Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner for Stamp Duties v. The Broken Hill South Extended, Limited, from the Supreme Court of the State of New South Wales; delivered the 15*th May* 1911.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD GORELL.
LORD SHAW.

[DELIVERED BY LORD MACNAGHTEN.]

This is an Appeal by the Commissioner of Stamp Duties for the State of New South Wales from an order pronounced by the Supreme Court of that State on a question submitted in a Special Case for the consideration of the Court.

The Special Case was stated by the Commissioner at the request of the Respondents, the Broken Hill South Extended, Limited, who were dissatisfied with his assessment of the duty payable in respect of the transfer to them of the property and assets of the New Australian Broken Hill Consols, Limited, a company then in progress towards liquidation.

The two companies may be conveniently referred to as the New Company and the Old Company. Both Companies, though formed for the purpose of developing and working mineral

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property in New South Wales, were incorporated in England as Companies limited by shares under the Companies Acts 1862 to 1890—the Old Company in 1896 and the New Company in 1907.

The Old Company was registered with a capital of 600,000*l.* divided into 600,000 shares of 1*l.* each. In July 1905 its capital was increased to 630,000*l.* by the creation of 600,000 preference shares of 1*s.* each, conferring on the holders the whole profits of each year until the sum of 5*s.* should have been paid in respect of each preference share which would then be deemed to have been paid off.

Of the capital of the Old Company so increased, 596,419 ordinary shares and 150,000 preference shares were issued. All these shares were fully paid or credited as fully paid.

In the early part of the year 1907 the directors of the Old Company were in need of funds to enable them to develop their property which then included a recently acquired mineral lease from which good returns were expected. At the same time they found themselves hampered in their efforts to raise money in consequence of the rights attached to the preference shares of 1905. In these circumstances they considered that the most advantageous plan would be to reorganise or reconstitute the Company. Accordingly they proposed to promote a New Company with a capital divided into shares of 10*s.* each to take over the property and assets of the Old Company.

The substance of the proposed scheme was this:—(1) the New Company was to acquire the preference shares in the Old Company by allotting to the registered holders thereof one fully paid share in exchange for every two fully paid preference shares, in accordance with the terms of a provisional agreement expressed to be made between a nominee on behalf of the preference shareholders and a person purporting to act on behalf of the New Company; (2) the New Company was to purchase from the Old Company all its property and assets for a share consideration of (*a*) 600,000 shares credited with 8*s*. 6*d*. paid up on each share, and (*b*) so many fully paid shares as would be equal to half the number of preference shares in the Old Company not exchanged under the provisional agreement above mentioned, and for the further consideration that the New Company should undertake all the liabilities of the Old Company including the costs, charges, and expenses of its liquidation; (3) the shares received from the New Company were to be offered for distribution among the shareholders of the Old Company at the rate of one share of the New Company (8*s*. 6*d*. paid) for each ordinary share of the Old Company, and one share fully paid for each two preference shares of the Old Company; and (4) if any members of the old Company should not accept their due proportion of the share consideration, the Old Company was to use its best endeavours to dispose of the same and to distribute the net proceeds among such members according to their rights and interests in the Old Company.

The directors of the Old Company submitted the proposed scheme to their shareholders with a notice of an extraordinary general meeting to be held for the purpose of considering it, and if thought fit, passing a resolution approving thereof with the necessary consequential directions. These documents were accompanied by a circular letter issued by order of the Board, in which it was stated that if the resolutions mentioned in the accompanying notice were duly passed, and the proposed scheme received the sanction of shareholders, the directors believed that the whole of the capital would be subscribed for, and that this would ensure sufficient funds for development of mining operations on an extended scale, and the erection of the necessary machinery. And then followed this passage :—" From the General " Manager's Report to the 30th June last, which " is enclosed, with further details of mining " operations, since that date, together with plan " of property, you will observe that he expresses " the opinion 'that there is no doubt this mine " 'will also soon reach the productive stage and " 'thus justify the confidence placed in it.' "

The provisional Agreement with the preference shareholders in the Old Company referred to in the proposed scheme was dated the 5th of March 1907. It was sanctioned by a resolution passed at a meeting of preference shareholders held on the 22nd of that month, by which all the preference shareholders were bound.

On the 26th of March 1907 the directors of the Old Company, in pursuance of the authority of an extraordinary general meeting held on the 25th of March, caused the seal of the Old Company to be affixed to a provisional agreement embodying the terms of the proposed scheme.

On the 5th of April 1907 the New Company was incorporated and the directors of the Old Company became directors of the New. As such directors in execution of the trust which they had undertaken on behalf of the New Company they approved the proposed scheme, and on the 17th April 1907 they caused the seal of the New Company to be affixed to two agreements of that date by which the New Company adopted the two provisional agreements of the 5th and the 26th of March 1907. The 17th of April 1907 is therefore the date on which the agreement for the transfer of the property and assets of the

Old Company became binding on the New Company, and the date to be looked to for the purpose of assessing stamp duty.

Stamp duties on agreements for the transfer of property in New South Wales are regulated by the Stamp Duties Act, 1898 (No. 27 of 1898), and the Stamp Duties Amendment Act 1904 (No. 24 of 1904). The duty is 10*s*. per cent. where the amount or value of the consideration exceeds 100*l*. There are sections in the Stamp Duty Code dealing with special cases where part of the consideration consists of stock or shares of a company "formed or to be formed." But it may be doubted whether any of those sections applies to a case where a company limited by shares purchases property by issuing its own shares fully or partly paid as the consideration or part of the consideration for the purchase, inasmuch as no share in a limited company can legally be issued as fully or partly paid except for payment in money or money's worth. The provision intended to have effect where the consideration consists of shares in a company "to be formed" certainly cannot apply to such a case as this, because, of course, no company can enter into a contract before it is formed or even ratify a contract purporting to be made on its behalf before its formation. The point is not of any practical consequence because in any case the enactment assumed to be applicable (Sub-section 5 of Section 14 of the Act of 1904) directs that the value of the shares forming the consideration or part of the consideration shall be taken into account in determining the consideration, and shall be assessed by the Commissioner. Practically it comes to the same thing whether that sub-section is or is not applicable in the present case.

Treating the case (as their Lordships for the purpose of argument propose to treat it) as falling under Section 14, Sub-section 5, of the Act of 1904, the Commissioner assessed the value of the 10*s*. shares forming part of the consideration for the transfer at 10*s*. each where issued as fully paid, and at 8*s*. 6*d*. where issued as paid up to the extent of 8*s*. 6*d*.

Considering the share consideration to be of that value the Commissioner assessed the duty payable at 1,479*l*. The New Company being dissatisfied with his assessment appealed to the Supreme Court, and, as they were entitled to do, they required the Commissioner to state a case for the purpose of the Appeal. The question proposed for the decision of the Court was whether the Commissioner was right in his assessment, and if he was not right, what was the correct amount of duty to be paid on the agreement of transfer? The Judgment of the Supreme Court was delivered by Cohen, J., with the concurrence of the other members of the Court. Cohen, J., held that the Commissioner was wrong in refusing to consider certain evidence tendered on the part of the New Company with the view of showing that the amount reckoned as paid up on the shares in the New Company, though approved by the promoters and directors of the New Company in their fiduciary capacity and adopted by the New Company under their common seal as part of the consideration for the proposed transfer, was or might be open to reconsideration. "I am of "opinion, therefore," says the learned Judge, "that the Commissioner was wrong in refusing "to consider the evidence to which I have "referred, and the question submitted in the "Special Case must be answered in the negative." "I do not decide," he adds, "as to the amount "he is wrong, but do decide that he proceeded "on a wrong principle, and that he did not give "a proper construction to the Act, and therefore "he is not right in his assessment." The question submitted by the Special Case being answered in the negative, the Court referred it to Cohen, J., sitting as the Court under statutory authority to assess the stamp duty.

In dealing with this Appeal it seems to be of some importance to bear in mind the exact point determined by the Supreme Court. That Court did not determine (as the Respondents erroneously allege in paragraph 11 of their Printed Case) that it was the duty of the Commissioner "to ascertain the real saleable or "marketable value of the shares issued by the "Respondent Company," and to assess the duty on that value. It did not determine the amount of the duty payable, nor indeed was any opinion on that point intimated except so far as an intimation of opinion may be gathered from a passage in the Judgment of Cohen, J., in which that learned Judge, after having stated that the Commissioner refused to receive the evidence tendered by the New Company, observes that if he had considered that evidence he might very well have said that the quotations tendered as evidence of value were so far distant in point of time from the date he had to direct his attention to, that he could not give any effect to them, and then the learned Judge adds: "all the expense "of this Appeal would have been avoided if he "had taken the course of receiving the evidence "and applying his mind to it, and then assessing "the value according to his own judgment." The only point decided by the Supreme Court was that the Commissioner was wrong in point of law in excluding summarily evidence tendered for the purpose of contradicting what was *primâ facie* evidence of the value at the time of issue. It was, of course, the duty of the directors of the New Company to satisfy themselves that the value put upon the property of the Old Company, which was to be assigned to the New Company, was a fair value, and not the less so because they were themselves promoters of the New Company and directors of the Old. Notwithstanding a very singular declaration by the Company's Secretary there is not sufficient evidence to prove that the directors of the New Company were guilty of a misfeasance which, on the authority of *Hirsche* v. *Sims*, A.C. 1894, 654, would subject them to a heavy liability, at any rate, in the case of the shares which were not taken up by the shareholders in the Old Company and were sold in the market as paid up to the extent of 8*s*. 6*d*. each. Still, if under Section 14, Subsection 5, of the Act of 1904, it was the duty of the Commissioner to assess the value of the share consideration, it cannot be contended that the action of the Company in issuing the shares as fully or partly paid operated as an estoppel when the question came before the Commissioner. Assuming that the directors acted in perfect good faith, it is quite conceivable that there might be evidence to show that the value attributed to the share consideration by the New Company was not the real value, as, for instance, if it appeared that the Old Company had no title to one of the mineral properties on which the estimate of value was, or ought to have been, based. Their Lordships, therefore, think that it is impossible to hold that the learned Judges of the Supreme Court were wrong in thinking that the Commissioner ought to have received and considered the evidence tendered by the Respondents. Their Lordships also think the Commissioner was in error in taking, as he did, the 26th of March 1907, as the date on which the value of the share consideration was to be assessed. At that date the New Company was not in existence. It is obvious that shares which a Company not in existence may or may not be in a position to issue, if it ever does come into existence, can have no assessable value. The true date is the date when the New Company adopted the provisional agreement of the 26th of March 1907, and bound itself to issue its shares representing them to be of the value of 10*s.* when issued as fully paid, and of the value of 8*s.* 6*d.* when issued as paid up to that extent. That date was the 17th of April. Possibly, if the true date had been kept in view, the difficulty, such as it is, which has given rise to this question, would not have presented itself, and probably no difficulty would have occurred to anybody if the agreement between the two Companies had been in a form which is not uncommon, viz., in the form of an agreement to the effect that the purchasing Company should buy the property and assets of the selling Company for so much cash (292,420*l.* in the present case), to be satisfied as to so much by the issue of shares fully paid, and as to so much by the issue of shares partly paid up. That is the real contract written large and stated fully and truly as required by Section 2, Sub-section 14 of the Act of 1904.

It will be for the learned Judge to whom the question was referred by the Supreme Court to assess the amount of stamp duty payable. Their Lordships therefore abstain from expressing a final opinion on that question. The learned Judge (if he thinks Section 14, Sub-section 5, of the Act of 1904 applicable), will no doubt, consider whether the market price of the shares of the Old Company can have any bearing on the question before the Court. The directors of the Old Company probably were aware of the market price of the shares of the Old Company when they issued the Circular Letter of the 14th of March, 1907, which was intended to create a hopeful view of the situation grounded in some measure on a report by their general manager, not easily reconcilable with the declaration submitted by him to the Commissioner. The shares in the

New Company which were sold in the London Stock Market in and after July 1907, seem to be the 96,242 shares which were not applied for by members of the Old Company, and which were apparently thrown upon the market without any prospectus or anything to recommend them or explain their issue. Whether a question which it was the duty of the directors to determine, as at a given date, can be affected by subsequent transactions on the London Stock Exchange, and if so, to what extent, is again a question to be determined by the learned Judge to whom the matter was referred.

In the result their Lordships think there is no ground for disturbing the judgment appealed from and they will humbly advise His Majesty that the Appeal ought to be dismissed.

The Appellant will pay the costs of the Appeal.

In the Privy Council

THE COMMISSIONER FOR STAMP DUTIES

v.

THE BROKEN HILL SOUTH EXTENDED, LIMITED.

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