PRIVY COUNCIL

Angostura Bitters, Ltd.

Vs.

Albert Kerr

P.C.A.No.58 of 1932
(Lords Merrivale Alness and Sir George Lowndes JJ.)

25.05.1933

JUDGMENT

SIR GEORGE LOWNDES J.

1.This appeal arises out of an originating summons taken out in the Supreme Court of Trinidad and Tobago for the friendly determination of certain questions affecting the rights of holders of preference shares in the appellant company.

2. When it first came on for hearing be fore the Board, only the company appeared, and it was adjourned in order that the preference share-holders might be represented, as is now the case. It will be convenient to refer to them in this judgment as the respondents. The interests of the ordinary share-holders, whose special representative does not appear, are identical with those of the appellants. Three questions were submitted for the determination of the Court, of which the third is alone the subject of the appeal. It is in the following terms :

> "(3)-(a) Is it intra vires of the Directors of the Company to use and dispose of the said Re-serve Fund of £50,000 for all or any of the purposes set out in Sub-Section 14, Clause 119 of the articles of association of the Company ?
> (b)If yes, is the company under any obligation to make up any deficiency arising from such user and disposal?"

3. The reserve fund in question was constituted under Clause 5 of the memorandum of association which is set out below :

> " The share capital of the company is £170,000 divided into 85,000 Participating Preference shares of £1 each, and 85,000 ordinary shares of £1 each. Subject as hereinafter provided, the rights following shall be attached to

the Participating Preference shares aforesaid :

(1) The holders of the said Participating Preference shares shall be entitled to a fixed cumulative preferential dividend at the rate of eight per cent. per annum on the capital for the time being paid up thereon, and after payment of such dividend 10 per cent. of the profits of each year shall be set aside and accumulated as a reserve fund until it amounts to £50,000, and after setting aside such 10 per cent. and after the holders of the ordinary shares shall have received a non-cumulative dividend of eight pet cent. per annum on the amount for the time being paid up on their original shares the holders of the Preference Shares shall be entitled to participate equally with the holders of the ordinary shares in any surplus divisible profits of the year until the dividend on the Preference Shares for such year amounts to ten per cent, per annum and the holders of the ordinary shares shall then be entitled to the remainder of such profits.

(2) The holders of the said Participating Preference Shares shall in a winding up have priority as to return of capital over all other shares in the capital for the time being of the company but shall not have any further right to participate in profits or assets.

(3) Any reserve fund formed under the provisions hereinbefore contained shall be invested outside the company's business.

(4) The right hereby attached to the said Participating Preference shares (including the provisions hereinbefore contained as to the reserve fund) may be modified in accordance with Clause 54 of the accompanying articles of association, but not otherwise and that clause and also Clause 155 of the said articles shall be deemed to be incorporated herein and have effect accordingly.

(5) Subject as aforesaid shares created upon an increase of capital may be divided into different classes and may have attached thereto respectively such preferential and qualified deferred or special rights, privileges and conditions as may be determined."

4. The company is incorporated under the Companies Ordinance, 1913-1914 of Trinidad and Tobago, but it is agreed that nothing turns on the precise terms of this ordinance, and that the question before the Board falls to be determined in accordance with the principles of the English company law.

5. The provision of a reserve fund is not one of the statutory requirements of a company's memorandum, and it is no doubt, unusual to find such prominence given to it. The only reason for this, in their Lordships' opinion, is that the framers intended it

to be regarded as part of the charter of the company, and as holding out special attractions to the subscribers of preference shares. The summons was heard by the Chief Justice, whose answer to question 3 (a) was in the negative. No answer therefore was required to 3 (b). The company has appealed to his Majesty in Council and seeks to have the decision of the Chief Justice on this question reversed.

6. It is not disputed before the Board that the constitution of this special reserve fund was part of the rights of the respondents, but it is said that the memorandum is silent as to the purposes to which the fund is to be applied : that this is provided for by Article 119 (14) of the articles of association : and that reading the two together it should be held that the company has the powers which it claims. Article 119 (14) empowers the directors of the company

> "to set aside out of the profits of the company such sums (in addition to the sums provided by Article 5, Sub-Section (1) of the Memorandum of Association to be set aside as the reserve fund there in mentioned) as they think proper as a reserve fund to meet contingencies or for special dividends or for repairing, improving and maintaining any of the property of the company and for such other purposes as the Directors shall in their absolute discretion think conducive to the interests of the company; and to invest the several sums so set aside both under Article 5, Sub-Section (1) of the Memorandum of Association and under this article upon such investments (other than shares of the company) as they may think fit, and from time to time to vary such investments. The reserve fund to be set aside under Article 5, Sub-Section (1) of the Memorandum of Association shall be kept invested outside the business until required for any of the above purposes."

7. The words relied on by the appellants in support of the above contentions are "until required for any of the above purposes," which, it is said, should be read as providing that the fund in question may be applied to any of the purposes mentioned. The learned Chief Justice thought it clear upon the terms of the memorandum that this fund was to be created for the benefit and security of the respondents, and that to accede to the contention of the appellants would be wholly destructive of this object. Under these circumstances he held it to be in accordance with a well-established principle that the memorandum must prevail. Before their Lordships it has been argued that there is no such principle; and that, except in respect of such matters as must by statute be provided for by the memorandum, it is not to be regarded as the dominant document, but is to be read in conjunction with the articles : *Harrison v.*

Mexican Railway Co. (1875) 19 Eq. 358, Anderson's Case *Guinness v. Land Corporation of Ireland In re South Darham Brewery Co.* Their Lordships agree that in such cases the two documents must be read together, at all events so far as may be necessary to explain any ambiguity appearing in the terms of the memorandum, or to supplement it upon any matter as to which it is silent.

8. They find themselves however in agreement with the learned Chief Justice as to the object for which this special reserve fund was to be created, viz., for the benefit and protection of the respondents, and they think that this object would be nullified if the fund could be applied, like any ordinary reserve fund, for the benefit of the company generally. There is not, in their Lordships' view, any ambiguity in the terms of Clause 5 of the memorandum which requires explanation, or any lacuna which requires filling in, and it is clear by sub-Clause 4 that the provisions with regard to this fund can only be modified by the particular procedure there referred to. Under these circumstances their Lordships are unable to read the two documents as giving the appellants the power they claim. What exactly the reference in Article 119 (14) to some time when this special fund may be "required for any of the above purposes" means, it is not easy to say. It may contemplate some modification of the provisions of the memorandum, to be made in the authorized way, which would allow the application of the fund to some one or other of the purposes referred to; it may have been thought by the draftsman (their Lordships do not say rightly) that it could be utilized in a lean year for payment of the preference dividend; or the words may have crept in per incuriam. Whatever the true explanation may be, their Lordships are unable to hold, in view of the terms of Clause 5 of the memorandum, that the company has the wide powers which are claimed for it in respect of the fund, and they think that question 3 (a) was rightly answered in the Supreme Court. They will therefore humbly advise His Majesty that this appeal should be dismissed. In view of the arrangement made between the parties, no order as to costs will be necessary.

Appeal dismissed.

Cases Referred.

(1878) 7 Ch D 75=47 LJ Ch 273=26 WR 442=37 LT 560,

(1883) 22 Ch D 349=52 LJ Ch 177=31 WR 341=47 LT 517,

(1886) 31 Ch D 261=55 LJ Ch 179=34 WR 126=53 LT 928.