

Inheritance tax – Business relief – Land owned by deceased used for business of company – Deceased held 50% of shares and was chairman of directors – Whether deceased had control of powers of voting – IHTA 1994 s.105(1)(d), 269(1) – Appeal allowed

THE SPECIAL COMMISSIONERS

EXECUTORS OF THE WILL OF Appellant

MRS FANNY WALKER DECEASED

- and -

THE COMMISSIONERS OF INLAND REVENUE Respondents

Special Commissioner: THEODORE WALLACE

Sitting in London on 22 January 2001

Elizabeth Wilson, instructed by Sharp and Partners, for the Appellant

Peter Twiddy, of the Office of the Solicitor of Inland Revenue, for the Respondents

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DECISION

1. This appeal concerns business relief for inheritance tax following the death of Mrs Fanny Walker. Mrs Walker owned land used for the business of a company in which she held 50 per cent of the shares and of which she was chairman of the directors. As chairman of directors, she was entitled under regulation 62 of Table A to a casting vote at general meetings. The issue was whether immediately before her death, by virtue of the casting vote she had control of the company, as defined by section 269(1) of the Inheritance Tax Act 1994, for the purposes of section 105(1)(d).

2. The Commissioners determined that she did not have control and was thus not entitled to 50 per cent business relief on the land. There is no dispute that 100 per cent relief was available for the shares being within section 105(1)(bb).

Facts

3. The following facts are based primarily on an agreed statement. Mrs Walker died on 31 March 1996. Since before 1960 she had been the freehold owner of land on which was situated a petrol station and garage premises ("the Land"). Its value at her death was £95,000. The Land was used wholly or mainly for the

purposes of the business of FF & P Walker Ltd ("the Company"). The Company did not have a lease of the Land nor did it pay any rent for its occupation.

4. The Company carried on the business of road haulage contractors, operating a petrol station and forecourt, and providing vehicle servicing and repairs. It was incorporated on 18 March 1960 by Mrs Walker and her late husband, Francis Walker ("Mr Walker"). The articles incorporated Table A with variations. Regulations 24, 53, 75, 76 and 77 were excluded; some others which are not material were modified. Articles 12 and 15 of the Company's own articles (which refer to the Table A provisions as "Clauses") provided,

"12. The following persons shall be the first Directors of the Company: FRANCIS WALKER and FANNY WALKER (his wife) both of The Sterrett Green Lane Ockbrook in the County of Derby. They shall be Permanent Directors of the Company, and subject to the provisions of Clause 88 in Part I of Table A each of them shall be entitled to hold such office so long as he or she shall live unless he or she shall be removed from office under Clause 96 in Part I of Table A; and accordingly Clauses 89 to 94 in Part I of Table A shall not apply to any Permanent Director.

...

"15. A Director may vote as a Director in regard to any contract or arrangement in which he is interested or upon any matter arising thereout, and if he shall so vote his vote shall be counted and he shall be reckoned in estimating a quorum when any such contract or arrangement is under consideration; and Clause 84 in Part I of Table A shall be modified accordingly."

5. Mr Walker died in 1983. Following his death Mrs Walker and their son, Philip, each held 6000 shares, one-half of the capital. Philip has been a director since 1975 and his wife since October 1995; they are the present directors and Philip is now sole shareholder.

6. On the death of Mr Walker, Mrs Walker was elected by the directors as permanent chairman under regulation 101 of Table A. As chairman of the board of directors, she presided at general meetings by virtue of regulation 55 and in the case of an equality of votes was entitled to a second or casting vote under regulation 60.

The statutory provisions

7. The relevant provisions of the Inheritance Tax Act 1994 were as follows:

"s.104(1) Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced –

(a) in the case of property falling within section 105(1)(a)(b) or (bb) below, by 100 per cent;

(b) in the case of other relevant business property, by 50 per cent;

but subject to the following provisions of this Chapter."

Subsection (2) is not material. Leaving out immaterial parts, section 105 provided

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"105(1) Subject to the following provisions of this section ... 'relevant business property', means in relation to any transfer of value, -

(a) ...

(b) ... securities of a company which are unquoted and which (either by themselves or together with other such securities owned by the transferor and any unquoted shares so owned gave the transferor control of the company immediately before the transfer;

(bb) any unquoted shares in a company;

(c) [repealed by FA 1996];

(cc) ...

(d) any land or building, machinery or plant which, immediately before the transfer, was used wholly or mainly for the purposes of a business carried on by a company of which the transferor then had control or by a partnership of which he was then a partner; and

(e) any land or building, machinery or plant which, immediately before the transfer, was used wholly or mainly for the purposes of a business carried on by the transferor and was settled property in which he was then beneficially entitled to an interest in possession."

8. Sections 269(1) and (4) provide,

"(1) For the purposes of this Act a person has control of a company at any time if he then has the control of powers of voting on all questions affecting the company as a whole which if exercised would yield a majority of the votes capable of being exercised on them.

(2) ...

(3) Where the shares or securities are comprised in a settlement, any powers of voting which they give to the trustees of the settlement shall for the purposes of subsection (1) above be deemed to be given to the person beneficially entitled in possession to the shares or securities (except in a case where no individual is so entitled).

(4) Where a company has shares or securities of any class giving powers of voting limited to either or both of –

(a) the question of winding up the company, and

(b) any question primarily affecting shares or securities of that class,

the reference in subsection (1) above to all questions affecting the company as a whole shall have effect as a reference to all such questions except any in relation to which those powers are capable of being exercised."

Submissions

9. Miss Wilson, for the Appellant, said that immediately before her death Mrs Walker had control of the Company by reason of her 50 per cent shareholding allied to the casting vote which she held at general meetings in her capacity as chairman of the directors. These gave her the necessary control of the powers of voting under section 269(1) to give her control for the purposes of section 105(1)(d). She was a director for life under the Articles and was elected permanent chairman in 1983, so that her position did not depend on re-election.

10. She said that the Commissioners' contention in correspondence, that Mrs Walker did not control the company because the casting vote depended on her attendance, ignored the words "if exercised" in section 269(1). She said that the right to use a casting vote is not fettered nor is the chairman under a duty to act impartially,

see *R v Bradford City Council, ex parte Corris Wilson* [1990] QB 375, per Neill LJ at page 373 and Bingham LJ at page 381-2 which is a case of general application, applying to companies as well as councils; the only constraint is honesty. Even if used improperly, a casting vote is valid until set aside.

11. It is necessary, said Miss Wilson, to examine the Articles and see what powers the deceased had under the Articles, rather than to examine the factual situation in the particular case. It is irrelevant whether a deceased person was ill prior to death or unconscious following an accident; it would be absurd for this to affect the relief. It is irrelevant that a child of five cannot vote, see *Walding v IRC* [1996] STC 13.

12. The natural meaning of control is the power to carry a resolution. There was nothing special about the Articles in the present case. In *IRC v B W Noble Ltd* (1926) 12 TC 911, a person in a similar position to Mrs Walker was held to have "a controlling interest" for the purposes of Corporation Profits Tax. In *Steele v EVC International NV* [1996] STC 785, the Court of Appeal held that "control of the company" within ICTA 1988, s.416 was no different. She also referred to *IRC v Monnick* (1949) 29 TC 379 and to *Barclays Bank Ltd v IRC* [1961] AC 509 at 523, an estate duty case. The Revenue argument here was contrary to all these decisions. "The company as a whole" means the corporators as a general body, see *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291 and *Walding*

13. Mr Twiddy, for the Commissioners, said that section 105(1)(d) being a relieving provision must be construed strictly. It clearly adopted specific wording as also did section 269. He said that inheritance tax is concerned with beneficial entitlement, see section 5; section 269 must also be directed at beneficial ownership, see particularly sub-section (3), governing shares comprised in a settlement.

14. Noble was directed at the question of control at the end of the accounting period; here the issue is control at the moment of transfer. In Noble it was significant that Mr Noble was chairman by contract, see page 926. Here the deceased could have been removed, although he accepted that it is necessary to look at the fact that she was not removed. *IRC v Monnick Ltd* (1949) 29 TC 379 was another case concerning control at the end of the accounting period

15. Mr Twiddy said that, when exercising her casting vote as chairman, Mrs Walker owed a fiduciary duty as an officer of the company. Section 269(1) requires "control of the powers of voting on all questions". The word "would" in section 269(1) connotes certainty. There is a distinction between the rights of a shareholder and the obligations of a director, see *North-West Transportation*

Company v Beatty (1887) 12 AC 589, PC. In the present case if there had been a conflict between Mrs Walker's personal interest and that of the company, her use of the casting vote would have been constrained by her fiduciary position. For example if the issue had arisen of the purchase by the company of the land from Mrs Walker at an independent valuation but the other shareholders opposed the sale, Mrs Walker would have had to use her casting vote in the company's interest.

16. He said that section 269(4) sheds some light on the meaning of "questions affecting the company as a whole". He accepted that "majority" in section 269(1) means bare majority rather than the necessary majority, although a resolution for winding up would require a higher percentage.

17. Miss Wilson, in reply, said that the language of the statute is not confined to votes as a shareholder. No authority had been cited by Mr Twiddy to show that the powers of the chairman of a company are comparable to those of directors. In any event Directors of this company were specifically permitted under Article 15 to vote on contracts or arrangements in which they were interested; Mrs Walker's position as chairman was as chairman of directors.

18. It was not possible to say in advance that she could not use her casting vote on a question, merely that she was constrained if a matter was not in the company's interests. She referred to the Bradford City Council case at page 388c and submitted that the Articles of this company had imposed no higher duty.

19. She said that trustees are obliged to act in the interests of the beneficiaries. Section 269(3) only applies to interests in possession. Trustees without an interest in possession but with a majority holding were not taken out of the relief by their fiduciary duty to beneficiaries.

Textual analysis

20. It is convenient to start with a textual analysis of the statute.

21. Section 104 provides for business property relief on a transfer of value insofar as it is attributable to relevant business property as defined by section 105. The transfer of value may be on death or an inter vivos transfer or it may be a deemed transfer on the termination of an interest in possession or an occasion of charge under the discretionary trust regime. The transfer may thus be sudden and unexpected or it may be certain and predictable. Here of course it was on death.

22. Since April 1996 there have been six categories of relevant business property under s.105(1). 100 per cent relief applies to an interest in a business under subsection (1)(a), to unquoted securities of a company controlled by the transferor under subsection (1)(b) and to any unquoted shares under subsection (1)(bb).

23. Lower relief at 50 per cent is available for quoted shares or securities of a company controlled by the transferor under subsection (1)(cc), to land of buildings used mainly for the business of a company controlled by the transferor or by a partnership of which he was a partner under subsection (1)(d) and to land which was settled property in which the transferor had an interest in possession and which was used for a business carried on by him, see subsection (1)(e).

24. Here the shares attracted 100 per cent relief under subsection (1)(bb) regardless of whether Mrs Walker had control. The relief under subsection (1)(d) however turns on whether immediately before Mrs Walker's death the FF & P Walker Ltd was "a company of which [Mrs Walker] then had control." If the premises had been used for the business of a partnership, it would have sufficed if she was a minority partner.

25. Section 269(1) defines the circumstances in which a person has control of a company at any time. It is not a deeming provision; it is worded as an exhaustive definition, directed at a particular point in time : in section 105(1) as with instalment relief under sections 227-8, this is the moment immediately before the transfer. Control depends on voting power in general meetings although most questions affecting a company are decided by the directors at board meetings and are not subject to resolutions at general meetings : any other construction would make subsection (4) superfluous. Further, in spite of the words "control of powers of voting on all questions" in subsection (1), it cannot depend on the majority needed on winding up or class issues, since that again would make subsection (4) irrelevant.

26. A person with an interest in possession in shares is treated as having their voting rights. This is not effected by the fact that such person may himself be a trustee with fiduciary duties.

27. If trustees of a settlement with no interest in possession control a company, classically the infant's accumulation and maintenance settlement, their entitlement to relief under section 105(1)(bb) does not depend on their control, although relief under section 105(1)(b)(cc) and (d) does. Relief for land used for the business of such company does depend on control as does agricultural relief under section 119(1) and 122(1). Business and agricultural relief are potentially applicable to trustees of a settlement where there is no interest in possession who control a company.

28. A question affecting a class only is expressly excluded from section 269(1) by subsection (4), the latter subsection by inference assuming that otherwise such questions would be included. Neither section 269 nor section 105(1)(d) refer to the capacity in which the transferor must have control, whereas both section 105(1)(b) and (1)(cc) (quoted shares or securities) do.

Case Law

29. The only authority cited on section 105(1)(d) or indeed the inheritance tax legislation itself was *Walding v IRC* [1996] STC 13. The deceased owned factory units used for the business of a company in which she was 45 per cent shareholder. 24 per cent were registered in the name of her grandchild, aged four. The executors claimed that because the grandchild was not "capable" of voting by reason of his age, the deceased had control within section 269.

30. Knox J said that the appellant's argument turned on "the personal capacity (or otherwise) of the registered proprietor" of the shares. He continued at page 15d,

"The Crown's construction is that one has to have regard to the constitution of the company in the shape of the articles in deciding whether or not there is relevant capacity to exercise votes on all questions affecting the company. However, one should disregard questions of personal capacity on that connection,

unless they are enshrined in the constitution of the company and, as thus enshrined, have the effect of disfranchising the person in question."

At page 16b-c, Knox J said this,

"It seems to me that the inclusion of the words 'capable of being exercised' is attributable to the rest of the sentence, which is 'on them', and that the reason why the words 'capable of being exercised' are to be found in the section is by way of explanation of the category of votes that is being referred to. Implicit in the subsection are two categories of votes that may exist first, votes on questions which do not affect the company as a whole, of which a classic example is a voting right attached to particular classes of shares so as to entrench them in one way or another; and, secondly, voting rights on all questions affecting the company. It is the latter which count for the purposes of control of company within s.269.

It seems to me that as a matter of drafting the inclusion of the reference to capability is to identify the particular category of votes that is being aimed at. I am much fortified in that conclusion by the practical consequences of it. If one has regard, as the executors' argument requires one to do, to the personal capacity of the person in whom the shares are registered to determine whether or not at the critical time the person has control under s.269(1), the results can be very serious from the point of view of the executors."

At page 17e-f he pointed out that it was unlikely that Parliament intended an investigation into the mental powers of the deceased at the date of death. He decided that the incapacity of the grandchild was not relevant so that the deceased did not have control.

31. The concept of control of a company was considered in relation to corporation profits tax in *Inland Revenue Commissioners v Noble (BW) Ltd* (1926) 12 TC 911. The question there was whether a director with half of the shares in a company and a casting vote had a "controlling interest" within section 53(2)(c) of the Finance Act 1926, so that remuneration in excess of £1000 a year was disallowed as a reduction. After hearing submissions from the Attorney-General (Sir Douglas Hogg QC) and, for the company Mr E M Konstam QC, Rowlatt J gave a short unreserved judgment in which he paid tribute to the ingenuity and industry of Mr Konstam but decided against him. His judgment on page 926 contained the following passage,

"It seems to me that controlling interest is a phrase that has a certain well known meaning; it means the man whose shareholding in the Company is such that he is the shareholder who is more powerful than all the other shareholders put together in General Meeting. That is really what it comes to. Now, this gentleman has just half the number of shares, but those shares, in the circumstances of this case, are reinforced by the position that he occupies of Chairman, a position which he occupies not merely by the votes of the other shareholders or of his Directors elected by the shareholders but by contract; and, so reinforced, inasmuch as he has a casting vote, he does control the General Meetings – there is no question about that – and inasmuch as he does possess at least half of the shares he can prevent any modifications taking place in the constitution of the Company which would undermine his position as Chairman."

32. The first sentence in *Noble* was specifically approved by the House of Lords in *British-American Tobacco Co Ltd v Inland Revenue Commissioners* [1943] AC 335; 29 TC 49, although that case did not involve a casting vote. The House of

Lords held that the 75 per cent needed to change the articles was not necessary for control : a bare majority sufficed. Viscount Simon LC said this at page 339,

"I find it impossible to adopt the view that a person who (by having the requisite voting power in a company subject to his will and ordering) can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has in fact control of the company's affairs, is a person of whom it can be said that he has not in this connection a controlling interest in the company."

33. The same sentence from *Noble* was cited in *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509, a case involving very similar wording to section 269(1) in relation to the assets basis of valuation for estate duty. Viscount Simonds said this at page 524,

"I see no difference between the natural meaning of the two phrases 'having a controlling interest in the company' and 'having control of the company', though it might be desirable, and in the case of the latter phrase was found to be so, to give an extended meaning to the words. If so, I think that your Lordships should accept the guidance given by this House in *Inland Revenue Commissioners v J Bibby & Sons Ltd*. That case determined that control must be ascertained by reference to the company's constitution and that it is irrelevant that a shareholder who has the apparent control may himself be amenable to some external control. I see nothing inconsistent in saying that anyone, who by reason of his apparent voting power has the majority of votes, controls the company, but adding that he also shall be deemed to control the company who can by any means procure the exercise of a majority of voting power."

At page 534 Lord Cohen, in a concurring opinion said, that it was immaterial whether or not the exercise of voting power in accordance with the constitution of a company could be "controlled either by co-trustees or through appropriate proceedings by order of the court."

34. *Noble*, *British-American Tobacco* and *Barclays Bank* were all cited by Morritt LJ in *Steel v EVC International NV* [1996] STC 785. He said this at page 794-5,

"In my view control of the affairs of the company in section 416 [of ICTA 1970] means control at the level of general meetings of the company in the sense explained in the cases to which I have referred. Those cases recognise that control at that level carries with it the power to make the ultimate decisions as to the business of the company and in that sense to control its affairs."

35. Apart from *Noble* itself, none of the above cases specifically addresses the position where control depends on the chairman's casting vote. *Noble* was of course concerned with different wording in that section 269 refers to "all questions affecting the company as a whole."

36. Mr Twiddy's argument for the Commissioners is based on the proposition that if the deceased used a casting vote as chairman she was acting as a director and was constrained by her obligations as a director : in the event of a transaction between herself and the company her use of the casting vote would have been constrained by her fiduciary duty as a director. He said that there was a higher fiduciary requirement for the chairman of a company meeting than for a local authority. He cited the following passage from Sir Richard Baggallay in the Privy Council decision in *North West Transportation Company v Beatty* (1887) 12 AC 589,

"... a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound by a fiduciary duty to protect."

37. It seems to me that the constraints upon the exercise of Mrs Walker's powers as a director at board meetings, including the use of her casting vote at such meetings, must logically apply also to the exercise of her powers as chairman of directors at general meetings. Parity of reasoning, however, requires that the relaxation in Article 15 applies also to her casting vote as chairman at either type of meeting. The relaxation does not however, lift the fiduciary duty it merely enables the director to vote notwithstanding his personal interest. I accept that such duty goes further than the duty of majority shareholders not to oppress minority shareholders.

38. It is important to note that the existence of such duty did not prevent the chairman in Noble from having a controlling interest. There is no suggestion either in that case or in any of the cases where Noble is cited that this factor is relevant. If the constraints on the use of her chairman's casting vote meant that Mrs Walker did not have control of the powers of voting, it would be arguable that Noble was wrongly decided. I cannot accept that.

39. The alternative, if Mr Twiddy is to succeed, is to fasten on the difference in wording between the provision considered in Noble and that now under consideration. The observation of Viscount Simonds in Barclays Bank as to the width of the phrase "having control of the company" in relation to section 55 of the Finance Act 1940 suggests that the difference in wording if anything assists Miss Wilson.

40. I can see no logic in disregarding the fiduciary duty of trustee shareholders while taking account of the duty of a chairman as director.

41. In my judgment Mrs Walker did have control. I am fortified in this view by the views of the authors of Green on Death Duties 17th ed (1971) at page 446 and the Third Supplement and Hanson's Death Duties 10th ed (1956) at paragraph 1302 and 6th Supplement. Both passages of course related to the assets basis for estate duty, however the wording is strikingly similar. If Parliament had intended to vary the concept of control of the powers of voting, it is surprising that the words in section 269(1) are so similar to those in section 55(3)(a) of the 1940 Act. The appeal is allowed.

THEODORE WALLACE

SPECIAL COMMISSIONER 4 April 2001

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