[COURT OF APPEAL]

* TAYLOR *v.* GOOD (INSPECTOR OF TAXES)

[1972 No. 48]

1974 Feb. 20, 21, 22 — Russell, Stamp and Orr L.JJ.

Revenue—Income tax—Profits of trade—Purchase and sale of land —Acquisition for possible use as residence—Subsequent sale to developer at profit—Whether advantage or concern in nature of trade—Income Tax Act 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 123 (1), 526 (1)

In 1959 the taxpayer, who carried on the business of a retail grocery and a newsagent, bought a house with grounds at a public auction for £5,100. At the time of the purchase there was a possibility that he and his family might live there but that plan did not materialise. In 1963, he obtained outline planning permission to develop the site by the demolition of the house and the erection of 90 houses. In September 1963 he sold the property to a firm of developers for £54,500. He was assessed to income tax for the year 1963–64 under Case I of Schedule D to the Income Tax Act 1952, on the surplus on realisation from the sale of the property on the basis that it was a profit derived from a trade or an adventure in the nature of trade. The taxpayer's appeal to the special commissioners was dismissed, and he appealed to the High Court. Megarry J. dismissed the appeal on the ground that although there had not been initial trading at the time of the purchase of the property, there was sufficient evidence to support the commissioners' findings of supervening trading but he remitted the case to the commissioners to determine at what stage the trading had begun.

On appeal by the taxpayer:—

Held, allowing the appeal, that where a taxpayer, not being a property developer, bought a property with no initial intention of selling it for a profit but later took steps to enhance its value, as by obtaining planning permission for development, and later sold it for development, those activities did not amount to an adventure or concern in the nature of trade, assessable to income tax under Case I of Schedule D and the assessment should be discharged.

Hudson's Bay Co. Ltd. v. *Stevens* (1909) 5 T.C. 424, C.A. considered.

Mitchell Bros. v. *Tomlinson* (1957) 37 T.C. 224, C.A. distinguished.

Per curiam. If the commissioners thought the events including the purchase constituted trading, it by no means follows that they would have arrived at the same conclusion without taking in the purchase as part thereof. If the matter was properly to be remitted to the commissioners at all, the question should have been whether there was an adventure in the nature of trade excluding the purchase, which would be for the commissioners to determine—a point they had never determined. The form of remission adopted could not therefore in any event be allowed to stand (post, p. 559B–C).

Decision of Megarry J. [1973] 1 W.L.R. 1249; [1973] 2 All E.R. 785 reversed.

The following cases are referred to in the judgment of Russell L.J.:

Alabama Coal, Iron, Land & Colonization Co. Ltd. v. *Mylam* (1926) 11 T.C. 232.

Cooksey v. *Rednall* (1949) 30 T.C. 514.

A *Edwards* v. *Bairstow* [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.).
Hudson's Bay Co. Ltd. v. *Stevens* (1909) 5 T.C. 424, C.A.
Leach v. *Pogson* (1962) 40 T.C. 585.
Lucy & Sunderland Ltd. v. *Hunt* [1962] 1 W.L.R. 7; [1961] 3 All E.R. 1062; 40 T.C. 132.
Mitchell Bros. v. *Tomlinson* (1957) 37 T.C. 224, C.A.
B *Pilkington* v. *Randall* (1965) 42 T.C. 662, Cross J. and C.A.
Rand v. *Alberni Land Co. Ltd.* (1920) 7 T.C. 629.

The following additional cases were cited in argument:

Inland Revenue Commissioners v. *Livingston* (1926) 11 T.C. 538.
Iswera v. *Inland Revenue Commissioner* [1965] 1 W.L.R. 663, P.C.
West v. *Phillips* (1958) 38 T.C. 203.

C

APPEAL from Megarry J.

The taxpayer, Walter Marcus Taylor, of 8 Hester's Way Road, Cheltenham, carried on a business as a grocer in Cheltenham. On July 23, 1959, he bought at a public auction a regency house, Marle Hill Court, Swindon Leve, Cheltenham with 9½ acres of ground for the sum of £5,100. He
D initially thought of using it as a family residence, but later rejected the idea. In January 1962 he was granted outline planning permission for the erection of 90 dwelling houses on a layout involving the demolition of the house. On August 1, 1963, the taxpayer accepted an offer for the property for £54,500 from a firm of developers and contracts were exchanged on September 17, 1963. The taxpayer was assessed for the current fiscal year for the sum of £48,000 as profits of a trade or of an adventure in the nature
E of trade, the commissioners having determined that the purchase and sale constituted such an activity. On April 6, 1973, the taxpayer appealed by way of case stated to the High Court pursuant to section 56 of the Taxes Management Act 1970. At the hearing of the appeal before Megarry J. on April 6, 1973, the Crown did not support the commissioners' view that the purchase of the property as such could be regarded in law as any part
F of an adventure in the nature of trade but that supervening trading took place shortly after the purchase of the property by way of applying and obtaining planning permission and culminating in the sale of the property at a profit. Megarry J. remitted the matter to the commissioners to determine when the actual trading started, so that the measure of profit could be applied, not on the basis of the purchase price but on the value of the property when the trading began.

G The taxpayer appealed on the grounds, inter alia, that (1) in the circumstances of the case the judge had no power to remit the case to the commissioners; (2) the judge misdirected himself and/or was wrong in law in holding that there was evidence on which the commissioners could make the determinations that were the subject of the remitter; (3) the only question that fell to be determined by the judge was whether there was evidence on
H which the commissioners could find that the taxpayer carried on an adventure or concern in the nature of trade in respect of the purchase and sale of the property, and as the Crown conceded before the judge and as the judge held, there was no such evidence.

The facts are stated in the judgment of Russell L.J.

Barry Pinson Q.C. and *John Gardiner* for the taxpayer.
Patrick Medd Q.C. and *Harry Woolf* for the Crown.

RUSSELL L.J. The case under appeal from Megarry J. is reported in [1973] 1 W.L.R. 1249, and that fact enables me to be relatively brief.

The taxpayer bought in 1959 a house and grounds at Cheltenham at public auction for £5,100. By 1963 he had obtained outline planning permission for the erection of 90 dwellings on a lay-out involving the demolition of the house, and in that year he sold the property to an estate developer for £54,500. He was assessed in respect of the then current fiscal year for income tax on a sum of some £48,000 as profits of a trade, or, rather, of an adventure in the nature of trade. The commissioners determined that the purchase and sale constituted such an adventure; the taxpayer expressed dissatisfaction, and a case was stated for the High Court.

Before Megarry J. the Crown did not support the view of the commissioners that the circumstances of the purchase were such that the purchase could be regarded in law as any part of an adventure in the nature of trade. The attitude of the Crown in this court on that point was the same. In those circumstances it is no part of our task to examine the circumstances attending the purchase or to express a view on that point.

Before Megarry J. the Crown asserted the existence of an adventure in the nature of trade on the ground that activities of the taxpayer in connection with the property that started not long after the purchase, and culminated in the sale, constituted together with the sale an adventure in the nature of trade. Those activities, shortly stated, were a first application for planning consent to use the agricultural land for residential purposes and a successful appeal to the Minister from its refusal: the preparation of plans for a lay-out of 90 houses and so forth and the successful application for outline planning permission for such a lay-out: and the procuring of co-operation from a neighbouring owner to facilitate suitable road access. The details may be gathered from the report of the case below. There was dispute below whether it was open to the Crown to take this point—which was referred to as the "supervening trade" point—and the judge allowed it. We need not in the event deal with that dispute.

It was then that the case seems to me to have started to go wrong. The judge finally remitted the matter to the commissioners on the footing that an adventure in the nature of trade had started at some time after the purchase (and not with and including the purchase): the commissioners were to find when it started, so that the true measure of profit could be applied, based not upon the purchase price of £5,100, but on the value of the property when the trading adventure started. The judge considered that the finding by the commissioners of trading including the purchase must necessarily involve a finding by them of "supervening trading," a finding which on *Edwards* v. *Bairstow* [1956] A.C. 14 principles he considered that he could not fault. Megarry J. said, at p. 1260:

> "There is a finding of trading: that finding covers the whole period including the initial acquisition: as to the initial acquisition the finding is unsupported by evidence: as to the rest it is supported by some evidence. In those circumstances, to say that the court must say that the whole determination is wrong seems to me unreal. The finding of trading cannot, as it seems to me, be totally destroyed merely because there is no evidence to support the finding during the initial period of acquisition, even though there is evidence to support such a finding during all subsequent stages. If from a finding of trading throughout one discards the one period which may be said to point against trading, what remains must surely be more, rather than less, strongly supported.

A Put another way, if the finding is that from purchase to sale the transaction as a whole constituted trading, despite the lack of any indicia of trading in the purchase itself, a finding of trading for a period subsequent to the purchase must be a fortiori. Nevertheless, trading (or an 'adventure') must have a commencement, and I do not see how a finding of trading throughout can stand. A man cannot trade before he begins to trade, nor embark upon an adventure before he has B thought of it."

With all respect, this, it seems to me, is to turn the situation upside down. If the commissioners thought the events including the purchase constituted trading, it by no means follows that they would have arrived at the same conclusion without taking in the purchase as part thereof. If the matter was properly to be remitted to the commissioners at all, the question should C have been whether there was an adventure in the nature of trade excluding the purchase, which would be for the commissioners to determine—a point they had never determined. The form of remission adopted by Megarry J. could not therefore in any event, in my view, be allowed to stand.

But the matter does not end there. The question is raised whether, on the facts found in the case stated, not including the purchase within the D alleged adventure, any reasonable body of commissioners properly instructed in the law could find here an adventure in the nature of trade. If not, then the proper course for this court would be to decide all along the line in favour of the taxpayer and not remit to the commissioners at all.

The judge considered that as a matter of law the facts found could support a finding of a relevant adventure, excluding the purchase as part of the adventure. He relied for this upon the decision in *Mitchell Bros.* v. E *Tomlinson* (1957) 37 T.C. 224, in this court, and dicta in three other cases, namely, *Cooksey* v. *Rednall* (1949) 30 T.C. 514; *Lucy & Sunderland Ltd.* v. *Hunt* [1962] 1 W.L.R. 7 and *Leach* v. *Pogson* (1962) 40 T.C. 585, all mentioned in the report below [1973] 1 W.L.R. 1249, 1257. I do not think that that case and those dicta at all support the judge's view, bearing in mind the fact that we are to regard the purchase in this case as in no F wise a step taken with the object of later sale and as no different from an ordinary acquisition of a residence, or an inheritance by the taxpayer: and further bearing in mind that the taxpayer was at no time engaged, or intending to engage, in the activity of buying any other properties with a view to their sale at a profit, his other acquisitions of other properties being for investment only.

I refer first to some cases cited to us. The first is *Hudson's Bay Co.* G *Ltd.* v. *Stevens* (1909) 5 T.C. 424 in this court. The details do not matter. The importance of the case lies in the fact that, in accepting the finding that there was there no trade of buying and selling land, it was stated that the case was no different in substance from the case of a landowner minded to sell, or sell from time to time, inherited land for building purposes at a profit: it was equivalent, it was said, to dealing with land merely as owner: H the fact that a landowner lays out part of his estate with roads and sewers for sale in building lots does not constitute a trade, nor the fact that he may have expended money in getting the property up for sale: it was no different, it was said, in substance from an ordinary landowner who sells parts of an estate which he acquired by purchase. My references are to pp. 436, 437, 438 and 440 of that report.

In *Rand* v. *Alberni Land Co. Ltd.* (1920) 7 T.C. 629, before Rowlatt J., the same principle, it appears to me, was followed. It was a case in which

lands were owned in the ordinary sense (that is to say, not acquired with a view to sale) by a number of people who set up a company purely as machinery to realise their interests in the land—to turn land into money. The company expended money in clearing the land and forming roads, and even in procuring a railway company to bring a line to open up the area. This was only a course, it was said, of enhancing the value of the land and not of trading: see in particular pp. 638, 639 of the report.

In *Alabama Coal, Iron, Land & Colonization Co. Ltd.* v. *Mylam* (1926) 11 T.C. 232, the decision as to the company was the other way: but that was because there was an element of buying for sale: and at p. 254 the distinction was drawn with a case of activities in the course of a mere turning of land into money. Here again, it seems to me, the same principle underlay.

Pilkington v. *Randall* (1965) 42 T.C. 662, in this court, was a case in which the taxpayer bought his sister's interest in land with the intention of improving and selling it and his own interest. Here was the element of purchase and sale with which we are not concerned as a combination indicating trade.

All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development.

I turn now to *Mitchell Bros.* v. *Tomlinson* (1957) 37 T.C. 224. In that case there were 60 houses bought before 1939 for investment. Some of those were later sold at a profit, but they were not embraced in the assessment. From 1942 to 1948 another 239 houses were bought at the bottom of the market, of which 58 were sold, some within that period. It does not seem to me that this decision contradicts in any way the basis of the earlier decisions. If you find a period in which there are purchases and sales, it is not difficult to find a trade of dealing in land, whatever may have been the original motive or purpose of acquisition. But here we have, we must assume, no purchase at all with an eye on realisation.

If of course you find a trade in the purchase and sale of land, it may not be difficult to find that properties originally owned (for example) by inheritance, or bought for investment only, have been brought into the stock-in-trade of that trade. To such circumstances I would relate the dicta relied upon in the other three cases referred to by Megarry J. But where, as here, there is no question at all of absorption into a trade of dealing in land of lands previously acquired with no thought of dealing, in my judgment there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taken as pointing to, still less as establishing, an adventure in the nature of trade. Were the commissioners, on a remission to them, to decide otherwise, it seems to me they would be wrong in law.

Mr. Medd for the Crown, in contending that the matter should at least be remitted to the commissioners, suggested that in some sort the circumstances of the purchase and the apparently brief time that elapsed before the idea of using the property as a family residence was abandoned would be material for their consideration. I do not agree with that suggestion. It seems to me to depart from the acceptance by the Crown that the purchase could not be properly taken as part of an adventure in the nature of

A trade. In my view, it was either in and part of an alleged avdenture, or it was not relevant to the question.

For the Crown it was further argued that all these cases were matters of degree, and therefore even if the purchase in this case be equated, for example, to an inheritance by the taxpayer, it should be left to the commissioners to determine whether subsequent events amounted to an adventure in the nature of trade. Hereunder reference was made to passages in B *Pilkington* v. *Randall*, 42 T.C. 662, both at first instance and in this court, as suggesting or showing that even in such a case the activities of the landowner on or in connection with the land and its improvement and enhancement in value might of themselves be of such a quality or degree as could properly be regarded as constituting a relevant adventure. Let me assume this to be so. Nevertheless, I cannot think that the activities of the C taxpayer in this case subsequent to the purchase, which I have already summarised, could be so regarded by any reasonable body of commissioners versed in the relevant law.

Accordingly, I would allow the appeal and set aside the order of the judge, and substitute an order appropriate to overrule the determination of the commissioners.

D STAMP L.J. I agree and have nothing to add.

ORR L.J. I also agree.

Appeal allowed with costs.
Assessment discharged.

E Solicitors: *Vizards for Stannard & Moss, Cheltenham; Solicitor of Inland Revenue.*

L. G. S.

F [PRIVY COUNCIL]

* BORAMBIL PTY. LTD. . . . . APPELLANT

AND

FRANCIS O'CARROLL . . . . . RESPONDENT

G [ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES]

1973 July 12, 16;
1974 Feb. 4

Lord Reid, Lord Morris of Borth-y-Gest, Lord Wilberforce, Lord Simon of Glaisdale and Sir Garfield Barwick

Australia—New South Wales—Landlord and tenant—Lease of prescribed premises for term of tenant's lifetime—Whether H *"lease for a fixed term" for purposes of rent control—Landlord and Tenant (Amendment) Act* 1948 *(No. 25 of* 1948), *s.* 17B *(as amended by Landlord and Tenant (Amendment) Act* 1968 *(No. 58 of* 1968))

By an agreement in writing dated March 18, 1952, the appellant agreed to lease to the respondent at a rent for his life land on which was erected a block of flats. Pursuant to an order for specific performance of that agreement the appellant on October 13, 1970, executed a memorandum of