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25, 1961

IN THE PRIVY COUNCIL

No. 43 of 1958

ON APPEAL FROM THE FEDERAL SUPREME COURT
OF THE
WEST INDIES

UNIVERSITY OF LONDON
W.C.I.
INSTITUTE OF ADVANCED
LEGAL STUDIES

I N T H E M A T T E R of THE ESTATE of SOPHIA
MUSTERD deceased

- and -

635

I N T H E M A T T E R of THE SUPREME COURT ORDINANCE
CHAPTER 7, SECTION 45

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B E T W E E N

VICTORINE ROBERTS (Feme Sole)
and OSCAR JAMES

Appellants

- and -

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

Respondents

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CASE for the RESPONDENTS
other than STANLEY HEALD

Record

1. This is an Appeal from an Order of the
Federal Supreme Court of the West Indies (on transfer
from the West Indian Court of Appeal) dated 4th July 1958 whereby:- p.42

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(a) The present Respondents Jessica Watt, Ella
Jeannie Mearns and Greta Enid Mearns (herein-
after collectively called "the Shareholders")
were ordered to be added as respondents to
the Appeal before the said Court and to be
bound by its decision:

(b) The said Court allowed an appeal from an
Order made by the Honourable Mr. Justice
Miller in the Supreme Court of British Guiana p.23

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on 8th August 1957 whereby he directed the present Respondent Stanley Heald (hereinafter called "the Executor") who is the sole executor of Sophia Musterd deceased (hereinafter called "the Testatrix") and was the Applicant on an Originating Summons (the Respondents thereto being the present Respondents Letter "T" Estates Limited which is hereinafter called "the Company" and the present Appellants who are hereinafter called "the Legatees") as such executor to execute two transfers each of 121 shares in the capital of the Company in favour of the Legatees respectively, and in lieu thereof directed the Legatees to make the offer required to be made by Article 15 of the articles of association of the Company;

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(c) The said Court directed that the fair value of the said shares be ascertained by the auditors of the Company as at the date when such offer should be made but that if such value should be greater than the value of the said shares at any time during the three months from 19th October 1956 then the fair value of the said shares should be the highest valuation which such auditors might have placed on the said shares during that period; and

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(d) The said Court ordered the taxed costs of the appeal of the Executor and the Company to be paid out of the estate of the Testatrix but made no order as to the costs of the appeal of the Legatees and the Shareholders and affirmed the Order of Mr. Justice Miller as to the costs below whereby he ordered the costs of each party to the proceedings before him to be taxed and paid out of the said estate.

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p.24

2. The sole question in this Appeal is what is the true construction and effect of the articles of association of the Company relating to the shares of a deceased member.

3. The Company was incorporated under the Companies Ordinance of British Guiana as a private company limited by shares in the year 1932 and at all material times the issued share capital was and still is \$48,300 British Guiana Dollars divided into a single class of 483 shares of \$100 each. On 19th October 1956 (when the Testatrix died) the issued shares of the

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Company were held as follows:-

	<u>Member</u>	<u>Shares held</u>
	The Testatrix	222
	The Executor	10
	J.C. Falconer	10
	The Respondent Jessica Watt	80
	The Respondent Ella Jeannie Mearns	81
	The Respondent Greta Enid Mearns	70
	The Respondent Greta Enid Mearns) and M.M. Smith jointly)	10
10		<u>483</u>

The Executor and J.C. Falconer held their shares as nominees of the Testatrix who accordingly owned a bare majority of the issued share capital. The Respondent Jessica Watt (hereinafter called "Mrs. Watt") is a niece of the Testatrix and the Respondents Ella Jeannie Mearns and Greta Enid Mearns (hereinafter called "Mrs. E.J. Mearns" and "Mrs. G.E. Mearns" respectively) are the widows of two of her nephews. The 10 shares held in the joint names of Mrs. G.E. Mearns and M.M. Smith are held by them as trustees for two children of Mrs. G.E. Mearns. The Company was formed to acquire certain ~~sugar~~ estates belonging to the family of the Testatrix and its shares have at all material times had a value in the region of \$400 (or £83.6.8. sterling) each.

4. Probate of the Will of the Testatrix was granted to the Executor on 25th January 1957. By her said Will the Testatrix specifically bequeathed the 242 shares of the Company which she owned equally between the Legatees who were respectively her personal maid and her chauffeur and are neither members of the Company nor related to any member in any of the ways specified in Article 15 of the Company's articles of association.

5. On 7th February 1957 the Executor, on the footing that he had by virtue of the grant of probate to him become entitled to the shares of the Testatrix within the meaning of Article 15 of the Company's articles of association, gave notice in writing to the Company that he desired to transfer the shares of the Company bequeathed by the Testatrix, asked to be informed of the persons willing to purchase the same and stated that the fair value thereof had been fixed

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at \$410 per share which he would require to be paid before the transfer of such shares.

p.13 6. On 19th February 1957 the Secretary of the Company wrote to the Shareholders offering the shares of the Testatrix to them respectively in the proportions of 81 shares to Mrs. Watt 80 shares to Mrs. E.J. Mearns and 71 shares to Mrs. G.E. Mearns and enclosing forms of acceptance in respect thereof and 10 shares were also offered to Mrs. G.E. Mearns and Mr. M.M. Smith.

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7. On 22nd February 1957 the Solicitors acting for all the Shareholders wrote to the Secretary of the Company informing him that the Shareholders would take all the shares of the Testatrix in the proportions of 101 shares by Mrs. Watt 81 shares by Mrs. E.J. Mearns and 60 shares by Mrs. G.E. Mearns and stating that their clients Mrs. G.E. Mearns and the said M.M. Smith were not in a position to take up their proportion of the shares offered. The said Solicitors enclosed with their letter the forms of acceptance which had accompanied the letter of the Company's Secretary dated 19th February 1957 duly completed by the Shareholders in relation to the shares accepted by them respectively and containing an undertaking to pay the fair value of \$410 per share on demand. In their said letter the said Solicitors requested the Secretary of the Company to ask the Executor and the nominees of the Testatrix to execute transfers of such shares accordingly and stated that on receipt thereof they would send to the Executor a cheque for \$99,220 in payment for the shares.

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p.5 8. The Secretary of the Company informed the Executor of the contents of the last-mentioned letter, and as a result of subsequent correspondence between the Executor and his Solicitor on the one hand and Counsel for the Legatees on the other hand the Executor took out an originating summons in the Supreme Court of British Guiana seeking directions as to whether the Executor should execute transfers of the 242 shares of the Company which were owned by the Testatrix to the Shareholders in the proportions notified to him by the Secretary of the Company or (as Mr. Justice Miller decided) should execute two transfers of such shares each for 121 shares in favour of the Legatees respectively. The Executor did not join the Shareholders as respondents to the said originating

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summons or inform them of its issue and did not seek the directions of the Court as to whether all or any of the shares of the Testatrix fell to be transferred by a person other than himself.

9. In giving judgment on the said originating summons Mr. Justice Miller arrived at the following conclusions of law:- p.25

10 (a) On the true construction of the said Article 25 it was the Legatees and not the Executor who had become entitled to the shares of the Testatrix and who accordingly were the persons required to make the offer prescribed by Article 15. p.15
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(b) The offer which the Executor made was accordingly invalid and could not be properly accepted.

20 (c) The fair value of the shares to be certified by the Auditor of the Company under Article 11 in default of a declaration thereof by the directors must be certified when a member is found willing to purchase any shares offered for sale, and accordingly that the valuation of \$410 per share which the evidence showed had been made previously for purposes of estate duty could not properly be used to fix the fair value for the purposes of the transfer articles. p.12

30 Mr. Justice Miller thereupon directed the Executor to execute two transfers each of 121 shares in favour of the Legatees respectively but did not give any direction as to the rights or obligations of the Company if and when any such transfers should be delivered for registration.

10. The Company on 18th September 1957 appealed against the said decision to the West Indian Court of Appeal. On 24th September 1957 the Solicitor for the Company applied for leave for the Shareholders to be joined in the appeal since they were affected by the decision of Mr. Justice Miller and such leave was granted on 28th September 1957 by Mr. Justice Bollers who ordered the Shareholders to be served with a notice of the Order made by Mr. Justice Miller. The Shareholders were joined in the appeal accordingly. p.29
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40 11. Judgments were delivered on the appeal in

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- p.35 the Federal Supreme Court (Hallinan C.J. and Rennie and Archer JJ.) on transfer from the West Indian Court of Appeal on 4th July 1958. Hallinan C.J. (with whom Rennie J. concurred) arrived at the following conclusions of law:-
- p.13 (a) The person becoming entitled to shares in consequence of the death of a member who was required by Article 15 to offer them for sale was the person who became entitled to the beneficial interest in such shares. 10
- p.15 (b) The person to be recognised by the Company under Article 25 as alone having any title to the shares registered in the name of a deceased member was the person who acquired the legal title thereto.
- p.13 (c) It was and remained the duty of the Legatees to make the offer required by Article 15 and the offer made by the Executor was a nullity.
- (d) The fair value of the shares of the Testatrix had not been properly ascertained but the Company's notice that the Shareholders were willing to purchase such shares was not thereby invalidated. 20

The learned Chief Justice was accordingly of Opinion that the Court should direct the Legatees to make the required offer and the Auditors to ascertain the fair value of the shares as at the date of the offer, but so that such value should not exceed the highest valuation which the Auditors might have placed on the shares during the three months following the death of the Testatrix. 30

12. Mr. Justice Archer differed from Hallinan C.J. and Rennie J. as regards both directions. He was of opinion that it was for the Executor to make the offer required by Article 15 but since his offer was made more than three months after the death of the Testatrix it was out of time. Nevertheless the Legatees could not complain of the making of such offer and it remained only to ascertain the fair value of the shares which in the opinion of Archer J. should be determined as at 7th February 1957, the date when the Executor made his offer. 40

13. All three learned Judges concurred in allowing the costs of the Executor and the Company of the appeal out of the estate of the Testatrix whilst making no order for the costs of the Shareholders or of the Legatees.

10 14. The Company as a Respondent to this Appeal humbly submits that no order should be made on this Appeal which would restrict the exercise by the Directors of the Company of their power of refusing to register the transfer of any shares conferred by Article 17 of its articles of association and humbly submits to act in all respects as Her Majesty in Her Majesty's Privy Council may direct and that the Company's costs of this Appeal should be provided for.

15. The Shareholders humbly submit:-

- 20 (a) that the offer of the 242 shares of the Testatrix made by the Executor and accepted by the Shareholders at the price of \$410 per share was valid and is now binding on the parties thereto respectively;
- (b) that the Executor ought to be directed to transfer and procure the transfer of the said 242 shares to the Shareholders respectively in the proportions specified in the letter dated 22nd February 1957 and addressed by the Secretary of the Company to the Executor against payment of the said price; p.5
- 30 (c) that the Company ought to be directed to register such transfers upon their being duly completed, stamped and presented for registration; and
- (d) that the Executor or alternatively the Legatees ought to be ordered to pay the costs of the Company and Shareholders of this Appeal and their costs of the proceedings below for the following among other

REASONS

- 40 (1) Because by virtue of Article 25 the Executor is the only person whom the Company can recognise as having any title to the shares registered in the name of the Testatrix, and is therefore the person becoming entitled to such shares within the p.15

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Complete
copies of
the Articles
will be
available
at the
hearing.

meaning of Article 15 and as such required to offer the same pursuant to the last-mentioned article.

- (2) Because Article 7 prohibits the Company from recognising any person as holding any share upon any trust and from being bound by or recognising any equitable interest in any share.
- (3) Because section 15(1) of the Companies Ordinance of British Guiana provides that the executor of a deceased member of a company is bound by the provisions of its articles, and section 29 thereof provides that a transfer of the shares of a deceased member made by his executor shall, although the executor is not himself a member, be as valid as if he had been a member at the time of executing the instrument of transfer. 10
- (4) Because the Executor as personal representative of the Testatrix was in a position to compel the transfer of the 20 shares held by himself and J.C. Falconer respectively as nominees of the Testatrix and could therefore properly offer such shares pursuant to Article 9 simultaneously with the offer of the 222 shares registered in the name of the Testatrix. 20
- p.12
- (5) Because the Executor became entitled to the shares of the Testatrix upon and not before the grant of probate to him on 25th January 1957 and accordingly his offer of her shares which was made on 7th February 1957 was made within the period of three months prescribed by Article 15. 30
- p.13
- (6) Because the Executor was at the date of the offer the registered holder of ten shares of the Company and the articles of association thereof do not impose any restriction on the transfer of shares by one member to another.
- p.12
- (7) Because Article 11 on its true construction does not require the determination of the fair value of shares to be made after the date of the relevant offer of shares, and the valuation of \$410 per share made by the Auditors on 28th November 1956 must be regarded as valid and binding for the purposes of the offer made by the Executor on 7th February 1957 in the absence of 40
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any evidence of any change in the value of the shares comprised in such offer between the said dates.

- 10 (8) Because it was open to the Executor in making his offer and the Shareholders in accepting it to agree between themselves (as they did) as to the fair value of the shares of the Testatrix independently of the provisions of Article 11, and accordingly the fair value of \$410 per share so agreed is in any event binding on the Executor and the Shareholders respectively as the price of the shares to be sold in pursuance of such offer. p.12
- 20 (9) Because Articles 8 and 9 preclude the Executor from transferring any shares to the Legatees (who are not members of the Company) until such shares have been offered for sale pursuant to Article 9 and the Company shall have failed to find purchasers therefor within three months thereafter, which condition has not been satisfied in the present case. p.12
- (10) Because there is nothing in the articles of association of the Company or the Companies Ordinance of British Guiana which enables or requires the Legatees to offer or transfer any shares or the Company to register any instrument of transfer executed by the Legatees as transferors.
- 30 (11) Because the only question raised in these proceedings is whether the Legatees or the Shareholders are the persons to whom the shares of the Testatrix ought to be transferred and the Shareholders ought to have been made parties to the originating summons taken out by the Executor to determine this question and were properly joined as parties to the appeal of the Company to the West Indian Court of Appeal. p.1
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- 40 (12) Because the said question arises in the course of the administration of the estate of the Testatrix or alternatively upon the construction of her bequest of her shares to the Legatees, and the cost of determining such question ought to be

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borne by the estate of the Testatrix or
alternatively by the Legatees.

P.S.A. ROSSDALE

for the Respondent Letter T Estates
Limited

RALPH INSTONE

for the Respondents Jessica Watt,
Ella Jeannie Mearns and Greta
Enid Mearns.

No.43 of 1958

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ROBERTS and JAMES

- v -

LETTER T ESTATES LIMITED
and OTHERS

CASE for the RESPONDENTS
other than STANLEY HEALD

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