HIGH COURT OF JUSTICE (CHANCERY DIVISION)—17TH, 18TH, 19TH, 20TH, 21ST, 24TH, 25TH, 26TH, 27TH AND 28TH JUNE AND 1ST, 2ND AND 17TH JULY 1968

COURT OF APPEAL—17TH, 18TH, 19TH, 20TH AND 23RD JUNE AND 29TH JULY 1969

HOUSE OF LORDS—5TH, 6TH, 7TH, 8TH, 12TH AND 13TH JULY AND 27TH OCTOBER 1971

In re Lynall deceased
Lynall and Another *v.* Commissioners of Inland Revenue[1]

Estate duty—Share valuation—Unquoted shares—What information to be deemed available to hypothetical purchaser in open market—Finance Act 1894 (57 & 58 *Vict., c.*30), *s.*7(5).

The estate of L, who died on 21*st May* 1962 *aged* 76, *included* 67,980 £1 *shares in a private trading company, being* 28 *per cent. of the issued capital.* 32 *per cent. of the shares were held by L's husband, then aged* 69, *and the rest by their two sons, apart from a few held by the general manager. The husband was chairman of the company, and the sons were directors. Under the company's articles of association no share could at the material date be transferred without first being offered to the husband at par, and the directors were entitled to refuse to register any proposed transfer. It was a substantial high-class private company with a successful profit record, showing growth, a strong liquid position, a high dividend cover and a satisfactory cash flow. At the date of L's death favourable reports had been obtained from a firm of accountants and a firm of stockbrokers as to the possibility of a public flotation, but it was established in evidence that if questioned at that date on the prospect of a public issue the board would have replied that it was doubtful and remote and would not have disclosed the reports. (In July* 1963 *there was a public issue of* 27½ *per cent. of the shares at the equivalent of* £7 16*s. per share, which was heavily over-subscribed.) The company's accounting date was* 31*st July. The* 1961 *accounts had been audited and signed in L's lifetime, but were not passed until* 7*th June* 1962.

The Commissioners of Inland Revenue were of opinion that the value of the shares for the purposes of estate duty, being the price which they would have fetched if sold in the open market at the date of the death, was £4, *later increased on the basis of further information to* £5 10*s. The executors, the two sons, were of opinion that it was* £2. *On appeal to the High Court, it was common ground that the* 1961 *accounts of the company should be taken into account. The executors contended that the value of the shares should be determined only by reference to the accounts up to the year* 1961 *and other published information, or, alternatively, on that information together with any information which the board would have given in answer to any reasonable question likely to be asked by any vendor shareholder or intending purchaser. For the Crown it was contended that the value should be determined by reference to the information which the board of a private company would in practice disclose on a confidential basis in negotiating a sale of a block of shares such as that owned by L, including information as to the company's performance since the date of the last accounts and any report as to the possibility of a public issue. The High Court determined the value of the shares on either basis contended for by the executors as* £3 10*s. and on the Crown's basis as* £4 10*s.*

[1] Reported (Ch.D.) [1969] 1 Ch. 421; [1968] 3 W.L.R. 1056; 112 S.J. 765; [1968] 3 All E.R. 322; (C.A.) [1970] Ch. 138; [1969] 3 W.L.R. 771; 113 S.J. 723; [1969] 3 All E.R. 984; (H.L.) [1971] 3 W.L.R. 759; 115 S.J. 872; [1971] 3 All E.R. 914.

In the House of Lords the executors further contended that Commissioners of Inland Revenue *v.* Crossman [1937] A.C. 26 *was wrongly decided, and in view of the restrictions on transfer the value of the shares should be taken as par, in accordance with the minority opinions in that case. Apart from that contention the question in the House of Lords was whether the value of the shares was* £3 10*s. or* £4 10*s.* A

Held, (1) *that the hypothesis of a sale of the shares in the open market required the assumption that on the occasion of that sale the right of pre-emption under the articles had been waived and the board's consent given;* (2) *that evidence as to the kind of information given in practice on a confidential basis on the sale of blocks of shares in private companies was irrelevant, since such sales were sales by private treaty and not in the open market;* (3) *that no general rule could be laid down as to what information if any a hypothetical purchaser in the open market of shares in a private company must be deemed to have in mind in addition to that published by the company to its shareholders, but in any event the board could not be deemed to disclose confidential information which if published prematurely might prejudice the company's interests, including reports on the possibility of a public issue.* B C

Commissioners of Inland Revenue *v.* Crossman [1937] A.C. 26 *followed on the first point.* D

The facts are stated in Plowman J.'s judgment.

The case came before Plowman J. in the Chancery Division on 17th, 18th, 19th, 20th, 21st, 24th, 25th, 26th, 27th and 28th June and 1st and 2nd July 1968, when judgment was reserved. On 17th July 1968 judgment was given against the Crown, with costs. E

W. A. Bagnall Q.C. and *Peter Gibson* for the Executors.

Sir Milner Holland Q.C., Jeremiah Harman Q.C. and *L. H. Hoffman* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—In re *Thornley decd.* (1928) 7 A.T.C. 178; *McNamee* v. *Revenue Commissioners* [1954] I.R. 214; In re *Aschrott* [1927] 1 Ch. 313; In re *Sutherland decd.* [1963] A.C. 235; *Duke of Buccleuch* v. *Commissioners of Inland Revenue* [1967] 1 A.C. 506; *Earl of Ellesmere* v. *Commissioners of Inland Revenue* [1918] 2 K.B. 735; *Commissioners of Inland Revenue* v. *Marr's Trustees* (1906) 44 S.L.R 647; In re *Bradberry* [1943] Ch. 35; *Simpson* v. *Jones* 44 T.C. 599; [1968] 1 W.L.R. 1066. F G

Plowman J.—This is an appeal by the executors of the late Mrs. Nellie Lynall under s. 10 of the Finance Act 1894 against the determination by the Commissioners of Inland Revenue of the value, for the purposes of estate duty, of 67,980 £1 ordinary shares (representing a 28 per cent. interest) in the capital of Linread Ltd., which at all material times was a private family company. The Commissioners of Inland Revenue originally fixed the value at £4 per share, but they have since redetermined the value at £5 10*s.* The Plaintiffs, on the other hand, contend for a value of somewhere between £2 and £2 15*s.* If the Crown is right, the rate of estate duty payable on Mrs. Lynall's death will be increased from 50 per cent. to 65 per cent., and something like £175,000 in duty is at stake. H I

Mrs. Lynall died on 21st May 1962, and in essence the dispute centres round the question how likely was it, at the time of her death, that the company would go public in the foreseeable future? It is common ground that the greater that likelihood, the higher the value to be attributed to Mrs. Lynall's block of shares. In fact there was a public issue of 27½ per cent. of the company's shares in July 1963 at the equivalent of £7 16*s.* per share, the issue being 22 times over-subscribed. But it is again common ground that the knowledge of after-events must be disregarded in fixing the value of Mrs. Lynall's shares at the date of her death.

There is no dispute as to the basic principles on which a minority holding in an unquoted private company falls to be valued. Section 7(5) of the Finance Act 1894, provides:

> " The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

It is common ground that the shares must be valued on the basis of a hypothetical sale on 21st May 1962 in a hypothetical open market between a hypothetical willing vendor (who would not necessarily be a director) and a hypothetical willing purchaser, on the hypothesis that no one is excluded from buying and that the purchaser would be registered as the holder of his shares but would then hold them subject to the articles of association of the company, including the restrictions on transfer: see *Commissioners of Inland Revenue* v. *Crossman* [1937] A.C. 26.

Two important questions, however, are in dispute: first, What evidence is admissible, in relation to the likelihood at Mrs. Lynall's death of a public issue? and, secondly, What was the true value of Mrs. Lynall's shares at that time in the light of the admissible evidence? The latter is an exercise in the art, which I do not profess, of valuation, but I have had a great deal of expert evidence and my task is to make the most intelligent guess that I can.

Faced with a similar problem, Danckwerts J. in *Holt* v. *Commissioners of Inland Revenue* [1953] 1 W.L.R. 1488, at page 1492, said this:

> " The result is that I must enter into a dim world peopled by the indeterminate spirits of fictitious or unborn sales. It is necessary to assume the prophetic vision of a prospective purchaser at the moment of the death of the deceased, and firmly to reject the wisdom which might be provided by the knowledge of subsequent events. In my task I have had the assistance of a number of experts on each side who differ in their opinions in the manner in which experts normally do, and the frankest of them admitted that certain of his calculations were simply guesswork. It seems to me that their opinions are indeed properly described as guesswork, though, of course, it is intelligent guesswork, aided by the experience which they have gained by their work as stockbrokers or accountants. No possible suggestion can be made against the honesty of these witnesses, but their methods of calculation appear to me to be inevitably uncertain and controversial, and, in my view, statements by several of them that they would have been ready to buy the shares at the price reached by them if they had had the opportunity some five years ago must be discounted accordingly. Nonetheless, I could not have approached my task without their valuable assistance, and my remarks must not be taken to belittle the efforts which have been made by them to provide an answer to a question to which no certain answer is possible."

(Plowman J.)

In all that, I respectfully concur.

So much by way of introduction. I must now say something about the company. It was incorporated in the year 1925 with an authorised capital of £1,000. At the times with which I am concerned its issued capital was £241,700, divided into 241,700 shares of £1 each. All those shares, with the exception of 200, were held within the Lynall family. Mrs. Lynall's husband, Mr. Ezra Lynall, who was one of the founders of the company and its chairman, held 77,040, representing approximately 32 per cent. Mrs. Lynall, as I have said, held 67,980, representing approximately 28 per cent.; their two sons, the present Plaintiffs, each held 48,240, or approximately 20 per cent. The remaining 200 were held by a Mr. Ellis, the general manager, who had been in the company's service for many years. Those five persons were also the directors of the company, and except for Mrs. Lynall were executive directors, Mr. Ezra Lynall being managing director, Mr. Alan Lynall technical director, and Mr. Donald Lynall sales director.

Mr. Ezra Lynall survived his wife and died in the year 1966. At the time of her death she was 76 years of age and her husband 69. Their elder son was 44 and their younger 39. By her will Mrs. Lynall appointed her sons to be the executors and bequeathed to them equally her shares in the company. The articles of association of the Company contain stringent restrictions on transfer, in particular Article 8, which is as follows:

> " The Directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares and Regulation 24 of Part I of Table ' A ' shall be modified accordingly and no Preference or Ordinary Share in the Company shall be transferable until it shall (by letter addressed and delivered to the Secretary of the Company) have been first offered to Ezra Herbert Lynall so long as he shall remain a Director of the Company and after he shall have ceased to be a Director of the Company to the Members of the Company at its fair value. The fair value of such share shall be fixed by the Company in General Meeting from time to time and where not so fixed shall be deemed to be the par value. The Directors may from time to time direct in what manner any such option to purchase shares shall be dealt with by the Secretary when communicated to him."

At the time of Mrs. Lynall's death a fair value never had been fixed. A prospective purchaser of Mrs. Lynall's shares might well have taken the view, rightly or wrongly (and I am not really concerned which), that, on the true construction of this article, if he wished later to dispose of his shares by transfer he would be unlikely to obtain more than their par value, and that his chances of obtaining an accretion to his holding from other members of the company were remote.

The business of the company, which is based on Birmingham, is principally the manufacture of what are called " cold-forged fasteners ", which include such things as screws, bolts and rivets. The company is a leading manufacturer in that field. In the year 1962 about half its business was with the motor industry, and a quarter with the aircraft industry. At the time of Mrs. Lynall's death the company was a very flourishing company. Its profit and dividend record can be seen from an agreed document, P.1, which was prepared by Sir Henry Benson, who gave evidence for the Crown. This shows, among other things, that between the year ending 31st July 1957 and the year ending 31st July 1961 (the last completed financial year before the death) the turnover

had risen from £979,000 to £1,607,000; the profits before depreciation and taxation had risen from £112,798 to £300,905; and the profits available for dividend had risen from £35,456 to £135,496. The trend between those years was upward, the most dramatic increase being between 1959 and 1960, when sales rose from £1,267,000 to £1,604,000; the profits before depreciation and taxation from £180,299 to £309,516; and the profits available for dividend from £90,697 to £141,343.

The policy of the board was always to pay a small dividend and retain the major part of the profits in the business in order to finance the expansion of the company and the replacement of its assets. For 1957 and 1958 a dividend at a rate of 5 per cent. was paid; for 1959 10 per cent.; and for 1960 and 1961 15 per cent. On average, each of those dividends was covered over six times. Even the 5 per cent. dividend for 1957 and 1958 was ten times the equivalent rate for 1952 and 1953. But in the background were the Special Commissioners. Under threat of surtax directions under s. 245 of the Income Tax Act 1952 additional net dividends totalling £27,798 were declared and paid in the year ended 31st July 1957 in respect of the years 1949 to 1953 inclusive, and from that time on the board's dividend policy was influenced by the desire to avoid the possibility of a surtax direction. In that they were completely successful. In June 1961 clearance was obtained down to 31st July 1959, and, although clearance was not sought in Mrs. Lynall's lifetime for the years 1960 and 1961, it was obtained after her death.

Another agreed document prepared by Sir Henry Benson, P.2, shows a strong capital position. Between the years 1957 and 1961 the fixed assets at cost less depreciation had risen from £259,376 to £396,753. This development had been financed entirely out of accumulated profits, with the result that the capital reserves, which stood at £127,102 in 1957, had disappeared in 1961. On the other hand, the company's cash resources (including tax reserve certificates) had risen from £218,783 to £263,200. Its only liability for borrowed money was a small mortgage reducing by £2,000 per annum, which in 1957 stood at £20,000 and in 1961 at £12,000. The ratio of its current assets to its current liabilities had gone up from 1·7 : 1 in 1957 to 2·4 : 1 in 1961. The company's balance sheet as at 31st July 1961 shows that it was then committed to capital expenditure estimated at £105,000. Up to that time the increase in profits had been roughly proportional to capital expenditure.

This, then, was a substantial high-class private company with a successful profit record, even in a difficult year in industry like 1961, showing growth, a strong liquid position, a high dividend cover and a very satisfactory cash flow (that is to say, aggregate of depreciation and retained profits). It was undoubtedly likely to do well if it went public. But that, of course, depended on the volition of the directors.

All the matters to which I have referred up to this point are matters of information which would have been available to the hypothetical seller and the hypothetical buyer of Mrs. Lynall's shares, either from a consideration of the company's accounts up to the date of death or from other easily accessible sources. I must now mention certain additional facts which were not of that character, and which, had they been known to the hypothetical seller and the hypothetical buyer, would have influenced the purchase price and therefore the value of Mrs. Lynall's shares. The first concerns the company's accounts for the year ending 31st July 1962. Mrs. Lynall died with two months of that year still to go, and at her death the accounts were not, of course, in existence. What they ultimately showed was this: sales had risen to £1,801,000;

(Plowman J.)

profits before depreciation and taxation had risen to £400,295; and profits available for dividend had risen to £180,067. The dividend, however, remained the same at 15 per cent. This was covered over eight times. The fixed assets had risen to £484,727, cash resources to £289,136, and the ratio of current assets to current liabilities to 3 : 1. When Mrs. Lynall died the directors must have had a fairly good idea of this general trend. The 1962 accounts would have confirmed an optimistic profits forecast, but frustrated an optimistic dividend forecast.

The second is the chairman's speech at the annual general meeting of the company on 7th June 1962, that is to say, shortly after Mrs. Lynall's death. The speech was not circulated before the meeting, and there is no evidence that it was in existence at the date of death. (At this point I should mention, parenthetically, that although the accounts for the year ending 31st July 1961 were not passed until 7th June 1962, they had been audited and signed in Mrs. Lynall's lifetime and it is common ground that they ought to be taken into account.)

Thirdly, there are what have been called the category B documents. These are documents which came into being in Mrs. Lynall's lifetime, and which record the investigations which the board was making into possible ways and means of raising money to pay prospective death duties. They are, in their nature, private documents. They show that in July 1959 Mr. Ezra Lynall began to show concern with the question of estate duty on the death of himself or his wife, and consulted solicitors, who prepared a memorandum on the subject suggesting various alternatives, including a flotation. In December 1959 the board asked Messrs. Thomson McLintock to carry out a survey of the company's undertakings with a view to a public issue. In July 1960 Thomson McLintock made a preliminary report and the matter stood over until the 1960 accounts were available. In February 1962, as a result of further discussions, Thomson McLintock expressed the view that the board should consider a flotation at the earliest possible moment, either in May 1962, based on the 1961 accounts, or at the end of the year when the 1962 accounts were available. They also suggested that Messrs. Cazenoves should be consulted in order to obtain the reaction of the City. Mr. Ezra Lynall replied noting Thomson McLintock's views and stating that the board did not wish to rush into a flotation without studying the situation from every angle. He agreed that Thomson McLintock should consult Cazenoves, without, however, committing the board to any course of action. In March 1962 Cazenoves made a report to Thomson McLintock suggesting the method of flotation. They thought that a minimum of 25 per cent. of the shares might be sold on a $5\frac{1}{2}$ per cent. to 6 per cent. dividend yield basis with a minimum earnings cover of $2\frac{1}{4}$ to $2\frac{1}{2}$ times. This would put a value of £1,300,000 to £1,600,000 on the business. Copies of this report were sent to the company in April 1962, but nothing had been decided when, in May, Mrs. Lynall died.

What knowledge of these matters is to be imputed to the hypothetical vendor and the hypothetical purchaser? And by what criterion is the answer to this question to be judged? There are a number of possibilities. At one end of the scale is the proposition for which Sir Milner Holland contended on behalf of the Crown, that the Court, in valuing the shares, should have regard to all facts which are proved before it to have been facts at the relevant time. This would include all the facts deducible from the category B documents. At the other end of the scale is the proposition that the Court ought not to impute to the parties knowledge of anything more than the company's accounts

A and any other information which has been made available to the shareholders or was available to the public at large. I will refer to this as " the published information ". Between the extremes of omniscience on the one hand and the published information on the other lie two further possibilities. The first is that the hypothetical vendor and the hypothetical purchaser must be deemed to be in possession, not only of the published information, but also of any B information which the directors would have given in answer to any reasonable question likely to be asked by any vendor-shareholder or intending purchaser. This is the proposition for which Mr. Bagnall contends on behalf of the Plaintiffs, basing himself on *Holt* v. *Commissioners of Inland Revenue*(1). The second is the proposition, for which no one has hitherto contended, that the parties must be taken to know any additional facts which a hypothetical C reasonable board of directors would have disclosed in answer to any reasonable inquiries which the vendor or the intending purchaser or his advisers might have made.

I will consider the relevant authorities in a moment, but apart from authority there are, to my mind, two objections to the proposition for which the Crown contends. In the first place, it seems to me to substitute an intrinsic value test D for " the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market ", to quote s. 7(5) of the 1894 Act. To take an example, suppose the deceased to have been the owner of a picture which had been authenticated by the world's leading experts as being the work of some old master. In fact it is the work of a forger, but at the time of the deceased's death that fact is known only to the forger himself and possibly a small number E of associates. The price the picture would fetch in the open market at the date of death might be enormous, though it might be almost nothing if the fact of the forgery were known to the buyer. On the wording of the subsection it appears to me to be plain that the higher value is the value for estate duty purposes even if the forger later confesses. Secondly, once the door is opened to let in evidence over and above the published information, and particularly if all the knowable F facts are admissible, an intolerable burden of investigation would be laid upon the Commissioners, and I can see no warrant in the language of the subsection for subjecting them to it. I do not therefore accept the test suggested by Sir Milner Holland.

Had I felt entirely free to choose between the other alternatives, I should have preferred the " published information " criterion, partly for the practical G reason that I have already indicated, namely, the administrative difficulties of the Commissioners in applying any other, and partly because it is, in my view, wrong to assume, as a matter of law, that a board of directors would disclose to any individual member or to an intending purchaser or his advisers any information which it was under no duty to disclose, such as a contemplated flotation: see *Percival* v. *Wright* [1902] 2 Ch. 421. In the first place, this would H mean that the value of the shares, in respect of which the known financial facts remained constant, would be liable to vary at the whim of the board. Secondly, once such an assumption is made, a whole new field of inquiry is opened: What would be reasonable questions to ask? What would reasonable answers to those questions be? What would this particular board have answered if asked?—and so on. None of the answers to these questions is likely to be I conclusive or even very satisfactory, and the only safe assumption is that the board would disclose what it was bound to disclose and no more.

I turn now to authority. Three cases were cited to me, the first of which was *Salvesen's Trustees* v. *Commissioners of Inland Revenue* (1930) 9 A.T.C. 43(2), a

(1) [1953] 1 W.L.R. 1488. (2) 1930 S.L.T. 387.

(Plowman J.)

case in the Court of Session concerned with the depreciatory effect of restrictions on transfer contained in the company's articles of association. Lord Fleming's judgment contains a number of passages which refer to the question of the buyer's knowledge. At page 45 he said this:

> " The estimation of the value of a share in a company, whose shares cannot be bought and sold in the open market, and with regard to which there have not been any sales on ordinary terms, is obviously one of difficulty. There has been one transfer by Mr. Theodore Salvesen of 5,000 shares to his son at their par value, but the petitioners did not found upon this transaction as being any real guide to the value of the shares. The problem can only be dealt with by considering all the relevant facts so far as known at the date of the testator's death and by determining what a prudent investor, who knew these facts, might be expected to be willing to pay for the shares. Counsel for both the petitioners and respondents accordingly assumed that the prospective buyer would inform himself of all the relevant facts and, in particular, would have made available to him the accounts of the company. The relevant facts may, I think, be classified under the following heads: (1) The history of the whaling industry; (2) the history of the company from its inception to the date of the testator's death and particularly its position at that date; (3) the prospects of the whaling industry generally at that date and of this company in particular; and (4) to what extent the restrictions in the articles might be expected to depreciate the value of the shares." At page 49 he said: " It appears from the evidence of the chairman of the company that he has had a long and intimate knowledge and experience of the industry. The hypothetical buyer would see from the accounts that he and the other directors were quite willing year after year to embark the large profits, which they had already made from the industry, in another year's trading and would draw his own conclusions from that circumstance." Then, at page 50: " Apart from any conclusion which an intending investor might draw from the break-up value of the undertaking, he would, I feel sure, especially when he was informed that it was intended to continue the company's trading operations, examine the most recent balance sheet carefully with a view to obtaining some indication of the value of the concern as a going undertaking. A person who was being invited to acquire a third of the shares of a private company which imposed stringent conditions on the right of transfer would certainly wish to ascertain the value at which the assets had been entered in the last balance sheet. As a prudent person he would, of course, keep in view that he was purchasing the shares in October 1926 and that the balance sheet shows the affairs of the company as at July 1926 and he would make inquiry as to the alterations in its financial position which had taken place between these two dates." Finally, at page 51: " I quite recognise that the problem I have to deal with must be solved in the light of the information available at or about the time of the testator's death, but I think that, however, does not debar me completely from making any reference to the balance sheet at 31st July 1927, which includes a period of nearly three months prior to the testator's death. The profit made in that year was £171,122 and the directors set aside £400,000 as a dividend reserve. This seems to indicate that the directors must have considered that the undistributed profits that they had in hand at the end of the previous year were far more than was necessary for trading purposes and might have been used by them to maintain the rate of dividend in bad years."

There is nothing in those passages which leads me to think that the Judge had in mind the problem of the various categories of knowledge with which I am concerned. The facts which he regarded as relevant appear to have been what I have called the published information, particularly the accounts of the company, plus some information as to whether there had been any alteration at the date of death in the position as disclosed by the last published accounts. He permitted himself a look at the accounts for the year in which the death occurred, but as this was a document which was not in existence at the date of death he can, I think, have done so only in the context of a check on the profit and dividend forecast which might have been made at the date of death.

The second case, also in the Court of Session, is *Findlay's Trustees* v. *Commissioners of Inland Revenue* (1938) 22 A.T.C. 437. That case concerned the value to be put upon a share in the goodwill of a partnership. The hypothetical vendor would necessarily be a partner, and the relevant information would therefore include information in the possession of the vendor as a partner. At page 440, Lord Fleming said:

> " In estimating the price which might be fetched in the open market for the goodwill of the business it must be assumed that the transaction takes place between a willing seller and a willing purchaser; and that the purchaser is a person of reasonable prudence, who has informed himself with regard to all the relevant facts such as the history of the business, its present position, its future prospects and the general conditions of the industry; and also that he has access to the accounts of the business for a number of years." And a little later on on the same page: " It is to be presumed that the hypothetical purchaser having obtained all the relevant information would consider in the first place the risks which are involved in carrying on the business, and would fix the return which he considered he ought to receive on the purchase price at a rate per cent."

I do not regard either of those cases as authority for the proposition that the relevant information was anything more than the information which would be known to any vendor; indeed, as far as one can see the contrary had never been suggested.

In the third of the three cases, *Holt* v. *Commissioners of Inland Revenue*[1], which, like the present case, concerned the value for estate duty of a minority holding in a private company, Danckwerts J. went further than Lord Fleming, and I must refer to a number of passages from his judgment. I have already quoted the passage at [1953] 1 W.L.R. 1492, where he stated that it was necessary firmly to reject the wisdom which might be provided by the knowledge of subsequent events. At page 1493, he said:

> " At the same time, the court must assume a prudent buyer who would make full inquiries and have access to accounts and other information which would be likely to be available to him: see *Findlay's Trustees* v. *Commissioners of Inland Revenue*."

Somewhat surprisingly, the *Salvesen* case[2] does not appear to have been cited to Danckwerts J. At page 1495, Danckwerts J. said:

> " One question of some importance dealt with by Mr. Holt was how far a prospective purchaser would have been able to obtain information as to the company's position and prospects by inquiry from the directors. Mr. Holt said that all the information which he had given in

(1) [1953] 1 W.L.R. 1488. (2) 9 A.T.C. 43.

> evidence would not have been given directly to a buyer of a small quantity of shares, but that it would have been made available, in confidence, to a reputable firm of accountants, acting on behalf of a buyer and approved by the board of directors, with the result, as I understood the position, that the information so revealed would not be passed on to the buyer, but his accountant would be in a position to advise him as to the prudence of the purchase and the price which could reasonably be offered for the shares."

That passage should be read in the light of the fact that the information in the possession of the board was depreciatory of the value of the shares. It related to the difficulties of trading in West Africa. The executors were saying it should be taken into account; the Crown were saying it should not. The Judge then refers to the evidence of a Mr. Samuel, the chairman of another company, who dealt with the difficulties of trading in West Africa, and at page 1496 he said this:

> " It was suggested in cross-examination to Mr. Samuel, and I think that it is a fair point, that an ordinary buyer would not have all the information on West African conditions which led him to take such a depressing view. Consequently, in my view, Mr. Samuel's estimate of the value of the shares, so far as based on the unattractiveness of the company's ordinary shares to him, must be discounted by this consideration."

At this point I should mention an interlocutory observation of Danckwerts J. which is not in the report, but which I quote from the transcript of the proceedings (day 3, 22nd October 1953, page 56):

> " The Solicitor-General: My Lord, the witness is being asked about the confidence of the board, and matters of that sort. If we are going into what the board considered as a board, I should like to see the minutes of the company showing that these matters were ever discussed by the board as a board. Danckwerts J.: This is, of course, of historical interest, but we are getting away from the point that it is not so much what the board thought as what other people could find out. The Solicitor-General: If this gentleman likes to express his opinion, my Lord, I certainly would not express the slightest objection, but if it is going to be represented throughout as the opinion of the board after mature consideration, then I should like to be satisfied that they did, in fact, have board meetings to consider these matters. Danckwerts J.: I do not think it matters what they did so much as what information the outsider would be likely to get."

That passage, in my judgment, reinforces the opinion which I have already expressed that facts which would be unknown to the purchaser must be left out of account in valuing the shares. Finally, at page 1501, Danckwerts J. said:

> " I think that the kind of investor who would purchase shares in a private company of this kind, in circumstances which must preclude him from disposing of his shares freely whenever he should wish (because he will, when registered as a shareholder, be subject to the provisions of the articles restricting transfer) would be different from any common kind of purchaser of shares on the Stock Exchange, and would be rather the exceptional kind of investor who had some special reason for putting his money into shares of this kind. He would, in my view, be the kind of investor who would not rush hurriedly into the transaction, but would

A consider carefully the prudence of the course, and would seek to get the fullest possible information about the past history of the company, the particular trade in which it was engaged and the future prospects of the company."

It appears from those passages that Danckwerts J. regarded as relevant to the question of value knowledge which a prospective buyer would have obtained B from the board on inquiry, and I do not think it would be right for me to dissent from that view, particularly as the information which the hypothetical purchaser would have obtained in the present case would probably not have materially affected the value of the shares. Mr. Bagnall, for the Plaintiffs, accepted that the difference between what I may paraphrase as the published information value and the *Holt*(1) information value would lie within the 10 per cent. margin C of error which some of the expert witnesses regarded as inherent in the operation anyway.

I therefore come back to the documents with the admissibility of which I am concerned, and my conclusions are as follows.

(1) The accounts for the year ending 31st July 1962, being post-death documents, are not admissible as evidence of the value of Mrs. Lynall's shares D at the date of her death, except possibly to the limited extent I have already mentioned.

(2) The chairman's speech is a post-death document and is not admissible. In any event, in my view, it added nothing of any material significance to the 1961 accounts themselves.

(3) Mr. Alan Lynall, whose evidence was tendered and accepted as being E the evidence of the board, said in evidence that if, at the date of his mother's death, he had been asked by a prospective purchaser of her shares to forecast the profits for the year ending 31st July 1962, his answer, being as helpful as possible, would have been: " Roughly in line with the preceding year "; and if asked by the same enquirer to forecast the dividend for the year ending 31st July 1962 he would have said that he expected it to be the same as that for F the preceding year. I should, perhaps, quote *verbatim* his evidence about the answers he would have given to questions about the likelihood of a public issue. At vol. 1 of the evidence, page 17D, he was asked:

" What was your attitude towards the possibility of the company having a public issue? (A) Could you tell me at what time? (Q) During the whole of the period from 1959 to the day before your mother died G in 1962. (A) I started with an open mind on the matter, knowing practically nothing about it. As we got information from Thomson McLintock, which gave us a basis for seeing what the effects of a public issue would be on the company, I myself became very much more dubious about the correctness of such an action, and I would say that my attitude really eventually became adverse. (Q) What was it about the project that H made you dubious and then subsequently adverse? (A) I felt that the way in which we would have had to have conducted the company as a public company, which would have involved distributing very much more of the company's funds in profits, would have been likely to prevent us continuing to promote the growth of the company from our own resources; so that we would either have had to stagnate or raise money by borrowing— I an idea which was most unwelcome, to say the least. (Q) Again wait

(1) [1953] 1 W.L.R. 1488.

and see if there is any objection to this question: Do you know what your father's view was on the project? (A) I believe that he started, as I did, with an open mind about it, but I think that his views changed very much in the same way as mine did. Indeed, I think they would probably have been stronger, because, in all honesty, he could see the implications I think very much more clearly than I could. (Q) Supposing that on 21 May, 1962, again my gentleman came in and said he was proposing to buy a block of shares in your Company—first of all supposing he said he was a banker and that he was proposing to buy a block of shares in your Company for his bank and he asked you whether the Directors would give him an undertaking to have a public issue within say four or possibly five years, what would have been your attitude to that request? (A) We would not have given such an undertaking. (Q) Supposing that the person we have been talking about, the potential or hypothetical purchaser, asked you what was the likelihood of the Company having a public issue in the foreseeable future, what answer would you have given to that question? (A) That I find a very difficult one. I would certainly prefer to say nothing at all; but to say nothing at all I am afraid would have created an impression, so I would have tried then to give as accurate a view as I could of the state of affairs as I saw them, and I would have said then that I regarded the prospect as doubtful and remote. (Q) If the gentleman had said: 'Well, look, let me see any minutes of the Board of Directors or other documents in the possession of the Company which might throw any light on the question of whether there would or would not be a public issue', what would you have done in answer to that request? (A) I would have said that all Board minutes and other documents were completely confidential and I would certainly not disclose anything. (Q) Supposing that it was not the gentleman who said he was negotiating a purchase of the shares who asked you the question but that it was a partner in a firm of chartered accountants who said: 'We are advising a client who is negotiating a purchase of shares in your Company', and he had asked the same question about minutes and other documents of the Company, what would have been your answer to the partner in the chartered accountants? (A) It would have been the same so far as I am concerned, it would have been a breach of confidence."

In the light of that evidence, which I see no reason to reject, my conclusion is that the category B documents are not admissible, since the information contained in them is neither published information nor information which would have been elicited from the board on inquiry.

I turn now to the troublesome question of valuation. The following matters are, I think, common ground, namely, that the sale envisaged by s. 7(5) of the 1894 Act would be likely to be a sale to a single purchaser, with a corporate rather than an individual existence, who would be advised by lawyers and accountants. Such a purchaser would be looking, either for a lock-up investment with an appropriate return on his money and the hope of an ultimate capital profit as the result of a public issue, or for a quick capital profit as the result of an early public issue. It is also common ground that the possibility of liquidation or a takeover can, in the circumstances of the present case, be left out of account. In the ten years prior to Mrs. Lynall's death there had been no transactions for value in the company's shares which would afford any guide to their value at the date of her death. In these circumstances there are, I think,

three principal factors which affect valuation: (1) the appropriate dividend yield; (2) the prospective dividend; and (3) the possibility of capital appreciation. The evidence suggests certain general observations which may be made about them.

(1) *Dividend yield.* Two approaches to the problem of an appropriate yield have emerged during the course of this case. The first is to take a purely arbitrary figure based on experience and expertise and work from that. The other is to ascertain the yield which can be obtained on investments in companies in the same general field of industry in the public sector, and then to apply an arbitrary figure of discount for the fact that one is dealing not with a public company but with a private company. The latter method has the advantage over the former that it at least starts on a factual basis, but it is open to criticism on a number of counts. For example, dividend policy in a private company is likely to be entirely different from dividend policy in a public company; and the regulations affecting the transfer of shares are likely to be entirely different in the two cases. Moreover, it is in the company, Linread Ltd., and its management and not in the industry that the hypothetical purchaser is likely to be interested. These are only examples, and there are no doubt numerous other factors which influence the stock market but are irrelevant in considering the value of shares in a private company, and in particular this company. It can, however, I think, safely be said that any method of calculation involves the introduction of at least one arbitrary figure somewhere along the line.

(2) *Prospective dividend.* A number of factors enter into any assessment of the dividend which a company is likely to pay in the future. Past dividends are obviously an important consideration. In the case of the present company the profit and dividend record, the dividend policy of the board and the capital position would have suggested that, at the lowest, a 15 per cent. dividend would be maintained. The likelihood of an increase would have to be judged in the light of the known policy of the directors, but that would not rule out the probability of an increase. A number of factors pointed in that direction, such as the upward trend of profits, the high dividend cover, the risk of surtax directions, the employment of surplus profits in the expansion of the business which itself might well lead to an increase of profits.

(3) *The possibility of capital appreciation.* It is common ground that in the present case this need only be considered in the context of a possible flotation. The probability of such a flotation was a matter depending primarily, but not entirely, on the wishes of the board. The board's hypothetical known assessment of the position at Mrs. Lynall's death was that the prospect of a flotation was " doubtful and remote ". But against that attitude must be set the fact that it was at least a tenable view on the published information, including the family nature of the business and the ages of the family shareholders, that the board would be forced willy-nilly to go public sooner or later in order to provide for death duties, or for some other financial reason urged upon them by their advisers, such as the fear (justified by the event) of the imposition of a general capital gains tax. Mr. Lynall's subjective view of the situation must be discounted accordingly.

I come now to the expert evidence. The witnesses called on behalf of the Plaintiffs were: (1) *Mr. Rose*, a Fellow of the Institute of Chartered Accountants, who qualified in 1948 and from 1952 to 1960 was a partner in a firm of chartered accountants practising in Birmingham and London. Since 1960 he has been an executive director of a well-known issuing house, Neville Industrial

(Plowman J.)

Securities Ltd., of Birmingham. He is also a director of other companies, quoted and unquoted. (2) *Mr. Hamilton-Baynes*, also a Fellow of the Institute of Chartered Accountants, who has specialised in the valuation of shares in private companies and has written a standard textbook on the subject. He is a well-known expert witness in this field and gave evidence in the *Holt* case(1). (3) *Mr. Hill-Wood.* He is a young man who has been in the City for twelve years, the first four of which were spent with stockbrokers and the last eight of which have been with Hambros Bank. He is now second in charge, under a director, of the department of industrial services, which, among other things, is concerned with investing money in private companies on the bank's own account. Two experts were called on behalf of the Crown: (1) *Sir Henry Benson*, a past President of the Institute of Chartered Accountants, and a senior partner in the firm of Cooper Bros. He is another well-known expert in this field, and he too gave evidence in the *Holt* case. (2) *Mr. Andrews*, a Fellow of the Institute of Chartered Accountants, and a director of Samuel Montagu & Co., well-known merchant bankers, and experienced in advising on and negotiating the acquisition of majority and minority holdings in public and private companies. All, of course, were honest witnesses, expressing their professional opinions in the light of their experience, and, as is the way with experts, differing from each other.

Mr. Rose said that he would have expected what he called an " effective return " of 15 per cent. on his money. That expression is comparable with the concept of a yield to redemption in another context. Mr. Rose explained it by saying that it meant that he would require an immediate yield of 10 per cent. in the expectation that the dividend would double over a 10-year cycle. He would not expect a rise in dividend for some time, because so long as profits were being applied in acquiring assets employed in the business a modest dividend would be enough to satisfy the Special Commissioners. Applying his required 10 per cent. to an actual dividend of 15 per cent. he reached a price of 30*s.* a share, ignoring up to that point the possibility of a public issue. He took the view that a public issue would be an aggravation rather than a solution of the estate duty problem, but nevertheless came to the conclusion that he would have advised a purchaser to pay another 20*s.* having regard to the possibility of a public issue. In reaching the figure of 20*s.* he took into account the burden of article 8. Neither he nor any other witness put a specific value on the depreciatory effect of article 8, though all agreed that it was depreciatory. The principal effect that Mr. Rose attributed to it was to exclude from the category of potential investors all private individuals. In the result Mr. Rose arrived at a valuation of £2 10*s.* after taking into account the answers which Mr. Lynall said he would have given in reply to questions about the profit, dividend and flotation prospects. He was not asked what effect knowledge of the category B documents would have had on his valuation.

Mr. Hamilton-Baynes thought that the basic assumption to be made was that price depended on what the hypothetical purchaser was going to get out of his investment, basically in dividends. He started his process of valuation by assuming as an appropriate dividend yield a yield of 12 per cent. in a case where a small private company can satisfactorily pass twelve tests set out on pages 116–7 of his book on Share Valuations. These tests are as follows: 1. If there is not at the time a political or financial crisis. 2. If the industry is not on the decline. 3. If there are no unusual clauses in the articles. 4. If the company has no pronounced trend of profits, either upward or downward.

(1) [1953] 1 W.L.R. 1488.

A 5. If the management is adequate and reasonably remunerated. 6. If the profits have not widely fluctuated. 7. If regular dividends have been paid and the dividend cover is reasonable but not excessive. 8. If the company does not depend on one customer or one supplier. 9. If the gearing is satisfactory. 10. If the company is financed without recourse to temporary loans and overdrafts; that is, if the liquid position is satisfactory. 11. If the company's fixed B assets are properly maintained. 12. If one shareholder does not personally control the company, or the purchase of these shares will not give him control. He then adjusted the figure of 12 per cent. to 7 per cent. in order to reflect the high marks with which the present company would pass his examination paper, including the probability that sooner or later the risk of surtax directions would necessitate an increase in the dividend. Then, relating that figure of C 7 per cent. to the actual dividend of 15 per cent., he arrives at a figure of 43*s.* per share. He said that he would not in fact expect an increase of dividend for two or three years. He then reduced the 7 per cent. to 6 per cent. to reflect the possibility of a public issue, and so increased the share price by 7*s.* to 50*s.* He reached these figures after taking into account Mr. Lynall's views as to the prospects of a public issue. His view of the depreciatory effect of article 8 D was that it cancelled out the nuisance value, or " negative control ", attaching to a 28 per cent. minority holding. Knowledge of the category B documents might, in his view, have added another £1 to the value of the shares.

Mr. Hill-Wood approached the problem of valuation as if the transaction to be considered was an entirely different transaction from what it in fact is. He visualised it as a case of the type he was used to, where Hambros Bank was E going to inject money into the company with a view to accelerating expansion and nursing it to the point where the bank itself would be able to float it. The transaction would be one between the board (not an outside shareholder) on the one side and Hambros on the other. This type of transaction is so different from that with which I am concerned that I do not think that Mr. Hill-Wood's evidence helps me in arriving at a value for Mrs. Lynall's shares, and accordingly, F with no disrespect at all to Mr. Hill-Wood, I propose to disregard it.

I come now to the witnesses for the Crown.

Sir Henry Benson started his process of valuation by considering dividend yields earned on shares in quoted companies at the time of Mrs. Lynall's death in the same class of industry. He found that the answer lay between 5 per cent. and 6 per cent. He then adjusted this figure for the private company factor G (including restrictions on transfer) and considered that the yield to apply was 7½ per cent. Sir Henry then considered what figure he should take as the prospective dividend, and taking into account the dividend record of the company, the rising trend of profits, the expectation of further increases, and the pressure likely to be exerted by the Special Commissioners, he concluded that a fair distribution and one which would satisfy the Special Commissioners H would be 35 per cent. of the available profits. He showed that this is the equivalent of an actual dividend of 33 per cent. for 1960 or 32 per cent. for 1961. On the basis of these dividends and a 7½ per cent. yield he reached share values of £4 8*s.* and £4 5*s.* 4*d.* respectively. He then reconsidered these figures in the light of the possibility of capital profit. He thought that the buyer and seller would have wanted to know the price at which the shares would have been I quoted if the company had gone public at the date of death, and said that he would have advised that it would have been on the basis of a yield of 5½ per cent. to 6 per cent. twice covered. This produced a share value on the basis of the 1961 profits and a dividend yield of 6 per cent. of £7 13*s.* 4*d.* That figure had,

(Plowman J.)

however, to be discounted to allow for an estimated period of one to five years between death and flotation and the buyer's profit. Sir Henry said that it was impossible to arrive at a precise figure, but he thought that the price agreed between buyer and seller would be £5 per share. If he was entitled to take the category B documents into account he would have taken the view that a public issue was more imminent than he had assumed, and would raise his valuation from £5 to £6 a share. As regards article 8, Sir Henry took the view that its practical effect was not material or significant, as the buyer whom he contemplated was a long-term investor and almost certainly a company.

Mr. Andrews produced a novel basis of valuation. He started by postulating a figure of £300,000 (which he arrived at by jobbing back from the 1962 accounts) as a maintainable profit level. His next step was to establish a relationship between profits and capital value. He calculated that the maximum earnings available for distribution by way of dividend on the ordinary shares would be £226,000, or 18*s.* 8*d.* per share. He then took a figure, which the " little man inside " (as he put it) told him ought to be 20 per cent., as an appropriate earnings yield (that is to say, 18*s.* 8*d.* expressed as a percentage of the share price), and arrived at a valuation of £4 13*s.* 4*d.*, which he rounded off at £4 10*s.* As a cross-check on his calculation, he asked himself at what price he would have been prepared to underwrite the shares in May 1962. In his view he could have floated the company on a dividend yield of 6¼ per cent. twice covered—that is to say, an earnings yield of 12½ per cent.—and on that basis the shares would have been worth £7 10*s.* He then discounted that sum by 40 per cent. to take account of the depreciatory factors (shares unquoted, directors' dividend policy, article 8 and minority interest), and arrived back at the figure of £4 10*s.* He did not regard article 8 as having any significant effect on value. If he was entitled to take the category B documents into account he would add another 30*s.* to the £4 10*s.*, making £6, the same figure as that proposed by Sir Henry Benson.

That, then, in bare outline, was the evidence of the experts, and I must now venture a few brief comments. 1. *Mr. Rose.* I regard his valuation as being on the low side. I think that his figure of 10 per cent. as the appropriate immediate yield is high and that he has underestimated the dividend prospects. 2. *Mr. Hamilton-Baynes.* He fastened on Mr. Lynall's forecast of the chances of a public issue as " doubtful and remote ", and in my view underestimated the possibility that the company would be forced to go public. Moreover, by applying his 6 per cent. figure to the actual dividend of 15 per cent., I think that he underestimated the prospects of an increase in dividend, although in arriving at a figure of 6 per cent. he had no doubt to some extent taken into account the prospects of an increase. In my view his valuation also is too low. 3. *Sir Henry Benson.* By applying his 7½ per cent. yield to a dividend of 32 per cent. or 33 per cent. Sir Henry has, in my view, overestimated the risk of a surtax direction and the probability of a large immediate increase of dividend. As I have said, the Special Commissioners were always in the background, but I do not think they were knocking at the front door. Mr. Bagnall submitted that the 7½ per cent. ought to have been applied to the actual dividend of 15 per cent. (which would have given a share value of £2) on the ground that the element of " yield in the public sector " which it comprised itself took into account future dividend prospects. I think that there is some force in this criticism, though I do not think that it sufficiently takes into account the dividend prospects of this particular company. In another respect too I think that Sir Henry was perhaps over-optimistic, namely, in regarding a public issue as inevitable within a period of one to five years. In the light of Mr. Lynall's evidence I regard this as

A conjectural. 4. *Mr. Andrews.* His evidence too, in my view, overrates the prospects of a public issue and disregards the effect of the views of the Lynall family. Indeed, he stated that he would have wanted the board and its advisers to tell him, as part of the deal, that it was their intention to go public. I have misgivings about a valuation which regards the immediate dividend policy of the board as irrelevant and proceeds on the basis that the whole of the profits
B available for distribution ought to be taken into account.

For these reasons I have reached the conclusion that, while the valuations put forward by the Plaintiffs' experts are on the low side, those of the Crown's experts are on the high side. Making the best estimate I can in all the circumstances, I fix the value of Mrs. Lynall's shares at £3 10*s*. If I am wrong in my view that the category B documents are not admissible, then I would
C add £1 to £3 10*s*., bringing the value up to £4 10*s*. per share.

If anyone asks for it, I give leave to appeal.

Appeal allowed, with costs.

The Crown having appealed against the above decision, the case came before the Court of Appeal (Harman, Widgery and Cross L.JJ.) on 17th, 18th,
D 19th, 20th and 23rd June 1969, when judgment was reserved. On 29th July 1969 judgment was given unanimously in favour of the Crown, with costs.

Sir Milner Holland Q.C., Jeremiah Harman Q.C. and *L. H. Hoffman* for the Crown.

W. A. Bagnall Q.C. and *Peter Gibson* for the Executors.

Percival v. *Wright* [1902] 2 Ch. 421 was cited in argument in addition to
E the cases referred to in the judgments.

Harman L.J.—Mrs. Nellie Lynall, with whose estate this appeal is concerned, died on 21st May 1962. Her age was in the middle 70s. Her principal asset was a large holding representing about 28 per cent. of the issued capital of a private limited company called Linread Ltd. This was an old-established and
F prosperous concern havings its headquarters in Birmingham and being engaged in the manufacture of what are known as cold-forged fasteners—things in the nature of screws, nuts and bolts used in the aircraft and motor industries. The company was a private company and the shares were held entirely in the family, the chairman, Mrs. Lynall's husband, owning 32 per cent. and two sons owning 20 per cent. each. All four were directors of the company, though
G Mrs. Lynall was not an executive director.

Under the articles of association the shares of the company were very severely restricted in transfer; the directors had an absolute right to refuse to register, and a would-be seller must first offer his shares to Mr. Lynall and, after he ceased to be chairman, to the other members of the company, at the fair value, which at all material times was fixed at par. At the very lowest
H estimate the shares were worth double that figure, but in effect a would-be transferor had nothing to sell but the par value. In these circumstances a familiar difficulty arose of valuing the shares for estate duty purposes under s. 7(5) of the Finance Act 1894, which is in these terms:

> " The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would
I fetch if sold in the open market at the time of the death of the deceased."

(Harman L.J.)

It has been the law since *Attorney General* v. *Jameson* [1905] 2 I.R. 218, the decision of a very strong Court of Appeal in Ireland, which was followed and confirmed in the House of Lords in *Commissioners of Inland Revenue* v. *Crossman* [1937] A.C. 26, that the meaning to be given to this section is that for the purpose of estimating the price of such shares, price being under the section the criterion of value, it must be assumed that a purchaser would be entitled notwithstanding the restrictions to be registered as the holder, but would take his holding subject to the restrictions on transfer imposed by the articles of association. This view of the law is admittedly binding on this Court, but the Respondent taxpayer desired to reserve the point, in case the matter went to the House of Lords, that the minority view expressed by Lords Russell and Macmillan in *Crossman's* case was the right one and that the true value of shares such as these is par and no more.

The company had a conservative dividend record, but during the last two years of Mrs. Lynall's life a dividend of 15 per cent. had been paid, no doubt under the pressure exercised by the Revenue, which of course had in its hands the weapon of a surtax direction on the members. Moreover, this was a company in which two persons holding 60 per cent. of the capital were about 70 years old, and inevitably the question must arise how the very heavy estate duties which would become payable on their deaths could be found. It is notorious that in order to raise the duty many such companies have been obliged to offer a certain proportion of their shares by an issue to the public, which of course involves the sweeping away of the restrictions on transfer and becoming a public company. This would have the result of very much enhancing the price which the shares would fetch, and the chance of its happening must necessarily be in the mind of any purchaser, who would so long as the company remained a private company in effect be locking up his capital.

The sale envisaged by the section is, as is agreed, not a real but a hypothetical sale, and must be taken to be a sale between a willing vendor and a willing purchaser: see, for instance, the speech of Lord Guest in In re *Sutherland* [1963] A.C. 235, at page 262. It is true that the so-called willing vendor is a person who must sell: he cannot simply call off the sale if he does not like the price; but there must be on the other side a willing purchaser, so that the conditions of the sale must be such as to induce in him a willing frame of mind.

The controversy which has arisen here is extraordinarily free from authority, which is strange, as valuations under the section have been going on since 1894. The dispute is, what information about the company and its past history and future prospects is to be assumed to be in the possession of the purchaser at the date of the sale. Three possibilities were canvassed. First, that which was reached by the learned Judge below, namely, that the purchaser must be taken to be in possession, apart from what I call published documents, of all such further information (if any) as on the evidence in this case a member of the board applied to would have afforded. This evidence was given by one of the two sons of the family, who alleged that the board if asked would have been extremely uncommunicative. The Judge himself did not favour this result, but he felt constrained to it by a decision of Danckwerts J., In re *Holt* [1953] 1 W.L.R. 1488. The second view, which the Judge would have preferred had he felt himself free, is the " published information " footing, namely, that the purchaser would have had only such information as had before the date of the death been communicated by the board to the shareholders and no confidential information such as was within the knowledge of the board. The third possibility, which was, at any rate in this Court, supported by the Crown, was that the purchaser

must be supposed to have in addition to the published information such further information as would in practice, on a sale of an important block of shares such as these, have been confided by the board either to the purchaser or perhaps more probably in confidence to his financial advisers.

As a matter of history what happened was that the executors, in the Inland Revenue affidavit upon which probate was obtained, put in a valuation of the shares made by the secretary, who stated the value at £2 a share. The Commissioners, having considered the matter, formed the opinion that the true value following the *Jameson*(1) principle was £4 a share. This the executors were unwilling to pay, and, being aggrieved by the decision, appealed to the High Court under s. 10 of the 1894 Act. The Crown then applied for discovery of documents. Now of course the executors, being directors themselves, had in their possession or power material beyond the published information and would have been bound to include it in their affidavit on discovery. By way of compromise the documents which have been called the " B " documents were disclosed by the executors without prejudice to the question whether they would have been bound to make them available to the Crown or whether they could have objected to disclosing their contents on the ground that they only had this information as members of the board and were entitled to withhold it. This information was of two kinds: first, the interim monthly statements in the possession of the members of the board showing the progress of the company during the nine months which had passed since the period covered by the last information in the hands of the shareholders, which was that contained in the accounts for 1961; second, such facts as there were in the knowledge of the board to show the prospects or the likelihood of the company going public. Both these matters would have been of the utmost importance to a purchaser, but it was said that, not being published information, that is to say, information available to the shareholders at the date of death, they must be ignored.

Before Plowman J. there was elaborate evidence of experts giving their opinions as to the value of the shares. None of these questions arose before us and this judgment is shortened accordingly. Plowman J., weighing the opinions on the two sides, came to the conclusion that the proper price was £3 10*s*. With this the taxpayer is content. The experts, however, all agreed that if the buyer was entitled to be informed upon the two points, namely the last nine months' profits and the indications of the board's intentions as to a public offer, there would have to be added a pound to the value of each share. Before us, therefore, only one point was argued, namely, whether Plowman J.'s valuation of £3 10*s*. should stand or whether it should have a pound added to it, as, on the evidence, would happen if the further information were disclosed.

There is an extraordinary dearth of authority on this point. In *Jameson's* case no question of valuation arose because the Commissioners had not arrived at a valuation: the only thing settled was the basis of the valuation. That case, therefore, is of no help. *Attorney-General* v. *Jameson* was followed in Scotland by Lord Fleming in *Salvesen's Trustees* v. *Commissioners of Inland Revenue*(2) (1930) 9 A.T.C. 43 in the Outer House of the Court of Session. The shares in question were shares in a private company with a restricted right of transfer and the Judge made a valuation following *Jameson*. He said this, at page 46:

> " The problem can only be dealt with by considering all the relevant facts so far as known at the date of the testator's death and by determining what a prudent investor, who knew these facts, might be expected to be

(1) [1905] 2 I.R. 218. (2) 1930 S.L.T. 387.

(Harman L.J.)

willing to pay for the shares. Counsel for both the petitioners and respondents accordingly assumed that the prospective buyer would inform himself of all the relevant facts and, in particular, have made available to him the accounts of the company." Then he goes into the question of what the relevant facts were. This assumes that the purchaser knew " of the relevant facts so far as known " but does not say to whom they would be known. Later, at page 50, the learned Lord said this: " As a prudent person, he "—that is, the buyer—" would, of course, keep in view that he was purchasing the shares in October 1926 and that the balance sheet shows the affairs of the company as at July 1926 and he would make inquiry as to the alterations in its financial position which had taken place between these two dates. But he would first examine the balance sheet and I think that he would be very favourably impressed by the fact that the assets showed a surplus of upwards of £900,000 over its capital."

Then he calculates the value of the shares on that footing. The Judge therefore assumed that the purchaser would know all that he wanted to know, in particular the state of the company's business since the date of the last published balance sheet. In fact he felt himself entitled to look at the later published balance sheet to see what in fact happened during the last three months before the death, and this I think was only because he assumed that the purchaser would obtain that information: he could obtain it only from the board.

The next case is *Findlay's Trustees* v. *Commissioners of Inland Revenue* (1938) 22 A.T.C. 437. There the property was a share in a partnership. Here again the Judge assumed that the purchaser was informed of all the facts which he required to know: see at page 440, where he said this:

" In estimating the price which might be fetched in the open market for the goodwill of the business it must be assumed that the transaction takes place between a willing seller and a willing purchaser; and that the purchaser is a person of reasonable prudence, who has informed himself with regard to all the relevant facts such as the history of the business, its present position, its future prospects and the general conditions of the industry; and also that he has access to the accounts of the business for a number of years."

Once again the Judge assumes that all relevant facts are disclosed; but there was no argument on the subject of how or from whom the purchaser must be taken to have obtained them.

The third case is that already mentioned, In re *Holt*[1]. There the information in the hands of the directors was of a depreciatory character, and evidence was given by one of them of the adverse factors. He said that he would if enquiry had been made have disclosed all these facts to the prospective purchaser: see [1953] 1 W.L.R. at page 1495:

" One question of some importance dealt with by Mr. Holt was how far a prospective purchaser would have been able to obtain information as to the company's position and prospects by inquiry from the directors. Mr. Holt said that all the information which he had given in evidence would not have been given directly to a buyer of a small quantity of shares, but that it would have been made available, in confidence, to a reputable firm of accountants, acting on behalf of a buyer

(1) [1953] 1 W.L.R. 1488.

A and approved by the board of directors, with the result, as I understood the position, that the information so revealed would not be passed on to the buyer, but his accountant would be in a position to advise him as to the prudence of the purchase and the price which could reasonably be offered for the shares."

The Judge in the end based his valuation on the facts so disclosed. This B appears from page 1501.

> "It is plain", he says, "that the shares do not give a purchaser the opportunity to control the company, or to influence the policy of the directors to any great extent, as the shares available only represent 43,698 shares out of 697,680 ordinary shares which had been issued. Any purchaser would, therefore, be dependent on the policy of the C directors, so long as they should have the support of the general body of the shareholders. I think that the kind of investor who would purchase shares in a private company of this kind, in circumstances which must preclude him from disposing of his shares freely whenever he should wish (because he will, when registered as a shareholder, be subject to the provisions of the articles restricting transfer) would be different from D any common kind of purchaser of shares on the Stock Exchange, and would be rather the exceptional kind of investor who had some special reason for putting his money into shares of this kind. He would, in my view, be the kind of investor who would not rush hurriedly into the transaction, but would consider carefully the prudence of the course, and would seek to get the fullest possible information about the past history of the E company, the particular trade in which it was engaged, and the future prospects of the company."

None of these cases, as it seems to me, decides the point here at issue. They all, I think, assume full knowledge of all relevant facts by the purchaser, including facts not published to the shareholders before the date of death.

Neither side was enamoured of the basis on which Danckwerts J. decided, F although the taxpayer preferred it to the Crown's view. In my judgment, it is not a satisfactory basis, for it seems to depend on the whim of the board of directors in question and is uncertain and depends on whether the directors were favourably disposed to the seller or no. I think this view must be rejected. As I have said, Plowman J. felt bound to follow the *Holt* (1) decision, but stated that if free to express his own view he would decide in favour of the taxpayer's G submission that published information alone ought to be taken into account and that in particular the "B" documents were inadmissible. As to the second view, which is the taxpayer's view, it seems to me that in the end the taxpayer found he could not maintain it in its logical form, for he was constrained to admit that it was legitimate to take into account the financial results of the company for the nine months after the last published balance sheet. The H reason given was that this information would eventually come into the hands of shareholders; but that cannot be made to accord with the principle that the knowledge of the shareholders at the date of death is the only relevant consideration. It seems to me, therefore, that the taxpayer's contention breaks down at this point and it is legitimate that the hypothetical purchaser should know matters which at the date of death were only known to the board. I The more important information is, of course, facts which tend to show the likelihood of a public issue. Now the "B" documents show that this had been

(1) [1953] W.L.R. 1488.

(Harman L.J.)

in fact under consideration by the board since 1959, and that Messrs. Thomson McLintock & Co. had been called in to report and advise on this very subject and had advised an immediate issue to the public. They show, moreover, that the board had sanctioned the taking of advice from Messrs. Cazenove & Co., well-known stockbrokers, who had at the beginning of 1962 reported in favour of a public issue and discussed ways and means.

This leaves the Crown's contention. Very strong evidence was produced from two leading experts that, where substantial blocks of shares in private companies are in the market, as from time to time they are, it is the invariable practice among boards of directors to answer reasonable questions in confidence to the advisers of the purchaser. In fact, it was said that if such questions are not answered no sale would ever go through, because a purchaser would fight shy if he felt he were being left in ignorance of material facts. This, then, would not produce the willing purchaser which the formula postulates. It was said, further, that where a substantial shareholder was minded to dispose of his shares in such a company the directors would feel a moral duty to assist him by answering reasonable questions. It was argued by the taxpayer that this solution was impracticable because it would depend on the availability of members of the board who could in the last resort, if unwilling to make a proper disclosure, be called into the witness box on *subpoena duces tecum* to produce some reasonable information. I suppose such circumstances might conceivably arise, but I am content to leave the matter where it is, relying on the almost unchallenged evidence that boards of directors do not behave in that way and that reasonable answers would be forthcoming.

No such difficulty of course arises here, for the vendors were in fact directors in possession of the information in question and the only question is whether in a normal case they would have obtained their father's leave to disclose it. Now if in fact it were necessary for the vendors to sell some of the shares in order to pay their mother's debts—as is most likely—it is clear that the father would have been only too ready to permit disclosure of facts which would enhance the purchase price. It was the taxpayer's argument that directors must be excluded from amongst possible purchasers because they would be " special " purchasers. I do not accept this, and am of opinion that this is not an ingredient in the *Crossman* decision(1). In *Crossman's* case it was decided that the fact that a " special " purchaser, namely a trust company, would have offered a special price must be ignored, but this was because that particular purchaser had a reason special to him for so doing. So, here, a director who would give an enhanced price because he would thus obtain control of the company would be left out of account. But that is not to say that directors as such are to be ignored. *All* likely purchasers are deemed to be in the market. What the Act says is that the sale is to be treated as an open market sale, that is to say, the restrictions on transfer are to be ignored for the purpose of the hypothetical sale which is to fix the price, but I cannot see why the hypothetical sellers are not to be treated as being what they are, namely, directors in possession of the information which a purchaser would reasonably require and which on the evidence he would have obtained if he were to be a willing purchaser.

It is agreed here, as I have said, that if information such as is contained in the " B " documents were available to the hypothetical purchaser a pound must be added to the value of the shares, and I am accordingly of opinion that the

(1) [1937] A.C. 26.

A Crown's appeal succeeds and that the proper price for these shares for the purpose of estate duty ought to be set at £4 10*s*.

I would allow the appeal accordingly.

Widgery L.J.—The facts of this case are fully set out in the judgment in the Court below and I find it unnecessary to repeat them in full.

When Mrs. Lynall died on 21st May 1962 she was the registered holder of
B 67,980 ordinary shares in Linread Ltd. This holding represented approximately 28 per cent. of the issued share capital, the other substantial shareholders being her husband (32 per cent.) and her two sons (each 20 per cent.). Mrs. Lynall's shareholding passed on her death for the purposes of the Finance Act 1894, and must be valued for the purposes of estate duty under s. 7(5), which my Lord has read and I will not repeat.

C The business of the company was a family business which had started from small beginnings and had prospered. The accounts of the company for the years preceding 1962 showed a steady and rapid increase in both turnover and profits, much of the latter being retained in the business and not distributed as dividends. Both the deceased and her husband were elderly, and the possibility that the company might be minded to make a public issue of shares would have
D occurred to anyone who had made a careful study of the accounts and the structure of the company in 1962. It is common ground that the effect of a successful public issue would have been to enhance the price of the shares, and that as the prospect of such an issue increased the market price would increase also. The directors had in fact been giving serious thought to the possibility of a public issue since 1959, but this was known only to the members of the board.
E Messrs. Thomson McLintock were commissioned by the board to carry out a survey of the company's undertaking with a view to a public issue, and made their first report in July 1960. In February 1962 McLintocks were advising that the board should consider a flotation at the earliest possible moment, and in March 1962 the board received a report from stockbrokers (Messrs. Cazenoves) suggesting the method by which this might be carried out. A public issue was
F in fact made in 1963. It is further common ground that the price which would have been paid for these shares in the open market on the date of the death of the deceased would have been markedly affected by the extent to which the buyer was aware of these developments and of the imminence of a public issue which they indicated. This appeal is concerned only with the extent of the knowledge which is to be attributed to such a purchaser, the Judge having made
G alternative valuations on two hypotheses and there being no appeal in regard to his figures.

Three alternatives have been put forward. First, that the vendor and purchaser concerned in the hypothetical sale should be deemed to be in possession of no information as to the financial position and prospects of the company beyond that contained in the company's accounts prepared prior to
H the relevant date, and any other information which had then been made available to the shareholders or was available to the public at large. The Judge referred to this by the convenient label of " the published information ". Mr. Bagnall contended that the published information should also include that to be derived from the company's accounts for the financial year in which the death occurred even though these were not available until a later date. The
I second alternative contended for was that in addition to the published information the vendor and purchaser should be deemed to have any information

(Widgery L.J.)

which the board of directors of this company would in fact have provided to a prospective purchaser on enquiry made on the relevant date. This has been referred to as the " subjective test ", since it involves an investigation of the state of mind of the board and of its probable response to such an enquiry. Thirdly, that in addition to the published information the vendor and purchaser should be deemed to have all information which would normally be made available to a genuine intending purchaser of property of the kind in question, this being information which a purchaser would expect to have and without which he would be unwilling to buy. Sir Milner Holland, who argues for this third alternative, put his proposition in a number of different ways, and the words I have used are my own paraphrase of his submission.

The learned Judge rejected Sir Milner's submission, and indicated a preference for the " published information " test. He was constrained, however, to follow the decision of Danckwerts J. in In re *Holt* [1953] 1 W.L.R. 1488, and accordingly adopted the second alternative as the principle to be applied in this case. Having heard evidence from a director of the company as to the information which would have been made available to a prospective purchaser on 21st May 1962, he concluded that the confidential reports from Messrs. McLintock and Messrs. Cazenoves would not have been disclosed and fixed £3 10*s*. as the value of each share. He further held that if the purchaser was to be deemed to have seen this confidential information the price would have been £4 10*s*. per share. Neither party in this Court has shown any enthusiasm for the subjective test, though Mr. Bagnall supports it as an alternative to the published information test if the latter is not acceptable. In either event he is content with the Judge's valuation of £3 10*s*. Sir Milner, for the Crown, contends for the third alternative and a valuation of £4 10*s*.

Section 7(5) of the Act of 1894 applies to all forms of property passing on a death. It makes the hypothetical market price the test of value, and prescribes only two of the conditions to which the sale is subject, namely, that it must be a sale in the open market and conducted at the time of the death of the deceased. In so far as other conditions need to be inferred, the Court must supply those which will give effect to the intention of the section. Thus, it is established that the sale is a wholly hypothetical one conducted between hypothetical parties. As Lord Hailsham said in *Commissioners of Inland Revenue* v. *Crossman* [1937] A.C. 26, at page 43: " Lord Plender " (a witness) " ' did not exclude anybody or include anybody in particular; he considered the matter generally '. In my opinion that is the right way to arrive at the value in the open market." It is also clear that quite drastic departures from the so-called reality of the situation must be made when this is necessary to give effect to the intention of the Statute. In the *Crossman* case itself a majority of the House of Lords held that, when shares in a private company are to be valued, it must be assumed that the hypothetical purchaser will have a right to be entered on the share register notwithstanding restrictions on transfer or rights of pre-emption contained in the articles, which would have precluded an open market sale in practice. A further example of such departure from reality is to be seen in *Duke of Buccleuch* v. *Commissioners of Inland Revenue* [1967] 1 A.C. 506, where Lord Reid, at page 525, said:

> " But here what must be envisaged is a sale in the open market on a particular day. So there is no room for supposing that the owner would do as many prudent owners do—withdraw the property if he does not get a sufficient offer and wait until a time when he can get a better offer."

A It is desirable, in my opinion, that when the Court is constructing the conditions under which the hypothetical sale is deemed to take place it should build upon a foundation of reality, so far as this is possible, but it is even more important that it should not defeat the intention of the section by an undue concern for reality in what is essentially a hypothetical situation.

The intention underlying s. 7(5) is to produce a fair basis of valuation B between the Crown and the subject. The same principles must govern its application whatever the nature of the property concerned, and the resultant value should not depend on the whim of any individual. A sale between a vendor and a purchaser who are fully informed on all relevant matters affecting the value of the property is a more accurate guide to value than is a sale between parties who are denied such information. As a matter of first impression these C considerations lead me to support the third alternative, which is the one for which Sir Milner contends and which is also consistent with the view adopted by Lord Fleming in *Salvesen's Trustees* v. *Commissioners of Inland Revenue* (1930) 9 A.T.C. 43, at pages 46 and 50.

What are the arguments to the contrary? So far as the subjective test is concerned, I can see none. Once it is accepted that the directors are to be D deprived of their rights of pre-emption under the articles, and are bound to register the purchaser whether they like it or not, the transaction is so far removed from reality that they cannot usefully be asked to say how they would have responded to a request for information. In any event, I do not think that the valuation should depend upon the attitude of members of the particular board. The real contest, in my opinion, therefore, is between the first and the E third alternatives. Mr. Bagnall supports the published information test as one which is consistent with the Act, simple and certain in operation, and productive of consistent results in all cases. He cites the analogy of quoted shares in a public company, and says that the quoted price (which is accepted for the purposes of s. 7(5)) is derived from the effect of published information upon the market; but in my judgment this is not so. The validity of the quoted price F derives from the fact that when other identical shares are available at that price no vendor of the shares in question will accept less, and no purchaser need pay more, whatever the state of his individual knowledge. Mr. Bagnall's main argument is concerned with the practical difficulties which he says will arise if the hypothetical purchaser is assumed to have confidential information in the possession of the directors. He says (and with the support of the Judge below) G that this would involve protracted enquiries which would make the Commissioners' task impossible, but the Commissioners do not take this view. He asks, rhetorically, what is to happen if the directors decline to provide the information to the Commissioners, and concludes that the result would be to force the parties to litigate, so that the information could be obtained on subpoena, and points out that even then the result would depend on whether the person in possession H of " the information " was amenable to the jurisdiction of the Court. I think that these difficulties are exaggerated. If, as a result of our decision, it is accepted that evidence is admissible of facts in the directors' knowledge which a prudent purchaser would wish to discover, the likely consequence is that such information will be made available. I would not expect a marked increase in litigation. Nor am I unduly disturbed by the fact that in a minority of cases I the parties may be unable to discover confidential information which was in the directors' possession, because in these cases the assessment will be made on the basis of " published information ", which is precisely what Mr. Bagnall contends for. The fact that in these cases the assessment falls to be made on what I would regard as inadequate information does not mean that a similar error must be

(Widgery L.J.)

built into all other cases merely for conformity. In this connection it is useful to remember that, although the " published information " test is favourable to the subject in the present case, it could easily favour the Crown in another. In the course of argument some concern was expressed for the small shareholder whose executors might have difficulty in persuading the directors to make the effort to supply information necessary for an assessment under s. 7(5). Such a case, if it arises at all, is merely another example of the class to which I have just referred. If the directors are uncooperative but there is no real reason to suppose that they have anything vital to disclose, and the amount at stake does not justify litigation, the parties will no doubt reach agreement on the basis that the published information is comprehensive.

Being unable to accept either of the first two alternatives, I return to the third. The Crown have led expert evidence below to the effect that a purchaser of such a substantial block of shares would require to know the state of the company's trading since the last published accounts, and what progress had been made towards a public issue, and would not conclude a deal without such information. The Judge expressed no view upon this evidence, and Mr. Bagnall submits, with force, that it is of no value because the transactions envisaged by the witnesses were transactions designed to assist the company, in which the directors would be cooperative, and were not transactions in which the seller might be a private shareholder at odds with the directors. This evidence satisfies me that a prudent purchaser of shares in this company would wish to have this information whether he was buying a large block of shares or a small one, but I need not decide whether he would refuse to deal if the information were not forthcoming. I would prefer to state Sir Milner's proposition somewhat differently and say that, whatever the nature of the property in question, it must be assumed that the purchaser would make all reasonable enquiries, from all available sources, which a prudent purchaser of that property would wish to make, and it must further be assumed that he would receive true and factual answers to all such enquiries.

In the present case a prudent purchaser would have made enquiries of the directors which, if truthfully answered, would have disclosed the confidential reports of McLintocks and Cazenoves. Accordingly I would allow this appeal and declare that the value of the shares is £4 10*s*. each.

Cross L.J.—The question at issue in this appeal is, What degree of knowledge of matters affecting the value of the shares is to be imputed to the parties to the hypothetical sale postulated by s. 7(5) of the Finance Act 1894?

Three different possibilities were suggested in argument both in the Court below and before us, which I will call, for short, the " published information standard ", the " Holt standard " and the " Crown's standard ". 1. The " published information standard " imputes to the parties to the hypothetical sale knowledge of what is shown in the company's accounts and of any other information which has in fact been made available to the shareholders or was available to the public at large. 2. The " Holt standard " imputes to them, in addition to what they are taken to know by the published information standard, knowledge of any information which the directors of the particular company would have given in answer to any reasonable question likely to be asked by the vendor shareholder or the intending purchaser at the date of the sale. 3. The " Crown's standard ", as put in argument to, or at all events as understood by, the Judge below, was that the Court in valuing the shares should have regard to all relevant facts which were proved to have been facts at the date of the death. But in this Court counsel for the Crown submitted that the knowledge

A to be imputed to the parties to the hypothetical sale was merely possession of the information which a willing vendor would normally require before he was prepared to sell and a willing purchaser would normally require before he was willing to purchase.

Plowman J. considered—I think rightly—that the Holt standard had been adopted by Danckwerts J. in In re *Holt* [1953] 1 W.L.R. 1488 and that B he ought to follow that decision. If he had felt himself free to do so he would have opted for the published information standard, which would in fact have yielded the same result, since Mr. Lynall said that he would not have disclosed the information contained in the category B documents. In my judgment, however, the procedure adopted by Danckwerts J. of enquiring what information the particular board would have disclosed was not supported by any earlier C case and was wrong—though, as Mr. Holt said that he would in fact have disclosed the information in question, and the Judge consequently took it into account, the result arrived at may well have been right. To my mind there are at least three objections to the Court enquiring what information the board in question would in fact have disclosed. In the first place, a director of a private company cannot sensibly be asked what his reactions would have been to D questions put to him by a prospective vendor or purchaser of shares in his company unless he is told who the vendor was and—even more important—who the purchaser was. But as the sale is purely hypothetical he cannot be told that. Secondly, the time at which the Court is called upon to ascertain what the attitude of the board towards disclosure would have been may be many years after the death when the composition of the board may have E changed. In this connection it is not irrelevant to observe that the criterion of value prescribed for estate duty purposes by s. 7(5) of the Finance Act 1894 has been adopted by the Finance Act 1965, s. 44(1), for the purpose of capital gains tax, where the chargeable disposition may be made many years after the basic date in April 1965. Thirdly, it would be very unsatisfactory if the amount of estate duty payable in cases such as this were to depend on evidence, which F in the nature of the case cannot easily be challenged, given by persons who may be personally interested in the result. I do not suggest for a moment that the directors in question would give evidence which they knew to be false, but in this sort of situation the wish may easily be father to the thought, and one cannot help observing that in the *Holt* case the information which Mr. Holt said that he would have disclosed was depreciatory of the value of the shares, G whereas the information which Mr. Lynall said that he would not have disclosed tended to enhance the value.

If one rejects the Holt test, one is left to choose between the published nformation test and the Crown's test. As the Judge pointed out, the Crown's test as presented to him can hardly be right, since there may be all sorts of facts affecting the value of the shares which are known to some people at the H relevant date but which are unknown to the board and knowledge of which cannot reasonably be imputed to the hypothetical vendor and purchaser. For example, an important customer of the company might have decided the day before the death not to renew some contract on which the company's prosperity largely depended, but might not have communicated the sad news to the company until the day after the death. As he understood them, therefore, the Judge I can hardly be blamed for rejecting the Crown's contentions and saying that had he felt free to do so he would have adopted the " published information " test. We, however, have to choose between the published information test and the Crown's test as submitted to us, and I have no doubt that the latter is to be preferred to the former. The case in favour of the published information test,

(Cross L.J.)

which was cogently argued by Mr. Bagnall, started from the premise—which I think is correct—that one must not envisage a vendor who is a director as well as a shareholder. Of course, the hypothetical vendor may be a director, but he equally well may not be a director. One must, therefore, only endow him with the characteristic which must necessarily belong to all hypothetical vendors, namely, that of owning the block of shares in question. From this Mr. Bagnall went on to submit that the published information test had the great merit of securing that the hypothetical vendor and purchaser should have and have only the information to which the vendor was entitled as a shareholder or which they could obtain as members of the public. But to my mind this second step in the argument was unwarranted. It is true, of course, that the accounts of the company when they have been audited and approved by the board are presented to the shareholders. Further, under s. 158(2) of the Companies Act 1948, any shareholder is entitled to be supplied with a copy of the last accounts. But it does not follow from this that the hypothetical vendor would have as of right at the time of the assumed sale all the information which the published information test assumes that he will have. In the first place, as one does not know when the vendor became a shareholder, one cannot predicate of him that he will be in possession of the company's accounts over a reasonable number of years before the sale. In this case the witnesses who gave evidence had before them the accounts back to 1951–52. Secondly, although the accounts for the year July 1960 to July 1961 had been audited and approved by the directors before Mrs. Lynall died on 21st May 1962, they had not yet been sent to her. These two points may of course be said—and fairly said—to be comparatively trivial, for it would be a very unreasonable board of directors which refused to supply a shareholder with copies of the accounts for a few years back or with information as to the contents of accounts a copy of which was due to be sent to him. But the third difficulty in Mr. Bagnall's way—namely, the fact that the accounts for the year 1961–62 (ten months of which had expired at the date of Mrs. Lynall's death) were not available for the shareholders until long after death—is far more formidable. Obviously no one would give a proper price, or anything like a proper price, for the shares if he was refused all information as to the company's fortunes between the date to which the last published accounts were made up and the date of his purchase, and in fact the witnesses who gave evidence and the Judge himself all assumed that the parties to the sale had some information about the ten months in question which they could only have obtained from the directors. But the assumption that the parties to the sale will have information as to the trading results for this broken period which the vendor has no right as a shareholder to require the directors to give him is inconsistent with Mr. Bagnall's argument, and prompts one to ask whether there is any difference in principle between the board supplying a shareholder with information as to the current trading results and supplying him with information bearing on the likelihood of the company " going public ". Mr. Bagnall submitted that it made all the difference that the current trading results were raw material for the preparation of the company's accounts for the year which would eventually come into the hands of the shareholders, whereas the steps which the directors were taking in the direction of " going public " might never contribute anything to any material which was published to the shareholders. This does not, however, appear to me to be a very substantial difference.

Another point which was urged in favour of the published information test was that the price of shares quoted on the Stock Exchange depends on the market's assessment of published as opposed to confidential information, and that it was desirable that the same standard should be applied to the valuation

of every sort of share. I cannot follow this argument at all, for the market for the sale of quoted shares is completely different from the market for the sale of holdings in private companies. No one will be a " willing " purchaser of shares quoted on the Stock Exchange at a price higher than the quoted price, and if he happens to have confidential information showing that the shares are worth less than the quoted price he will not be willing to buy at all.

On the other hand, the uncontradicted evidence of the experts called by the Crown, Sir Henry Benson and Mr. Andrews, shows that substantial minority holdings of shares in private companies are often bought and sold, and that before a price is agreed the purchaser invariably asks the vendor or the board to supply him, or alternatively to supply his advisers, in confidence with information possibly affecting the value of the shares which is not to be found in the accounts—as, for example, the trading results from the date to which the last accounts were made up and information, such as is contained in the category B documents in this case, bearing on the likelihood of a capital appreciation and the time at which one might hope to realise it. Further, the evidence showed that such information is in practice always given to enable the sale to go through. It is, of course, true—as Mr. Bagnall pointed out—that the sales of which Sir Henry Benson and Mr. Andrews were speaking were sales sponsored, or at least approved, by the board of the company in question. This is necessarily so, for if the board did not wish the shareholder in question to dispose of his holding they would make it clear that they would refuse to register the purchaser. It is in fact a condition of the market for the sale of minority holdings in private companies that the directors co-operate with the vendor. But that is the very condition which the *Crossman* decision[1] obliges one to impose on the hypothetical sale envisaged by s. 7(5) of the Finance Act 1894, for the restrictions on transfer can only be got out of the way if the board will waive them. One can see that in certain cases the *Crossman* decision may work hardly, since it may oblige the estate of a deceased shareholder to pay estate duty on an assumed price which the shareholder could not in fact have obtained. But accepting, as we must, the principle of the *Crossman* case, the Crown's test as to the knowledge to be imputed to the parties to the sale appears to me to follow logically and not itself to involve any hardship, since the confidential information in the possession of the board is just as likely to depreciate as to enhance the value of the shares. Moreover, in a case such as this, where the executors are themselves directors, an acceptance of the published information test would involve the very odd result that if the executors, acting with the approval of their father, had sold Mrs. Lynall's shares to raise money to pay duty and had disclosed the category B documents to the purchaser in order to obtain a higher price, they would, nevertheless, pay estate duty on the footing that on the hypothetical sale envisaged by s. 7(5) the category B documents would not have been disclosed to the purchaser.

The published information test has indeed the practical advantage that it would make the Commissioners' task easier than would the test for which they contend. Although the company's accounts for the year in which the death occurred might not be available for some time—possibly as much as a year or 18 months—after the death, the executors would eventually be able to make them available to the Commissioners, who could then, if the published information test be correct, determine the value of the shares without having to ask the executors to obtain information from the board which the board might refuse to give. But in those cases—and they would probably be the

(1) [1937] A.C. 26.

(Cross L.J.)

majority—in which the executors were either directors themselves or closely connected with the board, they would be able to obtain the information if they wished. Therefore the Commissioners, if it was not forthcoming, might fairly draw the inference that there were facts unknown to them which made the shares worth more than the accounts alone would suggest, and to determine the value accordingly. On any appeal by the executors the Commissioners could of course obtain the evidence by discovery or subpoena. There may, of course, be exceptional cases in which the executors could not obtain the information, however hard they tried to do so. To take an example pressed on us by Mr. Bagnall, the deceased holder of a substantial number of shares might have been a member of the family who had quarrelled with the others and had been expelled from the board. Again, one might have the case of a small holding—such as the 200 shares held by Mr. Ellis in this case—which had passed into the hands of someone who was completely out of touch with the board. But I think that in such cases the Commissioners can be trusted to act reasonably and not to draw unfavourable inferences from a failure of the executors to produce information which they are not in a position to produce. At all events, the disadvantages—such as they are—of the Crown's test as compared with the published information test appear to me to weigh very lightly in the balance against the considerations telling in favour of the Crown's test which I have tried to set out.

In the event, therefore, I agree with my Lords that this appeal should be allowed and the figure of £4 10*s*. be substituted for £3 10*s*. as the value of each share in the company held by Mrs. Lynall.

Appeal allowed with costs; no order for costs below; certificate for three counsel refused; leave to appeal to House of Lords.

The Executors having appealed against the above decision, the case came before the House of Lords (Lords Reid and Morris of Borth-y-Gest, Viscount Dilhorne and Lords Donovan and Pearson) on 5th, 6th, 7th, 8th, 12th and 13th July 1971, when judgment was reserved. On 27th October 1971 judgment was given unanimously against the Crown, with costs.

Raymond Walton Q.C. and *Peter Gibson* for the Executors.

Jeremiah Harman Q.C. and *L. H. Hoffman* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Borland's Trustee* v. *Steel Bros. & Co. Ltd.* [1901] 1 Ch. 279; *Priestman Collieries Ltd.* v. *Northern District Valuation Board* [1950] 2 K.B. 398; *Duke of Buccleuch* v. *Commissioners of Inland Revenue* [1967] 1 A.C. 506; In re *Aschrott* [1927] 1 Ch. 313; In re *Cassel* [1927] 2 Ch. 275; *Smyth* v. *Revenue Commissioners* [1931] I.R. 643.

Lord Reid—My Lords, Mrs. Lynall died on 21st May 1962. At her death she owned 67,886 shares in Linread Ltd., a private company whose articles contained restrictions on the right of shareholders to sell their shares. The question at issue in this case is the proper value of these shares for estate duty purposes. At first the executors suggested £2 per share. The Revenue claimed on the basis of a value of £4 per share, which figure on obtaining further information they increased to £5 10*s*. Plowman J. fixed a value of £3 10*s*. On appeal the Court of Appeal increased this to £4 10*s*. Now the Appellants claim that the value should be fixed at £1 or alternatively £3 10*s*. per share.

A Linread began on a very modest scale in 1925. It prospered greatly but remained a family concern. At Mrs. Lynall's death there were only five shareholders. She held 28 per cent. of the share capital: her husband held 32 per cent.: each of their two sons held 20 per cent.: and the manager only held 200 shares. All five were directors. Both she and her husband were elderly, and it had been realised that there would be financial difficulties B if they died without steps being taken to avoid that. So in 1959 Messrs. Thomson McLintock were asked to carry out a survey with a view to a public issue. They recommended that course, and in March 1962 a report was obtained from Messrs. Cazenoves as to the best method of flotation. No decision about this had been taken by Linread before Mrs. Lynall's death, but the company was then ripe for " going public ".

C The shares must be valued as provided by s. 7(5) of the Finance Act 1894:

> " (5) The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

But neither Mrs. Lynall nor her executors were entitled to sell these shares in the open market. Linread's articles of association provided:

> D " 8. The Directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares and Regulation 24 of Part I of Table ' A ' shall be modified accordingly and no Preference or Ordinary Share in the Company shall be transferable until it shall (by letter addressed and delivered to the secretary of the Company) have been first offered to Ezra Herbert Lynall so long as he shall remain a Director of the Company and after he shall have ceased to be a Director E of the Company to the Members of the Company at its fair value. The fair value of such share shall be fixed by the Company in General Meeting from time to time and where not so fixed shall be deemed to be the par value. The Directors may from time to time direct in what manner any such option to purchase shares shall be dealt with by the Secretary when communicated to him." F

No fair value had been fixed by the Company. So the position at Mrs. Lynall's death was that the shares were not transferable until they had been first offered to her husband at £1 per share, and even if he did not want them they were only transferable to a purchaser accepted by the directors.

A similar situation occurred in *Commissioners of Inland Revenue* v. *Crossman* [1937] A.C. 26. The Appellants asked us to reconsider that decision. G I have done so, and I agree with the decision of the majority in this House. They followed the Irish case of *Attorney-General* v. *Jameson* [1905] 2 I.R. 218. The most succinct statement of the ground of decision is that of Holmes L. J., at page 239:

> " Turning to the 7th section of the Act, I find therein the very test of value which I should have applied in its absence. ' The principal value H shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased '. The Attorney-General and the defendants agree in saying that in this case there cannot be an actual sale in open market. Therefore, argues the former, we must assume that there is no restriction of any kind on the disposition of the shares and estimate I that would be given therefor by a purchaser, who upon registration would have complete control over them. My objection to this mode of

(Lord Reid)

ascertaining the value is that the property bought in the imaginary sale would be a different property from that which Henry Jameson held at the time of his death. The defendants, on the other hand, contend that the only sale possible is a sale at which the highest price would be £100 per share, and that this ought to be the estimated value. My objection is that this estimate is not based on a sale in open market as required by the Act. Being unable to accept either solution, I go back to my own, which is in strict accordance with the language of the section. I assume that there is such a sale of the shares as is contemplated by article 11, the effect of which would be to place the purchaser in the same position as that occupied by Henry Jameson. An expert would have no difficulty in estimating their value on this basis. It would be less than the Crown claims, and more than the defendants offer; but I believe that it would be arrived at in accordance not only with the language of the Act, but with the methods usually employed in valuing property."

The Appellants urged your Lordships to accept the view of the minority in *Crossman's* case(1). They appear to assume that there could be a sale by a shareholder of shares subject to a right of pre-emption. In my view it is legally impossible for the shareholder to sell such shares in the open market or otherwise without first obtaining from the holder of the right of pre-emption an agreement not to exercise that right. I agree with Lord Roche that sale means a transaction which passes the property in the thing sold. All that the shareholder could offer would be an undertaking that if the right of pre-emption was exercised he would assign to the " purchaser " his right to receive the pre-emption price, and that if the right of pre-emption was not exercised he would transfer the shares to the purchaser, so that if the directors registered the transfer the property in the shares would pass but if they did not he would hold the shares in trust for the purchaser. In my view that would not be a sale. I support the view of the majority on the ground that s. 7(5) is merely machinery for estimating value, that it will not work if s. 7(5) is read literally, that it must be made to work, and that the only way of doing that is the way adopted in *Crossman's* case. If *Crossman's* case stands then the first submission of the Appellants fails. The parties admit that then the choice is between the valuation of £3 10*s*. and £4 10*s*. per share.

We must decide what the highest bidder would have offered in the hypothetical sale in the open market, which the Act requires us to imagine took place at the time of Mrs. Lynall's death. The sum which any bidder will offer must depend on what he knows (or thinks he knows) about the property for which he bids. The decision of this case turns on the question what knowledge the hypothetical bidders must be supposed to have had about the affairs of Linread. One solution would be that they must be supposed to have been omniscient. But we have to consider what would in fact have happened if this imaginary sale had taken place, or at least—if we are looking for a general rule—what would happen in the event of a sale of this kind taking place. One thing which would not happen would be that the bidders would be omniscient. They would derive their knowledge from facts made available to them by the shareholder exposing the shares for sale. We must suppose that, being a willing seller and an honest man, he would give as much information as he was entitled to give. If he was not a director he would give the information which he could get as a shareholder. If he was a director and had confidential information, he could not disclose that information without the consent of the board of directors.

(1) [1937] A.C. 26.

A In the present case, if we are to suppose that the bidder only had information which he could obtain himself or which could be given without the consent of the board, then admittedly £3 10*s.* is the correct estimate of what the highest bid would have been. But the Crown maintains, and the Court of Appeal would seem to have held, that it must be supposed that the board would have authorised the hypothetical seller to communicate highly confidential information to all B who might come forward as bidders. Bidders would know that both Mrs. Lynall and her husband were elderly and that they held most of the shares. Their general experience would tell them that in such circumstances it is common for a private company to make a public issue and remove restrictions on the transfer of its shares. The successful bidder would have to lock up a sum of £200,000 or more until there was a free market in the shares. If there was a prospect of an C early public issue he would be prepared to pay considerably more than if it were uncertain whether or when the company would " go public ". I have said that the board had reports which made it very probable that a public issue would be made in the near future. If bidders must be supposed to have known about these reports then it is agreed that there would have been a bid of £4 10*s.* per share.

D The case for the Crown is based on evidence as to how large blocks of shares in private companies are in fact sold. There is no announcement that the shares are for sale and no invitation for competitive bids. The seller engages an expert who selects the person or group whom he thinks most likely to be prepared to pay a good price and to be acceptable to the directors. If that prospective purchaser is interested he engages accountants of high E repute, and the directors agree to co-operate by making available to the accountants on a basis of strict confidentiality all relevant information about the company's affairs. Then the accountants acting in an arbitral capacity fix what they think is a fair price. Then the sale is made at that price. Obviously the working of this scheme depends on all concerned having complete confidence in each other, and I do not doubt that in this way the seller gets a better price F than he could otherwise obtain. In my view this evidence is irrelevant because this kind of sale is not a sale in the open market. It is a sale by private treaty made without competition to a selected purchaser at a price fixed by an expert valuer. The 1894 Act could have provided—but it did not—that the value should be the highest price that could reasonably have been expected to be realised on a sale of the property at the time of the death. If that had been the G test then the Crown would succeed, subject to one matter which I need not stop to consider. But the framers of the Act limited the enquiry to one type of sale—sale in the open market—and we are not entitled to rewrite the Act. It is quite easily workable as it stands.

No doubt sale in the open market may take many forms. But it appears to me that the idea behind this provision is the classical theory that the best H way to determine the value in exchange of any property is to let the price be determined by economic forces—by throwing the sale open to competition when the price will be the highest price that anyone offers. That implies that there has been adequate publicity or advertisement before the sale, and the nature of the property must determine what is adequate publicity. Goods may be exposed for sale in a market place or place to which buyers resort. Property I may be put up to auction. Competitive tenders may be invited. On the Stock Exchange a sale to a jobber may seem to be a private sale, but the price has been determined, at least within narrow limits, by the actions of the investing public. In a particular case it may not always be easy to say whether there has been a sale in the open market. But in my judgment the method on which

(Lord Reid)

the Crown rely cannot by any criterion be held to be selling in the open market. If the hypothetical sale on the open market requires us to suppose that competition has been invited, then we would have to suppose that steps had been taken before the sale to enable a variety of persons, institutions or financial groups to consider what offers they would be prepared to make. It would not be a true sale in the open market if the seller were to discriminate between genuine potential buyers and give to some of them information which he withheld from others, because one from whom he withheld information might be the one who, if he had had the information, would have made the highest offer.

The Crown's figure of £4 10*s*. per share can only be justified if it must be supposed that these reports would have been made known to all genuine potential buyers, or at least to accountants nominated by them. That could only have been done with the consent of Linread's board of directors. They were under no legal obligation to make any confidential information available. Circumstances vary so much that I have some difficulty in seeing how we could lay down any general rule that directors must be supposed to have done something which they were not obliged to do. The farthest we could possibly go would be to hold that directors must be deemed to have done what all reasonable directors would do. Then it might be reasonable to say that they would disclose information provided that its disclosure could not possibly prejudice the interests of the company. But that would not be sufficient to enable the Crown to succeed. Not all financiers who might wish to bid in such a sale, and not even all the accountants whom they might nominate, are equally trustworthy. A premature leakage of such information as these reports disclose might be very damaging to the interests of the company, and the evidence in this case shews that in practice great care is taken to see that disclosure is only made to those of the highest repute. I could not hold it right to suppose that all reasonable directors would agree to disclose information such as these reports so widely as would be necessary if it had to be made available to all who must be regarded as genuine potential bidders or to their nominees. So in my opinion the Crown fail to justify their valuation of £4 10*s*. I would therefore allow this appeal.

Lord Morris of Borth-y-Gest—My Lords, the first submission that was made on behalf of the Appellants was one that was not open to them in the Courts below. It was that we should depart from the decision of this House in *Commissioners of Inland Revenue* v. *Crossman* [1937] A.C. 26 by preferring the opinions expressed by the minority in that case to those expressed by the majority. Even if we were persuaded that the minority opinions were to be preferred, the question would arise whether it would be right to depart from the decision. It was given as long ago as March 1936, and it must on numerous occasions have been acted upon. It was in accord with the decision of the Court of Appeal in Ireland in *Attorney-General* v. *Jameson* [1905] 2 I.R. 218 and the reasoning in that case had guided practice in subsequent years: see also *Salvesen's Trustees* v. *Commissioners of Inland Revenue* 1930 S.L.T. 387. It has been open to Parliament at any time since 1936 to amend s. 7(5) of the Finance Act 1894 if it had been considered that that section (as interpreted in this House) ought to be amended or supplanted. But, having considered the arguments attractively presented on behalf of the Appellants, I have not been persuaded that the decision in *Crossman's* case was erroneous. Section 7(5) requires an estimate to be made of the price which the property would fetch " if sold " in the open market. So a sale in the open market must be assumed, and this in some cases will involve an assumption of the satisfaction of such conditions as would have to be satisfied to enable such a sale to take place.

A On the basis of an acceptance of the *Crossman* decision(1) it was for the learned Judge on the appeal from the decision of the Commissioners to decide what price the shares would have fetched if sold in the open market at the time of the death of the deceased. In his careful judgment the learned Judge summarised the evidence which he had heard. It became common ground that the price to be decided upon was that which would have been B paid (*a*) by a hypothetical willing purchaser (*b*) to a hypothetical willing vendor (*c*) in the open market (*d*) on 21st May 1962. The issue which was raised turned largely on the question as to what knowledge and information would be available for and would be at the command of a purchaser. There were certain documents in existence the contents of which would have influenced a purchaser who had access to them. Referred to as " category B C documents ", they included (i) documents having relevance to investigations made by the board into possible ways and means of raising money to pay prospective death duties which would be payable on the death of a shareholder, and showing that the board were actively contemplating a public issue; (ii) a report made in July 1960 by Messrs. Thomson McLintock (who had been asked to carry out a survey of the company's undertakings with a view to a D public issue) and papers recording their views as to a possible flotation; (iii) a report made in March 1962 by Messrs. Cazenove & Co. in regard to the method of flotation, and (iv) various kindred documents and also statements showing month by month the progress made by the company. The learned Judge decided that, as the information contained in these documents was not published information, it would not have been available to a purchaser: he E further decided, in view of the evidence given by a director (Mr. Alan Lynall), that had an enquiry been made of the board by a prospective purchaser the information contained in the documents would not in fact have been made available by the board.

On the evidence which he heard the learned Judge decided that the valuation should be £3 10*s*. He held that if he were wrong in his view that the category F B documents were not admissible he would have fixed the valuation at £4 10*s*. The Court of Appeal concluded, on the basis of certain evidence given at the hearing as to the practice of directors where blocks of shares in private companies are in the market, that a purchaser would have made enquiry of the board which would have resulted in the information contained in the category B documents being made available (even if only in confidence to the G advisers of a purchaser). They held that the valuation figure should be that of £4 10*s*.

Questions also arose in regard to the availability for a prospective purchaser on 21st May 1962 of certain other information. The company's accounts for the year ending 31st July 1961 had before 21st May 1962 been drawn up and audited, but they were not passed until 7th June 1962. By H 21st May 1962 some ten months trading within the year ending 31st July 1962 had taken place. The accounts for that year when drawn up revealed that sales had risen and that profits had increased. In fixing the price which would be paid by a hypothetical purchaser in the open market on 21st May 1962 to what extent should he be regarded as having information as to the current financial position of the company?

I In argument before your Lordships counsel agreed that if the decision in the *Crossman* case stood the figure to be decided upon should be either £3 10*s*. or £4 10*s*., and that it should be the latter figure only on the basis that a

(1) [1937] A.C. 26.

(Lord Morris of Borth-y-Gest)

hypothetical purchaser would be in possession of the information contained in the category B documents as well as of information concerning the current financial position of the company. Argument turned considerably on the question whether a hypothetical purchaser in the open market would have available to him the contents of or the information contained in the category B documents, and in particular the documents in relation to the possibility of the company going public.

Before the learned Judge several possible classifications of the knowledge to be imputed to the hypothetical purchaser and the hypothetical vendor were canvassed. Should it comprise the published information available from published accounts or statements to all who sought it? Should it comprise all the circumstances relevant to value which in fact existed at the relevant time? Should it include such information additional to the published information which would have been supplied by the directors if they had reasonably been asked for information by a shareholder wishing to sell or by a member of the public wishing to buy? Should the test be what a reasonable board of directors would communicate?

At the date of her death (21st May 1962), Mrs. Lynall was the registered holder of 67,886 ordinary shares in the company: her holding was about 28 per cent. of the issued share capital. Accepting the *Crossman* decision(1) the hypothetical purchaser would purchase on the basis that he would become a holder but would be subject to the restrictions on transfer imposed by the articles. If, however, the company became a public company and these restrictions were removed it is clear that the value of the shares would greatly increase. Any information relating to the prospects of the company becoming a public company, and in particular of the timing of such a change, would therefore be calculated to have very considerable effect upon the price of the shares.

The sum required to purchase the shares now in question would be very large. On the learned Judge's valuation of £3 10*s*. a share a sum of nearly £250,000 would be involved. It is obvious that no purchaser would expend so much money unless he had such reasonable information as would give him confidence. He would certainly wish to make all reasonable enquiries. In *Salvesen's Trustees*(2) Lord Fleming pointed out the difficulty of estimating the value of shares in a company whose shares could not be bought and sold in the open market, and with regard to which there had not been any sales on ordinary terms and said(3): " The problem can only be dealt with by considering all the relevant facts so far as known at the date of the testator's death, and by determining what a prudent investor, who knew these facts, might be expected to be willing to pay for the shares ". Lord Fleming proceeded to indicate what in that case were " the relevant facts ". In *Findlay's Trustees* v. *Commissioners of Inland Revenue* (1938) 22 A.T.C. 437 (at page 440) Lord Fleming spoke of the willing purchaser as being " a person of reasonable prudence ", who would inform himself of all relevant facts such as the history of the business being carried on and its present position and future prospects, and who would have access to the accounts of the business for a number of years.

In the present case it is clear that the information contained in what have been called the category B documents would be highly relevant, but the question arises whether that information would be available. In particular, the question arises whether that information would be available not just to

(1) [1937] A.C. 26. (2) 1930 S.L.T. 387. (3) *Ibid.*, at p. 392.

A some possible purchasers and vendors, but whether it would be available to hypothetical purchasers and vendors " in the open market ". This must mean whether it would be openly available to all potential purchasers and vendors in the market or markets in which the relevant purchases and sales take place. There may be different markets or types of markets for differing varieties of property, but in the operation of s. 7(5) of the Finance Act 1894 the market
B which must be contemplated, whatever its form, must be an " open " market in which the property is offered for sale to the world at large so that all potential purchasers have an equal opportunity to make an offer as a result of its being openly known what it is that is being offered for sale. Mere private deals on a confidential basis are not the equivalent of open market transactions.

The somewhat limited issue as between the two figures of £3 10*s.* or
C £4 10*s.* mainly depends upon the question whether knowledge of the category B documents and of the information which they contain would be " open market " knowledge. The conclusion of the learned Judge was that, as such information was not published information, and as (on Mr. Alan Lynall's evidence, which the learned Judge accepted) it would not in fact have been elicited on enquiry, it ought not to enter into the calculation of price and value. The differing view
D of the Court of Appeal was based on the evidence, above referred to, of the practice of boards of directors to answer reasonable questions in confidence to the advisers of an interested potential purchaser. If this is the practice, and even if the sought-for information may be given " in confidence " to an interested potential purchaser himself, I cannot think that this equates with open market conditions. It was said that it should be assumed that a purchaser would make
E reasonable enquiries from all available sources and that it must further be assumed that he would receive true and factual answers. If, however, the category B documents and the information contained in them were confidential to the board, as they were, the information could not be made generally available so that it became open market knowledge. On this somewhat limited issue I therefore prefer the figure of £3 10*s.* and I would restore the decision of the
F learned Judge.

On the wider issues, I doubt whether it is possible to define with precision the extent or the limits of the information on the basis of which a hypothetical purchaser of shares on a sale in the open market might purchase. There may be cases where prudent and careful potential purchasers of a large block of shares will be unwilling to purchase unless they have the inducement of being
G given confidential information which is not generally known. If in practice some large deals take place on the basis that some information is given which must be kept secret, then any such practice is the practice not of an open market but of a special market operating in a special way. I would see great difficulties if the Commissioners or a Court had to assess the extent to which a particular board of directors would or would not have been likely or willing to answer
H some particular enquiries—though there may be some enquiries of which it can with certainty be said that they would readily and properly and openly have been answered. A purchaser in the open market would probably not be content merely with what would be published information in the sense of information which had been in print in some documents sent out by a company to its shareholders. He would form his own idea as to the company's prospects
I having regard to trends and developments which are matters of public knowledge. Furthermore, on known facts in regard to a private company and its directors and its management he would form his own reasonable deductions.

I would allow the appeal.

Viscount Dilhorne—My Lords, two questions have to be decided in this appeal; first, whether the decision of this House in *Commissioners of Inland Revenue* v. *Crossman* [1937] A.C. 26 should be adhered to; and, secondly, whether it is to be assumed that the hypothetical purchaser of shares in Linread Ltd., a private company, would have had knowledge at the time of the hypothetical sale of reports by Messrs. Thomson McLintock and by Messrs. Cazenove & Co. as to the advisability of making a public issue of shares and converting the company into a public company.

Section 7(5) of the Finance Act 1894 is in the following terms:

> " (5) The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

Mrs. Lynall died on 21st May 1962. She then held 67,886 £1 shares in the company, of which the issued share capital was £241,700 divided into 241,700 £1 shares. The price which the shares she held would have fetched if sold in the open market has therefore to be determined.

Article 8 of the company's articles of association contains restrictions on transfers of shares in the company. It gives the directors power in their absolute and unfettered discretion to refuse to register any proposed transfer of shares. That article also provided that no shares in the company should be transferable until they had first been offered to Mr. Lynall, Mrs. Lynall's husband, if he was a director of the company, at their fair value. The article went on to say that the fair value was to be fixed by the company in general meeting from time to time and where not so fixed should be deemed to be the par value. The fair value had not been fixed, and so, if Mrs. Lynall had been in a position to sell her shares on 21st May 1962 and had wished to do so, she would have had to offer them in the first place to her husband at £1 a share; and if he did not want to buy them the directors could by withholding consent to registration of the transfer have prevented a sale to anyone else.

The question of the application of s. 7(5) to shares in a private company has arisen before and given rise to some conflict of judicial authority. The problem was considered in this House in *Commissioners of Inland Revenue* v. *Crossman*, in *Attorney-General* v. *Jameson* [1905] 2 I.R. 218 and in *Salvesen's Trustees* v. *Commissioners of Inland Revenue* 1930 S.L.T. 387. The House was invited to reconsider the majority decision in *Crossman* and to depart from it. In my view the decision in that case was right. Parliament has enacted that the price the shares would fetch if sold in the open market has to be assessed. There could be no sale on the open market on 21st May 1962 unless the directors agreed to the registration of the transfer of the shares and Mr. Lynall refused to purchase the shares at £1 a share. Therefore, for the price the shares would fetch if sold in the open market to be assessed, it must be assumed that the directors had so agreed and Mr. Lynall had refused to buy. As Mr. Harman said in the course of his argument for the Crown, if property is only saleable in the open market in certain circumstances, then when the Act requires the property to be valued at the price which it would fetch if sold in the open market, one must proceed on the basis that those circumstances exist. This does not mean that the shares change their character. The shares bought by the hypothetical purchaser will be subject to the restrictions imposed by article 8.

Turning to the second question, it was said that the normal way in which a block of shares in a private company is sold is for the vendor to find a potential purchaser, and then if the directors approve of him they will authorise their

A accountants to furnish confidential information to an accountant acting for the purchaser who will in the light of his advice make an offer for the shares. On such a sale no doubt all or nearly all the relevant information, whether confidential or otherwise, will be disclosed to the purchaser's accountant, and a higher price will be obtainable than would be the case in the absence of such information. If the shares in Linread were sold in this way, presumably B McLintocks' reports and that of Cazenoves would have been disclosed to the purchaser's accountant. The Crown contend that, as this is the normal way of selling such shares in a private company, it constitutes a sale in the open market. In my opinion it is the antithesis of a sale in the open market. Only a person or persons selected by the vendor will be able to make an offer. It is, I think, an essential feature of a sale in the open market that persons interested should have C an opportunity to purchase, not just those selected by the vendor. This method of selling shares in a private company is not a sale in the open market but one by private treaty.

On a sale in the open market is it to be assumed that possible purchasers would have information as to the contents of the reports of McLintocks and Cazenoves? They were confidential to the directors. All the shareholders in D Linread were directors, but it is not to be assumed that they would disclose confidential information they possessed to the public without the consent of the board; nor is it to be supposed that the board would have given its consent to the disclosure of the contents of those reports. In the light of the evidence given by Mr. Alan Lynall, whose evidence was tendered and accepted as being the evidence of the board, and accepted by Plowman J. (set out on E pages 1068–9 of his judgment in [1968] 3 W.L.R. 1056) it is clear that that would not have been given. It was agreed that, if it were held that it is to be assumed that purchasers would have knowledge of those reports in a sale on the open market, the shares were to be valued at £4 10*s.* a share, but that if no such assumption was to be made, their value was £3 10*s.* a share.

Some discussion took place on whether it was to be assumed that a F purchaser in the open market would only have knowledge of information about the company which had been published, or whether he was to be assumed to have such information as a board of directors would have disclosed if asked for it. It is not necessary to express in this case an opinion on the point as it does not really arise. In support of the contention that he must be assumed to have such information as a board would, if asked, have disclosed In re *Holt* G [1953] 1 W.L.R. 1488 was cited, but this question was never in issue in that case.

For the reasons I have given, in my opinion it must be held that the price a share in the company would have fetched if sold in the open market on 21st May 1962 was £3 10*s.*, and so this appeal should be allowed.

Lord Donovan—My Lords, I would not accede to the request that this House should depart from the decision reached in 1937 in *Commissioners of* H *Inland Revenue* v. *Crossman* [1937] A.C. 26. The effect of that decision was to uphold the view of the Court of Appeal in Ireland in *Attorney-General* v. *Jameson* [1905] 2 I.R. 218, so that for nearly 70 years the valuation of shares subject to a restriction on alienation has been made for estate duty purposes on the basis laid down in the latter case. It would, therefore, need to be clearly demonstrated that that basis was erroneous if it were now to be supplanted. I So far from being shewn to be wrong, I think the two decisions quoted have emerged from the further examination to which they have been subjected with enhanced authority.

(Lord Donovan)

I concur in the view that confidential information ought not to be regarded as available to a hypothetical purchaser under s. 7(5), Finance Act 1894; though I would think it right not to treat as confidential information for this purpose accounts of the company already prepared and awaiting presentation to the shareholders. I have in mind the accounts of the present company for the year to 31st July 1961.

I have been a little perturbed about the procedure adopted in this case, apparently as an innovation, that discovery should be applied for as a means of prising out of the Appellants the secrets of the board room. The corresponding procedure, had not the Appellants been directors of the company as well as executors, would presumably have been the service of a *subpoena duces tecum* upon an officer of the company with the like end in view. I think it would be wrong to try and compel such a witness to disclose, under pain of committal if he refused, information of a confidential character, the publication of which might do the company (which is not even a party to the proceedings) immense harm. The Revenue, following I suppose their own notions of what is permissible and what is not, have hitherto efficiently performed their duties under the Act of 1894 without resort to any such procedure. They are now proved to have been in the right, since the effect of your Lordships' decision is that such confidential information is irrelevant to the determination of the value of shares under s. 7(5); and being irrelevant is, therefore, inadmissible.

I also would allow the appeal.

Lord Pearson—My Lords, the deceased Mrs. Lynall at the time of her death on 21st May 1962 was the owner of 67,886 shares of £1 each in Linread Ltd. (which I shall call " the company "), and these shares passed on her death and have to be valued for the purposes of estate duty. The statutory method of ascertaining the value is laid down by s. 7(5) of the Finance Act 1894, which provides:

> " The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

Plowman J. assessed the principal value at £3 10*s.* (now £3·50) per share, but the Court of Appeal assessed it at £4 10*s.* (now £4·50) per share. The Appellants, however, have put forward to your Lordships a contention, which was not open to them in the Court of first instance or in the Court of Appeal, that *Commissioners of Inland Revenue* v. *Crossman* [1937] A.C. 26 was wrongly decided, and that, by reason of article 8 of the company's articles of association, the deemed price of the shares in the hypothetical sale which has to be assumed under s. 7(5), and therefore the principal value as defined in that section, can only be £1 per share. Article 8 provides:

> " The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares and regulation 24 of Part I of Table ' A ' shall be modified accordingly and no preference or ordinary share in the company shall be transferable until it shall (by letter addressed and delivered to the secretary of the company) have been first offered to Ezra Herbert Lynall so long as he shall remain a director of the company and after he shall have ceased to be a director of the company to the members of the company at its fair value. The fair value of such share shall be fixed by the company in general meeting from time to time and where not so fixed shall be deemed to be the par value. The directors may from time to time direct in what manner any such option to purchase shares shall be dealt with by the secretary when communicated to him."

A The company in general meeting had never fixed the fair value of its shares for the purposes of article 8, and accordingly a shareholder wishing to sell his shares would have been obliged to offer the shares to Ezra Herbert Lynall at the par value of £1 per share.

The question, therefore, arises whether in a case such as this the hypothetical sale in the open market under s. 7(5) is in itself subject to or free from B the restrictions imposed by the articles of association. The question was one of difficulty and gave rise to a conflict of judicial opinions, but, in my view, it has been authoritatively and correctly decided by the majority in this House in *Commissioners of Inland Revenue* v. *Crossman*[1], and though it would now be possible, it would not be right, to depart from that decision. Originally a decision on this question was given by the Irish Court of Appeal in *Attorney-*C *General* v. *Jameson* [1905] 2 I.R. 218, unanimously overruling the majority decision of the Irish Court of King's Bench [1904] 2 I.R. 644. The decision of the Irish Court of Appeal, as stated in the declaration proposed by Holmes L.J., at page 240, was that

> " the principal value of the shares is to be estimated at the price which, in the opinion of the Commissioners, they would fetch if sold in the D open market, on the terms that the purchaser should be entitled to be registered as holder of the shares, and should take and hold them subject to the provisions of the articles of association, including the articles relating to alienation and transfer of the shares of the company."

Then in the Scottish case of *Salvesen's Trustees* v. *Commissioners of Inland Revenue* 1930 S.L.T. 387 Lord Fleming, at page 391, while not bound by the E decision and reasoning of the Irish Court of Appeal, expressed his agreement with them and followed their judgment, but also gave his own reasons. He said:

> " If the articles of association be complied with, a sale in the open market in a reasonable sense seems to be impossible. The petitioners argued that the maximum price the shareholder can obtain for his shares F in the open market is determined by the best price he can obtain in the closed market, viz. £1. But it appears to me that if this argument is well founded, it merely demonstrates that there cannot be a real sale in the open market under the articles. The Act of Parliament requires, however, that the assumed sale, which is to guide the Commissioners in estimating the value, is to take place in the open market. Under these circumstances G I think that there is no escape from the conclusion that any restrictions which prevent the shares being sold in an open market must be disregarded so far as the assumed sale under section 7(5) of the Act of 1894 is concerned. But, on the other hand, the terms of that subsection do not require or authorise the Commissioners to disregard such restrictions in considering the nature and value of the subject which the hypothetical H buyer acquires at the assumed sale. Though he is deemed to buy in an open and unrestricted market, he buys a share which, after it is transferred to him, is subject to all the conditions in the articles of association, including the restrictions on the right of transfer, and this circumstance may affect the price which he would be willing to offer."

To my mind, that is a clear and convincing statement.

I In *Crossman's* case Finlay J. followed the decisions in the *Jameson* case and the *Salvesen* case; then the majority of the Court of Appeal took the other view; and then this House by a majority restored Finlay J.'s order.

---

(1) [1937] A.C. 26.

(Lord Pearson)

I find the reasoning of the majority in this House, especially that of Lord Roche, preferable to that of the minority, and I think their decision should be followed in the present case—not only because it is an authoritative decision which has stood intact and been frequently applied over a substantial period, but also on the merits of the question involved. Accordingly, the Appellants' first contention should be rejected.

The Appellants' alternative contention is that Plowman J.'s assessment of £3 10*s*. per share should be restored, whereas the Crown contend that the Court of Appeal's assessment of £4 10*s*. should be upheld. It is common ground for the purposes of this appeal that, if the suggested assessment of £1 per share in accordance with the Appellants' primary contention is rejected, the choice then lies between £3 10*s*. per share and £4 10*s*. per share, and the choice depends on the extent of the information which must be deemed to have been available to participants in the hypothetical open market.

At the material time the company was highly prosperous, though distributing small dividends. One of the shareholders, Mrs. Lynall, was 76 years of age. Another of them, her husband Ezra Herbert Lynall, was 69 years of age. There was an evident general probability that before very long the company would have to " go public ", i.e., make a public issue of shares and cease to be a private company. If that happened there would be a prospect of larger dividends and of the restrictions on transfer of shares being removed. That general probability for the fairly near future would be known in the hypothetical market, and when taken in conjunction with the prosperity of the company would justify a price of £3 10*s*. per share. But there was in fact more than that general probability. The facts are set out in the judgment of the learned Judge in [1968] 3 W.L.R. 1056, at page 1062(1). It can be said shortly that, while the board maintained throughout a cautious and uncommitted attitude, they had instructed Messrs. Thomson McLintock to carry out a survey of the company's undertaking with a view to a public issue, and had received Messrs. Thomson McLintock's report and subsequent advice that the board should consider a flotation at the earliest possible moment, and had authorised consultation with Messrs. Cazenove & Co. in order to obtain the reaction of the City, and Messrs. Cazenove had suggested a method for the flotation. The importance of this information, if it could be deemed to be available to participants in the hypothetical market, would be that it would substantially advance the time at which a public issue of shares in the company could be expected, and therefore would enhance the price of the shares to an extent agreed to be £1 per share, making a price of £4 10*s*. per share.

The crucial question, therefore, is whether this information should be deemed to be available to participants in the hypothetical market. I should agree with what was said by Lord Fleming in the *Salvesen* case(2) and by Danckwerts J. in In re *Holt* [1953] 1 W.L.R. 1488 to the effect that a purchaser of shares in a private company subject to restrictions on transfer would be diligent in his enquiries. Danckwerts J. said, at page 1501:

> " I think that the kind of investor who would purchase shares in a private company of this kind, in circumstances which must preclude him from disposing of his shares freely whenever he should wish (because he will, when registered as a shareholder, be subject to the provisions of the articles restricting transfer) would be different from any common kind of purchaser of shares on the Stock Exchange, and would be rather the

(1) *See* page 384 *ante*. (2) 1930 S.L.T. 387.

A exceptional kind of investor who had some special reason for putting his money into shares of this kind. He would, in my view, be the kind of investor who would not rush hurriedly into the transaction, but would consider carefully the prudence of the course, and would seek to get the fullest possible information about the past history of the company, the particular trade in which it was engaged and the future prospects
B of the company."

In the imaginative exercise in which s. 7(5) requires the courts to engage, that passage seems to me to be well imagined.

In the present case, however, the company's board of directors had received reports and advice which were obviously of a confidential character, and the board had come to no decision as to whether they would act on the
C advice or not but were maintaining their cautious and uncommitted attitude. It is reasonable to imagine that in that situation the board would have kept these matters confidential, and would have been unwilling to disclose the reports and advice which they had received, and in particular unwilling to make them available to participants in the open market. *Prima facie* the information would not have been available.

D It is, however, suggested that it would have been available in two ways. First, it is said that the likely purchasers might have included a director of the company, and he would have had the information *ex officio*. But unless others also knew it his possession of the information would not materially affect the market price which he or any other purchaser would have to pay. The situation differs from that in *Commissioners of Inland Revenue* v. *Clay* [1914] 3 K.B. 466,
E at pages 471–2, where the special fact enhancing the price of the property was assumed to be a matter of local knowledge. Secondly, it is said that the directors of the company might have been willing to impart the information confidentially to a chartered accountant or other expert acting as agent for a purchaser, though the information would be imparted on the terms that it would not be passed on to the purchaser himself. But in such a case the
F transaction would be in the nature of a private placing and not a sale in the open market such as has to be envisaged under s. 7(5). In my opinion the reasonable supposition is that the information would not be available in the hypothetical open market, and so the assessment should be £3 10*s*. and not £4 10*s*.; and therefore the appeal should be allowed and the judgment of Plowman J. should be restored.

G *Questions put:*

That the Order appealed from be discharged and the judgment of Plowman J. restored.

The Contents have it.

That the Respondents do pay to the Appellants their costs here and in the Court of Appeal.

H *The Contents have it.*

[Solicitors:—Waltons Bright & Co. (in the House of Lords) and Warren Murton & Co. (in the Chancery Division and the Court of Appeal), for Pinsent & Co., Birmingham; Solicitor of Inland Revenue.]