

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

IN THE PRIVY COUNCIL

No.13 of 1972

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

ANKER LIVINGSTONE WARTHO
HANSEN AND OTHERS

Appellants

- and -

THE COMMISSIONER OF INLAND
REVENUE

Respondent

10

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (North P., Turner and Haslam JJ.) given on 16 July 1971, dismissing an appeal from a judgment of the Supreme Court of New Zealand (Woodhouse J.) given on 2 November 1970.

P. 73-74

P. 44

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2. The question in this appeal is whether the Respondent acted incorrectly in making amended assessments of income tax under the Land and Income Tax Act 1954 in respect of the Appellants for the income years ended 31 March 1963, 1964, 1965 and 1966 by increasing the appellants' assessable income for those years.

3. The circumstances giving rise to this question may be broadly outlined as follows. The Appellants carried on a farming partnership on two properties situated at Glen Murray and

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P. 2 1.17
and P.6-7

Clevedon. On 1 December 1964 they agreed to sell the Glen Murray property together with livestock and chattels for a purchase price of £200,000. The purchaser was Lochiel Cameron Ltd. Clause 17 of the Agreement for Sale and Purchase provided:

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"THE SAID PURCHASE PRICE IS APPORTIONED AS TO THE SUM OF £168,450 FOR THE LAND AND BUILDINGS SPECIFIED IN THE FIRST SCHEDULE HERETO AND TO THE SUM OF £31,550 FOR THE LIVE AND DEAD STOCK CHATTELS AND SHARES SPECIFIED IN THE SECOND SCHEDULE HERETO" 10

P. 8A

4. The Second Schedule to the said Agreement attributed the sum of £27,750 to the livestock as follows :

1,265 cattle at £10	£12,650	
10,000 sheep at 30s.	15,000	
6 horses ("hacks")	<u>100</u>	
	TOTAL	£27,750 20

P. 3 1.15

5. The Appellants used this figure of £27,750 when declaring the assessable income of the partnership for the income year ended 31 March 1966. The Respondent, however, considered that figure to be inadequate. He accordingly purported to rely on section 101 of the Land and Income Tax Act 1954 and he determined that of the total consideration of £200,000 the proper figure attributable to livestock was £82,555. This figure was derived by the Respondent from a valuation of the livestock made for the purchaser, Lochiel Cameron Ltd., by a well known and long established firm of stock and station agents and farm valuers, Wright Stephenson & Co.Ltd. That valuation was made on 14 June 1965, which was twelve days after "settlement" (i.e. completion) of the transaction was effected, and possession given and taken. 30

P.76-77

6. The declared assessable income of the partnership for the income year ended 31 March 1966 was £13,760.6.11. As a result of adjusting the assessable income under section 101 the Respondent arrived at the following figures :

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P. 3-4

	Market value of sheep and cattle sold to Lochiel Cameron Ltd.	£82,555. 0. 0
10	<u>Less values returned</u>	<u>27,650. 0. 0</u>
		54,905. 0. 0
	<u>Add income returned</u>	<u>13,760. 6.11</u>
		<u>£68,665. 6.11</u>

This was allocated as follows :

P. 4 1.6

	First Appellant	£17,166. 6. 8
	Second Appellant	17,166. 6. 9
	Third Appellant	17,166. 6. 9
	Fourth)	
	Fifth) Appellants	17,166. 6. 9

20 7. The Respondent subsequently made amended assessments of the assessable income of each of the Appellants for the income years ending 31 March 1963, 1964, 1965 and 1966. These amended assessments brought into account the above stated fresh allocations of partnership income.

P. 4 1.11

30 8. The Appellants subsequently objected to their assessments on the grounds set forth in a letter written by their accountants, Messrs. Hutchesson, Longbottom & Co., dated 22 May 1968. The objection was disallowed, and the Respondent was required to state a case under section 32 of the Land and Income Tax Act 1954 to the Supreme Court.

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9. In the Supreme Court of New Zealand
Woodhouse J. held :

- (1) that the Commissioner had acted correctly in adjusting the Appellants' partnership income;
- (2) Subject to an adjustment to include the value of the 6 horses, the Commissioner had correctly made use of the valuation made by Wright Stephenson & Co.Ltd.

(3) That it was necessary, however, for the Respondent to relate the valuation of the livestock to the valuation of the other assets if sold in isolation. Accordingly, the proportionate amount of the consideration which should be attributed to the livestock was £70,713. 10

(4) That the Commissioner acted incorrectly in including as partnership income in the assessment of each of the Appellants the difference between the book values of 15s. and £5 and the values of 30s. for sheep and £10 for cattle at which such livestock was transferred by the Appellants to Norman Hansen pursuant to the dissolution of partnership which followed the sale to Lochiel Cameron Ltd. 20

P. 33-34 10. In his reasons for judgment Woodhouse J. first outlined the main facts. He then set out section 101(1) of the Act and the nature of the Appellants' (Objectors') contentions. His Honour considered section 98 and the relationship of that section to section 101. 30

P. 36-37 11. His Honour then dealt with an argument based on the Respondent's alleged past practice of not applying section 101 where the parties have settled for themselves the price of trading stock in a sale of mixed assets. His Honour then considered S's Trustees v. Commissioner of Taxes (1950) 7 M.C.D. 218 and the relevant

dicta in Edge v. Inland Revenue Commissioner
/1958/ N.Z.L.R. 42, an earlier decision of the
New Zealand Court of Appeal. In agreement with
those dicta he held that section 101 applies in
cases where part of a global price has been
specifically attributed by the parties to
trading stock.

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P. 38 1.5

10 12. Woodhouse J. next turned to consider the
evidence adduced before him, holding that the
overall consideration was a genuine reflection
of normal bargaining between the parties at
"arms-length".

P. 38 1.27
P.39 1.38

13. His Honour proceeded to consider the date
as at which the livestock values should be
assessed, and held that the relevant date was
the date of settlement, namely 2 June 1965.

P.39 1.39
- P.40 1.11

20 14. His Honour proceeded to reject the
Appellants' argument that it was wrong to value
the livestock by reference to sale prices
received at sales by public auction in the sale
yard.

P.40 1.12

15. His Honour then explained why he did not
propose to act on the evidence of Mr E.R.Hope
who had valued the livestock at the figure of
£67,395 (see Exhibit "D").

P.40 1.24

30 16. His Honour proceeded to discuss the
Appellants' submission that section 101 merely
enabled the Respondent to decide what portion
of the agreed comprehensive consideration could
fairly be attributed to trading stock. He held
that the consideration to be determined by the
Respondent as attributable to trading stock
must be ascertained within the comprehensive,
market consideration of £200,000. He held that
the true market value of the land and
improvements was £147,500; and, of the chattels
included in the sale, £3,600; and that the
proportionate amount of the consideration which
40 should be attributed to the livestock was
£70,713.

P.41 1.12

P. 42 1.18

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P.42 1.35

- 1.44

17. In the final section of his judgment Woodhouse J. considered a question added to the Case Stated by consent at the hearing. This question related to the subsequent transfer of various partnership assets to Norman Hansen. His Honour's answer, which was not challenged before the Court of Appeal, and is not one of the matters in issue before this Board, is stated in paragraph 9(4) supra.

P. 45

18. The Appellants appealed to the Court of Appeal of New Zealand from the whole of Woodhouse J.'s judgment except for its final section dealing with the added question, on the grounds that the judgment was erroneous in fact and in law. Judgment of the Court of Appeal was delivered on 16 July 1971.

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P. 73-74

19. North P., after recounting the facts, said that the crucial question with which the Court was concerned was whether the Respondent, on the facts of the instant case, was entitled to invoke section 101 and substitute another figure for the sum stated by the parties in the contract as the amount that the purchaser was to pay for the livestock. His Honour then set out the Appellant's two main submissions.

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P. 48 1.9

P.48 1.41

- P.49 1.10

P.49-50

20. Turning to the Appellants' first submission, his Honour set out the legislative history of sections 98 and 101 of the Act, and proceeded to hold that section 101(1) was not applicable only in cases where the contract is silent as to the price which the parties themselves have attributed to trading stock in fixing a global purchase price. He held that section 101 was wide enough to cover every case "where any trading stock is sold together with other assets of the business." This included the instant case.

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P. 50 1.33

P.51 1.14-

P.52

21. Turning to the Appellants' second submission, his Honour held that 2 June 1965 was the appropriate date as at which to value the livestock. He further held that Woodhouse J. acted correctly in making a pro rata apportionment among each group of assets sold of the

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comprehensive consideration agreed upon.

22. His Honour concluded his judgment by rejecting the Appellants' subsidiary contention that the Respondent was wrong in using as a basis for his determination the value of the stock if sold separately from the land in several lots. P. 52 1.35
23. In his judgment Turner J. first stated the facts in outline. His Honour then set out the Appellants' two main submissions. He held that section 101(1), in its ordinary and literal meaning, was plainly applicable to the transaction before the Court. P. 55 1.34-37
24. His Honour then dealt with the Appellants' argument based on the legislative history of section 101, holding that section 5(1) of the Land and Income Tax Amendment Act 1926 was, when passed, sufficient, and that section 101(1) is presently sufficient, without aid from its context, to catch the instant transaction. P.56-57
25. His Honour next discussed this Board's decision in Doughty v. Commissioner of Taxes [1927] A.C. 327/[1926] N.Z.L.R. 279, holding that section 5(1) of the 1926 Act could not be said to be intended to deal only with cases exactly like Doughty and no others. P.57 1.10 - P.58 1.8
26. Turner J. then proceeded to review sections 98(7) and (8) of the Act, and section 101, holding that in applying section 98(7) the amount to be taken into account in assessing the taxpayer is "the price which under this Act the trading stock is deemed to have realised." He accordingly concluded that section 101 empowered the Respondent, in the instant transaction, to apportion the consideration between the trading stock and the other assets sold. P.60 1.33 P.60 1.36
27. His Honour next dealt with the Appellants' submission about the date as at which the valuation of the livestock should be made. He

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P. 61 1.21
- P.63

gave detailed reasons for concluding that the transaction between vendor and purchaser, as it stood immediately on the execution of the agreement on 1 December 1964, was not one from which the vendors derived, or could be deemed to derive, any income. It was a conditional, not an unconditional, agreement. In these circumstances the Respondent was right in deciding that the price which he had to apportion was the price actually paid on the day of settlement. 10

P.63 1.34

P.64-65

28. Turner J. then proceeded to consider the Appellants' submission that it was wrong for the Respondent to value the stock as if sold separately from the land, but gave detailed reasons for holding that that submission failed.

P.68 1.40

29. Haslam J. in his judgment first considered the legislative history of section 101, and then set out that section, and 98(8). His Honour expressed his agreement with Woodhouse J.'s view that the opening words of section 98(8) would be irrelevant if section 101 did not embrace the type of sale referred to in section 98(8). 20

P.69 1.18

30. His Honour held that section 101 should not be read restrictively, but should be construed as applying to composite sales, whether or not the consideration for land and chattels be severed in the contract embodying the transaction. 30

P.69 1.24-
P.70 1.17

31. A further answer to the Appellants' primary contention was to be found, in his Honour's opinion, in the conveyancing practice with regard to stamp duty which prevailed when the 1926 amendment was enacted.

P.70 1.18-
1.30

32. Haslam J. agreed that section 101 of the Act was sufficient to prevent the result that a vendor, on quitting his farm, could avoid all liability for tax under section 88(1)(a) on the difference between his standard values and the market value of the livestock. 40

33. His Honour then proceeded to consider the date as at which the valuation of the livestock should be assessed. For various reasons the Respondent was correct in accepting livestock values as at 2 June 1965.

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P.71 1.10
- P.72 1.23

34. Haslam J. concluded his judgment by agreeing with Woodhouse J.'s pro rata reduction of the figure attributable to livestock.

P.72 1.24-
1.41

10 35. On 16 December 1971 the Court of Appeal granted the Appellants final leave to appeal from the judgment of the Court of Appeal to Her Majesty in Council.

P. 75

36. The Respondent submits :

20 (1) The wording of section 98(8) establishes the proper interpretation of section 101, which is that it empowers the Respondent to fix what part of the total consideration is attributable to the trading stock, even when the parties have themselves specified a price at which the trading stock is sold.

30 (2) The plain meaning of section 101 as it stands is that the Respondent has power to fix what part of the total consideration payable on the sale of a farm as a going concern should be attributable to the trading stock both when the parties to the sale have fixed merely a global price and when they have attributed part of that price to the trading stock.

(3) Any recourse to the legislative history of the relevant sections of the Land and Income Tax Act 1954 in this appeal offends against the principle that the legislative history of statutory provisions should be examined only in order to resolve a doubt as to the proper interpretation of those provisions, not in order to raise a doubt as to the meaning of plain and

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unambiguous provisions. Alternatively, if any recourse is had to legislative history, that history does not assist the Appellants' contention that section 101 should be restrictively glossed.

- (4) The Respondent was correct in deciding to adopt 2 June 1965 as the date at which the value of the livestock should be assessed.
- (5) Woodhouse J. and the learned Judges in the Court of Appeal correctly decided that there should be a pro rata reduction of the livestock figure from £82,555 to £70,713 in order properly to relate the livestock to the other assets sold within the comprehensive consideration. 10
- (6) The Respondent acted correctly in adopting the valuation made by Wright, Stephenson & Co.Ltd. on 16 June 1965, and the Appellants have not shown that that valuation was made on an erroneous basis. 20

37. The Respondent's first submission.

Section 98(7) deals with the sale or other disposition of the assets of a business when those assets "consist of or include any trading stock." It accordingly applies when the assets sold only partly consist of "trading stock" - an expression which includes livestock: section 98(1). Similarly, section 98(8) applies when livestock are merely part of the assets sold. 30

38. Section 98(8) deals with the situation where the parties have specified a price for the livestock component of the sale. It thus applies to the sale that took place in this case. But the rule stated in the subsection is expressly made "Subject to the provisions of sections 101 and 102 of this Act...." This is a clear indication by the Legislature that both sections 101 and 102 are capable of application where the parties have specified a price for the livestock component. To interpret section 101 in the restrictive way for which the Appellants 40

contend would render the qualification to section 98(8) meaningless. Such a result should be avoided by the Board.

39. The Respondent's second submission.

10 Section 101 is couched in terms wide enough to empower the Respondent, in a case such as the present, to decline to accept the figure attributed to livestock by the parties themselves. "The consideration", within the meaning of section 101, was the comprehensive contract price of £200,000. There is no justification for reading section 101 restrictively. The word "attributable" means: capable of being attributed. The Respondent is empowered to determine what part of the total price is capable of being attributed to livestock, whether the parties have attributed part of the price to livestock or not. Some significance attaches to the phrase "for the purposes of this Act." This contemplates that the total consideration may have been apportioned by the parties, in order to minimise the amount of ad valorem stamp duty that the purchaser will have to pay under the Stamp Duties Act 1954, or for other private purposes of their own.

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40. The Respondent relies on the dicta of Hutchison J. and McCarthy J. in Edge v. Inland Revenue Commissioner [1958] N.Z.L.R. 42, at 45 (per Hutchison J.) and at 53 (per McCarthy J.).

30 41. The Respondent's third submission.

The Appellants' detailed argument in the Court of Appeal, based mainly on the legislative history of sections 98 and 101 and 102, served only to obscure the really important question which relates to the proper interpretation of section 101 in its present statutory context. In any event, Section 5 of the Land and Income Tax Amendment Act 1926 was, from its first enactment and at all times, widely enough framed to enable the Respondent to do what he has done in this case in reliance on Section 101

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of the 1954 Act, the successor of the said Section 5.

42. The Respondent's fourth submission

The determination which the Commissioner is empowered by Section 101 to make is one having fiscal effect. It could not have fiscal effect, on the facts of this case, until such time as it quantified derived income. It was not until 2 June 1965 that income was first derived from the sale of the livestock by the Appellants.

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43. The contract of sale into which the Appellants entered was a conditional contract. No equitable title to the livestock passed, or was capable of passing, until all the conditions were fulfilled. Upon the failure of any of the conditions, the sale might never eventuate. As at 1 December 1964, when the contract was executed, the Appellants had not derived any income from the sale, and the Respondent could not deem them to have derived any such income. It would accordingly be wrong in principle to select 1 December 1964 as the relevant date. Moreover, sections 98(7), 101(2) and 102(2) all contemplate that the relevant date is the date of the sale, not the date of the contract to sell - where these are different dates. The parties entered into a contract to sell (inter alia) the livestock on 1 December 1964 but there was no "sale" within the meaning of section 3 of the Sale of Goods Act 1908 until 2 June 1965.

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44. The only plausible objection to selecting 2 June 1965 as the relevant date is that the value of the land and/or the livestock may have changed between 1 December 1964 and 2 June 1965. But it was an essential part of the bargain between the Appellants and Lochiel Cameron Ltd that the parties took the risk that any fluctuation of value might be harmful to one side or the other: the fixed price of £200,000 would hold good regardless. It is therefore in conformity with the bargain made to value the

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livestock as at 2 June 1965. Moreover, Woodhouse J.'s adjustment formula, approved by the Court of Appeal, eliminates any possible unfairness to the Appellants due to fluctuation in values.

10 45. There is no evidence to support the inference that the parties to the contract intended that property in the livestock should pass as soon as the contract had been executed. Clause 25 of the contract, which provides that "The Vendors will not share (sic) the sheep described in the Second Schedule hereto between the date hereof and the day of settlement" is inconsistent with the view that property in the sheep passed to Lochiel Cameron Ltd on 1 December 1964, and consistent with the view that the parties intended the property in all the livestock to pass on the day of settlement.

46. The Respondent's fifth submission

20 In the Court of Appeal of New Zealand the Respondent did not contest the correctness of Woodhouse J.'s pro rata reduction of the livestock figure from £82,555 to £70,713. The inherent justice of this approach is emphasized, as Haslam J. said, in that in the final result the total consideration fixed by the parties is not exceeded.

47. The Respondent's sixth submission

30 Woodhouse J. in the Supreme Court was right not to assume that large numbers of livestock sold as part of a sale of a farming business as a going concern would fetch prices lower than sale yard prices. The Appellants had the onus of proving that the valuation acted upon by the Respondent was wrong (Inland Revenue Department Amendment Act 1960, s.20). There is no evidence sufficient to displace the determination which the Respondent actually made, or the basis of that determination.
40 Moreover, this Board is requested not to

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entertain any submission on behalf of the Appellants to the contrary, as such a submission would involve the Board in reaching a different conclusion on a matter which is wholly or mainly a matter of fact from the findings reached in both the Supreme Court and the Court of Appeal.

48. The Respondent contends that this appeal should be dismissed with costs for the following among other reasons.

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R E A S O N S

(1) That upon its proper interpretation section 101 empowered the Respondent to make the amended assessments of income that he made in respect of the Appellants for the various income years.

(2) That the Respondent was correct in deciding to adopt 2 June 1965 as the date at which the value of the livestock should be assessed.

(3) That the Respondent acted correctly in adopting the valuation made by Wright, Stephenson Ltd on 16 June 1965, because it has not been shown that that valuation was made on an erroneous basis.

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(4) That the judgments of Woodhouse J., and of the Court of Appeal, were correct, for the above reasons and for all the additional reasons mentioned in their Honours' respective reasons for judgment.

D.L. MATHIESON

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No.13 of 1972

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