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Calcutta High Court

Case No: Special Appeal No. 666 of 1869

Gopal Das		APPELLANT
	Vs	
Sheikh Syad Ali and Others		RESPONDENT

Date of Decision: June 10, 1869

Judgement

HARMAN L. J. - Mrs. Nellie Lynall, with whose estate this appeal is concerned, died on May 31, 1962. Her age was in the middle seventies. Her principal asset was a large holding representing about 28 per cent. of the issued capital of a private limited company called Linread Ltd. This was an old-established and prosperous concern having its headquarters in Birmingham and being engaged in the manufacture of what are known as cold-forged fasteners -things in the nature of screws, nuts and bolts used in the aircraft and motor industries. The company was a private company and the shares were held entirely in the family, the chairman, Mrs. Lynalls husband, owing 32 per cent. and two sons owning 20 per cent. each. All four were directors of the company, though Mrs. Lynall was not an executive director.

Under the articles of association the shares of the company were very severely restricted in transfer; the directors had an absolute right to refuse to register, and a would-be seller must first offer his shares to Mr. Lynall and, after he ceased to be chairman, to the other members of the company, at the fair value, which at all material times was fixed at par. At the very lowest estimate the shares were worth double that figure, but in effect a would-be transferor had nothing to sell but the par value. In these circumstances a familiar difficulty arose of valuing the shares for estate duty purpose u/s 7(5) of the Finance Act, 1894, which is in these terms :

"The principal value of any properly shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

It has been the law since Attorney-General v. Jameson, the decision of a very strong Court of Appeal in Ireland, which was followed and confirmed in the House of Lords in Inland Revenue Commissioners v. Crossman, that the meaning to be given to this

section is that for the purpose of estimating the price of such shares, price being under the section the criterion of value, it must be assumed that a purchaser would be entitled notwithstanding the restrictions to be transfer imposed by the articles of association. This view of the law is admittedly binding on this court, but the respondent taxpayers desired to reverse the point, in case the matter went to the House of Lords, that the minority view expressed by Lords Russell and Macmillan in Crossmans case was the right one and that the true value of shares such as these is par and no more.

The company had a conservative dividend record, but during the last two years of Mrs. Lynalls life a dividend of 15 per cent. had been paid, no doubt under the pressure exercised by the Revenue, which of course had in its hands the weapon of a surtax direction on the members. Moreover, this was company in which two person holding 60 per cent. of the capital were about 70 years old and inevitably the question must arise how the very heavy estate duties which would become payable on their deaths could be found, and it is notorious that in order to raise the duty many such companies have been obliged to offer a certain proportion of their shares by an issue to the public, which of course involves the sweeping away of the restrictions on transfer and becoming a public company. This would have the result of very much enhancing the price which the shares would fetch, and the chance of its happening must necessarily be in the mind of any purchaser, who would so long as the company remained a private company in effect be looking up his capital.

The sale envisaged by the section is, as is agreed, not real but a hypothetical sale and must be taken to be a sale between a willing vendor and willing purchaser - see, for instance, the speech of Lord Guest in In re Sutherland. decd. It is true that the so-called willing vendor is a person who must sell : he cannot simply call off the sale if he does not like the price; but there must be on the other side a willing purchaser, so that the conditions of the sale must be such as to induce in him a willing frame of mind.

The controversy which has arisen here is extraordinarily free from authority, which is strange, as valuations under the section have been going on since 1894. The dispute is, what information about the company and its past history and future prospects is to be assumed to be in the possession of the purchaser at the date of the sale. Three possibilities were canvassed. First, that which was reached by the judge below, namely, that the purchaser must be taken to be in possession, apart from what I call published documents, of all such further information (if any) as on the evidence in this case a member of the board applied to would have afforded. This evidence was given by one of the two sons of the family, who alleged that the board if asked would have been extremely uncommunicative. The judge himself did not favour this result but he felt constrained to it by a decision of Danckwerts J. in In re Holt, decd.

The second view, which the judge would have preferred had he felt himself free, is the "published information" footing, namely, that the purchaser would have had only such information as had before the date of the death been communicated by the board to the shareholders and no confidential information such as was within the knowledge of the board. The third possibility, which was, at any rate in this court, supported by the Crown, was that the purchaser must be supposed to have in addition to the published information such further information as would in practice, on a sale of an important block of shares such as these, have been confided by the board either to the purchaser or perhaps more probably in confidence to his financial advisers.

As a matter of history what happened was that the executors, in the Inland Revenue affidavit upon which probate was obtained, put in a valuation of the shares made by the secretary, who stated the value at pounds 2 a share. The commissioners, having considered the matter, formed the opinion that the true value following the Jameson principle was pounds 4 a share. This the executors were unwilling to pay and, being aggrieved by the decision, appealed to the High Court u/s 10 of the Act of 1894. The Crown then applied for discovery of documents. Now of course the executors being directors themselves had in their possession or power material beyond the published information and would have been bound to include it in their affidavit on discovery. By was a compromise, the documents which have been called the "B" documents were disclosed by the executors without prejudice to the question whether they would have been bound to make them available to the Crown or whether they could have objected to disclosing their contents on the ground that they only had this information as members of the board and were entitled to with hold it. This information was of two kinds. First, the interim monthly statements in the possession of the members of the board showing the progress of the company during the nine months which had passed since the period covered by the last information in the hands of the shareholders, which was that contained in the accounts for 1961. Second, such facts as there were in the knowledge of the board to show the prospects or the likelihood of company going public. Both these matters would have been of the utmost importance to a purchaser, but it was said that, not being published information, that is to say information available to the shareholders at the date of death, they must be ignored.

Before Plowman J. there was elaborate evidence of experts giving their opinions as to the value of the shares. None of these questions arose before us and this judgment is shortened accordingly. Plowman J., weighing the opinions on the two sides, come to the conclusion that the proper price was pounds 3 10s. With this the taxpayer is content. The experts, however, all agreed that if the buyer was entitled to be informed upon the two points, namely, the last nine months profits and the indications of the boards intentions as to a public offer, there would have to be added a pound to the value of each share.

Before us, therefore, only one point was argued, namely, whether Plowman J.s. valuation of pounds 3 10s. should stand or whether it should have a pound added to it, as, on the evidence, would happen if the further information were disclosed.

There is an extraordinary dearth of authority on this point. In Jamesons case no question of valuation arose because the commissioners had not arrived at a valuation : the only thing settled was the basis of the valuation. That case, therefore, is of no help. Attorney-General v. Jameson was followed in Scotland by Lord Fleming in Salvesens Trustees v. Inland Revenue Commissioners in the Outer House of the Court of Session. The shares in question were shares in a private company with a restricted right of transfer and the judge made a valuation following Jameson. He said, at page 46 :

"The problem can only be dealt with by considering all the relevant facts so far as known at the date of the testators death and by determining what a prudent investor, who knew these facts, might be expected to be willing to pay for the shares. Counsel for both the petitioners and respondents accordingly assumed that the prospective buyer would inform himself of all the relevant fact and, in particular, have made available to him the accounts of the company."

Then he goes into the question of what the relevant facts were. This assumes that the purchaser knew "of the relevant facts so far as known" but does not say to whom they would be known.

Later, Lord Fleming said, at page 50 :

"As a prudent person, he " - that is, the buyer - "would, of course, keep in view that he was purchasing the shares in October, 1926, and that the balance sheet shows the affairs of the company as at July, 1926, and he would make inquiry as to the alterations in its financial position which had taken place between these two dates. But he would first examine the balance sheet and I think that he would be very favourably impressed by the fact the assets showed a surplus of upwards of pounds 900,000 over its capital."

Then he calculates the value of the shares on that footing. The judge, therefore, assumed that the purchaser would know all that he wanted to know, in particular the state of the companys business since the date of the last published balance sheet. In fact he felt himself entitled to look at the later published balance sheet to see what in fact happened during the last three moths before the death, and this I think was only because he assumed that the purchaser would obtain that information : he could obtained it only from the board.

The next case is Findlays Trustees v. Inland Revenue Commissioners. There the property was a shares in a partnership. Here again the judge assumed that the purchaser was information of all the facts which he required to know. He said, at page 440 :

"In estimating the price which might be fetched in the open market for the goodwill of the business it must be assumed that the transaction takes place between a willing seller and a willing purchaser; and that the purchaser is a person of reasonable prudence, who has informed himself with regard to all the relevant facts such as the history of the business, its present position, its future prospects and the general conditions of the industry; and also that he has access to the accounts of the business for a number of year."

Once again the judge assumes that all relevant facts are disclosed; but there was no argument on the subject of how or from whom the purchaser must be taken to have obtained them.

The third cases is that already mentioned, In re Holt, decd. There, the information in the hands of the directors was a deprecatory character, and evidence was given by one of them of the adverse factors, and he said that he would if inquiry had been made have disclosed all these facts to the prospective purchaser. Danckwerts J. said, at page 1495 :

"One question of some importance dealt with by Mr. Holt was how for a prospective purchaser would have been able to obtain information as to the companys position and prospects by inquiry from the directors. Mr. Holt said that all the information which he had given in evidence would not have been given directly to a buyer of a small quantity of shares, but that it would have been made available, in confidence, to a reputable firm of accountants, acting on behalf of a buyer and approved by the board of directors, with the result, as I understood the position, that the information so revealed would not be passed on to the buyer, but his accountant would be in a position to advise him as the prudence of the purchase and the price which could reasonably be offered for the shares."

The judge in the end based his valuation on the facts so disclosed. The appears from what he says, at page 1501 :

"It is plain that the shares do not give a purchaser the opportunity to control the company, or to influence the policy of the directors to any great extent, as the shares available only represent 43,698 shares out of 697,680 ordinary shares which had been issued. Any purchaser would, therefore, be dependent on the policy of the directors, so long as they should have the support of the general body of the shareholders. I think that the kind of investor who would purchase shares in a private company of this kind, in circumstances which must preclude him from disposing of his shares freely whenever he should wish (because he will, when registered as a shareholder, be subject to the provisions of the articles restricting transfer) would be different from any common kind of purchaser of shares on the Stock Exchange, and would be rather the exceptional kind of investor who had some special reason for putting his money into shares of this kind. He would, in my view, be the kind of investor who would not rush hurriedly into the transaction, but would

consider carefully the prudence of the course, and would seek to get the fullest possible information about the past history of the company, the particular trade in which it was engaged and the future prospects of the company."

None of these cases, as it seems to me, decides the point here at issue. They all, I think, assume full knowledge of all relevant facts by the purchaser, including facts not published to the shareholders before the date of death.

Neither side was enamoured of the basis on which Danckwerts J. decided, although the taxpayer preferred it to the Crowns view. In my judgment, it is not a satisfactory basis, for it seems to depend on the whim of the board of directors were favourably disposed to the seller or no. I think this view must be rejected.

As I have said, Plowman J. felt bound to follow the Holt decision but stated that if free to express his own view, he would decide in favour of the taxpayers submission that published information alone ought to be taken into account and that in particular the "B" documents were inadmissible.

As to the second view, which is the taxpayers view it seems to me that in the end the taxpayer found he could not maintain it in its logical form for he was constrained to admit that it was legitimate to take into account the financial results of the company for the nine months after the last published balance sheet. The reason given was that this information would eventually come into the hands of shareholders but that cannot be made to accord with the principle that the knowledge of the shareholders therefore, that the taxpayers contention breaks down at this point and it is legitimate that the hypothetical purchaser should know matter which at the date of death were only known to the board.

The more important information is, of course, facts which tend to show the likelihood of a public issue. Now the "B" documents show that this bad been in fact under consideration by the board since 1959, that Messrs. Thomson McLintock & Co. had been called in to report and advise on this very subject and had advised an immediate issue to the public. They show, moreover, that the board had sanctioned the taking of advice from Messrs. Gazenove & Co., well-known stockbrokers, who had at the beginning of 1962 reported in favour of a public issue and discussed ways and means.

This leaves the Crowns contention. Very strong evidence was produced form two leading experts that where substantial blocks of shares in private companies are in the market, as from time to time they are, it is the invariable practice among boards of directors to answer reasonable questions in confidence to the advisers of the purchaser. In fact it was said that if such question are not answered no sale would ever go through because a purchaser would fight shy if he felt he were being felt in ignorance of material facts. This, then, would not produce the willing purchaser which the formula postulates. It was said further that where a substantial shareholder was mined to dispose of his shares in such a company the directors

would feel a moral duty to assist him by answering reasonable question.

It was argued by the taxpayer that this solution was impracticable because it would depend on the availability of members of the board who could in the last resort if unwilling to make a proper disclosure be called into the witness-box on subpoena duces to produce some reasonable information. I suppose such circumstances might conceivably arise but I am content to leave the matter where it is, relying on the almost unchallenged evidence that boards of directors do not behave in that way and that reasonable answers would be forthcoming.

No such difficulty of course arise here, for the vendors were in fact directors in possession of the information in question and the only question is whether in a normal case they would have obtained their fathers leave to disclose it. Now if in fact it were necessary for the vendors to sell some of the shares in order to pay their mothers debts - as is must likely - it is clear that the father would have been only too ready to permit disclosure of facts which would enhance the purchase price. It was the taxpayers argument that directors must be excluded from amongst possible purchasers because they would be "special" purchases. I do not accept this, and am of opinion that this is not an ingredient in the Crossman decision. In Crossmans case it was decided that the fact that a "special" purchaser, namely, a trust company, would have offered a special price, must be ignored, but this was because that particular purchaser had a reason special to him for so doing. So, here, a director who would give an enhanced price because he would thus obtain control of the company would be left out of account. But that is not to say that directors as such are to be ignored. All likely purchasers are deemed to be in the market. What the Act says in that the sale is to be treated as an open market sale, that is to say, the restrictions on transfer are to be ignored for the purposes of the hypothetical sale which is to fix the price, but I cannot see why the hypothetical sellers are not to be treated as being what they are, namely, directors in possession of the information which a purchaser would reasonably require and which on the evidence he would have obtained if he were to be a willing purchaser.
It is agreed here, as I have said, that if information such as is contained in the "D" documents were available to the hypothetical purchaser a pound must be added to the value of the shares and I am, accordingly, of opinion that the Crowns appeal succeeds and that the proper price for these shares for the purpose of estate duty ought to be set at pounds 4 10s.

I would allows the appeal accordingly.

WIDGERY v. L. J. - The facts of this case are fully set out in the judgment in the court below and I find it unnecessary to respect them in full.

When Mrs. Lynal died on May 21, 1962, she was the registered holder of 67,980 ordinary shares in Linread Ltd. This holding represented approximately 28 per cent. of the issued share capital, the other substantial shareholders being her husband

(32 per cent.) and her two sons (each 20 per cent.) Mr. Lynall"s shareholding passed on her death for the purpose of the Finance Act, 1894, and must be valued for the proposes of estate duty u/s 7(5), which may Lord has read and I will not repeat.

The business of the company was family business which had started from small beginnings and had prospered. The accounts of the company for the years preceding 1962 showed a steady and rapid increase in both turnover and profits, much of the latter being retained in the business and not distributed as dividends. Both the deceased and her husband were elderly, and the possibility that the company might be minded to make a public issue of shares would have occurred to anyone who had made a careful study of the accounts and the structure of the company in 1962. It is common ground that the effect of a successful public issue would have been enhance the price of the shares and that, as the prospect of such an issue increased, the market price would increase also.

The directors had, in fact, been giving serious thought to the possibility of a public issue since 1959 but this was known only to the members of the board. Messrs. Thomson McLintock were commissioned by the board to carry out a survey of the companys undertaking with a view to a public issue and made their first report in July, 1960. In February, 1962, McLintocks were advising that the board should consider a floatation at the earliest possible moment and in March, 1962, the board received a report from stockbrokers (Messrs. Cazenoves) suggesting the method by which this might be carried out. A public issue was in fact made in 1963.

It is further common ground that the price which would have been paid for these shares in the open market on the date of the death of the deceased would have been markedly affected by the extent to which the buyer was aware of these developments and of the imminence of a public issue which knowledge which is to be attributed to such a purchaser, the judge having made alternative valuations on two hypotheses and there being no appeal in regard to his figures.

Three alternatives have been put forward :

First, that the vendor and purchaser concerned in the hypothetical sale should be deemed to be in possession of no information as to the financial position and prospects of the company beyond that contained in the companys accounts prepared prior to the relevant date, and any other information which had then been made available to shareholders or was available to the public at large. The judge referred to this by the convenient lable of "the published information." Mr. Bagnall contended that the published information should also include that to be derived from the companys accounts for the financial year in which the death occurred even though these were not available until a later date.

The second alternative contended for was that in addition to the published information the vendor and purchaser should be deemed to have any information which the board of directors of this company would in fact have provided to a

prospective purchaser or inquiry made on relevant date. This has been referred to as the "subjective test" since it involves an investigation of the state of mind of the board and of its probable response to such an inquiry.

Thirdly, that in addition to the published information the vendor and purchaser should be deemed to have all information which would normally be made available to a genuine intending purchaser of property of the kind in question, this being information which a purchaser would expect to have and without which be would be unwilling to buy. Sir Milner Holland, who argues for this third alternative, put his proposition in a number of different ways and the words I have used are my own paraphrase of his submission.

The judge rejected Sir Milners submission, and indicated a preference for the "published information" test. He was constrained, however, to follow the decision of Danckwerts J. in In re Holt, decd. and accordingly adopted the second alternative as the principle to be applied in this case. Having heard evidence from director of the company as to the information which would have been made available to a prospective purchaser on May 21, 1962, he concluded that the confidential report from Messrs. McLintock and Messrs. Cazenoves would not have been disclosed and fixed pounds 3 10s. as the value of each share. He further held that if the purchaser was to be deemed to have seen this confidential information the price would have been pounds 4 10s per share.

Neither partly in this court has shown any enthusiasm for the subjective test, though Mr. Bagnall supports it as an alternative to the published information test if the later is not acceptable. In either event he is content with the judges valuation of pounds 3 10s. Sir Milner, for the Crown, contends for the third alternative and a valuation of pounds 4 10s.

Section 7(5) of the Act of 1894 applies to all forms of property passing on a death. It makes the hypothetical market price the test of value, and prescribes only two of the conditions of which the sale is subject, namely, that it must be a sale in the open market and conducted at the time of the death of the deceased. In so far as other conditions need to be inferred, the court must supply those which will give effect to the intention of the section. Thus, it is established that the sale is a wholly hypothetical one conducted between hypothetical parties. As Lord Hailsham said in Inland Revenue Commissioners v. Crossman :

"Lord Plender" (a witness) "did not exclude anybody or include anybody in particular; he considered the matter generally. In my opinion that is the right way to arrive at the value in the open market."

It is also clear that quite drastic departures from the so-called reality of the situation must be made when this is necessary to give effect to the intention of the statute. In the Crossman case itself a majority of the House of Lords held that, when shares in a private company are to be valued, it must be assumed that the hypothetical

purchaser will have a right to be entered on the share register notwithstanding restrictions on transfer, or rights or pre-emption, contained in the articles, which would have precluded an open market sale in practice. A further example of such departure from reality is to be seen in Buccleuch (Duke) v. Inland Revenue Commissioners where Lord Reid said, at page 525 :

"But here what must be envisaged is a sale in the open market on a particular day. So there is no room for supposing that the owner would do as many prudent owners do - withdraw the property if he does not get a sufficient offer and wait until a time when he can get a better offer."

It is desirable, in my opinion, that when the court is constructing the conditions under which the hypothetical sale is deemed to take place it should build upon a foundation of reality, so far as this is possible, but it is even more important that it should not defeat the intention of the section by an undue concern for reality in what is essentially a hypothetical situation.

The intention underlying section 7(5) is to produce a fair basis of valuation between the Crown and the subject. The same principles must govern its application whatever the nature of the property concerned, and the resultant value should not depend on the whim of any individual. A sale between a vendor and a purchaser who are fully informed on all relevant matters affecting the value of the property is a more accurate guide to value than is a sale between parties who are denied such information. As a matter of first impression these considerations lead me to support the third alternative, which is the one for which Sir Milner contends and which is also consistent with the view adopted by Lord Fleming in Salvesans Trustees v. Inland Revenue Commissioners.

What are the arguments to the contrary ? So far as the subjective test is concerned I can see none. Once it is accepted that the directors are to be deprived of their rights of pre-emption under the articles, and are bound to register the purchaser whether they like it or not, the transaction is so far removed from reality that they cannot usefully be asked to say how they would have responded a request for information. In any event, I do not think that the valuation should depend upon the attitude of members of the particular board. The real contest, in my opinion, therefore, is between the first and the third alternatives.

Mr. Bagnall supports the published information test as one which is consistent with the Act, simple and certain in operation, and productive of consistent result in all cases. He cites the analogy of quoted price shares in public company and says that the quoted price (which is accepted for the purpose of section 7(5) is derived from the effect of published information upon the market : but in my judgment this is not so. The validity of the quoted price derives from the fact that when other identical shares are available at that price no vendor of the shares in question will accept less, and no purchaser need pay more, whatever the state of his individual knowledge.

Mr. Bagnalls main argument is concerned with the practical difficulties which he says will arise if the hypothetical purchaser is assumed to have confidential information in the possession of the directors. He says (and with the support of the judge below) that this would involve protracted inquiries which would make the commissioners task impossible, but the commissioners do not take this view. He asks, rhetorically, what is to happen if the directors decline to provide the information to the commissioners, and concluded that the result would be to force the parties to litigate, so that the information could be obtained on subpoena, and points out that even then the result would depend on whether the person in possession of "the information" was amenable to the jurisdiction of the court. I think that these difficulties are exaggerated. If, as a result of our decision, it is accepted that evidence is admissible of facts in the directors knowledge which a prudent purchaser would wish to discover, the likely consequence is that such information will be made available. I would not expect a marked increase in litigation. Nor am I unduly disturbed by the fact that in a minority of cases the parties may be unable to discover confidential information which was in the directors possession, because in these cases the assessment will be made on the basis of "published information", which is precisely what Mr. Bagnall contends for. The fact that in these cases the assessment falls to be made on what I would regard as inadequate information does not mean that similar error must be built into all other cases merely for conformity. In this connection it is useful to remember that although the "published information" test is favourable to the subject in the present case, it could easily favour the Crown in another.
In the course of argument some concern was expressed for the small shareholder whose executors might have difficulty in persuading the directors to make the effort to supply information necessary for an assessment u/s 7(5). Such a case, if it arises at all, is merely another example of the class to which I have just referred. If the directors are unco-operative but there is no real reason to suppose that they have anything vital to disclose, and the amount at stake does not justify litigation, the parties will no doubt reach agreement on the basis that the published information is comprehensive.

Being unable to accept either of the first two alternatives I return to the third. The Crown have led expert evidence below to the effect that a purchaser of such a substantial block of shares would require to know the state of the companys trading since the last published accounts, and what progress had been made towards a publish issue, and would not conclude a deal without such information. The judge expressed no view upon this evidence, and Mr. Bagnall submits with force, that it is of no value because the transactions envisaged by the witness were transactions designed at assist the company, in which the directors would be co-operative, and were not transactions in which the seller might be a private shareholder to odds with directors. This evidence satisfies me that prudent purchaser of shares in this company would wish have this information whether he was buying a large block of

shares or small one, but I need not decide whether he would refuse to deal if the information were not forthcoming.

I would prefer to state Sir Milners proposition somewhat differently and say that, whatever the nature of the property question, it must be assumed that the purchaser would make all reasonable inquiries, from all available sources, which a prudent purchaser of that property would wish to make, and it must further be assumed that he would receive true and factual answers to such inquiries.

In the present case a prudent purchaser would have made inquiries of the directors which, if truthfully answered, would have disclosed the confidential reports of McLintocks and Gazenoves. Accordingly, I would allow this appeal and declare that the value of shares is pounds 4 10s each.

GROSS L. J. - The question at issue in this appeal is : "What degree of knowledge of matter affecting the value of the shares to be imputed to the parties to the hypothetical sale postulated by section 7(5) of the Finance Act. 1894 ?"

Three different possibilities were suggested in argument both in the court below and before us, which I will call, for short, "the published information" standard, "the Holt" standard and "the Crowns" standard.

1. The "published information" standard imputes to the parties to the hypothetical sale knowledge of what is shown in the companys accounts and of any other information which has in fact been made available to the shareholders or was available to the public at large.

2. "Holt" standard imputes to them in addition to what they are taken to know by the published information standard knowledge of any information which the directors of the particular company would have given in answer to any reasonable question likely to be asked by the vendor shareholder or the intending purchaser at the date of the sale.

The "Crowns" standard as put in argument to, or, at all events as understood by, the judge below was that the court in valuing the shares should have regard to all relevant facts which were proved to have been facts at the date of the death. But in this court counsel for the Crown submitted that the knowledge to be imputed to the parties to the hypothetical sale was merely possession of the information which a willing purchaser would normally require before he was prepared to sell and a willing purchaser would normally require before he was prepared to sell and a willing purchaser would normally require before he was willing to purchase.

Plowman J. considered - I think rightly - that the "Holt" standard had been adopted by Danckwerts J. in re Holt decd., and that he ought to follow that decision. If he had felt himself free to do so he would have opted for the "published information" standard which would in fact have yielded the same result since Mr. Lynall said that he would not have disclosed the information contained in the category "B"

documents. In my judgment, however, the procedure adopted by Danckwerts J. of enquiring what information the particular board would have disclosed was not supported by any earlier case and was wrong - though, as Mr. Holt said that he would in fact have disclosed the information in question and the judge consequently took it into account, the result arrived at may well have been right.

To my mind there are at least three objections to the court enquiring what information the board in question would in fact have disclosed. In the first place, a director of a private company cannot sensibly be asked what his reactions would have been to questions put to him by a prospective vendor or purchaser of shares in his company unless he is told who the vendor was and - even more important - who the purchaser was. But as the sale is purely hypothetical he cannot be told that. Secondly, the time at which the court is called upon to ascertain what the attitude of the board towards disclosure would have been may be many years after the death when the composition of the board may have changed. In this connection it is not irrelevant to observe that the criterion of value prescribed for estate duty purpose by section 7(5) of the Finance Act, 1894, has been adopted by the Finance Act, 1965, section 44(1), for the purposes of capital gains tax, where the chargeable disposition may be made many years after the basic date in April, 1965. Thirdly, it would be very unsatisfactory if the amount of estate duty payable in cases such as this were to depend on evidence, which in the nature of the case cannot easily be challenged, given by persons who may be personally interested in the result. I do not suggest for a moment that the directors in question would give evidence which they knew to be false, but in this sort of situation the wish may easily be father to the thought and one cannot help observing that in the Holt case the information which Mr. Holt said that he would have disclosed was depreciatory of the value of the shares, whereas the information which Mr. Lynall said that he would not have disclosed tended to enhance the value. If one rejects the "Holt" test, one is left to chose between the "published information" test and the "Crowns" test. As the judge pointed out, the "Crowns" test as presented to him can hardly be right since there may be all sorts of facts affecting the value of the shares which are known to some people at the relevant date but which are unknown to the board and knowledge of which cannot reasonably be imputed to the hypothetical vendor and purchaser. For example, an important customer of the company might have decided the day before the death not to renew some contract on which the companys prosperity largely depended the day after the death. As he understood them, therefore, the judge can hardly be blamed for rejecting the Crowns contentions and saying that had he felt free to do so he would have adopted the "published information" test.

We, however, have to chose between the "published information" test and the "Crowns" test as submitted to us, and I have no doubt that the latter is to be preferred to the former. The case in favour of the "published information" test, which was cogently argued by Mr. Bagnall, started from the premise - which I think is correct - that one must not envisage a vendor who is a director as well as a

shareholder. Of course the hypothetical vendor may be a director, but he equally well may not be a director. One must, therefore, only endow him with the characteristic which must necessarily belong to all hypothetical vendors, namely that of owning the block of shares in question. From this, Mr. Bagnall went on to submit that the "published information" test had the great merit of securing that the hypothetical vendor and purchaser should have only the information to which the vendor was entitled as a shareholder or which they could obtain as members of the public. But to my mind this second step in the argument was unwarranted. It is true, of course, that the accounts of the company when they have been audited and approved by the board are presented to the shareholders. Further, u/s 158(2) of the Companies Act, 1948, any shareholder is entitled to be supplied with a copy of the last accounts. But it does not follow from this that the hypothetical vendor would have as of right as the time of the assumed sale all the information which the "published information" test assumes that he will have. In the first place, as one does not know when the vendor became a shareholder, one cannot predicate of him that he will be in possession of the companys accounts over a reasonable number of years before the sale. In this case the witness who gave evidence had before them the accounts back to 1951-52. Secondly, although the accounts for the year July, 1960, to July, 1961, had been audited and approved by the directors before Mrs. Lynall died on May 21, 1962, they had not yet been sent to her. These two points may, of course, be said - and fairly said - to be comparatively trivial, for it would be a very unreasonable board of directors which refused to supply a shareholder with copies of the accounts for a few years back or with information as to the contents of accounts a copy of which was due to be sent to him. But the third difficulty in Mr. Bagnalls way - namely, the fact that the accounts for the year 1961-1962 (ten months of which had expired at the date of Mrs. Lynalls death) were not available for the shareholders until long after death - is far more formidable. Obviously no one would give a proper price, or anything like a proper price, for the shares if he was refused all information as to the companys fortunes between the date to which the last published accounts were made up and the date of his purchase, and in fact the witnesses who gave evidence and the judge himself all assumed that the parties to the sale had some information about the ten months in question which they could only have obtained from the directors. But the assumption that the parties to the sale will have information as to the trading results for this broken period which the vendor has no right as a shareholder to require the directors to give him is inconsistent with Mr. Bagnalls argument and prompts one to ask whether there is any difference in principle between the board supplying a shareholder with information as to the current trading results and supplying him with information bearing on the likelihood of the company "going public". Mr. Bagnall submitted that it made all the difference that the current trading results were raw material for the preparation of the companys accounts for the year which would eventually come into the hands of the shareholders, whereas the steps which the directors were taking in the direction of "going public" might never contribute anything to any

material which was published to the shareholders. This does not, however, appear to me to be a very substantial difference.

Another point which was urged in favour of the "published information" test was that the price of shares quoted on the Stock Exchange depends on the markets assessment of published as opposed to confidential information and that it was desirable that the same standard should be applied to the valuation of every sort of share. I cannot follow this argument at all, for the market for the sale of quoted shares is completely different from the market for the sale of holdings in private companies. No one will be a "willing" purchaser of shares quoted on the stock exchange at a price higher than the quoted price and if he happens to have confidential information showing that the shares are worth less than the quoted price he will not be willing to buy at all.

On the other hand, the uncontradicted evidence of the experts called by the commissioners - Sir Henry Benson and Mr. Andrews - shows that substantial minority holdings of shares in private companies are often bought and sold, and that before a price is agreed the purchaser invariably asks asks the vendor or the board to supply him or, alternatively, to supply his advisers in confidence, with information possibly affecting the value of the shares which is not to be found in the accounts - as, for example, the trading result from the date to which the last accounts were made up and information, such as is contained in the category "B" documents in this case, bearing on the likelihood of a capital appreciation and the time at which one might hope to realise it. Further, the evidence showed that such information is in practice always given to enable the sale to go through.

It is, of course, true - as Mr. Bagnall pointed out - that the sales of which Sir Henry Benson and Mr. Andrews were speaking were sales sponsored, or at least approved, by the board of the company in question. This is necessarily so, for if the board did not wish the shareholder in question to dispose of his holding they would make it clear that they would refuse to register the purchaser. It is in fact a condition of the market for the sale of minority holdings in private companies that the directors co-operate with the vendor. But that is the very condition which the Crossman decision obliges one to impose on the hypothetical sale envisaged by section 7(5) of the Finance Act, 1894, for the restrictions on transfer can only be got out of the way if the board will waive them.

One can see that in certain cases the Crossman decision may work hardship, since it may oblige the estate of a deceased shareholder to pay estate duty on an assumed price which the shareholder could not in fact have obtained. But accepting, as we must, the principal of the Crossman case, the Crowns test as to the knowledge to be imputed to the parties to the sale appears to me to follow logically and not itself to involve any hardship since the confidential information in the possession of the board is just as likely to depreciate as to enhance the value of the shares. Moreover, in a case such as this where the executors are themselves directors, an acceptance

of the "published information" test would involve the very odd result that if the executors, acting with the approval of their father, had sold Mrs. Lynalls shares to raise money to pay duty and had disclosed the category "B" documents to the purchaser in order to obtain a higher price they would, nevertheless, pay estate duty on the footing that on the hypothetical sale envisaged by section 7(5) the category "B" documents would not have been disclosed to the purchaser.

The "published information" test has indeed the practical advantage that it would make the commissioners task easier than would the test for which they contend. Although the companys accounts for the year in which the death occurred might not be available for some time -possibly as much as a year or 18 months - after the death, the executors would eventually be able to make them available to the commissioners who could then, if the "published information" test be correct, determine the value of the shares without having to ask the executors to obtain information from the board which the board might refuse to give. But in those cases - and they would probably be the majority - in which the executors were either directors themselves or closely connected with the board, they would be able to obtain the information if they wished. Therefore the commissioners, if it was not forthcoming, might fairly draw the inference that there were facts unknown to them which made the shares worth more than the accounts alone would suggest, and to determine the value accordingly. On any appeal by the executors, the commissioners could, of course, obtain the evidence by discovery of subpoena. There may, of course, be exceptional cases in which the executors could not obtain the information, however hard they tried to do so. To take an example pressed on us by Mr. Bagnall, the deceased holder of a substantial number of shares might have been a member of the family who had quarrelled with the others and had been expelled from the board. Again one might have the case of a small holding - such as the 200 shares held by Mr. Ellis in this case - which had passed into the hands of someone who was completely out of touch with the board. But I think that in such cases the commissioners can be trusted to act reasonably and not to draw unfavourable inferences from a failure of the executors to produce information which they are not in a position to produce. At all events, the disadvantages -such as they are - of the "Crowns" test as compared with the "published information" test appear to me to weigh very lightly in the balance against the considerations telling in favour of the Crowns test which I have tried to set out.

In the event, therefore, I agree with my Lords that this appeal should be allowed and the figure pounds 4 10s. be substituted for Pound 3 10s. as the value of each share in the company held by Mrs. Lynall.

Appeal allowed with costs in court

of Appeal.

No order as to costs below.

Application by appellants for certificate

for three counsel refused.

Leave to appeal to House of Lords.