

BURNS PHILP TRUSTEE COMPANY LIMITED

v.

THE COMMISSIONER OF ESTATE & GIFT DUTIES

[HIGH COURT, 1990 (Palmer J) 9 October]

Appellate Jurisdiction

Estate- estate and gift duty- valuation of real estate- now effected- Estate and Gift Duties Act (Cap 203) Section 62.

The Executor and Trustee of a deceased estate and the Commissioner of Estate and Gift duties were unable to agree valuation of the estate for duty purposes. On appeal against an official valuation the High Court explained the way in which such valuations should be carried out, ruled that the proper approach in the circumstances was on a lot by lot basis and fixed the value of the subject property.

Cases cited:

Abrahams v. F.C.T. [1944] 70 CLR 23

Duke of Buccleuch v. Inland Revenue Commission [1967] AC 506

Ganadabhai Kalyan Hari & Anr v. Gould & Anr. 10 FLR 105

McCathie v. FCT [1944] 69 CLR 1

Ratanji Motiram Narsey & Ors v. Gould 19 FLR 91

Spencer v. The Commonwealth of Australia (1907) 5 CLR 419

P. Knight for the Plaintiff

B. Hayhow for the Defendant.

Appeal against official valuation for estate duty.

Palmer J:

This is an appeal against the Defendant's valuation for the purposes of Estate Duty. The Plaintiff is the Executor and Trustee of the Estate of the late Thomas Fowler Pickering. The property in question of which the testator was the registered proprietor at the time of his death consists of nine blocks of land of approximately 5 acres each situated on the island of Taveuni. They are described as Lots 7 to 15 inclusive on deposited Plan No. 3532 and contained in Certificates of Title No. 14626 to 14634. The Plaintiff had instructed Messrs Harrison and Grierson Consultants Limited to do a Valuation for the purposes of Estate Duty of the property in question. That Valuation was made by Mr J.C. Kershaw who arrived at a value of \$43,000. The Defendant took the view that that Valuation was too low and wrote a letter suggesting instead values totalling \$164,000. At a subsequent meeting between the parties the Defendant agreed to reduce the Valuation to \$119,000 subject to a further Valuation being carried out by the

A Government Valuer. That Valuation was subsequently carried out and arrived at a figure of \$106,100. This was carried out by a Mr Kumar. It is convenient to mention at this stage that subsequently a further Valuation was carried out by Harrison and Grierson, this time by Mr Dakuidreketi, who gave evidence, and who arrived at a figure of \$85,000.

The Estate and Gift Duties Act (Cap. 203) provides in section 62 as far as relevant, as follows:

B “(1) For the purpose of assessing estate duty if the Commissioner is not satisfied as to the value as stated by the administrator... he may determine it either by agreement between himself and the administrator or, in the event of a failure to agree, by a valuation made by an official valuer appointed under the Stamp Duties Act.

C (3) Any administrator or the Commissioner may within one month from the date upon which a valuation by an official valuer is communicated to him, appeal by way of Originating Summons against such valuation to the Supreme Court.”

D The Plaintiff duly appealed in pursuance of that section by way of Originating Summons. The point was taken by the Defendant in his submissions, although not pressed, that the Summons does not show sufficient or adequate grounds for an appeal. It seems to me clear that nothing in the nature of a *prima facie* case needs to be put in the Summons which serves as a Notice of Appeal and that the parties mentioned in the section have a right to simply lodge the appeal, the result of which is that the Court is left to fix the appropriate value for Estate Duty purposes. I hold therefore that the appeal is procedurally in order. Another procedural point is that it was agreed by both parties that no Official Valuer under the Stamp Duties Act has ever been appointed. No point is taken by the parties as to this and it was agreed that the Principal Valuer of the Lands Department would be accepted as answering the purpose.

F The issue before me is a twofold one, namely which of the three valuations if any to adopt, and what method of valuation is appropriate to the particular circumstances of this property. As to the latter the contest is between the block valuation method contended for by the Plaintiff and the individual lot valuation method contended for by the Defendant. That issue arises because the property was subdivided in the testator's lifetime but it is said that none of the lots has as yet been sold. The Plaintiff points out that the entire property comprising those 9 lots passes to the Executors under the Will. The parties are agreed that the appropriate date for the valuation is the date of the death of the testator, which was the 28th June 1984. All valuations are of the unimproved capital value. It is convenient for ease of reference to set out the details of the various valuations side by side.

BURNS PHILP TRUSTEE COMPANY LTD v. THE COMMISSIONER
OF ESTATE & GIFT DUTIES

	January 86 "Suggested Valuation"	July 86 Narayan	November 86 Kumar	May 88 Dakuidreketi	
	\$	\$	\$	\$	
Lot 7	20,000	15,000	12,400	10,000	A
" 8	18,500	13,500	11,500	10,000	
" 9	18,500	13,500	11,700	10,000	
" 10	18,500	13,500	11,100	9,500	B
" 11	18,500	13,500	11,200	9,500	
" 12	17,500	12,500	11,200	9,000	
" 13	17,500	12,500	11,200	9,000	C
" 14	17,500	12,500	15,000	9,000	
" 15	<u>17,500</u>	<u>12,500</u>	<u>10,800</u>	<u>9,000</u>	
TOTAL:	<u>164,000</u>	<u>119,000</u>	<u>106,100</u>	<u>85,000</u>	

However I note that the Defendant is not seeking to maintain his original "suggested value" of \$164,000. Mr. Kershaw's valuation did not give any breakdown of individual Lots. The valuation of the suggested \$164,000 is the result, according to the evidence, of what is known as an "office" valuation arrived at by reference to comparable transactions but without any inspection of the site. The \$119,000 value subsequently put forward by the Commissioner is the result of the valuation by Mr. Narayan of the Lands Department. There is no evidence as to how that figure was arrived at. However that was put forward as being subject to a further valuation, which resulted in the \$106,100 valuation.

The \$164,000 and \$119,000 valuations are no longer being supported by the Defendant. With regard to Mr. Kershaw's valuation if one looks at the other figures this appears to be very far outside the sort of range that has been considered here. Moreover the valuation of Mr. Dakuidreketi of the same firm is almost double his. Although it is not made clear in Mr. Kershaw's valuation it appears that he valued the property on a block value basis. In his report he makes reference to two comparable sales, one of which results, after deduction of the value of improvements, in an assessment of \$2,500 per hectare. The other one is a property with seafrontage 1 kilometre from the airport consisting of 8 hectares and including a developed site with a large dwelling and 8 adjoining units. It is difficult to see what assistance Mr. Kershaw could have derived from that sale.

It appears from the submissions that that too has been abandoned. The parties appear to have recognised that upon removal of the extremes the contest is now between the Dakuidreketi valuation of \$85,000 contended for by the Plaintiff and the Kumar valuation of \$106,100 contended for by the Defendant. It is only necessary to add that in the course of his evidence Mr. Dakuidreketi was asked to calculate the value on a block as opposed to an individual Lot basis and his evidence after doing so is that on that basis the value would be \$50,000.

I now turn to the law on the subject.

A What has become known as the "willing buyer willing seller" rule has become generally accepted as the authoritative rule in land and also share valuation cases, which proceed on the same principles. The rule was laid down in Spencer v. The Commonwealth of Australia [1907] 5 CLR 419. At page 432 Griffiths CJ said:

B "The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time and from that point of view to ascertain what, according to the then current opinion of land values, a Purchaser would have to offer for the land to induce such a willing Vendor to sell it, or, in other words, to inquire at what point a desirous Purchaser and a not unwilling Vendor would come together."

And at page 441 Isaacs J said as follows:

C "To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then not by means of a forced sale, but by voluntary bargaining between the Plaintiff and a Purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all
D circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for
E What reasons soever in the amount which one would otherwise be willing to fix as the value of the property."

F The dicta in Spencer's case have been adopted in two Estate and Gift Duties cases in Fiji. The first is Ganadabhai Kalyan Hari and Another v. Gould and Another 10 FLR 105. In that case, which concerned the valuation of shares Hammett ACJ on page 109 cited one of the issues in the appeal before him which was under the same section of the Act as the present and one, as being "should the valuation of these shares be arrived at on the willing Buyer and willing Seller basis, i.e. the estimated market value basis on the lines laid down in Spencer". On page 110 His Lordship clearly adopted the Spencer principle for Fiji when after referring to a number of Australian and New Zealand cases he said, at letter H:

G "It appears to me to be clear, therefore, that the principle that underlies the decisions of the Courts and the Statute Law in England, Australia and New Zealand is one and the same. Wherever it is possible to do so and there are no exceptional or extraordinary circumstances arising, the value of shares should be arrived at on the 'market value' or the 'willing Buyer, willing Seller' principle."

And on page 111 his Lordship said at Letter C

BURNS PHILP TRUSTEE COMPANY LTD v. THE COMMISSIONER
OF ESTATE & GIFT DUTIES

“The mere fact that it may be difficult, as it is in this case, to arrive at a valuation on the ‘market value’ basis is, in my view, no reason for not using that method.”

A

The second case is Ratanji Motiram Narsey and Others v. Gould 19 FLR 91 unreported; on page 3 of that judgment Stuart J said:

“I think the important thing to bear in mind about Spencer’s case is that it concerns the value of the land to the Vendor and not the value to the Purchaser. That is the basis of the statement of Williams J in Abrahams v. F.C.T. (1944) 70 CLR 23 at 31, that the value to be ascertained is the value to the Seller at the date of death with all its existing advantages and possibilities.”

B

And at page 5

“I think therefore that the criterion is value to the Seller and that the proper approach to the matter in Fiji is that laid down by William’s J in McCathie v. FCT (1944) 69 CLR 1 and Abrahams v. FCT (1944) 70 CLR 23.”

C

It is clear therefore that the Spencer principle has been adopted in Fiji and should form the basis of the valuation in the present case.

D

I next consider which method of valuation is appropriate to be applied in the present case. The Plaintiff submits that the block valuation method is the appropriate one on two grounds, firstly, that under the terms of the Will all the Lots in question will be transmitted as one block to the Executor and then in turn transferred as one block to the named Beneficiary who is the Testator’s son Ian Fowler Pickering. This, it is contended, is equivalent to one Purchaser acquiring all the Lots as one block. No authority has been cited for that proposition and I do not accept it. As to the first part thereof it must inevitably be the case that the whole of a Testator’s Estate, whatever it may consist of, passes to the Executor in the first instance. That does not prevent the various component parts thereof being valued separately, see for example Duke of BuccLeuch v. Inland Revenue Commissioners [1967] AC 506 in the House of Lords. Equally it can be of no relevance in my view whether the property passes to one or more Beneficiaries. Indeed in this case the Will expressly devises to Ian Fowler Pickering the 9 separate pieces of land each of which is set out by reference to the Certificate of Title.

E

F

The second argument in favour of the block valuation is that although the subdivision was carried out in the seventies no lots thereof had been sold at the time of the Testator’s death in 1984. This, it is said, suggests on the balance of probabilities that there was not a ready market for the lots at the time of death. I do not think that inference follows. In my view it would be contrary to the principle in Spencer’s case and the authorities cited earlier on to the effect that the value in

G

A question is the value of the land to the Vendor. In this case the Testator as the notional Vendor obviously took the view that the best value is to be obtained by sub-dividing the land comprised in the deposited plan and bearing the expense of doing so and creating 15 separate Titles. I have had no evidence as to what became of blocks 3 to 6 of this property. But I presume since they were not devised under the Will, except possibly under the residual devise, and since they are not the subject of these proceedings, that they were sold by the Testator during his lifetime. There is evidence that blocks 1 and 2 were sold in 1989. Since they do not form part of the subject matter of this action which was instituted in 1987 I must conclude that those blocks were not sold by the Plaintiff but by other persons who had purchased them from the Testator during his lifetime. However I do not think that the inference sought can be drawn from the absence of sales. That situation could be referable to a number of unknown factors, such as a lack of endeavour on the part of the Testator to dispose of the Lots or a desire on his part to hold on to them until the market might rise. The mere fact of the subdivision points to the separate Lot method of valuation being appropriate on the facts of the present case.

D That brings me then to a consideration of the two competing valuations. They are not all that far apart, something in the order of 20%. There is evidence that variation of between 5 and 15% between Valuers of the same property is quite common and acceptable. However one of the Defendants Witnesses said that, 20% was too high to leave any room for negotiation. Hence these proceedings. Looking at the comparative table set out above it is interesting to note that three of four valuations proceed by three steps. Mr. Kumar on the other hand has 7 values for the 9 blocks, some only one or two hundred dollars different. This suggests that he gave deeper consideration to the assessment of each individual block. The qualifications of the two Valuers appear to be broadly comparable. As to comparable sales evidence Mr. Kumar relied on three comparable sales taking place in July October and November of 1984. Mr. Dakuidreketi relied on 4 sales two of which are among the three relied on by Mr. Kumar and the other two of which occurred in September 1982 and September 1983. There is a slight difference in the assessment made by the two Valuers of the value per acre to be derived from the total purchase price in respect of the two sales they have in common. It has been well said that valuation is an art rather than an exact science. Apart From two specific matters to be mentioned shortly it appears that both Valuers adopted different adjustments from the comparable sale price for the peculiarities of the instant property. That is only to be expected. The Defendant makes the point that Mr. Kumar inspected the properties involved in his comparable sales whereas Mr. Dakuidreketi did not do so apparently. That factor would tend to make his valuation more reliable. On the other hand Mr. Dakuidreketi mentions the fact that in order for each Lot to be separately saleable there would probably need to be access covenants registered on the Titles prior to sale, a fact which is also mentioned by Mr. Kershaw. Mr. Kumar does not mention this and it must therefore be presumed that he made no allowance for the expense involved in that exercise prior to disposal and that Mr. Dakuidreketi did take it into account in

BURNS PHILP TRUSTEE COMPANY LTD v. THE COMMISSIONER
OF ESTATE & GIFT DUTIES

fixing his values. Counsel for the Defendant has submitted that Mr. Dakuidreketi's valuation should not be given any weight because in disregard of the Spencer principle he has valued the property on the basis that the purchaser would be an investor and has therefore taken into account such factors as holding costs, legal costs, risk, etc. However what happened is that during the trial Mr. Dakuidreketi was given leave to calculate the value on a block valuation basis. He did so and came up with \$50,000. He explained that he had for that purpose taken his \$85,000 as a correct starting point and on the assumption that a purchaser who expected to sell the lots for a total of \$85,000 could be expected to give only \$50,000 for the whole block after making the allowances just referred to. Those allowances played no part in Mr. Dakuidreketi's original \$85,000 valuation. I therefore reject that submission. One final factor to be mentioned is in relation to block 14. Mr Kumar is the only one of the 4 Valuers who assigned a higher value to that block, presumably on the basis that it contains some 7 acres as opposed to the others which contained approximately 5 acres each. He conceded in evidence that he made an error in overlooking the fact that that block contains an access road. He said that he would value that access road at \$4,000 and that his valuation therefore should be reduced by that figure.

I should mention one other matter raised by the Plaintiff and it is this: Mr. Kumar in his valuation described the purpose thereof to assess the current market value of the property described hereunder and described the date of valuation as the 20th November 1986. He said in evidence that the latter date was in fact the date of his making the valuation but that he was conscious that he was to value the property as of the date of death 20th June 1984. That evidence is borne out by the fact that he has based his valuation upon comparable sales occurring, as already stated, within no more than 5 months of the date of death. In those circumstances I believe that no adverse inference can be drawn from what he has described as merely a clerical error in his valuation.

The result therefore is that in any event Mr. Kumar's valuation must be reduced to say \$102,000 and to that extent the appeal must succeed in any event. Having made that adjustment I am unable to say on the evidence that either of the valuations is wrong on the facts placed before me. As already indicated the more detailed steps of Mr. Kumar's valuation suggest closer accuracy arising possibly from his inspection of the comparable sales properties. As against that he has omitted the probable need for access covenants clearly taken into account by Mr. Dakuidreketi. I believe that after the adjustment just referred to the difference between the two valuations is in the order of 9%, well within the acceptable if not expected range of difference. Accordingly I fix the value of the subject property for Estate Duties purposes at \$93,000. The appeal succeeds to that extent. The Defendant must pay the Plaintiffs costs.

(Appeal allowed.)