

25, 1961

1.

IN THE PRIVY COUNCIL

No. 43 of 1958

ON APPEAL

FROM THE FEDERAL SUPREME COURT
OF THE WEST INDIES

UNIVERSITY OF GUYANA
W.G.I.
1-5-58
INSTITUTE OF
LEGAL STUDIES

IN THE MATTER OF

THE ESTATE OF SOPHIA MUSTERD, Deceased

- and -

IN THE MATTER OF

THE SUPREME COURT ORDINANCE
CHAPTER 7, SECTION 45

10

B E T W E E N

VICTORINE ROBERTS (Femme Sole)
OSCAR JAMES

Appellants

- and -

LETTER T ESTATES LIMITED
STANLEY HEALD
JESSICA WATT
ELLA JEANNIE MEARNs and
GRETA ENID MEARNs

Respondents

20

CASE FOR THE APPELLANT

Record

1. This is an Appeal from a Judgment of the West Indian Court of Appeal delivered upon the 4th July, 1958, which reversed the Judgment and Decree of Mr. Justice Miller in the Supreme Court of British Guiana and ordered and directed the Appellants Victorine Roberts and Oscar James to comply with Article 15 of the Articles of Association of the Respondent Company Letter T. Estates Limited (hereinafter called "the Company") and further ordered and directed that the fair value of the said shares be ascertained by the Auditors to the Company as at the date when the above mentioned offer was made, but that if this value should be greater than the value of the said shares at any time during the

pp.35-41
pp.25-28
pp.42-43
p.13-14

30

Record

three months ensuing after the 19th October 1956, the date of the death of Sophia Musterd, then the fair value should be the highest valuation which the Auditors might have placed on the said shares during that period and further ordered that the costs of the Respondent Stanley Heald and the Appellants to that Appeal (the Company) be taxed and paid out of the Estate of the said Sophia Musterd deceased, and that there be no order as to costs of the Appeal with respect to the added Respondents thereto, namely Jessica Watt, Ella Jeannie Mearns and Greta Enid Mearns and the Court further ordered that the Order of the Court below as to costs be and the same was thereby affirmed. 10

pp.3-11 2. The facts are set out severally in an Affidavit sworn by the Respondent Stanley Heald on the 11th day of March, 1957, and filed in support of the Originating Summons referred to in paragraph 4 below, in the Judgment of Miller, J., pp.1-2 20
pp.25-28 in the Supreme Court of British Guiana, Civil
pp.35-40 Jurisdiction, and in the Judgment of Hallinan, C.J., in the West Indian Court of Appeal, and may be summarised as follows:-

p.50 11.6-16 (a) Sophia Musterd, (herein referred to as "the Deceased") died on the 19th October, 1956, bequeathing by her Will dated 23rd April, 1956, legacies of 121 shares each in the Company (her total holding therein) to the Appellants. Probate to her Will was granted to the Respondent, p.48 30
Stanley Heald, on the 25th January, 1957.

(b) The Company is a private company and the Articles of Association of the Company restrict the transfer of shares in the Company. The relevant Articles are set out in paragraph 3 below.

pp.12-14 (c) In certain instances existing members of the Company have, under the Articles of Association, rights to the pre-emptive purchase of shares and they are entitled to purchase them at a fair value to be determined by a declaration of three Directors of the Company and, if the Directors make no such declaration, then by a certificate of the Company's Auditors. 40

pp.60-61 (d) On the 30th January, 1957, the Deceased's Executor, the Respondent Stanley Heald, wrote to the Appellants informing them that the shares had been valued at \$410 each, and explained that under the Articles of Association of the Company the shares had first to be offered to members of 50

the Company and asked for instructions.

Record

(e) In fact, the Directors of the Company declined to make a declaration as to the fair value. The Auditors gave a certificate valuing the shares at \$410 each as at 19th October, 1956 (the date of the Deceased's death), and this certificate was filed for the purposes of the Computation of Estate Duties on 9th January, 1957.

p.53

10 (f) The Appellants' lawyer, Linden F.S. Burnham on the 7th February, 1957, wrote to the Executor asking for details of the Company's finances and on the same day the Executor wrote to the Company giving notice of his desire, "pursuant to Article 25 to transfer the shares"..... and "to comply with Article 15".

pp.4-5

20 (g) On the 22nd February, 1957, the Company replied that three shareholders, namely the Respondents Jessica Watt, Ella Jeannie Mearns, and Greta Enid Mearns, had accepted the offer to buy the shares at \$410 each.

pp.5-6

(h) The Executor received from the Appellants' lawyer a letter also dated the 22nd February asserting (inter alia) that the Appellants were "under no misapprehension whatever as to what their rights are in respect of the shares in question....." As a consequence of receiving this letter the Executor applied to the Court for the directions set out in paragraph 4 below.

pp.7-8
p.8

30 3. The relevant Articles of Association of the Company are as follows :

8. Save as provided by Clause 15 hereof, no share shall be transferred by any member or person to any person who is not a member, so long as any member or failing any member, any person (whether a member or not) selected by the Directors is willing to purchase the same at the fair value. But if no member or person selected as aforesaid is willing to purchase such share, then the same may, subject to clause 17 hereof, be transferred to any person whether such person is a member or not.

p.12

40

9. Except where a transfer is made pursuant to clause 15 hereof a person proposing to transfer any shares (hereinafter called the proposing transferor), shall give notice in

p.12

Record

- writing to the Company that he desires to transfer the same. Such notice shall constitute the Company his agent for the sale of the shares to any member or to any person selected by the Directors as aforesaid at the fair value. The transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the Directors. 10
- p.12 10. If the Company shall, within the space of one month after being served with the transfer notice, find a member or person selected as aforesaid willing to purchase the share (hereinafter for convenience called the purchasing member), and shall give notice thereof, to the proposing transferor, he shall be bound upon payment of the fair value to transfer the share to the purchasing member. 20
- pp.12-13 11. For the purposes thereof the fair value of any share shall be such a sum as any three Directors shall declare in writing to be the fair value thereof, and if there be no such declaration, then as the Auditor shall certify in writing to be the fair value, and the said declaration or certificate, as the case may be, shall be final and conclusive. 30
- p.13 12. If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase money, and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of the share, and shall hold the purchase money in trust for the proposing transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid power the validity of the proceedings shall not be questioned by any person. 40
- p.13 13. If the Company shall not within the space of three months after being served with the transfer notice, find a member or person selected as aforesaid, willing to 50

purchase the shares and give notice in manner aforesaid, the proposing transferor shall at any time thereafter, subject to clause 17 hereof, be at liberty to transfer the shares (or those not placed) to any person and at any price.

Record

14. Such shares shall be offered in the first place to the members in proportion to their holdings or as near there to as may be, and as to any shares not then accepted the same shall be offered to any members willing to accept the same in proportion to their holdings and any share not accepted by members shall be offered to the person or persons (if any) selected by the Directors as aforesaid. If it be not possible to so apportion all such shares as aforesaid, such share or shares not dealt with shall be apportioned amongst those willing to accept the same by lot.
15. Any person, (not a member or the son, daughter, grandson, granddaughter, or other issue, brother, sister, husband or wife, nephew or niece, of a member) becoming entitled to shares in consequence of the death of any member, shall, within three months after his so becoming entitled, offer the shares to members or in default of members to persons selected by the Directors in accordance with the provisions of clauses 8, 9 and 10 hereof so far as is applicable, and the provisions of clauses 8, 9 and 10, 11, 12 and 13 and 14 hereof shall mutatis mutandis, and so far as they can be made applicable be deemed to apply to such shares, and the purchaser of such shares, shall be entitled, without making any payment therefor, except the fair value and costs of transfer, to all the shares held by such deceased person.
16. Any share may be transferred by a member to any son, daughter, grandson, granddaughter, or other issue, brother, sister, husband or wife, nephew or niece, of such member and clause 8 hereof shall not apply to any such transfer.
17. The Directors may refuse to register any transfer of a share or shares (a) where the Company has a lien on the share or shares; (b) where it is not proved to

Record

their satisfaction that the proposed transferee is a responsible person; (c) where the Directors are of an opinion that the proposed transferee is not a desirable person to admit to membership. But paragraphs (b) and (c) of this clause shall not apply where the proposed transferee is already a member or is selected by the Directors as aforesaid, nor to a transfer made pursuant to Clause 15 hereof.

10

p.15

25. The heirs, executors or administrators or other the legal representatives of a deceased member (not being one of several joint-holders) shall be the only persons recognised by the Company as having any title to the shares registered in the name of such member, and in case of the death of any one or more of the joint-holders of any registered shares, the survivors shall be the only person recognised by the Company as having any title or interest in any such shares.

20

p.16

26. Any guardian of any infant member and any curator or committee of a lunatic member, and any person becoming entitled to shares in consequence of the death or insolvency of any member upon producing such evidence that he sustains the character in respect of which he proposes to act under this clause, or of his title as the Directors think sufficient, may, with the consent of the Directors (which they shall not be under any obligation to give) be registered as a member in respect of such shares, or may, subject to the regulations as to transfers hereinbefore contained, transfer such shares. This clause is hereinafter referred to as the transmission clause.

30

pp.1-2

4. On the 11th March, 1957, the Respondent Stanley Heald took out an Originating Summons in the Supreme Court of British Guiana, Civil Jurisdiction, joining the Appellants and the Company as Defendants thereto asking for an Order of the Court giving directions as to whether the Respondent should execute transfers of 242 shares in the Company to the three shareholders in the Company referred to in the letter dated 22nd February 1957 in the proportion of their existing shareholdings or to execute two transfers one for 121 shares to the Appellant Victorine Roberts

40

pp.5-6

50

and one for 121 shares to the Appellant Oscar James, or to make and give such directions as the Court should deem fit and that the costs of those proceedings be provided for.

Record

5. After recording evidence both oral and documentary (including an Affidavit sworn by the Respondent Stanley Heald in support of the said Originating Summons sworn on the 11th March, 1957) Mr. Justice Miller in the Supreme Court of British Guiana gave judgment that the Respondent Stanley Heald as Executor of the Estate of Sophia Musterd deceased should execute two transfers, one for 121 shares to the Appellant Victorine Roberts, and one for 121 shares to the Appellant Oscar James in the Company and that the said Court did not think fit to make any other Order on the said application except that the costs of the said application should be taxed on each party to be paid out of the estate of the said Sophia Musterd deceased.
6. The reasoning of Miller, J., may be summarised as follows :-
- (a) Having read Article 15 the learned Judge concluded that the Appellants Victorine Roberts and Oscar James quite clearly did not come within the scope and ambit of Article 15 from the point of view of relationship to the deceased Testatrix; and that being so,
- (b) having regard to Article 25 (which the learned Judge read) it was not competent for the Respondent Stanley Heald to offer the shares to the Respondent Company as he purported to do by the letter dated the 7th of February 1957, since the Appellants were by the bequest in the Will of the Deceased the persons entitled to the shares and the Respondent Stanley Heald was merely a trustee, holding the shares on trust for them; and that being so
- (c) the offer to the Company should have come from the Appellants within the space of three months as provided under Article 15 and not from the Respondent Stanley Heald; and,
- (d) therefore the said offer was not valid and could not be properly accepted.
7. The Company appealed to the West Indian

pp.3-11

pp.23-24

pp.25-26

p.26

pp.26-27

p.27 L.21

pp.29-31

Record

- p.34 Court of Appeal and the Respondents Jessica Watts, Ella Jeannie Mearns and Greta Enid Mearns were joined as Respondents to the said appeal which came on for hearing before the West Indian Court of Appeal (Hallinan, C.J., Rennie, J., and Archer, J.,) on the 4th July 1958.
8. The reasoning of Hallinan, C.J., may be summarised as follows :-
- p.38 (a) Article 15 refers to beneficial interests in shares and "any person" in that Article means any person who becomes beneficially entitled to a share in the Company who is not himself a member or a close relative of a member; 10
- pp.38-39 (b) the offer required by Article 15 could not be made by an Executor, but must be made by the Beneficiary himself;
- p.39 (c) the fact that the Executor was already a member of the Company as a nominee could not entitle him to make an offer under Article 15 on behalf of the legatees; 20
- pp.39-40 (d) the fact that the Appellants did not make an offer within three months as required by Article 15, did not excuse them from making one now, and the Court would compel them to do so;
- p.40 (e) the Executor's offer of the 7th February, 1957, was a nullity;
- p.39 (f) Article 15 could not be passed over or ignored so as to enable the Executor to proceed under Articles 25 and 26 and Articles 9 to 13 alone; 30
- p.39 (g) the submission on behalf of the Appellants that the members of the Company and on any interpretation of the Articles lost their right to purchase the deceased's shares was without substance.
- p.39 9. On the question of fair value, Hallinan, C.J., concluded that the value was not properly ascertained as the Auditor's certificate was given before the offer was made.
- p.40 10. Rennie, J., concurred with Hallinan, C.J., but did not express any reasons. 40
11. Archer, J., differed from Hallinan, C.J., in so far as the judgment contained a direction

to the Appellants to offer their shares to the Respondents Jessica Watt Ella Jeannie Mearns and Greta Enid Mearns, and considered that the offer must have been made through the Executor, as he was the only person recognised by the Company as having any title to the shares. The offer which the Executor in fact made must therefore be regarded as made on behalf of the beneficiaries on the principle that equity treat as done that which ought to have been done, and the Appellants could not be heard to say that the offer was invalid because they were the persons who should have made the offer and thus rely on a breach of their own obligation to establish the invalidity of the offer.

Record
p.40

10

20

12. The Appellants humbly submit that this Appeal should be allowed with costs and that the Judgment or decision of the West Indian Court of Appeal of the 4th July, 1958, should be reversed and that the decision of the Supreme Court of British Guiana of the 8th August, 1957, should be restored for the following amongst other

p.42

pp.23-24

R E A S O N S

(1) BECAUSE the question whether the expression contained in Article 15 of the Company's Articles of Association "any person becoming entitled to the shares in consequence of the death of a deceased member" was intended to refer to the legal representatives of a deceased member or to a person succeeding to the beneficial interest in the shares is indeterminate and Article 15 is void for uncertainty;

pp.13-14

30

pp.13-14

(2) BECAUSE if contrary to the contention of the Appellants Article 15 is not void for uncertainty it has no application to the present case for the following reasons :-

pp.13-14

40

(a) if the words "any person" are intended to refer to the legal representatives the sole executor was already a member of the Company; alternatively,

(b) if the words "any person" are intended to refer to a person succeeding to the beneficial interest in the shares the Appellants became entitled to such beneficial interest on the death of the deceased; alternatively,

(c) the time limit for making the offer had expired before the grant of Probate to the

Record

Respondent Stanley Heald;

- pp.13-14 (3) BECAUSE if contrary to the contention of the Appellants Article 15 applies on the facts of the present case the offer which the Respondent Stanley Heald purported to make on the 7th of February was a nullity;
- pp.4-5
- pp.13-14 (4) BECAUSE the Appellants were not bound to comply with Article 15 since the Appellants, not being members of the Company, were not bound by its Articles of Association;
- pp.23-24 (5) BECAUSE the decision of Miller, J., in the Supreme Court was right;
- pp.42-43 (6) BECAUSE the decision of the West Indian Court of Appeal was wrong.

10

DINGLE FOOT

NEIL ELLES

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE FEDERAL SUPREME COURT OF
THE WEST INDIES

IN THE MATTER OF

THE ESTATE OF SOPHIA MUSTERD,
DECEASED

- and -

IN THE MATTER OF

THE SUPREME COURT ORDINANCE
CHAPTER 7, SECTION 45

B E T W E E N

VICTORINE ROBERTS (Femme Sole)
OSCAR JAMES

Appellants

- and -

LETTER T ESTATES LIMITED
STANLEY HEALD
JESSICA WATT
ELLA JEANNIE MEARNs and
GRETA ENID MEARNs

Respondents

CASE FOR THE APPELLANTS

GARBER VOWLES & CO.,
16, Soho Square,
London, W.1.

Solicitors for the Appellants.