## CONVEYANCE DUTY ON DISTRIBUTION BY A LIQUIDATOR

## SHAW SAVILL AND ALBION CO. LTD. v. COMMISSIONER OF INLAND REVENUE, [1956] N.Z.L.R. 211.

The question before the Court of Appeal (Stanton, Hutchison and Shorland JJ.) in Shaw Savill and Albion Co. Ltd. v. Commissioner of Inland Revenue (supra) was whether a transfer by a company in liquidation at the direction of the liquidator, transferring its assets in specie to the shareholders of that company, was liable to conveyance duty pursuant to s. 79 (a) of the Stamp Duties Act 1923 (now s. 66 (a) of the Stamp Duties Act 1954), or whether the transfer fell within the exemption provided by s. 81 (d) of the 1923 Act (now contained in s. 69 (d) of the 1954 Act).

In short, the Court decided:

(a) that the transfer was not for valuable consideration either by way of sale, exchange or otherwise and was not therefore excluded from s. 81 (d); and

(b) that the relationship of the company in liquidation to the shareholder was that of trustee and beneficiary within the meaning of s. 81 (d).

It is the intent of this note to examine the reasoning on which the judgment is based and the cases followed or distinguished in respect of the first conclusion only.

The argument that the exemption given by s. 81 (d) applied only to voluntary conveyances, or to conveyances to the extent that they were not for valuable consideration, was readily accepted. After considering the context in which the subsection is to be read and the general purpose of the statute to exact duty upon conveyances on sale Shorland J. summed up the opinion of the Court when he said (at p. 231):

> . . . A consideration of the instances in which the exemption prescribed by s. 81 is given lead irresistibly, in my view, to the conclusion that s. 81 can have no application to a conveyance on sale.

Such an assertion does, with respect, appear to be too wide when the character of the various conveyances exempted by s. 81 is studied. It is difficult to see why clause (e) (now subject to s. 70 of the 1954 Act) exempting conveyances to or by the Crown of any lands or other property, or clause (f) exempting conveyances of property to be held on a charitable trust, or clause (j) exempting transfers of policies or contracts of assurance, cannot apply to conveyances for "valuable consideration, in money or money's worth whether by way of sale, exchange, or otherwise howsoever" (s. 77, Stamp Duties Act 1954). It is not necessary to determine this point, however, for it is sufficient that the particular clause in question, i.e. s. 81 (d), can apply only to voluntary conveyances, the Court holding that it cannot have been intended that a transaction which is in reality a conveyance on sale should be exempted by clause (d) merely because the transaction is carried out in such a way that there ultimately arises a situation in which the legal owner of the property has become a bare trustee for the other party. The words of Channel J. in Gannett v. Inland Revenue Commissioner (1899), 81 L.T. 633, 638, are quoted: duty cannot be evaded "by paying your money first and executing your deed afterwards."

As a result, if the memorandum of transfer had been held to be a conveyance for valuable consideration, it would not have come within the operation of s. 81 (d) and the question whether a trustee-beneficiary relationship existed between the company and the respondent would not have arisen.

In support of the submission that consideration was given by the company for the transfer of the property in question, the decision of the High Court of Australia in Archibald Howie Pty., Ltd. v. Commissioner of Stamp Duties (1948), 77 C.L.R. 143, was strongly relied upon. In that case the company, having the necessary power, resolved to reduce its capital by distributing in specie among its members at book values certain shares held by it in other companies. Both Dixon and Williams JJ. in written judgments, with Rich J. concurring, held that the transfers, effecting a distribution by the company to shareholders of property in specie, were to be deemed to be given for valuable consideration and assessed for stamp duty accordingly.

Dixon J. emphasized in the first place the right of the shareholder to have share capital applied in pursuance of the memorandum and articles of association and, so far as assets are available, to have his paid up capital returned on liquidation, or upon a reduction of capital if decided upon pursuant to the articles of association. Secondly, he pointed out that the right to any return which the company may make either as a going concern or in winding up is measured by the extent of the share contributed to the capital of the company. Subject to any regulation, the articles may make the amount of the share determine the proportion in which the shareholder shares with other shareholders in a distribution of excess assets. The ratio decidendi emerging from his judgment is that the return made to the shareholders discharged pro tanto the claim of the shareholders upon the assets of the company.

Williams J. does not refer to this concept but bases his reasoning on the proposition that consideration passes when the shareholder acquires his shares. The payment by a shareholder of the nominal amount of his share, or the assumption of liability to pay it, provides full consideration for the right to receive any distributions of money or assets which the shareholder subsequently receives from the company.

The English cases Associated British Engineering Ltd. v. Inland Revenue Commissioners, [1941] 1 K.B. 15; [1940] 4 All E.R. 278, and Wigan Coal and Iron Co., Ltd. v. Inland Revenue Commissioners, [1945] 1 All E.R. 392, were cited in argument in Howie's case (supra). The Court of Appeal in the Shaw Savill case had difficulty in reconciling these decisions with the conclusion finally reached by the High Court, and purported to follow the English cases.

In the first case, Associated British Engineering Ltd. v. Inland Revenue Commissioners (supra), a company passed a resolution to distribute as a capital bonus amongst its shareholders a number of fully paid shares and stock units which it held in two other companies. Lawrence J. held that a distribution in specie of these shares held by the company was a "voluntary disposition inter vivos" and liable to ad valorem duty under the provisions of s. 74 of the Finance (1909-10) Act, 1910 (U.K.) by reference to the value of the

shares transferred. Particularly pertinent are the words in subs. (6) of the same section which provide that "A conveyance . . . under which no beneficial interest passes in the property conveyed or transferred . . . ." is not to be charged with duty under the section.

Basing their argument on this subsection the appellants urged, in the first place, that no beneficial interest passed in the property conveyed as the beneficial interest had already passed by virtue of the antecedent resolution of the company; that the transfers themselves did nothing more than give effect to the pre-existing right of the shareholders. Lawrence J. held, however, that the transactions ought to be regarded as a whole. This is to say, that the transfers and the antecedent resolution declaring the capital bonus were to be looked at as being part of the one transaction, so that a beneficial interest could then be deemed to have passed with the property. Even apart from this the learned Judge was of the opinion that as the resolution did not create any trust, some beneficial interest did remain to be conveyed on the execution of the transfers. Although Lawrence J. did not adequately demarcate the different conclusions in his judgment, it is obvious that no part of the above argument went to the question whether the conveyance was voluntary or not.

Section 74 (5) of the Finance (1909-10) Act, 1910 (U.K.) defines a voluntary conveyance as follows:

> Any conveyance or transfer (not being a disposition made in favour of a purchaser or encumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos . . . .

It was further contended by the appellant, therefore, that if the transaction was to be regarded as a whole so that a beneficial interest did pass with the property, it could not be said that the transfer was a voluntary disposition because it was a disposition made by the company in pursuance of the will legally expressed by the corporators or shareholders in the company. The learned Judge said: "I do not think that it can successfully be argued that the company was

not acting voluntarily because it was acting in pursuance of the wishes of the majority of the corporators legally expressed . . . ." To decide that the disposition of shares was voluntary because the company was under no obligation to make it is to give an entirely different meaning from that given to the word in the definition of voluntary conveyance in s. 77 (now s. 63) of the New Zealand Act under consideration in the Shaw Savill case.

Nor, in fact, does it appear to be wholly pertinent to the definition provided by subs. (5) (supra) itself, for the question was not considered whether the transfers were dispositions made in favour of other persons in good faith and for valuable consideration within the meaning of the words in brackets in that subsection.

The decision in Associated British Engineering Ltd. v. Inland Revenue Commissioners (supra) does not, therefore, revolve on the question of consideration. It is submitted that the decision has little relevance to the question whether the transfer in the Shaw Savill case was a conveyance on sale or not.

In Wigan Coal and Iron Co. Ltd. v. Inland Revenue Commissioners (supra) the company paid off its capital to the extent of 10s. per £1 share, and effected the reduction by the transfer to its shareholders of shares which it held in another company. The market value of these shares considerably exceeded the 10s. by which the capital had been reduced. Wrottesley J. held that the distribution was in the nature of a voluntary disposition inter vivos and within s. 74 (1) of the Finance (1909-10) Act, 1910 (U.K.). The decision was based in the main on the latter part of subs. (5). Subsection (5) which, as stated above, provides that all transfers which are not, inter alia, for valuable consideration are to be deemed to be voluntary dispositions inter vivos, continues:

> . . . the consideration for any conveyance or transfer shall not . . . be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.

The Inland Revenue Commissioners claimed that the consideration for the transfer of shares was inadequate because the transfer conferred a substantial benefit on the transferee, that is, a benefit over and above what was paid for at the time. Wrottesley J. pointed out that this was the proper question to which the Commissioners must direct themselves; not to decide whether the transaction could be called a voluntary disposition, for when the consideration is inadequate in their opinion the Act deems the disposition to be voluntary.

Wrottesley J. concluded that there was ample material on which the Commissioners could bring the case within the latter part of subs. (5), and was of opinion that the transfer conferred a substantial benefit on the transferee.

It is to be noted that this argument does not deny the presence of consideration in the transaction but posits only that the transaction confers a benefit over and above that for which consideration was provided. Therefore, because of the particular wording of the English statute, which is the basis of the decision in Wigan Coal and Iron Co. Ltd. v. Inland Revenue Commissioners, the case is not in point in the Shaw Savill case.

An argument was submitted by the appellants that the real consideration for the transfer moved when the transferee as a shareholder in the holding company had his capital cut down by half, but the point does not appear to have been developed to the same extent as in Dixon J.'s judgment in the Howie case (supra). Wrottesley J. was content to state that if it were necessary for him to deal with this aspect he would agree with the view expressed by Lawrence J. in Associated British Engineering Ltd. v. Inland Revenue Commissioners (but as demonstrated above, this case is of no assistance on the point), and the views expressed by Findlay J. in Cohen and Moore v. Inland Revenue Commissioners, [1933] 2 K.B. 126.

The question at issue in this latter case was this: if after the completion of a verbal transaction which effectually passed the property a deed was executed operating as a record of the disposition, should the prior settlement and the subsequent deed be regarded as one transaction or two distinct transactions? Findlay J. applied Gannett v.

Commissioners of Inland Revenue (supra) and held that there had been one single transaction and as a consequence the deed was chargeable with ad valorem duty as affecting a settlement of property.

If Wrottesley J. is to be taken as denying the presence of consideration in the circumstances of the Wigan case he could only have done so by holding that the resolution to reduce the capital of the company and the final distribution of shares in specie pursuant to that resolution were two distinct transactions. At the least, the learned Judge would have had to face the question whether the reducing of the capital share of the shareholders in the company did or did not constitute valuable consideration for the transfer of the shares. But the learned Judge expressly stated that the resolution had to be regarded as a necessary step in the transferring of the shares. The two cases, which he purported to follow, far from being of assistance are, it is submitted, in conflict with his conclusion.

In so far as the High Court in Howie's case relied on the original purchase price of the shares as constituting consideration for the subsequent transfer of assets as stated by Williams J., the learned Judgesin the Shaw Savill case (supra) held that such consideration was too remotely connected with the later transfer to allow it to be regarded as consideration for the transfer of the company's assets.

This concept was introduced by F.B. Adams J. in the Supreme Court. He had concluded that if the reasoning in the Howie case was accepted, an element of consideration would exist in the present case. He held that the Shaw Savill Company had undoubtedly at some stage given value for the transfer, that it was in no sense a gift. "In the final analysis," he states (at p. 219) "it seems clear, indeed, that value was given in the sense that other rights vested in the appellant as a shareholder were impliedly surrendered, or released in exchange for the transfer," thus adopting the concept of consideration initiated by Dixon J. It is difficult to understand how this consideration could be held to be too remote, for consideration in the sense of surrendering one's rights is inextricably bound up in the transaction itself.

However, Williams J.'s view, that the payment by a shareholder of the nominal amount of his share, or the assumption of liability, provides full consideration, was rejected by the Court of Appeal on the ground of "remoteness". It is difficult to see how the payment for the shares by the respondent company cannot be constructed as being irrevocably related to the ultimate transfer. If the true consideration is, in fact, the paying up of the share capital, the shareholder derives certain rights which subsist with the continuation of the company and are not curtailed by the passing of time. The notion of remoteness of consideration is not mentioned in the cases previously cited and does, with respect, appear to be a convenient innovation in the Shaw Savill case.

The Court of Appeal were content, in dismissing Dixon J.'s view of consideration, to emphasize the distinction between the case of either a reduction of capital or the issue of a bonus distribution in which cases the company continues in operation, and the case of a distribution consequent upon winding up, as in the Shaw Savill case. Shorland J. expressly referred to the distinction as put by Wrottesley J. in Wigan Coal and Iron Co. Ltd. v. Inland Revenue Commissioners (at p. 395):

> . . . there are obvious differences between a company distributing part of its assets amongst its shareholders and thereafter continuing to carry on business, as this company clearly intended to do, and a liquidator charged with the fiduciary duty of distributing to the shareholders property in which the liquidator had no personal rights or interest whatever.

It is submitted, with respect, that this distinction goes to the question of whether the relationship of a company in liquidation to its members is that of trustee and beneficiary, and not to the question whether the conveyance was for valuable consideration. Hutchison J. does remark that although there is obviously a difference between the position of a company in liquidation and that of a company carrying on business it is difficult to see why the view of the High Court, if it were to prevail, should not be applicable after liquidation as well as before liquidation.

The Court of Appeal, it is respectfully submitted, did not adequately examine the basis of the English cases referred to above, introduced a notion of "remoteness" of consideration which has no proper legal validity, and failed to rebut the cogent reasoning of either Dixon J. or Williams J. in the Howie case. It is submitted that the memorandum of transfer, not being voluntary, was properly assessed for ad valorem duty, and the question whether a trustee-beneficiary relationship existed between the company and the respondent pursuant to s. 81 (d) should not have been considered.

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