

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 13/1971

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BEFORE: The Hon. Mr. Justice Luckhoo, Ag.P. (Presiding)
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Swaby, J.A.

HORACE MAIR, Liquidator Washington Gardens
Limited (In Voluntary Liquidation) - Appellant

v.

THE COMMISSIONER OF INCOME TAX - Respondent

R.A. Mahfood, Q.C., and Dr. L.G. Barnett for the appellant.

Mrs. A. Hudson-Phillips and B. Kieran for the respondent.

March 12, 13, 14, 15, 18;
July 31, 1974

LUCKHOO, Ag. P.:

This is an appeal from the judgment of a judge in chambers dated April 2, 1971 which affirmed the decision of the Income Tax Appeal Board dated December 10, 1969, whereby the appellant's appeal from a decision of the respondent affirming assessments of the appellant to income tax for the years of assessment 1961, 1964 and 1965 was dismissed.

Two questions arise for determination in this appeal. The first is whether in respect of the year of assessment 1961 the appellant, who had objected to the assessment made upon him, agreed with the Commissioner of Income Tax as to the

amount at which he was liable to be assessed whereby the assessment for the year 1961 should have been confirmed at £47,085 and not £52,085 as the Commissioner of Income Tax purported to do by his notice of decision dated October 24, 1966. The second is whether in respect of the years of assessment 1964 and 1965 the conclusion reached by the Income Tax Appeal Board and by the judge in chambers that the two sales of lands part of the assets of Washington Gardens Limited a company in voluntary liquidation, constituted the carrying on of a trade of dealing in land and not merely the realisation of the assets of the company in liquidation, was a reasonable one on the facts admitted or proved.

The company was incorporated in 1956. The Memorandum of Association empowered the company, inter alia, to purchase, subdivide, develop and sell land and generally to trade in land. In 1957 the company acquired two large parcels of land. These parcels were subdivided into 900 lots each of 9000 sq. ft. in area the company reserving an area of 29 $\frac{1}{4}$ acres which was not intended to be sold. In that same year contracts for the sale of some of the lots were entered into and deposits on those lots were made totalling £79,272. The accounts of the company for the year ending December 31, 1957 show that a considerable sum was spent on the provision of roads, bridges, culverts, watermains, hydrants etc. The parcels of land had been laid out into building lots for sale to the public. During 1958 and 1959 the company continued with the development of the land and payments on lots in those years amounted to £18,000 and £41,000 respectively. Between 1957 and 1959 the total number of lots sold was 705 and at the end of 1959 there remained 195 lots still unsold. In 1960 the development of the land was virtually completed but no further lots were sold in that year as the company considered that in holding back the sale of those lots until a later date an enhanced price would be obtainable for them. A total of £138,272 had by then been paid on account of the purchase price for 705 lots sold and there was a balance of £48,000 still owing by the purchasers of those lots.

The accounts of the company to December 31, 1960 show that the area of 29¼ acres originally reserved on subdividing the land was sold for £25,125. Early in 1961 the development of the land being complete the company set about the sale of the 195 lots which had been held back. The company, however, had difficulty in selling those lots because of a depressed market due to economic factors as well as to political uncertainty in the Island. In that year 10 lots were sold for £5,850 and in 1962 6 lots were sold for £4,900. On October 31, 1962, a special resolution was passed at an extraordinary general meeting of the company to voluntarily wind up the company. Horace Mair was appointed Liquidator. At that time the indebtedness of the company was £50,516 and the assets about £78,495. Among the company's creditors were the Collector of Taxes and a bank to whom the amounts of £19,289 and £20,686 respectively were due. Those creditors were pressing for payment. On November 30, 1962 the liquidator advertised for creditors having been given instructions by Mr. Randall (who was chairman at the meeting on October 31 when the special resolution was passed to wind up the company voluntarily) "to wind up the company as quickly as possible and distribute the excess assets if there were any."

During 1963 the liquidator made enquiries as to the prospect of selling the remaining lots and considered that because of the depressed state of the real estate market it would be foolish for him to try to sell at that time. Towards the end of 1963 the liquidator considered that there was hope of improvement in the real estate market and on November 1, 1963 he advertised the assets of the company for sale. The advertisement invited offers for sale of the assets and goodwill of the company, in voluntary liquidation. The assets were stated to include (a) partially developed lands and (b) book debts amounting to \$23,000. In point of fact according to the liquidator the only undeveloped land was one lot of 11 acres. On February 7, 1964 the liquidator received an offer of £60,000

for the land presumably in response to the advertisement of November 1, 1963. He consulted the shareholders of the company about this offer. At a meeting held to consider the offer two of the shareholders - Mrs. Judah who held 333 shares and Mrs. DeLisser who held 276 shares - were represented by Mr. Randall. Mr. Webster the only other shareholder who held 208 shares was present as was Mr. K. Roberts a business associate of Mr. Webster but not a shareholder of the company at that time. Mr. Randall held 5 shares. At that meeting Mrs. Judah and Mrs. DeLisser who together held 609 shares of the 889 (other than Mr. Randall's 5 shares) issued by the company were in favour of acceptance of the offer of £60,000 but Mr. Webster was not. He instead offered to buy out the shares of the majority shareholders and to pay them for their shares on the basis of the £60,000 offer. Mr. Webster's offer was accepted and Mrs. Judah's 333 shares were transferred to him while Mrs. DeLisser's 276 shares were transferred to Mr. K. Roberts. This done Mr. Webster now held 613 shares and the new shareholder Mr. Roberts 276 shares. The liquidator refused the offer of £60,000 which, after discharging all liabilities of the company, would have left a small profit for distribution to the shareholders. On April 4, 1964 the liquidator contracted with one C.H. Phillips for the sale of 23 lots in a block for £27,350 and on April 23, 1964, 163 lots were sold in a block to the Dominion Development Co., Ltd. for £141,240. In November, 1964 a small parcel (1 acre 1 rood 12 perches) was acquired by the Minister of Communications and Works pursuant to the Flood Water Control Law, 1958, the sum of £5,962 being paid therefor.

The profits from the transactions in April, 1964 were assessed to tax in two parts, one in respect of the year of assessment 1964 and the other in respect of the year of assessment 1965.

So much for the facts, relating to the transactions of the company in relation to the lots.

In the accounts of the company for the year ending 31st December, 1960, there appeared in the balance sheet the entry "Provision for Estimated Expenditure required to complete development £5,000" as it did also in the balance sheet for the year ending 31st December, 1961. This sum was not expended and should have been brought into profit and loss and so increase the profit made by the company. On June 20, 1962, the company was assessed for the year of assessment on the sum of £500 as chargeable income. There was no objection made to that assessment. On November 14, 1963, the respondent made an additional assessment of £9,500 in respect of the year of assessment 1961. Thereafter Gerald Mair & Son acting on behalf of the company wrote the respondent stating that the profit for the year of assessment ¹⁹⁶¹ was not £9,500 but £46,937. This communication was treated by the respondent as an objection to the additional assessment. The figure of £46,937 was arrived at on the basis that the company had started to trade in 1957 whereas the respondent's figure of £9,500 was arrived at on the basis that the company had started to trade in 1960. On January 3, 1964, the respondent sent Gerald Mair & Son his amended computation for years of assessment 1960 - 1962, Exhibit 18. By that computation the profit for the year of assessment 1960 was stated to be £47,085 and that for the year of assessment 1961 was stated to be £1,138. These amounts were stated upon the basis of the amount of profits returned by the appellant. On January 9, 1964, the respondent discharged the two previous assessments for year of assessment 1961 and substituted therefor a chargeable income of £1,138.

On January 10, 1964 a conference took place between Brian Mair representing the company and certain officers of the Income Tax Department as a result of which the liquidator wrote the respondent the following letter (Exhibit 1) -

16th March, 1964

The Commissioner of Income Tax
Income Tax Office
KINGSTON

Dear Sir,

Re: Washington Gardens Ltd.
(In Liquidation)
Year of Assessment 1961

We confirm the decisions at a conference between our Mr. Brian Mair and your Messrs Dujon, Williams and Marsh on the 10th inst. and also telephone conversation between the writer and Mr. G.R. Williams with respect to the following:

Profits for the year 1960. These profits are confirmed at £47,085 and they form the basis of assessment for year of assessment 1961.

Yours faithfully
GERALD MAIR & SON

Per:.....?.....

HM/GP

To that letter came the following reply (Exhibit 2)

File 5065
grw:jc

1st April, 1964

Dear Sirs,

Re: Washington Gardens Ltd.
Years of Assessment
1960 & 1961

Thanks for your letter of the 16th instant.

Below is set out the position for these years of assessment:

	<u>Department's Computation</u>	<u>Your Computation</u>
Y/A 1960	47085	Nil
Y/A 1961	1138	47085

It was mutually agreed with your representative that since the tax on profit of £47,085 for the basis year 1960 was payable in any event and that since the Department has raised an assessment for this amount for Year of Assessment 1960, then payment should be made without prejudice to your contention that this amount of £47,085 is really assessable for Year of Assessment 1961. It was further agreed to place the 1961 assessment of £1,138 under objection pending determination of the real point at issue - which is when the business really commenced.

The Department contends that the business did not commence until 1960, when all the requirements of the K.S.A.C. and Water Commission were completed and the Company in a position to issue titles to the lots sold. Your contention as contained in your letter dated 15th January, 1964 is that the business commenced from 1957.

I now intend to issue Notice of Decision in respect of the 1961 assessment, which is under objection, but before doing so, I have to ask if you have any further submissions to make in the matter.

Yours faithfully,

for Commissioner of Income Tax.

Messrs. Gerald Mair & Son,
21/23, Duke Street,
KINGSTON.

Later in reply to a letter from the respondent dated March 1, 1966 the liquidator wrote on March 9, 1966 enclosing balance sheets of the company for the years ending 31st October, 1963, 31st October 1964 and 30th December, 1965. The respondent then wrote Gerald Mair & Son the following letter dated May 5, 1966 (Exhibit 3) -

B.F. 5065
OIN:ap

5th May, 1966

Dear Sirs,

Re: Washington Gardens Ltd.

Thanks for your letter of the 9th March, 1966 with enclosures.

The circumstances of this company have been carefully considered and I am prepared to accept the position stated in your letter of the 16th March, 1964, and admit the profits for 1960 as the basis for the Year of Assessment 1961.

From the evidence available I am not satisfied that the company ceased trading in 1962. The mere fact that the company has gone into liquidation is not itself conclusive that the business has been discontinued.

The accounts now submitted do not support the view that the business has been discontinued.

Computations for Years of Assessment 1962 to 1966 are enclosed.

Yours faithfully,

?
for Commissioner of Income Tax

Messrs. Gerald Mair & Son,
21-23 Duke Street,
KINGSTON.

Then the respondent by notice of decision dated October 10, 1966 purported to fix the company's chargeable income for year of assessment 1961 at £52,085.

The appellant submits that the respondent had, as evidenced by Exhibits 1, 2 and 3 set out above, agreed with the appellant the chargeable income of the appellant for the year of assessment 1961 at £47,085 and was therefore precluded by the provisions of s.50 (6) and (7) of the Income Tax Law, 1954 from varying that amount to £52,085 by a notice of decision. Section 50 (6) and (7) of the Income Tax Law, 1954 provide as follows -

"S.50 (6) - In the event of any person assessed, who has objected to an assessment made upon him, agreeing with the Commissioner as to the amount at which he is liable to be assessed, the assessment shall be amended accordingly. In any other event the Commissioner shall give notice in writing to the person of his decision in respect of the objection.

thereby, or where the amount of the chargeable objection or appeal in the time limited by assessment as regards the able income assessed

income has been agreed to under subsection (6) of this section, or where the amount of such chargeable income has been determined on objection or appeal the assessment as made or agreed to or determined on appeal, as the case may be, shall be final and conclusive for all purposes of this Law as regards the amount of such chargeable income:

Provided that nothing herein contained shall prevent the Commissioner from making any refund under the provisions of section 63 of this Law, or any assessment or additional assessment for any year of assessment which does not involve reopening any matter which has been determined on appeal for the year."

No oral testimony was adduced at the hearing before the Income Tax Appeal Board or before the judge in chambers as to what took place at the conference on March 10, 1964. The Income Tax Appeal Board stated that the correspondence disclosed that there was a difference between the parties as to the time when the trading commenced and that Exhibit 3 did no more than admit that the profit for 1960 would be the basis for the year of assessment 1961. The judge in chambers was of the view that Exhibit 3 did no more than state that the respondent was "prepared to accept" the situation therein spelt out viz. "admit the profits for 1960 as the basis for the year of assessment 1961" and concluded that the letters Exhibits 1, 2 and 3 did not show a final agreement between the parties. I take a similar view. Although Exhibit 1 written by the liquidator does state that he was informed that there was such an agreement reached, the respondent's reply Exhibit 2 in its terms indicates that he was not accepting the position as stated by the liquidator in Exhibit 1. Instead he stated that it was agreed that since tax on profit of £47,085 for the basis year 1960 was payable in any event and since the (Income Tax) Department had raised an assessment for this amount for year of assessment 1960, then payment should be made without prejudice to the liquidator's contention that this amount of £47,085 was really assessable for year of assessment 1961. This falls short of an

admission by the respondent that it was agreed that the profits of the basis year 1960 were to be fixed at £47,085. Further, the respondent by the very terms of his letter Exhibit 2 denies that any agreement had been reached at the conference held on March 10, 1964, that the profits for 1960 should form the basis of year of assessment 1961. Exhibit 3 endorses the contents of Exhibit 1 in so far as they relate to the profits for 1960 being taken as the basis for the year of assessment 1961 and not in so far as they relate to the statement in that document that the profits for 1960 were confirmed at £47,085.

I would, therefore, affirm the findings of the Income Tax Appeal Board and of the judge in chambers on this point.

The remaining point is one of some difficulty. Can it be said that the finding of the learned judge in chambers that the two sales of the remaining lots in 1964 by the liquidator constituted a carrying on of a trade of dealing in land, and were not by way of merely realising the assets of the company in liquidation is shown to be erroneous in point of law? Before examining the conclusions reached on this point by the Income Tax Appeal Board and by the learned judge in chambers reference should be made to the definition of "trade" appearing at s. 2 (1) of the Income Tax Law, 1954 - "trade includes every trade, manufacture, adventure or concern in the nature of trade." The Income Tax Appeal Board's conclusion is stated as follows -

"With respect to years of assessment 1964 and 1965 the appellant contended that there was no trading; what was done amounted to no more than realising the assets.

After very careful consideration of this submission we have come to the conclusion that the facts do not support it. When in 1964 the liquidator received the offer of purchase of the land for £60,000 and used it as the basis for ascertaining the value of Mrs. Judah's and Mrs. DeLisser's shares he brought about a complete change in his position with relation to the assets of the Company. To arrive at the value of Mrs. Judah's and Mrs. DeLisser's shares he took £60,000 as the value of the unsold land

added to it the assets of the company and subtracted from the sum so arrived at the debts and liabilities of the company. What was left after the subtraction of the liabilities was the amount the liquidator would pay the shareholder on the realisation of the assets. What in effect he did was to realise the assets of the company but instead of selling the land to the party who made the offer of purchase he sold it by way of transfer of shares to Mr. Webster who was prepared to gamble on the value of the land in going up. The subsequent sale of the land in our view was by way of trade the profit of which attracted income tax."

I do not think that this approach is justified by the facts found by the Board itself and there is much force in the submission of Dr. Barnett that the Board misdirected themselves as to the facts and as to the law.

The learned judge in chambers stated his conclusions in the following way -

"The state of the evidence indicates -

1. The Bank was pressing for payment since 1962.
2. The Collector of Taxes was also pressing for payment since 1962.
3. The offer came for £60,000.
4. The liquidator consulted the shareholders in relation to that offer.
5. The majority shareholders were in favour of accepting that offer and winding up the company.
6. One shareholder resisted acceptance of the offer.
7. The shares of the majority shareholders were bought out.
8. The liquidator refused the offer waiting for better price.
9. A small profit would be made by a sale at £60,000.
10. The liquidator refused the offer to sell at that price, even though it would have paid off all the company's liabilities leaving a small profit.

The 'holding off and waiting for better prices' is exactly what a trading company would do and in fact what the company did since 1959 in relation to the 195 lots. This scheme is followed by the liquidator in relation to the said lots which the company was formed to develop and sell. I find that all the facts in this case taken together indicate that the company, prior to 1962 and through the liquidator after that year, were pursuing a scheme of profit making, watching the market and waiting for better prices. I find that the liquidator was not merely realising the assets of the company but acting as a dealer in land in good business manner, holding off and waiting for better prices and this even so when there was pressure for payment by the Bank and Collector of Taxes and agreement to sell and wind up the company by the majority shareholders.

After anxious deliberation and consideration of all the facts and all the submissions, I have come to the conclusion, that the true interpretation to be placed on the facts and I so find, is that the original scheme of profit making by the company continued in the liquidator and culminated in the two sales in April, 1964; the facts are not consistent with a permanent cessation of trade as of the date liquidation commenced. The result is that the sales were in the course of trade and the resultant profit is income liable to tax."

For the appellant it was submitted that the liquidator's desire to obtain the best possible price is equally or even more indicative of the actions of a person attempting to realise assets; that this is the legal and commercial duty of a liquidator and there is no decision or dicta which suggest that a desire to obtain the best possible price is an attitude which is indicative of trading. Further, it was contended, the mere fact that a liquidator was engaged in realising assets which had been trading assets of the company did not mean that he was trading. To find that he was trading there must be evidence that he conducted his operations in a manner which bore the characteristics of trading and there was no such evidence in this case. For the

respondent it was submitted that the evidence discloses that at the time the offer of £60,000 was received the liquidator was not merely interested in paying off creditors and distributing the surplus, if any, but was in fact acting as an adventurer in the trade of dealing in lands; that bearing in mind the fact that the company had covered the cost of the development expenditure after the sale of 705 lots and had deliberately held back 195 lots in the hope of making a substantial profit from the sale of them, an examination of the evidence and of the facts shows that the liquidator's activities in 1964 were the culmination of the scheme of profit making which was on hand when the company went into liquidation. Consequently, the profit made by him being a profit made from trade is liable to taxation. Those were in substance the rival contentions put before us.

It is not disputed by the respondent that had the liquidator accepted the offer of £60,000 he received on February 7, 1964 it could hardly be urged that he was not merely realising the assets of the company. His earlier delay in realising the assets for the reasons he gave in evidence and a subsequent acceptance of the offer of £60,000 would have been consistent with his duty as liquidator to beneficially wind up the company. It is not suggested on behalf of the appellant that such course would not have been followed by the liquidator had all of the shareholders found the offer of £60,000 acceptable. The liquidator was deterred from following that course because Webster disagreed with any acceptance of the offer. Webster wished to await the possible receipt of a higher offer at some time in the future. To enable this to be done, he, with the aid of his business partner, Roberts, bought out the shares of Mrs. Judah and Mrs. DeLisser the purchase price of the shares of those shareholders being determined on the basis of the offer of £60,000 received. The transfer to Webster and Roberts of the shares so purchased had to be made with the consent of the liquidator otherwise such transfer would have been

void. To that extent the liquidator was a willing participant in that transaction. He was obviously aware of the reason for that transaction being effected and by giving his approval to it he must be taken to have appreciated and approved its purpose. Was such action on his part in these circumstances indicative of an adventure in the nature of trade and so inconsistent with the mere realisation by him of the assets of the company? The learned judge in chambers held it was and I think that there is evidence to support his conclusion. In so holding I have not overlooked the fact that the liquidator did not seek, as the company had done before going into voluntary liquidation, to sell the developed lots to individual purchasers. The fact that the disposal of the lots by the liquidator did not follow the mode of sale adopted by the company before it went into liquidation is not decisive of the question to be decided. The ultimate question is whether the liquidator disposed of the lots by engaging in an adventure in the nature of trade. A number of cases were referred to during the course of the argument in relation to the question as to whether or not the particular operations mentioned therein constituted trading or an adventure in the nature of trade. As such a question can only be answered in each case by reference to its particular facts and circumstances no general principle can be said to emerge from an examination of those cases.

I would dismiss the appeal and affirm the order of the judge in chambers with costs to the respondent to be agreed or taxed.

EDUN, J.A.:

I agree.

SWABY, J.A.:

I agree.