imposed on the right of a joint venturer to dispose of his interest in the venture: *Noranda Australia Ltd v Lachlan Resources NL and Ors* (unreported, Bryson J, 29 July 1988, NSW Sup Ct, Eq Div, p 48).

The application of these principles to the restriction on the transfer of an Interest imposed by cl 13 of the Red Anchor syndicate agreement leads to the conclusion that a purported sale of an Interest by a member otherwise than as required by the clause would be inoperative to convey any interest, legal or equitable, to the proposed purchaser. Furthermore, the other syndicate members would be entitled to equitable relief to restrain the purported sale of any Interest until the cl 13 procedures had been implemented.

To grant the applicant’s request to restrain the committee of management from implementing the procedure required by cl 13 would deny to the syndicate members the benefit of the right of pre-emption which the syndicate agreement gives them. The applicant nevertheless contends that there should be injunctive relief and stresses the observation in the speech of Lord Diplock in *American Cyanimid Co v Ethicon Ltd* [1975] AC 396 at 407 that

It is no part of the court's function at this stage of the litigation to . . . decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

But in the next sentence but one his Lordship says:

So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether balance of convenience lies in favour of granting or refusing interlocutory relief that is sought.

In my view, the material available to the court does fail to disclose any real prospect of the applicant succeeding in his claim for specific performance at the trial as, by reason of cl 13 of the syndicate agreement, the applicant has no real prospect of establishing that the agreement of 22 December 1988 upon which the claim is based was operative to convey any interest in the Connell Interest. Accordingly an interlocutory injunction should not be granted.

Earlier in these reasons I drew attention to the fact that Connell's notice to the committee of management of his intention to sell, and the Notice of Sale distributed to the syndicate members by O'Donoghue did not state "the name of the proposed purchaser". Even if the failure to state the name of the proposed purchaser rendered the Notice of Sale ineffectual as proper notice under cl 13.2 (and this is to take an extreme, and I think untenable view, of the construction of cl 13.2) that result would not alter my reasons for refusing the present application. The pre-emptive rights existing in the other syndicate members would still exist and remain to be complied with by Connell before there could be a valid and operative transfer by him of any interest to the applicant.

In light of the conclusion I have reached, it is unnecessary to rule on the alternative arguments advanced by counsel for the fourth respondents, but I mention them briefly. It was contended that if, contrary to the principal contention, an equitable interest had been conveyed to the applicant in the Connell Interest by the agreement of 22 December 1988, there exist equities that arose earlier in point of time either in all the syndicate members, or in the four who gave notice of intention to purchase prior to 22 December 1988, which should prevail, either on the application of the maxim *qui prior est tempore potior est jure*, or on the application of the rule in *Dearle v Hall* (1824) Russ 1. If the applicant's claim for specific performance fell to be decided according to priorities I think there would be a serious question to be tried. I think it is far from clear that the syndicate members, or even the four members who gave notice of intention to purchase, had an equitable interest in the Connell Interest on 22 December 1988. A right of pre-emption alone gives no equitable interest in the subject matter. It creates only a contractual right in the person on whom it is conferred: see Halsbury's Laws of England, 4th ed, Vol 35 paras 937, 938 and *Pritchard v Briggs* (1980) Ch 338; and I think it is clearly arguable that until the auction was held between the four syndicate members who gave notice pursuant to cl 13.3 none of them had any more than a contractual right. It would therefore become necessary on this approach to look to the balance of convenience.

The fourth respondent also contended that specific performance would not be granted if the applicant were otherwise to succeed in establishing the claim as the subject matter of the contract was an interest in a chattel, and damages would be an adequate remedy. On this point again, I think there would be a serious issue to be tried. The applicant's affidavits lend weight to the submission

that Red Anchor has unique qualities. Furthermore the acquisition of the Connell Interest would carry with it the right to an annual service to a mare chosen by the owner (cl 4.2). That is a right or "valuable privilege" (see *Dougan v Ley and Anor* (1946) 71 CLR 142 at 149) which could be sufficient to attract the remedy of specific performance.

Counsel for the fourth respondent contended that on the balance of convenience interlocutory relief should not be granted. The factors one way and the other leave the issue of convenience finely balanced but for one consideration which would lead me to resolve the application in favour of the respondents. If interlocutory relief were granted, and the applicant later failed to establish a right to specific performance, substantial loss could be suffered by the syndicate member who would otherwise have been the successful bidder at the cl 13.4 auction. The four syndicate members who will take part in the auction are not parties to the action and would not have the protection of the undertaking as to damages proffered by the applicant to the respondents.

For these reasons the application for an interlocutory injunction is dismissed. The interim injunction which has been extended to run until I delivered this judgment will be discharged.