*Privy Council Appeal No. 9 of 2004*

**Marjorie Ilma Knox**
*Appellant*

*v.*

**John Vere Evelyn Dean and Others**
*Respondents*

FROM

**THE COURT OF APPEAL OF BARBADOS**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 28th June 2005

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*Present at the hearing:−*
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Sir Anthony Evans
*[Delivered by **Lord Hoffmann**]*

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1. Kingsland Estates Ltd ("the company") was incorporated in 1958 to acquire substantial sugar plantations and other lands belonging to the late Mr Ebenezer Estwick Deane and his family. The whole of the issued share capital was allotted to Mr Deane, his wife and seven children. Mr Deane, his wife and three of his children have since died and their shares have devolved upon Mr Deane's surviving children and grandchildren.

2. The decline in the profitability of growing cane sugar resulted in the company building up substantial accumulated losses. The business was discontinued in 1993 and since then the company has had insufficient income (from lettings) to service its debt. On the other hand, its land has (subject to planning permission) development potential

for other uses such as tourism. In 1997 the board was approached by a development company called Classic Investments Ltd ("Classic") which, after some negotiation, made an offer (subject to various terms and conditions) to buy all the issued shares at $30 a share. The board recommended the offer for acceptance.

3. The offer has been accepted by all shareholders except Mr Deane's daughter, Mrs Knox. Classic is willing to buy the remaining shares and the other shareholders wish to sell. But Mrs Knox claims that she is entitled under the company's articles to a right of pre–emption which requires that the other shareholders first offer to sell their shares to her at the fair price determined in accordance with the articles.

4. The board, on behalf of the other shareholders, made an offer to Mrs Knox which they claimed to be in accordance with such right of pre–emption as she might have. Mrs Knox rejected the offer as not being in compliance with the articles, though continuing to maintain her wish to buy. When the board refused to go any further, she issued proceedings under section 228 of the Companies Act Cap 308, claiming that the affairs of the company were being conducted in a manner unfairly prejudicial to her interests and asking for an injunction to restrain any transfer of shares to Classic until there had been proper compliance with her rights of pre–emption.

5. Greenidge J dismissed the application on the ground that upon the true construction of the articles, the other shareholders were entitled to transfer their shares to Classic without first having to offer them to Mrs Knox. This decision was upheld by the Court of Appeal. Mrs Knox now appeals to the Privy Council.

6. The issue is agreed to turn upon the construction of the relevant articles:

"1. (a) A share may be transferred by a shareholder or other person entitled to transfer such share to any shareholder selected by the transferor; but save as aforesaid, and save as provided by clause 3 of this Schedule, no share shall be transferred to a person who is not a shareholder, so long as any shareholder, or any person selected by the Directors as one to whom it is desirable in the interests of the Company to be a shareholder, is willing to purchase the same at a fair value.

(b) Any shareholder or other person entitled to do so, who intends to transfer shares (hereinafter called the proposing transferor) shall give notice in writing to the Directors of his intention. Such notice shall constitute the Directors his agent for the sale of the said shares in one or more lots at the discretion of the Directors to shareholders of the Company or any person selected by the Directors as aforesaid at a price to be agreed upon by the proposing transferor and the directors, or in default of agreement, at the fair value to be fixed in accordance with sub-clause (c) of this clause.

(c) The fair value aforesaid shall be the sum fixed as the fair value by resolution of the shareholders in general meeting as follows, that is to say, once in each financial year the shareholders in general meeting shall by resolution fix the sum which shall

be deemed to be the fair value of the share. Until the fair value has been so fixed, the fair value of any shares, which it is proposed to transfer, shall be deemed to be a sum equal to the stated capital account maintained for such shares divided by the number of such shares which have been issued.

(d) Upon the price being ascertained as aforesaid the directors shall forthwith give notice to all the shareholders of the Company of the number and price to be sold and invite each of them to state in writing within twenty–one days from the date of the said notice whether he is willing to purchase any, and if so what maximum number, of the said shares.

(e) At the expiration of the said twenty–one days the Directors shall allocate the said shares to or amongst the shareholder or shareholders who shall have expressed his or their willingness to purchase as aforesaid, and (if more than one) so far as may be pro rata according to the number of shares already held by them respectively, provided that no shareholder shall be obliged to take more than the said maximum number of shares so notified by him as aforesaid. Upon such allocation being made the proposing transferor shall be bound on payment of the said price to transfer the shares to the purchaser or purchasers and if he makes default in so doing the Directors may receive and give a

good discharge for the purchase money on behalf of the proposing transferor and enter the name of the purchaser in the Register of Shareholders as holder by transfer of the shares purchased by him.

(f) In the event that all of the shares shall not be sold under sub–clause (e) as aforesaid to a shareholder or shareholders or a person selected by the Directors as aforesaid the proposing transferor may, at any time within three calendar months after the expiration of the said twenty–one days, transfer the shares not sold to any person (subject to clause 2 of this Schedule) at any price.

2. No share in the capital of the Company shall be transferred without the approval of the Directors of the Company or of a Committee of such Directors, evidenced by resolution and the Directors may, in their absolute discretion and without assigning any reason therefore, decline to register the transfer of any share. This restriction shall not apply where the proposed transferee is already a shareholder.

3. Notwithstanding the foregoing restrictions numbered1 and 2 any share may be transferred by a shareholder to any ancestor, child or other issue, wife or husband, brother or sister, of such shareholder, and any share of a deceased shareholder may be transferred by his personal representatives to any ancestor, child or other issue, widow or widower, brother or sister of such deceased shareholder to whom such deceased shareholder may have specifically bequeathed the same and

> shares standing in the name of the trustees of the will of any deceased shareholder may be transferred upon any change of trustees to the trustees for the time being of such will."

7. Certain matters are agreed. First, Miss Heilbron QC, who appeared for Mrs Knox, accepted that the directors selected Classic as a person to whom it was desirable in the interests of the company that shares should be transferred (for short, a selected person) and that the directors made this selection in good faith. Secondly, counsel for the respondents accepted that if Mrs Knox was entitled to exercise rights of pre–emption in priority to Classic and the offer to her did not comply with the articles, she is entitled to an injunction under section 228. Thirdly, Miss Heilbron accepts that if as a matter of construction the other shareholders were entitled to transfer their shares to Classic without making an offer to her client, then the terms of the offer which they actually made are irrelevant and the appeal must fail.

8. The articles appear to be an adaptation of a standard form giving rights of pre–emption to existing members. The adaptation has taken the form of adding references to a selected person in clauses 1(a), (b) and (f) and possibly making other changes as well. For example, the reference in clause 1(b) to the offer price being fixed by agreement between the vendor and the directors fits more easily with a sale to a selected person, who has no right to buy at any particular price, than with a sale to an existing member, who is entitled to buy at the fair price. It may also have been added. But this is a matter of speculation and does not require to be decided.

9. The judge and the Court of Appeal interpreted the articles as a substantial enlargement on the power of a shareholder to dispose of his shares. It treated the selected person as an equal member of the class to whom the shares had to be offered before they could be sold to anyone else. If a member sold his shares to a selected person, the pre–emption rights were exhausted and he was not obliged to offer them to the other members.

10. Miss Heilbron, on the other hand, argues for a hierarchy of pre–emptive rights, with members taking priority over the selected person. The directors may offer the shares to a selected person only if no members are willing to buy them. The selected person is a long stop whom the directors may put forward to prevent the shares from being sold to a less desirable outsider.

11. Both sides claimed that their construction gave effect to the purpose of the articles. The respondents said that the purpose of the inclusion of a selected person was to enable the directors to offer shares to an outsider as an incentive to providing capital or services to the company. If the directors considered this to be in the interests of the company, it would be wrong to allow them to be frustrated by a single shareholder who insisted upon exercising his rights of pre–emption. The appellant, on the other hand, said that the overriding purpose of the pre–emption clauses was to maintain family control. The inclusion of a selected person was merely to give the directors a choice of outsiders if no member of the family was willing or able to buy the shares at the fair price.

12. It seems to their Lordships that, a priori, each of these purposes is equally plausible. Mr Cohen, who appeared for most of the respondents, pointed out that one third of the shares remained unissued and

available at the discretion of the directors for allotment to any person. There was no provision that they should first be offered to existing members. He said with some force that this was inconsistent with an overriding policy of excluding anyone but the family. But their Lordships do not think that this is a case in which the context and surrounding circumstances provides clear guidance as to the purpose which the draftsmen intended to achieve. It can only be gathered from the language which he used. So, for example, in the Australian case of *Carew–Reid v Public Trustee* (1996) 20 ACSR 443 the articles also included a selected person among those entitled to pre–emption rights but said that the shares should be offered "in the first place" to the members. That language does suggest a hierarchy of the kind for which Miss Heilbron contends in this case. But there is no equivalent phrase in these articles.

13. Miss Heilbron nevertheless says that article 1(a) is perfectly clear. It provides that no share shall be transferred to a person who is not a shareholder so long as any shareholder or any selected person is willing to purchase at a fair value. That means that two conditions have to be satisfied before a share may be transferred to a non–shareholder like Classic. First, there must be no shareholder willing to purchase. Secondly, there must be no selected person willing to purchase. In this case, the second condition may have been satisfied but the first has not, because Mrs Knox is willing to purchase.

14. If subclause (a) stood alone, their Lordships would accept that this appeared to be its literal meaning. It would be a puzzling form of expression because a "person who is not a shareholder" includes by definition a selected person, so that the clause would appear to be saying that no

share shall be transferred to a class which includes a selected person if a selected person is willing to buy. That does not make much sense. It may therefore be necessary to imply into "person is not a shareholder" a qualification which excludes any selected person. Whether such a qualification needs to be made must be gathered from reading the clause as a whole.

15. Subclause (a) is at least clear in conferring pre-emption rights upon both shareholders and selected persons. That raises the question of how any conflicts are to be resolved if more than one person having pre-emption rights wishes to buy. In the normal case in which the pre-emption rights are confined to other shareholders, the articles usually provide machinery for pro rata distribution. This will be found here in subclauses (d) and (e). They provide for pro rata distribution of the shares offered for sale in proportion to the shareholdings of the members wishing to buy. But this form of conflict resolution cannot be applied to a selected person because he has no shares. Miss Heilbron says that the conflict is resolved hierarchically, by giving priority to any shareholder over a selected person. The respondents say it is resolved by the directors. By subclause (b), the directors are constituted agents of the vendor "for the sale of the said shares in one or more lots at the discretion of the Directors to shareholders of the Company or any person selected by the Directors". That means that when the shares are put up for sale, the directors have a discretion to choose whether to offer them to shareholders or to a selected person. If they offer them to shareholders, the pro rata machinery of subclauses (d) and (e) comes into action. If they offer them to a selected person and he accepts them, that is an end of the

matter. The rights of pre-emption are exhausted.

16. Miss Heilbron says that this construction gives too wide an effect to the discretion conferred by subclause (b). In her submission, it relates only to whether to offer the shares in one or more lots. There is no discretion as to the persons to whom the shares should be offered. They must be offered first to the shareholders and, only if they all refuse, to the selected person.

17. Their Lordships think it unlikely that there would be an express reference to the discretion of the directors if it related only to whether the shares were to be offered "in one or more lots". If that was all that was meant, the words "in one or more lots" would themselves be sufficient to confer the necessary discretion. The reference to the discretion of the directors is more likely to be linked to their undoubted discretion to choose the selected person. Having chosen the selected person, they are then given the discretion to decide that he rather than the shareholders shall be offered the shares.

18. Miss Heilbron, however, says that her construction is supported by the opening words of subclause (d), which says that once the price has been ascertained, the shares shall be offered "forthwith" to the shareholders. If they have to be offered forthwith to the shareholders, it follows that they cannot first be offered to someone else. The respondents, on the other hand, say that subclause (d) does not come into operation unless the directors have exercised their discretion under subclause (b) to make the offer to the shareholders. "Forthwith" then fixes the time at which the necessary notice must be given. If, on the other hand, the offer has been made to the

selected person, the machinery of subclauses (d) and (e) does not operate at all.

19. So far it seems to their Lordships that the indications to be drawn from the language of the articles are fairly equivocal. But the question is in their opinion resolved by subclause (f). This provides that if neither the members nor a person selected has agreed to buy the shares, the vendor shall be free to sell them to any person at any price. And the time fixed for releasing the vendor from the pre–emption rights is the expiry of the period of 21 days which, under subclause (e), is given to the members to decide whether or not to buy.

20. It would follow that if Miss Heilbron is right in saying that before the shares can be offered to a selected person, they must first be offered to the members, there is no way in which the pre–emption rights of the selected person can be enforced. As soon as the rights of the members have expired, the vendor is free to sell to anyone at any price. This would be flatly contrary to the evident intention of the article to include selected persons among those who are given some form of right of pre–emption.

21. It must therefore follow that the rights of the selected person are not subordinate but alternative to the rights of the shareholders. And the choice of alternatives is left to the discretion of the directors under subclause (b). In this case the directors decided to offer the shares to Classic and the pre–emption rights were thereby exhausted.

22. Their Lordships accept that the draftsman of the articles may not have contemplated that the inclusion of the selected person could be used to facilitate a take–over bid for the company rather than

the introduction of an outsider into what remained a family concern. But there is no way in which the effect of the articles can be qualified by reference to the number of shares on offer. If a small minority of shares can be offered to a selected person, it must follow that whatever number of shares are put up for sale can be so offered. All that matters is that the directors honestly consider this to be in the interests of the company.

23. Their Lordships therefore agree with the admirably concise judgment of Greenidge J and the judgment of the Court of Appeal. They will humbly advise Her Majesty that the appeal should be dismissed with costs.