

**Gillespie v.  
Retail Merchants' Assn. of Canada (Ontario) Inc.**

Between  
John Gillespie, plaintiff, and  
The Retail Merchants' Association of Canada (Ontario) Inc.,  
Retail Finance Corporation and RMA Coupon Redemption Inc.,  
defendants

And between  
The Retail Merchants' Association of Canada (Ontario) Inc.,  
Retail Finance Corporation and RMA Coupon Redemption Inc.,  
plaintiffs by counterclaim, and  
John Gillespie, defendant to the counterclaim

[1997] O.J. No. 956  
DRS 98-02308  
Court File No. 96-CU-103449

**Ontario Court of Justice (General Division)  
Keenan J.**

March 10, 1997.  
(4 pp.)

*Practice — Judgments and orders — Summary judgments — For part of claim.*

Motion by the plaintiff for summary judgment on his claim for delivery of shares of Retail Finance Corporation. The plaintiff was the former chief executive officer of the defendants. He sued for damages for wrongful dismissal, payment of deferred salaries and delivery of the shares of Retail Finance. The Board of the defendant Retail Merchants' Association resolved to allot 25 per cent of the shares of Retail Finance to the plaintiff as compensation for his efforts in setting up Retail Finance. The shares allotted to the plaintiff had a nominal value of \$250. No requests for payment were made and the plaintiff did not pay the nominal amount. After dismissing the plaintiff, the defendants refused to deliver the shares because they had not been paid. When the plaintiff tendered the share price, the defendants refused to accept payment.

**HELD:** Motion granted. The plaintiff was entitled to delivery of the shares. The shares were at all times considered to be those of the plaintiff. The issue of non-payment was only raised when the plaintiff demanded delivery with legal proceedings in mind. He was at all times the de facto shareholder. The issue of the plaintiff's entitlement to delivery of the shares was separate from the other issues in the action and ordering delivery of the shares to the plaintiff did not decide the other issues in the case.

## Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 20.

## Counsel:

E.R. Murray, Q.C., for the plaintiff.  
J. Gardner Hodder, for the defendants.

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¶ 1 **KEENAN J.** (endorsement):— The parties are engaged in litigation relating to the Plaintiff's employment as Chief Executive Officer of the Defendants. The Plaintiff claims damages for wrongful dismissal, payment of deferred salaries and delivery of shares of Retail Finance Corporation (RFC). The Defendants claim that the dismissal was for just cause and demand the return of money appropriated for salary and expenses by the plaintiff without authority from the Board. The Defendants claim that the Plaintiff deceived and defrauded the Board of RMA and thereby obtained an allotment of 25% of the shares of RFC.

¶ 2 The issue on this Rule 20 motion for summary judgment is the entitlement of the Plaintiff to delivery of a share certificate for 2500 shares of RFC representing 25% of the issued shares. RMA is a "not-for-profit" company. RFC was formed by RMA to undertake profit making activities. The Board of RMA resolved on April 30, 1988 to allot 25% of the shares of RFC to the Plaintiff "[A] compensation for his efforts in setting up [RFC], and in anticipation tht [RFC] would succeed in its independent financing activities". The allocation of shares was recorded on the share register. The shares were later assigned a nominal value of 10 cents per share. The 2500 shares allotted to the Plaintiff had a total nominal value of \$250. No request for payment was made nor did the Plaintiff tender the nominal amount.

¶ 3 On November 1, 1995, the Board of RMA fired the Plaintiff, alleging fraud and breach of fiduciary obligations. Although the plaintiff had been given notice to attend a meeting of the directors to answer the charges of fraud and breach of fiduciary obligations, the notice did not specify that it was called for the purpose of removing him as a director. Although the records of RMA show a resolution of shareholders made November 1, 1995 removing the Plaintiff no notice of a meeting of shareholders was given under sec. 122 of the BCA.

¶ 4 An exchange of correspondence relating to the Plaintiff's shares in RFC included a proposal by the Respondents solicitors to have the shares valued and transferred as part of a settlement of the severance. The Plaintiff's solicitors called for delivery of the shares. The Respondents then refused to deliver the shares because the subscription price of \$250 had not been paid. The Plaintiff tendered the \$250 which the Respondents refused to accept.

¶ 5 At all times between 1988 and 1996, the 2500 shares issued to the Plaintiff were considered to be his shares. The issue of non-payment of the subscription price was raised only when the Plaintiff demanded delivery of the shares with legal proceedings in mind. He was a de facto shareholder. If the obligation to pay the subscription price existed, it was not asserted by

the company. The Plaintiff did not address the issue and made no tender of payment until his demand for delivery of the certificate was refused.

¶ 6 In my opinion, the Plaintiff is entitled to delivery of the shares upon payment of \$250. A similar ruling was made by Carruthers J. in *Re Durham and Apollo Tours Ltd.* (NRI) (1978) 20 O.R. (2d) 3.

¶ 7 Mr. Hodder argued that the share certificate issue is not severable from the other issues in this case. He contends that summary judgment for delivery up of the shares will effectively decide the other issues in this case. I do not agree with that position. The effect will be simply to do what Mr. Murray has submitted: ie; to restore the "status quo".

¶ 8 All the other issues with respect to fraud and breaches of fiduciary duties are separate from the share certificate issue. It may very well be that the final result will be a determination that the allocation of the shares would not have been made had the Board of RMA been aware of all material facts. In such case, relief is available. Those issues will be determined at trial. Delivery up now of the shares does not foreclose any of the remaining issues.

¶ 9 In my opinion, the issue of a limitation period does not apply. The obligation to pay the subscription price is part of an executory contract with no fixed period for payment. When non-payment became an issue the Plaintiff tendered payment. In any event, the Plaintiff was at all times up to 1996 considered to be shareholder in good standing. The Defendants cannot now assert otherwise on the grounds of non-payment of the issue price alone.

¶ 10 Order to go that the Defendant RFC deliver up a share certificate representing 2500 shares of RFC to the Plaintiff against payment of \$250, within 7 days.

KEENAN J.

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