

Leslie John Holt

*Appellant*

v.

Juliet Elizabeth Holt

*Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
23RD JULY 1990  
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*Present at the hearing:-*

LORD KEITH OF KINKEL  
LORD TEMPLEMAN  
LORD GRIFFITHS  
LORD ACKNER  
LORD LOWRY

*[Delivered by Lord Templeman]*

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The appellant husband and the respondent wife were married, had three children now aged between 27 and 22 and were divorced. The wife applied under the Matrimonial Property Act 1976 (the Act of 1976) for a share of the matrimonial property. That property included one A share in L.J. Holt Limited (the company) which was valued by Heron J. for the purposes of the Act of 1976 at the sum of \$150,000.00. The decision of Heron J. was upheld by the Court of Appeal (Sir Robin Cooke P. and McMullin and Somers JJ.). The husband now appeals to Her Majesty in Council and submits that a proper valuation would have produced a figure of \$10,000.00.

The company was incorporated in 1973, the husband was issued with the only A share and with 899 B shares. The wife held 100 B shares. In 1973 the company purchased Woodah, a cattle and sheep farming estate in the Wairau Valley about 60 kilometres from Blenheim in the north east part of the South Island of New Zealand. In 1977 all the B shares in the company were transferred to trustees upon trust which exclude the husband and the wife and constitute the three children primary beneficiaries. All the A and B shares rank *pari passu* in the distribution of dividend and in the surplus assets on liquidation. Shares may be transferred to a member of the company or to a

relation "or other person or persons nominated by the directors". The interest of the A shareholder in dividends and capital is negligible. But by Article 17A:-

"In deciding any matter affecting the Company whether at a meeting of shareholders or otherwise each A share shall carry 10,000 votes and each B share shall carry one vote."

The husband exercised his voting rights as the holder of the A share to constitute himself managing director of the company and to occupy the farmhouse and to carry on the farming business. The company's estate comprises some 7,000 acres. The husband employed substantial gifts and legacies from his parents and laid out income from the farm in the improvement and development of the farm, the farmhouse and the company's business generally. The farm could be run at a profit or at a loss depending on the amount which the husband chose to spend on the upkeep and improvement of the farm. In 1983 the farm was run at a profit roughly equal to reasonable remuneration for the work of the husband in running the farm. No dividends appear to have been declared.

In valuing the A share for the purposes of the Act of 1976 Heron J. applied the valuation principle which he deduced from *Hatrick v. C.I.R.* [1963] NZLR 641 and was summarised by Mahon J. in *Coleman v. Myers* [1977] 2 NZLR 258 as follows:-

"The test ... in essence ... calls for an inquiry as to the value at which a willing but not anxious vendor would sell and a willing but not anxious purchaser would buy."

The Board was not invited to apply any other principle. The difficulty lies in applying the principle, taking into consideration all the unusual advantages and disadvantages which the incorporators of the company chose to confer on the A shareholder. The difficulty is compounded by the fact that in practice it is almost inconceivable that the husband would be willing to sell; he intends the farm and all other assets of the company in one form or another to devolve to his children. Nevertheless the difficulties of valuation do not render the task of valuation impossible. The court must postulate the existence of a willing but not anxious vendor and a willing but not anxious purchaser.

A potential purchaser would inspect the farm and the accounts; the latest accounts produced in the proceedings were those for 1983. Those accounts disclosed that the company bought and sold cattle and on 30th June 1983 possessed a herd of 112 and a stud herd of 23. For some unexplained reason the two herds had been reduced by sales without replacement from a total of 345 for the previous year. There was a sheep

flock of 5940, and a flock of 171 stud sheep. After farm working expenses and providing substantial sums for developments and repairs and after allowing for depreciation of \$10,506, there was a farm profit of \$12,345 which was available to the husband who could by the exercise of his voting rights obtain this sum for himself as reasonable remuneration. Other assets included the farmhouse valued at \$48,000, another house valued at \$13,000, sheds, cars and farm vehicles. Before Heron J., the net asset value of the company, depending on the price at which the farm land and the herds could be sold, was agreed to be not less than \$800,000 after discharge of the company's debts. The wife thought the net asset value might be as much as \$2,000,000 but Heron J. proceeded on the basis of \$800,000.

A potential purchaser would seek legal and accountancy advice as to the advantages and disadvantages of the A share and as to a price which it would be reasonable for him to pay. For the husband it was not suggested that the farm could only be carried on at a loss but it was suggested by reference to the 1983 accounts that the farm could only be carried on at a profit equal to the reasonable remuneration of a farm manager. The accounts are not decisive because the husband was content to spend more on repairs and improvements than a purchaser might feel necessary but the evidence supports the view that the farm would not produce more than reasonable remuneration for the work of the A shareholder or, if he did not work himself, for a farm manager. In these circumstances it was submitted that the A shareholder would be in no better position than a farm manager paid reasonable remuneration for his services and therefore the A share is not worth more than \$10,000.

The analogy between the A shareholder and the farm manager is false. The A shareholder is more nearly in the position of a tenant for life impeachable for waste. He can appoint himself sole director and in that capacity take possession of the farm estate, the farm house, the livestock, the machinery and equipment and all the other assets of the company. He can occupy the farm house as a family home, he can run the estate as he thinks fit. Unlike a farming manager he cannot be dismissed and is not obliged to consult or take instructions from anyone. He is as much the squire of the Woodah farm estate as a tenant for life and can even cause the estate to be sold if he pleases. He cannot sell capital assets and put the money in his pocket, he cannot commit waste and he cannot artificially increase the profits of the farm for his own benefit by allowing the condition and state of repair of the estate to deteriorate. But if he would like to farm the estate and enjoy the advantages of being a farmer in the Wairau Valley as long as he likes, drawing reasonable remuneration, he cannot be interfered with.

Moreover the A shareholder possesses two advantages which are not enjoyed by a farm manager or by a tenant for life. The first advantage is that the A shareholder can create a further tenant for life by transmitting the A share for example to his son if the son wishes to farm or to a purchaser for whom farming is attractive. The rights attached to the A share endure so long as the company endures unless the A shareholder alters the Articles. The second advantage is that the B shareholder can obtain nothing without the co-operation of the A shareholder. If the farming business became so prosperous that the profits exceeded all that was necessary for repairs and for reasonable remuneration for the A shareholder then any surplus would be devoted by the control of the A shareholder towards the improvement of the farm property or could be distributed in the form of a dividend. Such a surplus would have to be unforeseeably large before the B shareholders could successfully urge that a dividend ought to be paid.

On behalf of the husband Mr. Upton urged that the A shareholder would be subject to two constraints. In the first place equity would not allow the A shareholder to abuse his powers as sole director. In the second place Section 209 of the Companies Act 1955 would not allow the A shareholder to be "unfair" to the B shareholders. Mr. Upton attacked the judgments in the courts of New Zealand because, so he said, these constraints were not mentioned and were not given sufficient weight. Their Lordships have no doubt that these constraints were well appreciated and that Heron J. and the members of the Court of Appeal were very familiar with all the authorities which Mr. Upton cited whereby the courts of New Zealand have interpreted the powers conferred by Section 209 to secure that minority shareholders receive fair treatment.

But given that the farm is and can be run at a profit which provides approximately reasonable remuneration for the managing director, and no more, there is no breach of duty or unfairness on the part of the holder of the A share if he exercises his powers of control so as to secure that the farm is not sold, that he continues to occupy and manage the farm and continues to enjoy all the amenities of the farm and to take the profits in the form of remuneration. These advantages were the creation of the incorporators of the company. The B shareholders cannot complain and cannot compel the A shareholder to surrender any of his rights or sell his share. The potential purchaser would be advised that if he wished to farm and liked the company's farm he would be able to enjoy the farm and to take reasonable remuneration. He would be warned that he ought to ensure that the farm is kept in good condition out of its gross profits, that the business of the company is adequately managed and that

reasonable provision is made for repairs and replacements and that he should be careful to take no more than reasonable remuneration.

The purchaser would also be advised of the second extraordinary indirect advantage attaching to the A share inherent in the fact that, once the A share is transferred to the purchaser or some other stranger, the B shareholders at some time or another will be driven to reach an agreement with the A shareholder. If the A shareholder became tired of farming and wished to enjoy some capital he could put three propositions to the B shareholders: first the company's assets could be realised and divided as to 50% to the A shareholder and 50% to the B shareholders. Secondly the A shareholder could sell his A share to the B shareholders for 50% of the value of the company. Thirdly B shareholders could sell the B shares to the A shareholder for 50% of the value of the company. If the company were worth \$1,000,000 the B shareholders might be offered in effect \$500,000 at once instead of nothing in the future unless the A shareholder was foolish enough to allow the farm to deteriorate. Subject to behaving in a reasonable manner the A shareholder could not be compelled at any time to sell the A share to anybody or to surrender the A share to the B shareholders. Whether at the end of the day the A shareholder and the B shareholders would reach agreement on a division of 50% or some other percentage, no one can tell. For present purposes it suffices that Somers J., working on a net asset value of only \$640,000, rightly said that so far as the B shareholders were concerned:-

"It is a tenable view that to pay \$150,000 in order to receive a net sum of \$490,000 (\$640,000-\$150,000) is, on its face, good business when the existing value of the B shares without control must be very substantially less than that sum."

Their Lordships would on well established principles not interfere with concurrent findings regarding the value of the A shares. Having regard to the nature of the rights attached to the A share and the B shares respectively and to the necessary postulate of the existence of a willing but not anxious seller and a willing but not anxious buyer, their Lordships see no ground for disturbing the order made by Heron J. and affirmed by the Court of Appeal and will therefore humbly advise Her Majesty that this appeal should be dismissed. The husband must pay the costs of the wife before the Board.