A

RATANJI MOTIRAM NARSEY AND OTHERS

v.

B

SIDNEY GEORGE GOULD AND ANOTHER

[SUPREME COURT, 1973 (Stuart J.), 25th October]

Appellate Jurisdiction

Estate and Succession Duty—shares—basis of valuation—Estate and Gift Duties Ordinance (*Cap.* 178) s. 62(1) & (3).

C

Practice and procedure—parties to be joined in appeal under Estate and Gift Duties Ordinance (*Cap.* 178) s. 62(3)—*whether proper for official valuer to be joined as a party.*

At the date of his death the deceased held 2,150 5% preference shares and 12,850 ordinary shares in Narseys Limited, a private company. The Articles of Association contained a restriction on the transfer of all shares namely that they should be offered first to a person nominated or approved by the directors at a fair price to be fixed in
D the case of dispute by the company's auditors.

The executors' value for the ordinary shares was 10/– each, based on a valuation by a Suva chartered accountant. The Commissioner being dissatisfied with this valuation appointed an official valuer who valued the ordinary shares at £2.18.2p.

The executors appealed against the value ascribed to the ordinary shares.

E *Held:* 1. Both valuers adopted the capitalized earnings method but the court considered that the valuation on behalf of the executors was quite unrealistic in view of all the circumstances.

2. The official valuer should not have been brought into court as a party to the litigation in which he had no interest, and he was therefore dismissed from the suit.

F Cases referred to:

Gandabhai Kalyan Hari and Anor. v. Gould and Anor. 10 F.L.R. 105.

Spencer v. Commonwealth of Australia (1907) 5 C.L.R. 418.

Abraham v. Federal Commissioner of Taxation (1944) 70 C.L.R. 23.

Commissioner of Succession Duties (S.A.) v. Executor Trustee & Agency Co. of South Australia (1947) 74 C.L.R. 358.

G *Pastoral Finance Association v. The Minister* [1914] A.C. 1083.

I.R.C. v. Crossman [1936] 1 All E.R. 762.

McCathie v. Federal Commissioner of Taxation [1944] C.L.R. 1.

Holt v. I.R.C. [1953] 2 All E.R. 1499.

Amon v. Raphael Tuck [1956] 1 All E.R. 273.

Vandervell Trustees v. White [1970] 3 All E.R. 16.

H Appeal by the executors against the valuation of the deceased's shares by the official valuer appointed by the Commissioner of Estate and Gift Duties under the Estate and Gift Duties Ordinance (Cap. 178) s. 62.

Messrs. Grahame & Co. for the plaintiffs.

Messrs. Munro , Leys & Kermode for the first defendant.

Crown Solicitor for the second defendant.

STUART J. [25th October 1973]—

This is an appeal by the executors of the estate of Maganlal Motiram Narsey as plaintiffs by way of originating summons against the valuation of an official valuer appointed by the Commissioner of Estate and Gift Duties under section 62 of the Estate and Gift Duties Ordinance (Cap. 178). For the sake of convenience I will refer to the plaintiffs hereafter as ' the administrators ' which is the generic term used in the Ordinance.

The deceased died on the 15 June, 1967 and at the time of his death held 2,150 fully paid up 5% preference shares of £1 each and 12,850 fully paid ordinary shares of £1 each in Narseys Limited a private company having an authorized capital of 100,000 shares of £1 of which 39,570 ordinary shares had been issued as well as 10,750 preference shares. The Articles of Association of the Company contained the restrictions on transfer of shares which are common in private companies in Fiji, namely that the representative of a deceased shareholder or a person wishing to sell his shares has to offer them to a person nominated or approved by the directors at a fair price—to be fixed in case of dispute by the company's auditor. There was no evidence that the company's auditor had fixed any fair price under the Articles. The administrators' value for the preference shares was ten shillings each and ten shillings each also for the ordinary shares, based upon a valuation by Mr R. S. Kay a Suva chartered accountant of considerable experience. The Commissioner, being dissatisfied with the value stated by the administrators caused an official valuer, Mr S. G. Gould, also a chartered accountant of considerable experience, to be appointed under the Stamp Duties Ordinance (Cap. 177) and he valued the preference shares at eight shillings each and the ordinary shares at £3.4.5 each—a figure which was reduced by consent to £2.18.2 per share at the hearing of the appeal. There was no appeal by the Commissioner against the valuation of the preference shares fixed by Mr Gould and having called for the valuation by an official valuer the Commissioner must now accept their value at eight shillings per share as against ten shillings valued by Mr Kay. The administrators would appear to gratefully accept the official valuer's figure for the preference shares, for against this there is no appeal. The administrators have, however, appealed against the value ascribed to the ordinary shares. No evidence was given, other than by Mr Kay for the administrators and by Mr Gould for the defendants.

So fas as counsel were able to advise me, this subject has been considered on only two previous occasions by a Court in Fiji, once in 1952 by Carew J. when the value of shares in the estate of the late Sir Maynard Hedstrom was in question, and in 1964 in the estate of Hiralal Gangaram Hari deceased, when the deceased's shares in G.B. Hari & Co. Ltd. were the subject of consideration by Hammett A.C.J. The former case is not reported and the latter is at Vol. 10 F.L.R. 105 under the name of Gandabhai Kalyan Hari and another v. Gould and another. It was suggested to me by counsel for the Attorney-General that the learned Judge's statements in the latter case as to value were obiter but I cannot accept that view, in that the point at issue was what value was to be ascribed to the deceased's shares, and the learned Acting Chief Justice held that the proper basis of value was that adopted by Mr Kay, who was the valuer for the administrators. The learned Acting Chief Justice described this value as being " on a presumed open market sale of the shares in the company as a going concern, having regard principally to the likely income yield of the shares, but also taking into account, *inter alia*, the actual nett asset

A backing of the shares." The learned Acting Chief Justice quite obviously understood Mr Kay to have valued the shares on the lines laid down in *Spencer v. Commonwealth of Australia* (1907) 5 C.L.R. 418. This was, of course a case of land being valued for compensation for resumption by the Crown, and the basis was held to be the sum which a willing purchaser would pay to a willing but not anxious vendor, and I think the important thing to bear in mind about Spencer's case is that it concerns the value of the land to the vendor and not the value to the purchaser. That is the basis of the statements of Williams J. in *Abrahams v. Federal Commissioner of Taxation* B (1944) 70 C.L.R. 23, 31, that the value to be ascertained is the value to the seller at the date of death with all its existing advantages and possibilities, and he sums it up in the majority judgment in *Commissioner of Succession Duties* (S.A.) *v. Executor Trustee and Agency Co. of South Australia Ltd.* (1947) 74 C.L.R. 358, at P. 361, where he says:

> " But this test must be applied with caution in order to determine the value C of an asset in the estate of a deceased person because there is not as in the case of compulsory acquisition any actual transfer of ownership at the date of death; and the shares still remain part of the estate and in many instances are not sold at all, but after payment of the funeral and testamentary expenses, debts and duties, are transferred to the beneficiaries to whom the shares are bequeathed by the will. In estimating the price at which a reasonably willing vendor would sell and a reasonably willing purchaser would buy the shares if they entered into friendly negotiations for that purpose on the date of death, the price must D represent the full value of the shares to the vendor, so that slightly to adopt the words used by Lord Moulton in delivering the judgment of the Privy Council in *Pastoral Finance Association Ltd. v. The Minister*, [1914] A.C. 1083 at P. 1088 probably the most practical form in which the matter can be put is that the vendor is entitled to that which a prudent purchaser would have been willing to give for the shares sooner than fail to obtain them.

E Dixon J. emphasis the difference between value for revenue and compensation purposes in the same case where after agreeing with Williams J. he goes on, at P. 373:

> " I should like, however, to add for myself that there is some difference of purpose in valuing property for revenue cases and in compensation cases. In the second the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in the first it is to ascertain what F money value is plainly contained in the asset so as to afford a proper measure of liability to tax. While this difference cannot change the test of value, it is not without effect upon a court's attitude in the application of the test. In a case of compensation doubts are resolved in favour of a more liberal estimates, in a revenue case, of a more conservative estimate."

In New Zealand the criterion is indicated in the judgment of Wilson J. in *Miller and Ors. v. Commissioner of Inland Revenue* in 1965 which is not reported, but a copy of G which appears in a collection of essays on the New Zealand Estate and Gift Duties Act 1968 edited by Professor I.L.M. Richardson. Referring to the shares bequeathed by deceased's will, Wilson J. said " For the purposes of estate duty, their value has to be ascertained on the basis of what they could have fetched immediately after deceased's death had there been a sale then by a willing but not anxious buyer but without having regard to the restrictions on sale imposed by the articles of association of the company." I would add, that in my view, this method is not in essence, H different fron the basis of valuation adopted in *Inland Revenue Commissioners v. Crossman* [1936] 1 A.E.R. 762 and based upon the English Finance Act 1894. In both

Australia and New Zealand, as in Fiji, restrictions in the memorandum and articles are discounted, but not in precisely the same way. In England, however, as is shown by Crossman's case the purchaser of shares is regarded as being able to be registered as the holder of those shares, but when he is registered, he holds them subject to the restrictions contained in the memorandum and articles. So that, both in New Zealand and Australia, the criterion would appear to be the same. However, in New Zealand the matter appears to have been looked at from the angle of the buyer, almost inevitably, perhaps, because valuers, as Williams J. pointed out in Abrahams' case (*cit supra.*) tend to equate values with the necessities of buyers and to assess value in terms of the use to which the buyer could put the shares.

I incline also to the view that the method of valuing adopted in the New Zealand cases results in treating the vendor as a seller who is being forced to realise on a buyer's market. I think therefore that the criterion is value to the seller and that the proper approach to the matter in Fiji is that laid down by Williams J. in *McCathie v. Federal Commissioner of Taxation* (1944) 69 C.L.R. 1 and *Abraham v. Federal Commissioner of Taxation* (1944) 70 C.L.R. 23 both of which, it must be noted, were decided before Australian legislatures introduced the policy of discounting restrictive provisions in a company's memorandum and articles. I would add that the adoption of this criterion of ' value to the seller ' may also prevent valuers and the Courts from walking in the dark ways whereof Danckwerts J. speaks in *Holt v. Inaland Revenue Commissioners* [1953] 2 A.E.R. 1499 at P. 1501 "..... I must enter into a dim world peopled by the indeterminate spirits of fictitious or unborn sales." On this basis, there are three usual methods of valuation of shares not listed on Stock Exchange which would comprise most shares of Fiji companies. First the liquidation method, which postulates a purchase of shares with the intention of realising the assets of the company by winding it up. This method, as was indicated by the learned Acting Chief Justice in Hari's case above mentioned, is not suitable for valuation of shares in a company which is a going concern. In any event, as Mr Kay said in evidence, liquidation could not be enforced by a purchaser of these shares because he would hold only a minority interest. Next, there is the assets method which rests on the view that the hypothetical purchaser would consider the nett worth of the company at the relevant date. This is commonly applied to shares in an investment company, and lastly there is the capitalised earnings method which was the method adopted here by both Mr Kay and Mr Gould. Mr Kay in his evidence said that his valuation was based upon dividends which he expected to be paid to a purchaser within the next few years. This is in conformity with the dictum of Williams J. in McCathie's case, *cit. supra.*, when he says at P. 11:

> " A prudent purchaser while taking care to see that his purchase money is well secured by tangible assets, would look mainly to the dividends which he could reasonably expect to receive on his shares, and such a purchaser would no doubt expect to receive such dividends as were appropriate to the nature of the business in which the company was engaged. It follows, therefore, that the real value of shares which a deceased person holds in a company at the date of his death will depend more on the profits which the company has been making and should be capable of making, having regard to the nature of its business, than upon the amounts which the shares would be likely to realize upon a liquidation."

Although I accept some of the limitations indicated in the evidence given by Mr Kay, it seems to me that his valuation of these shares is quite unrealistic. I am not prepared to accept that the preference shares are to be valued at the same figure as the ordinary shares, when in 1966 after £537 had been paid to preference shareholders and £2,701 to ordinary shareholders by way of dividend, £14,742 out of

A a total profit of £17,980 was carried forward to reserves. This meant that in 1966 83% of the profits of the company was placed in reserve. If, as Mr Kay anticipated, the profits for following years were of the same order, and the same policy were followed, the company's reserves would have been built up quite extensively and it would therefore appear that a purchaser of shares in the company might confidently look forward to long term advantages.

B It is true that in Fiji there is in any event a very small market for shares and the shares of a company like Narseys Ltd. would have a limited appeal, even in that market. I accept Mr Kay's assessment that a purchaser of a minority holding, as is that of the deceased, might fear that his holding would be affected by the actions of the majority shareholders, and although he might be able to get over that difficulty by litigation, the normal purchaser would not buy shares which would lead him into Court proceedings to vindicate his rights. Taking these and other matters mentioned by Mr Kay into account the result is to depress the value of the shares very con-

C siderably and if Mr Kay's arguments are pressed to their ultimate conclusion the shares would be valueless. And yet not only have these shares a value but they have in my view a much greater value than is ascribed to them by Mr Kay. There would be for example, their value to the Narsey family, who would probably be prepared to pay the figure mentioned by Mr Gould, and more, rather than have the shares sold outside. I cannot accept that the value of £2 shares in Narseys Ltd. was only £1 at the date of the death of the deceased, Maganlal Motiram Narsey. I would think

D that if the administrators were selling their shares in the company and were only able to realise that figure they would consider themselves hardly served. Moreover, Mr Kay had five years earlier fixed the value of ordinary shares in G.B. Hari Ltd. which he said was a similar type of company to Narseys Ltd. at $2 a share.

It seems to me too that when Mr Kay says ' capital growth is of little value unless you can realise the shares when you want to ' he has overlooked subsection (5) of

E section 62. It is precisely here, in my view, that the ' restrictive provisions or other conditions ' mentioned in that subsection must be discounted, and the considerations which weighed so largely with Danckwerts J. in dealing with a minority holding in *Holt v. Commissioners of Inland Revenue* [1953] 2 A.E.R. 1499 must be accounted in this case to be not so weighty.

Mr McFarlane invited me to treat the matter of valuations as being at large, but I am not certain that I am at liberty to do that. A valuation in Fiji is not made by

F the Commissioner at his discretion, but by an official valuer and I would want to consider the effect of that factor before coming to a conculsion. However, I am relieved from making a decision on this point by the fact that the evidence, as I see it, is not sufficient for me to weigh the relative merits or demerits of the valuations, save as they are revealed in the figures submitted. For example I am not sure that Mr Gould's figure of 12½% as the return expected by a prospective buyer is not too high, but I bear in mind the statement of Dixon J. which I have set out above,

G that doubts about a valuation for revenue purposes should be resolved in favour of the more conservative estimate. I am unable to find that Mr Gould has taken into account anything that he should not have done. He stated in evidence that he had borne in mind that the deceased held only a minority holding in Narseys Ltd. and I think that his valuation reflects this, although it is not mentioned specifically therein. I accordingly hold that the value of the ordinary shares held by the deceased Maganlal Motiram Narsey in Narseys Ltd. was at the date of his death £2.18.2 or

H $5.82 per share.

Section 62(3) of The Estate and Gift Duties Ordinance (Cap. 178) provide for an appeal, either by the Commissioner or by the administrator and in this case an appeal was lodged by the executors as plaintiffs with the valuer as respondent.

This is analogous to the procedure in rating cases where the legislature has provided for the valuer to be a respondent to an appeal. That is not the case under the Estate and Gift Duties Ordinance, nor is there provision for payment of the valuers costs as there is under the local body legislation—see Local Government Act 1972 section 70 which has repeated previous legislation on this particular subject, The Attorney-General was subsequently added as a party at his own request on the basis that this was in effect a civil proceeding against the Crown and as such, governed by section 12(2) of the Crown Proceedings Ordinance (Cap. 17). On the hearing of the Attorney-General's application the position of the valuer was raised, but not discussed, and at the hearing of the case all counsel concerned asked for the matter to be considered. It seems to me quite unsatisfactory that the valuer should be brought into Court as a party to litigation in which he has no interest and in which his only concern is to support a valuation which he has given at the request of a party interested. It means equally unsatisfactory that one of the persons when it is sought to bind by his valuation should not be a party in the proceedings, and yet this was the position here until the Attorney-General was joined. I think that the point to be borne in mind here is that the valuation is the Commissioner's valuation. Section 62(1) reads:

> " For the purpose of assessing estate duty or gift duty, if the Commissioner is not satisfied as to the value as stated by the administrator or donor, as the case may be, he may determine it either by agreement between himself and the administrator in the case of estate duty or between himself and the donor in the case of gift duty or, in the event of a failure to agree, by a valuation made by an official valuer appointed under the Stamp Duties Ordinance."

In the face of this it may seem strange that he should be able to appeal against his own determination of value as is the case under section 62(3) but it may be that the legislature wished to give him the right to question a valuation, which although it is his own, in the sense that it is by his appointee, he may wish to impugn. In that event, in my view, the administrators would be vitally interested, and doubtless would wish to be parties, although if the procedure adopted to date in Fiji is to be accepted, they would not necessarily be. It seems to me that the words of Devlin J. in *Amon v. Raphael Tuck* [1956] 1 A.E.R. 273 are in point. His comments refer to the joinder of a party, but I think they apply equally to a person who is already a party. He said at P. 286–7:

> " The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and, if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it is necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

A I should perhaps add that although the judgment of Devlin J. has been subject to some criticism in the Court of Appeal, it now seems clear that the interpretation of the rule as to joinder of parties (O.15 R. 6 of the Supreme Court Rules) is to be taken as settled on the narrower basis favoured by him rather than on the wider basis favoured by the Court of Appeal. See the judgments of the House of Lords in *Vandervell Trustees v. White* [1970] 3 A.E.R. 16. Here there is no reason for the official valuer to be bound by the result of the action but there is every reason for
B the administrators and the Commissioner of Estate and Gift Duties as represented by the Attorney-General to be bound. I notice, incidentally, that in Sir Maynard Hedstrom's case both the Commissioner and the valuer were joined as defendants but I think the valuer should be a witness and not a party. I propose therefore to make an order as requested by Mr Leys dismissing Mr Gould from the suit. When the Attorney-General was joined as a party, he was joined on the basis that only one set of costs would be allowed to the defendants in the event of their success.
C There will therefore be no order for costs in favour of the Attorney-General but Mr Gould will have his costs, to be agreed or taxed as between party and party and paid out of the estate of the deceased.

Appeal dismissed.