[HIGH COURT OF AUSTRALIA.]

FISHER . . . . . APPELLANT;
DEFENDANT,

AND

FISHER AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1917.

SYDNEY, *Aug.* 21; *Sept.* 4.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Will—Tenant for life and remainderman—Shares in company held by trustees—Dividend—Distribution of shares in another company—Accumulated profits—Income or capital.

A company registered in New South Wales, which carried on business within and without the Commonwealth, had accumulated large profits equal in amount to the value of its assets without the Commonwealth. Being desirous of separating its business without from that within the Commonwealth while keeping both under the same management, the company proposed to form a new company which should acquire the assets without the Commonwealth in exchange for shares of the new company. With that object in view the old company amended its deed of settlement so as to authorize it to pay any dividend by the distribution among its shareholders of shares of any new company. The new company was then formed with a share capital consisting of a certain number of ordinary shares and of preference shares equal in number to the subscribed shares of the old company and in nominal value to the value of the assets of the old company without the Commonwealth. Those assets were then sold and transferred to the new company in consideration of the preference shares, which, pursuant to the amendment of the deed of settlement, were distributed among the shareholders of the old company. The ordinary shares of the new company, in respect of which alone there was voting power, were issued to the old company in consideration of a sum of money which was to be the working capital of the new company.

H. C. OF A. 1917.

FISHER v. FISHER.

Held, by *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that, as between life tenants and remaindermen, preference shares of the new company received by trustees in respect of shares of the old company held by them were capital and not income.

Knowles v. *Ballarat Trustees, Executors and Agency Co.*, 22 C.L.R., 212, followed.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Macansh* v. *Fisher*, 16 S.R. (N.S.W.), 636, reversed.

APPEAL from the Supreme Court of New South Wales.

Andrew Walter Irby Macansh, Robert Fisher and Donnelly Fisher, as trustees of the estate of Thomasine Cox Fisher, deceased, held 122 shares of the Colonial Sugar Refining Co. (Fiji and New Zealand) Ltd., a company registered in Fiji, and Macansh took out an originating summons for the purpose of determining (*inter alia*) the question whether the trustees held the shares as income or as capital of the residuary estate of the testatrix. The other two trustees, who were tenants for life, and Edith Eleanor Wentworth Fisher, who represented the remaindermen, were made defendants to the summons.

The summons was heard by *Harvey* J., who held that the trustee held the shares as income: *Macansh* v. *Fisher* (1).

From that decision Edith Eleanor Wentworth Fisher now appealed to the High Court.

The material facts are stated in the judgments hereunder.

Knox K.C. (with him *Maughan*), for the appellant. This case is governed by *Knowles* v. *Ballarat Trustees, Executors and Agency Co.* (2). The fact that the old company distributed the shares of the new company as dividend is irrelevant, for it cannot make income that which as between life tenants and remaindermen is capital. No company except in the case of liquidation can distribute anything except as dividend.

Leverrier K.C. (with him *Jordan*), for the respondents. On the facts there is no evidence that the old company, in distributing among its shareholders shares in the new company nominally as a dividend, intended the distribution to be as capital and not as

(1) 16 S.R. (N.S.W.), 636. (2) 22 C.L.R., 212.

dividend. Their intention was to sell portion of their assets which represented accumulated profits and to divide the proceeds as a dividend. In this case the distribution was not in contemplation of liquidation as it was in *Knowles* v. *Ballarat Trustees, Executors and Agency Co.* (1). The fact that the distribution was of a very large amount in proportion to the share capital is not important (*In re Hume Nisbet's Settlement* (2)). The burden is on the appellant to show that the intention was that the distribution was one of capital.

[Counsel also referred to *In re Northage*; *Ellis* v. *Barfield* (3).]

Cur. adv. vult.

Sept. 4.

The following judgments were read :—

BARTON J. The question in this appeal is between remaindermen and tenant for life, the latter of whom was successful in the Court below. The subject matter is a parcel of 122 shares in the Colonial Sugar Refining Co. (Fiji and New Zealand) Ltd. These are claimed by the appellant, whose title is in remainder, to be capital as between her and the tenant for life, who is a respondent.

The Colonial Sugar Refining Co., which is the parent company, has issued to the trustees of the will of Thomasine Fisher, one of whom is a respondent, in right of 122 shares in the parent company, an equal number of shares in the Fiji and New Zealand company. The last-named company was created in the following way.

On 26th March 1915 the directors of the parent company proposed to the shareholders an amendment of their deed of settlement for the purpose of authorizing the payment of "any dividend" by the distribution of specific assets, and in particular of paid-up shares of that company or of any other company. In the circular announcing the proposal the directors said :—"The object of the resolutions is to enable the Company to separate the Australian business from that part carried on outside the Commonwealth, and to simplify the formation of an allied company concerned with our interests in

(1) 22 C.L.R., 212. (2) 27 T.L.R., 461.
(3) 60 L.J. Ch., 488.

H. C. OF A. 1917.

FISHER v. FISHER.

Barton J.

Fiji and New Zealand. It is intended to place before you at the above meeting particulars of the scheme that is to be submitted for your approval at a later meeting about the end of April. Meantime, all that can be said is that the earning power of the business cannot be affected one way or the other by the change which the Board propose. On the other hand it will enable those concerned in our affairs to compare more accurately than is possible now the profit made with the cost of the assets from which it is derived."

At the meeting the chairman made a speech, before submitting the resolutions, in which he purported to tell the shareholders briefly why the directors advised them "to divide the business of the Company." He reminded the shareholders of the result of the adoption many years before of the practice of leaving in the business the large amounts which would otherwise have been set aside for depreciation of plant. The consequence had been, he said, that the amounts so made available for extending the scope of their operations were equal to the book value of their assets in New Zealand and Fiji. He referred to statements on this subject made by him to them in October 1910 and August 1913, which he said were true as to the position then held. He went on to say that the directors proposed a step from which the Company could derive no advantage, beyond that of disclosing to all concerned the outlay on their ventures in and outside of Australia. The half of their business outside the Commonwealth would on 31st March represent about £3,250,000, and the directors' proposal was that the new company should have preference shares of that amount; while £250,000 in ordinary shares would be subscribed by the parent company to provide the necessary working capital. The preference shares were to be distributed among the original shareholders ratably, each receiving one of £20 for every share now held. After describing the position of the preference shares as to dividend, its priority, and the building up of a reserve, the chairman used these words:—"But it must not be thought that this 6 per cent. preference dividend will be an addition to your present income from the Company. On the contrary, it will come out of this, and, as I said at the outset, you have no reason to suppose that the proposed division of our assets will bring us more profit to distribute. Nor will there be any alteration in regard

to the control of the business. It is our intention that the same Board and management shall work the separated businesses, and that, so far as possible, everything shall go on in this way as at present. For this reason the investment should be regarded as a whole. Accordingly, if any of you want to sell your holding, it will be better to sell the shares in both companies rather than the holding in one." I have referred to this speech at some length because I think it bears materially on the intention with which the directors of the parent company carried out the transaction now in question, in view of the effect which the directors knew it must have upon the market value of the old shares.

After the chairman's speech the shareholders adopted the resolutions as explained by him.

A special general meeting was held afterwards, namely, on 29th September, to authorize the directors "to distribute in specie all preference shares which the Colonial Sugar Refining Co. Ltd. is entitled to receive from the Colonial Sugar Refining Co. (Fiji and New Zealand) Ltd., in payment for the assets in Fiji and New Zealand" sold by the parent company to the additional corporation.

In a circular announcing this meeting, dated 14th September, the directors of the original company had said, *inter alia* : "In the absence of instructions to the contrary all shares will be placed on the principal register of the company, viz., the Fiji register." There was a foot-note to the circular in these words : "The term 'in specie' used in the resolution means 'in shares' not 'in cash.'"

At this meeting the shareholders gave the directors the required authority.

At this stage I will refer to an agreement made a fortnight before the special general meeting last mentioned, namely, on 14th September 1915, the day succeeding that on which the Fiji and New Zealand company increased its capital as I will mention presently. It is between the original company as vendors and the Fiji and New Zealand company as purchasers. It recites that the purchasers are duly authorized by their Memorandum of Association to acquire the Fiji and New Zealand business of the Colonial Sugar Refining Co. (see Memorandum, sec. 2 (*r*) and (*t*)). It was agreed that the vendors

H C. OF A. 1917.

FISHER v. FISHER.

Barton J.

should sell and the purchasers should purchase the goodwill, freeholds and leaseholds, plant and other assets of the vendors, with the benefit of pending contracts, the cash and securities in hand and at banks in Fiji or New Zealand, and all other the vendors' property in connection with Fiji and New Zealand. The consideration for the sale was to be £3,250,000, deemed to be the value of the premises on the 31st of the previous March, and to include any profits earned by the transferred business after that date. The vendor company was to have the right of taking up as a company 12,500 ordinary contributing shares of £20 in the purchasing company. (That right was exercised.) The vendor company was also to have the right of taking up 162,500 preferential shares of £20 each in the purchasing company, these preference shares aggregating £3,250,000 of capital in the purchasing company. (It will be noted that the capital of the Fiji and New Zealand company thus became £3,500,000 of which £250,000 was in money.) The preference shares were to confer the right to a fixed cumulative preference dividend of 6 per cent. per annum on their paid-up amount. The purchasers were to take all necessary steps to make the preference shares available to the vendors or their nominees. (The 162,500 preferential shares were taken up by the vendor company for their shareholders as their nominees, and were distributed to them, whether as dividend or as capital we have now to say.) The sale was to take effect from 1st April 1915, when the benefits and liabilities of the purchasers were to be complete. The vendors undertook, if thereto required by the purchasers, to act as managers of the affairs of the purchasers in Fiji and New Zealand on terms to be arranged, or if not arranged to be fixed by arbitration. There were sundry other terms in the agreement which for present purposes need not be stated.

The agreement was carried out. The shareholders of the Colonial Sugar Refining Co. became the holders of all the preference shares in the additional company, which they obtained as nominees of the vendors, share for share, in pursuance of the resolution of the special general meeting of the parent company already referred to. The parent company, however, retained the £250,000 worth of contributing shares in the Fiji and New Zealand company, paying their face value as working capital of that company.

To meet the circumstances of this agreement and of the transactions generally, the Fiji and New Zealand company had on the previous day, 13th September, increased its capital to £3,500,000, preference shares absorbing £3,250,000 and ordinary shares the balance.

I should mention that this agreement was not before the learned Judge who adjudicated on the originating summons, nor was the speech of the chairman on the 26th of March, which was so clearly acted upon by the shareholders on that date in amending the parent company's deed of settlement to allow of the rearrangement for dividing the business. These matters were brought before us on affidavit by agreement of the parties, so that we are enabled to consider them in coming to a conclusion. It should also be said that at the time of the hearing the case of *Knowles* v. *Ballarat Trustees, Executors and Agency Co.* had not been reported. It is now to be found in the *Commonwealth Law Reports* (1).

The parent company was authorized by clause XL. of its Articles to increase its capital at a special general meeting to any amount to be determined by such meeting, and to raise the increased capital by creating additional shares of £20 each. Art. 66 of the Fiji and New Zealand company provided that at a general meeting every member present in person should have one vote on a show of hands for every ordinary share held by him and on a poll every member present in person or by proxy should have one vote for every such ordinary share, while a corporation being a member, and being present by a proxy not being a member, should be entitled to vote by such proxy on a show of hands. The holders of preference shares were not to be entitled to vote at any meeting of the company in respect of such shares or any of them.

Thus the whole of the voting power in the Fiji and New Zealand company came into the hands of the parent company, which held all the ordinary shares, to the exclusion of the holders of preference shares.

But it is also apparent that the holders of shares in the capital of the parent company had the entire governance of the new

(1) 22 C.L.R., 212.

H. C. OF A. 1917.

FISHER v. FISHER.

Barton J.

company, not as preference shareholders in the new company, but as commanding the operations of the parent company.

The effect that the rearrangement necessarily had upon the value of the shares constituting the corpus in this case, if the contention of the life tenant is correct, is manifest beyond the necessity of express evidence.

If then the Fiji and New Zealand preference shares are income, the value of the property to pass to the remainderman may be roughly estimated at little more than half of that which it held before the rearrangement, although, according to the directors, it was only made " to divide the business " of the parent company by placing half of that business outside the Commonwealth. It was still the business of the parent company.

It will be seen that there was no option to the shareholders in the parent company of taking cash instead of the preference shares.

First, as to the intention of the testatrix. In *In re Armitage* (1) *Lindley* L.J. said :—" What does a man mean when he leaves shares to a tenant for life ? He means that that tenant for life shall have the income arising from the shares in the shape of dividends or bonuses declared during the lifetime of the tenant for life. He does not mean that the tenant for life shall receive profits in any other sense . . . This conclusion is completely in accord with *Bouch* v. *Sproule* (2), which . . . established the rational principle that what a tenant for life is to take under an ordinary bequest of shares is what is declared as dividends or bonuses in the shape of dividends during the lifetime of that tenant for life." To put it shortly, what the testatrix meant was that the life tenant should have the income of the shares in the parent company, but no more.

Then, is this issue of preference shares in the Fiji and New Zealand company to be regarded *as between tenant for life and remainderman* as income or as capital ? When I say capital I do not in this connection mean necessarily share capital in the parent company, but capital of the estate of the testatrix. The real question is, what is mere income on Thomasine Fisher's investment, and what is the corpus of her investment ? It matters not what name the parent company gave the transaction, or whether it called the issue dividend or capital.

(1) (1893) 3 Ch., 337, at p. 346. (2) 12 App. Cas., 385.

Its intention is to be gathered not from mere words but from the substance of the thing done. In that respect its intention, to be gathered from its acts, is decisive so far as it is within the intention of the testatrix, which must be held paramount.

The fact that the huge sum of assets sold to the Fiji and New Zealand company for shares therein consisted of accumulated profits is not conclusive, any more than is the fact that those profits had been progressively invested in extensions of the Company's business producing profit for the shareholders. But it is most material that a huge sum of money which made a great accretion to the market value of the shares in the parent company was, if the life tenant is correct, transmuted into something which withdrew nearly half that value from the corpus and placed it at one fell swoop into the hands of the life tenant as income of his for that particular year. Could this be what the testatrix meant in giving profits to the life tenant and corpus to the remainderman ? Or could this be the substance of the rearrangement, so as to turn half the capital value into income, as a transaction intended by the Company as a distribution of dividend ? I do not think any case can be cited which so governs this transaction as to give it a complexion of such strangeness. The whole object was to rearrange an existing business, not to deprive any person of capital or to make an addition of perhaps cent. per cent. to any person's income for a particular year.

In all these cases of tenant for life and remainderman I think that, as *Sargant* J. said in *In re Thomas* (1), the inquiry for the Court is "whether the benefits in question are really, and not merely nominally, received in respect of a division of dividend or are really received as and by way of a distribution of capital." I think that the Australian shareholders received these shares merely as an equivalent for their working capital in the parent company. The former value of one ordinary share in the Australian company was converted into the aggregate values of one share in the Australian company plus one share in the Fiji and New Zealand company by a process which halved the old value merely for the purpose of restoring it, and placing an organization which embraced the new company as in truth

(1) (1916) 1 Ch., 383, at p. 392.

H. C. OF A. 1917.

FISHER v. FISHER.

Barton J.

and fact part of the old concern, in a position to carry on its readjusted business with greater convenience, though not, as the chairman pointed out, with greater profit. I draw attention to that passage in the rule laid down by *Fry* L.J. in *Sproule* v. *Bouch* (1), and adopted by the House of Lords in *Bouch* v. *Sproule* (2), which reads thus: "What is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of capital stock in the concern, enures to the benefit of all who are interested in the capital." "As dividend" does not here mean in the guise of dividend, nor does "as capital" mean in the guise of capital. It means the substance and not the mere name, and I think that what the shareholders in the parent company received was allotted by the Company to the shareholders as capital in that sense. The case of *Knowles* v. *The Ballarat Trustees, Executors and Agency Co.* (3) was a good deal discussed in the argument in the present case. In principle, I think that case is an authority in favour of the present appellant, but I should have been prepared to come to my present conclusion had that case not arisen.

I am of opinion that this appeal must be upheld.

ISAACS J. The Colonial Sugar Refining Co. Ltd. registered under the *Companies Act* 1899, carried on business in Fiji and New Zealand as well as in Australia. Its powers as to creation of capital and distribution of assets are the ordinary powers of a trading company under the *Companies Act*. It had assets of the value of (say) £6,500,000, of which £3,250,000 were accumulated profits. In March 1915 it resolved to sell its assets in Fiji and New Zealand to another company formed in Fiji, and called the Colonial Sugar Refining Co. (Fiji and New Zealand) Ltd., for £3,250,000 payable principally in preference shares of the latter company. A new clause was added to the selling company's deed of settlement in these terms: "That any general meeting may direct payment of any *dividend* wholly or in part by the distribution of specific assets and in particular of paid-up shares, debentures and debenture-stock,

(1) 29 Ch. D., 635, at p. 653. (2) 12 App. Cas., 385.
(3) 22 C.L.R., 212.

of the Company, or paid-up shares, debentures or debenture-stock of any other company," &c. I italicize "dividend." The proposed transaction was effected, and in September 1915 a resolution of the New South Wales company was passed authorizing the directors to distribute in specie among its members in proportion to their respective interests the consideration shares it had received from the Fiji company. This was done, and the trustees of the Fisher estate received 122 of those shares. Prior to the distribution the New South Wales shares were worth in the market about £44 to £45 each, and afterwards about one-half that sum. The will simply in the most general terms gives income to tenant for life, and capital to remainderman.

The cardinal fact relied on by the life tenant was that the accumulated profits represented by the assets sold, and afterwards by the consideration shares received in exchange, were never converted into capital, strictly so called, and were never intended to be so converted. As a fact, that cannot be denied. *Harvey* J., upon a review of the authorities, held that that cardinal fact governed the case, and that in law the preference shares in the purchasing company were to be regarded as dividend with respect to the New South Wales company.

His Honor's decision was given on 4th October 1916. On 13th October 1916 this Court, by a majority, decided the case of *Knowles* v. *Ballarat Trustees, Executors and Agency Co.*(1). I dissented, taking the same view of the law as *Harvey* J. had taken. The judgment now appealed against must therefore be taken to be wrong. Mr. *Leverrier* stated he was prepared to argue against the correctness of the view adopted in *Knowles's Case*, but obviously reconsideration by this Court would have been useless, and counsel was informed that he must accept the decision. And accordingly Mr. *Leverrier*, reserving his rights as to that point, proceeded to discuss the only question open to him, and to contend that on the facts the distribution was by way of dividend.

The law laid down in *Knowles's Case*, as I understand it, is (1) that non-conversion of profits into share capital is not necessary to convert them into capital for the purpose of a case between life tenant and remainderman, and (2) that in each case it becomes an ordinary

(1) 22 C.L.R., 212.

H. C. OF A. 1917.

FISHER v. FISHER.

Isaacs J.

question of fact as to the intention of the company, and for the determination of that ultimate fact you have to regard not merely the immediate acts of the company in distributing the assets, but also all the surrounding circumstances of the company's general position, possibly including, as in *Knowles's Case*, the whole past history of the company, and its future prospects. I frankly admit my perplexity how to search for the Company's intention consistently with *Knowles's Case*. There are, as it appears to me, only three possible methods of approaching such a question.

The first method is by determining the legal effect of what the Company did. That is, whether what they did left the profits as profits of the Company, and therefore legally distributable, or converted them from profits into capital of the Company as permitted by law, so that they were no longer divisible as profits. But that amounts to my own, still individually unchanged, but, as I must, so long as *Knowles's Case* stands, judicially assume, fallacious, understanding of *Bouch* v. *Sproule* (1) and of the method adopted in such cases as in *In re Evans* (2); and so I cannot adopt it.

The second method is to look at all the circumstances, immediate and surrounding—including not only the fact that the shares of the purchasing company were primarily profits of the selling company, and the form in which they were offered in distribution to the shareholders of the selling company, but also the magnitude of the Company's business, and its general position including the value of its own shares on the market, and come to some conclusion as to what the Company would conjecturally intend. It was urged that the market value of the shares, which indicates the opinion of the outside world, was material, because it showed the procurable money value of an aliquot part of the Company's "assets." Now, strictly speaking, a share is the aliquot part of the capital. The *Companies Act* 1899 speaks of the "capital divided into shares," as, for instance, its sec. 19 and following sections, including sec. 46. I am afraid it is productive of error to say that a share is an aliquot part of the company's assets. "Assets" in this sense is more appropriate in the case of a non-solvent company.

In the English *Companies Act* 1908 (8 Edw. VII., c. 69, sec. 285)

(1) 12 App. Cas., 385.

(2) (1913) 1 Ch., 23, at p. 32.

a share is defined as a "share in the share capital of the company." It creates rights of participation in profits when the company determines to distribute them, but that does not make the share a share of the profits. But even regarding the matter from a business point of view, and assuming the share is regarded by the public as a share in the whole "assets" of the company, it must still be remembered that in the present instance the "assets" comprised both (1) capital and (2) profits. Consequently it does not, to my mind, help to say how much of the market value—supposing that factor material at all—would represent in the mind either of the hypothetical purchaser or the hypothetical vendor the aliquot part of capital, and how much the aliquot part of profits. It is plain that if the Company had received cash upon the sale, and distributed the cash avowedly as profits, the result on the market value of the shares would have been precisely the same.

I have to confess, therefore, I am personally unable to divine the intention of the Company by taking into account the variety of outside circumstances suggested as material, and therefore cannot come to any conclusion on that basis. As this is a question of fact, I of course have to act upon the impression created upon my mind by the facts of the particular case.

There remains a third method. It is to construe the actual circumstances of the distribution. I start with the fact that the Company had in its hands certain preference shares representing a new form, and nothing but a new form, of accumulated profits, and that there existed an article permitting those shares to be distributed by way of "dividend." Then what the New South Wales company did, and all that it did, was pursuant to a resolution passed under the authority of that article to distribute those shares in the other company to be taken and kept by its own shareholders, and, of course, professedly by way of "dividend." No fact appears to qualify that in the "form" or "substance" (using Lord *Herschell's* words in *Bouch* v. *Sproule* (1)) of the distribution. The only conclusion of fact I can reach is that they were distributed as dividend, that is as "profits," of the New South Wales company; and

(1) 12 App. Cas., at p. 398.

H. C. OF A. 1917.

FISHER v. FISHER.

Gavan Duffy J. Rich J.

therefore the judgment appealed from was in my opinion right, and this appeal should be dismissed.

GAVAN DUFFY AND RICH JJ. We adhere to what we said in *Knowles* v. *Ballarat Trustees, Executors and Agency Co.* (1), and we concur in the conclusion at which our brother *Barton* has arrived on the facts of the present case. We therefore think that the appeal should be allowed.

Appeal allowed. Order appealed from varied by substituting for the declaration in answer to the first question in the originating summons a declaration that the trustees hold the shares in question as capital and not as income of the residuary estate. Order that the case be remitted to the Supreme Court in Equity to be proceeded with in accordance with this judgment. Costs of this appeal as between solicitor and client to be paid by the trustees out of the estate to the appellant and the respondents or their respective solicitors.

Solicitors for the appellant, *Fisher & Macansh.*

Solicitor for the respondents, *J. T. Ralston.*

B. L.

(1) 22 C.L.R., 212.