1970 S. C. No. 14051.

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

IN THE MATTER OF the Estate of Joseph Willard Rudderham, late of Sydney, in the County of Cape Breton, Province of Nova Scotia, Deceased.

HEARD at Halifax, Nova Scotia, April 8, 1970 before the Honourable Chief Justice McKinnon, the Honourable Mr. Justice Coffin, and the Honourable Mr. Justice Cooper.

OPINION May 15, 1970

COUNSEL T.J.K. Gillis, Esq., Q.C. for The Nova Scotia Trust Company
R. N. Pugsley, Esq., and
H. K. Smith, Esq., for Stewart R. Rudderham, Edward N. Rudderham and Mrs. Selma Doucet
E. N. Colborne, Esq,, Q.C., for Emerson D. Rudderham, James R. F. Rudderham and Wilson V. Rudderham.

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BETWEEN:

THE NOVA SCOTIA TRUST COMPANY, a body corporate, Trustee under the last will and testament of Joseph Willard Rudderham, late of Sydney, in the County of Cape Breton, Province of Nova Scotia, deceased, Plaintiff, Respondent.

-and-

MRS. ALEXANDRIA RUDDERHAM, of Sydney, Nova Scotia, EMERSON DIXON RUDDERHAM, of Sydney, Nova Scotia, JAMES R. F. RUDDERHAM of Sydney, Nova Scotia, WILSON V. RUDDERHAM, of Sydney, Nova Scotia, MRS. A. CRAIG OLIVER, of Peterborough, Ontario. Defendants Respondents.

-and-

STEWART R. RUDDERHAM, of Sydney, Nova Scotia, EDWARD N. RUDDERHAM, of Sydney, Nova Scotia, MRS. SELMA DOUCET, of Sydney, Nova Scotia. Defendants Appellants.

COOPER, J.A.:

The Nova Scotia Trust Company, sole trustee of the estate of the late Joseph Willard Rudderham, herein called "the Trustee", issued an originating summons on November 12, 1969 for the determination of the following questions:

"1. Should the Nova Scotia Trust Company, in its capacity as Trustee under the Last Will and Testament of Joseph Willard Rudderham, late of Sydney, in the County of Cape Breton, Province of Nova Scotia, deceased, use its voting power as registered holder of 508 shares of the capital stock of J.W. RUDDERHAM LIMITED, a body corporate with Head Office at Sydney, Nova Scotia, at an extraordinary Meeting of the Shareholders of the said Company, to eliminate Section 39(a) of said Company's Articles of Association as amended by Special Resolution dated the 1st day of April, A.D. 1959, for the purpose of enabling said Trustee to give effect to paragraph 5(b) of the Last Will and Testament of said Joseph Willard Rudderham, deceased, in accordance with the terms of the Order for Judgment of Dubinsky, J., under cause entitled '1967 "B" No. 4021, in the Supreme Court, Trial Division, Between Emerson Dixon Rudderham, Plaintiff, and The Nova Scotia Trust Company, a body corporate, Trustee under the Last Will and Testament of Joseph Willard Rudderham, Defendant'?

2. What variation, if any, should be made in the price for the Shares of capital stock of said J. W. Rudderham Limited when offered for sale by the said Trustee
   (a) if the existing Special Resolution, dated 1st April, 1959, is revoked at an extra-ordinary meeting of the Shareholders of said J. W. Rudderham Limited; -or-
   (b) if any sale is carried out pursuant to the provisions of Section 39 (a) of the said Company's Articles of Association as approved by the Shareholders of the Company by Special Resolution dated 1st April, 1959."

The matter was heard by Hart, J., who answered the questions thus:

"1. The Nova Scotia Trust Company in its capacity as trustee under the Last Will and Testament of Joseph Willard Rudderham, late of Sydney, in the County of Cape Breton, Province of Nova Scotia, deceased, should not use its voting power as

registered holder of 508 shares of the capital stock of J. W. Rudderham Limited, a body corporate, with head office at Sydney, Nova Scotia, at an extraordinary meeting of the shareholders of the Company to eliminate Section 39(a) of the said Company's Articles of Association as amended by special resolution dated the 1st day of April, A.D. 1959, for the purpose of enabling said trustee to give effect to paragraph 5(b) of the Last Will and Testament of the said Joseph Willard Rudderham, deceased, in accordance with the terms of the order for judgment of Dubinsky, J., under cause entitled 1967 'B' No. 4021 in the Supreme Court, Trial Division, between Emerson Dixon Rudderham, plaintiff and the Nova Scotia Trust Company, a body corporate, trustee under the Last Will and Testament of Joseph Willard Rudderham, defendant.

2. The shares of the capital stock of J. W. Rudderham Limited should be first offered to the shareholders of that Company, pursuant to Section 39(a) of the Company's Articles of Association. This should be done as soon as possible, at a price to be determined in the manner set forth in Section 39(a) of the articles and the price should be determined as of this [sic - the] date of the offer."

Section 39(a) of the Articles of Association of J. W. Rudderham Limited reads:

"Section 39 (a) No share shall be transferred by any shareholder to any person not a shareholder without first offering it in writing at its fair value (such fair value, in case of difference, to be finally determined by the auditor of the Company for the time being) to the shareholders of the Company and any other shareholder or shareholders shall have the right to purchase, at such fair value, all or any of the total number of shares to be sold, and the shares so purchased shall be divided pro rata among the purchasing shareholders in proportion to their holdings in the Company, unless otherwise agreed between them."

This appeal is taken from that part of the decision and order of Hart, J. which answers the second of the two questions. The appellants submit that the second question should be answered:

> "No. 2. The shares of the capital stock of J. W. Rudderham Limited should be first offered to the shareholders of that Company, pursuant to Section 39 (a) of the Company's Articles of Association. This should be done as soon as possible, at a price to be determined in the manner set forth in Section 39 (a) of the Articles, and a price should be determined as of the 15th day of December, 1967, or such earlier date as the Nova Scotia Supreme Court, Appeal Division deems proper."

The only issue before us, therefore, is determination of the date on which the shares of J. W. Rudderham Limited held by the Trustee, should be valued, and their price thereby set, upon being offered to the other shareholders under s. 39(a) of the Articles of Association.

Although the issue before us is simply stated, there lies behind it and bearing upon it a somewhat tangled and unusual chain of circumstances as set out in the admission of facts and revealed in the other documents before us.

Joseph Willard Rudderham, the testator, died as the result of a motor vehicle accident on or about March 1, 1965. His Will, dated July 8, 1963, was duly admitted to probate on March 9, 1965. The Nova Scotia Trust Company and E. Allan Jost were the executors and the Trust Company the

sole trustee. The estate was duly administered and final decrees granted to the executors by the Court of Probate for the Probate District of the County of Cape Breton on May 9, 1967.

The relevant provisions of the testator's Will are contained in the Fifth Clause. By sub-clause (a) thereof he gave, devised and bequeathed all his remaining property to the Trustee upon trust to sell with power, inter alia, to retain any of his investments or assets as authorized investments. Sub-clause (b) reads:

> "Notwithstanding the provisions of clause (a) immediately preceding this clause (b) of this my Will, I direct my Trustee to sell all the shares of stock of J. W. Rudderham Limited which I may own at the time of my death, upon such terms and conditions as my Trustee shall, in its absolute discretion deem fit; PROVIDED, HOWEVER, that my sons Emerson Dixon Rudderham, Stewart Ross Rudderham, Edward Nelson Rudderham, James Robert Franklin Rudderham, and Wilson Valentine Rudderham, or any group of them shall have the first option to purchase the said shares or any portion thereof that they may choose to accept, at the fair market value thereof to be determined by the Auditor of the Company; BUT PROVIDED, ALSO, that all the other terms of such option, including the time in which the same may be exercised, shall be in the absolute discretion of my Trustee, it being my Will that my Trustee shall do everything reasonable to facilitate the purchase of the said shares by my said sons above-named, and that my said sons above-named shall have an equal opportunity to acquire the said shares of stock or portions thereof. If the offers so made to my said sons above-named are not accepted, the shares subject to the unaccepted offers shall be held by my Trustee or disposed of by my Trustee to such other person or persons and in such manner as my Trustee

> shall see fit and proper; but no such shares shall be offered for sale to such persons for a lower price than such shares have first been offered for sale to my said sons above-named. I order and direct that the proceeds of all such sales shall fall into and form part of the residue of my estate."

The Trustee was then by sub-clause (e) of the Fifth Clause directed to pay to the testator's wife out of income and so much of the capital as necessary $300.00 per month, with power to pay additional sums in circumstances there set out and with further provisions in the event of the wife remarrying.

The residue on the death of the testator's wife is disposed of by sub-clause (f) of the Fifth Clause. Insofar as relevant to this appeal, all the testator's children, except one son Louis Bernard Rudderham who receives nothing under the Will, take the residue in equal shares.

The testator was survived by his wife Alexandria Rudderham and by the following sons and daughters as his residuary legatees:

> Selma Doucet
> Stewart Ross Rudderham (Ross)
> Edward Nelson Rudderham (Nelson)
> James Robert Franklin Rudderham (Franklin)
> Wilson Valentine Rudderham (Wilson)
> Emerson Dixon Rudderham (Emerson)
> Mrs. A. Craig Oliver ✓

The shareholders of J. W. Rudderham Limited are:

The Nova Scotia Trust Company
as trustee under the Will
Stewart Ross Rudderham
Edward Nelson Rudderham
Selma Doucet

The Trustee holds 509 shares out of 550 shares issued, not 508 shares as appears in some of the documents.

The Trustee, acting under sub-clause (b) of the Fifth Clause of the Will, called for offers to purchase from the sons therein named at $225.00 per share. This value was arrived at by the auditor of the Company as set out in a letter to the Trustee dated July 20, 1967. Difficulties developed as to the number of shares each of the sons should be entitled to purchase and as to the terms of purchase. These culminated in an offer made by Ross Rudderham and Nelson Rudderham to purchase the 509 shares, but not less, at $225.00 per share, payment to be made of $30,000.00 on acceptance of the offer and of the balance of the purchase price within ninety days thereof. There were competing offers as to 20% of the 509 shares from each of Franklin Rudderham, Emerson Rudderham and Wilson Rudderham, but payment in each case was not to be made in cash but on terms as to payment which I do not think it necessary for me to go into.

At a meeting held on November 14, 1967 attended by the Manager of the Sydney branch of the Trustee and by the five sons named in sub-clause (b) of the Fifth Clause of the Will, a discussion and review of all the proposals to

purchase took place. The Manager informed the five sons that on the basis of the proposals already presented, the Trustee intended to accept the joint proposal of Ross Rudderham and Nelson Rudderham if a more favourable proposal was not forthcoming. Final proposals were to be presented on or before December 15, 1967.

In answer to letters from Emerson Rudderham and Wilson Rudderham asking for the reasons the Trustee had for not accepting their proposals, the Trustee wrote each of them on November 29, 1967 and said in each of the letters:

> "To reiterate the matter, it is this Company's feeling that the Will allows this Company, as Trustee, the absolute discretion to decide on the terms and conditions of sale and we believe the best terms and conditions are offered by your two brothers."

The joint proposal of Ross Rudderham and Nelson Rudderham was, however, never accepted. On December 14, 1967 Emerson Rudderham issued an originating summons for the interpretation and construction of sub-clause (b) of the Fifth Clause of the Will. The matter came on for hearing in due course before Dubinsky, J. who, on June 20, 1968, rendered a decision directing the Trustee not to act upon the offer of Ross and Nelson Rudderham for the purchase of all the shares and further directing a procedure by which all sons were each to have an opportunity to purchase 20% of the shares on terms as to payment.

The order for judgment pursuant to the decision of Dubinsky, J. was issued on April 24, 1969. But on April 22, 1969 Ross Rudderham, Nelson Rudderham and Selma Doucet brought action against the Trustee, Emerson, Franklin and Wilson Rudderham claiming, inter alia, a declaration that the individual defendants were prohibited from purchasing any of the shares of J. W. Rudderham Limited. An injunction was granted on April 23, 1969 restraining the Trustee from dealing with or in any way disposing of or encumbering the shares of J. W. Rudderham Limited.

The next relevant proceeding in this labyrinth of litigation was the issue of the originating summons on November 12, 1969 and to which I have referred in the first paragraph of this opinion. On November 27, 1969 by order of Hart, J., the injunction granted on April 23, 1969 was dismissed. The hearing took place on November 27, 1969. Mr. D. M. Gillett, who was Manager of the Sydney branch of the Trustee from March 1, 1966 to August, 1969, said in evidence that he was not aware of the existence of s. 39(a) of the Articles of Association at the time of negotiations for the purchase and sale of the shares held by the Trustee in 1967. In fact, he only knew of s. 39(a) two or three months before the date of the hearing. Ross Rudderham, who also gave evidence, said that he had known of the special resolution bringing s. 39(a) into force in 1959 and had thought about it

at times, but never from 1965 to 1969. In any event, it was the discovery, or rediscovery, of the existence of s. 39(a) of the Articles that brought about the issue of the summons on November 12, 1969.

I have set out the questions asked by the originating summons heard by Hart, J. and the answers given by him. The conflict between s. 39(a) and sub-clause (b) of the Fifth Clause of the Will has been thereby resolved in favour of s. 39(a). The Trustee, in disposing of its 509 shares, must first offer them to the other shareholders. The only question for us is, at what price are they to be offered; their value as at the date of the testator's death, namely $225.00 per share, their value as at the date when actually offered to the other shareholders pursuant to s. 39(a), or their value as at some other date. The answer to this question affects the other shareholders Ross Rudderham, Nelson Rudderham and Selma Doucet very materially. Since the death of the testator, Ross Rudderham has been the active head of the Company and has been President since July 5, 1966. Nelson Rudderham has been in charge of one of the divisions of the Company. Selma Doucet is Office Manager. All have worked extremely hard and in particular, Ross Rudderham has devoted almost all of his waking hours to the Company. As a result of efficient management, very hard work and taking advantage of opportunities arising from increased industrial activity in Cape Breton, sales have grown remarkably and the

Company has had a phenomenal growth since 1966. The auditor of the Company gave evidence that the shares of the Company were worth $725.00 each as at the end of 1968. It was urged upon us by counsel for the appellants that his clients should not have to pay to buy the Trustee's shares at approximately $500.00 more per share than they would have had to pay if they had been able to buy under the Will. It was contended that such a result would be most inequitable in view of the fact that it was the efforts of the appellants which had increased the value of the shares.

It was also urged upon us by counsel for the appellants that the testator in his lifetime had manifested an intention that the appellants should have the right to purchase his shares upon his death. The testator and the appellants had discussed a buy-sell agreement. The money to enable the appellants to acquire the testator's shares was to be provided by the proceeds of policies of insurance on the life of the testator. In fact, such policies were applied for but in the end no buy-sell agreement was ever concluded. The cost of the life insurance was considered to be too high. An alternative proposal was apparently discussed, but the testator died before any such proposal was brought to finality. It is perhaps of some significance, however, in this respect that Selma Doucet said in evidence that even with the buy-sell agreement, the testator was going to remain "captain of the ship". The buy-sell agreement would allow him to retain some

control over his own shares so that Emerson and Wilson Rudderham could be treated the same as the appellants if they showed "the interest" in the business.

Regardless of what may have been the presumed intention of the testator as shown by the proposed buy-sell agreement and alternate proposal, the situation following the testator's death was one simply of the Trustee holding 509 shares of J. W. Rudderham Limited upon trust for sale. As a result of the decision and order of Hart, J., the Trustee is now bound to offer the shares first to the other shareholders under s. 39(a) of the Articles of Association. The Trustee's duty in effecting the sale is to get the best price possible. Only by so doing will it be acting in the best interests of the trust and, under the circumstances, holding the scales even among all the beneficiaries of the trust.

In Buttle v. Saunders, [1950] 2 All E.R. 193, trustees held property on statutory trusts for sale. When negotiations for sale of the property were in an advanced stage, another offer to buy at a higher price was made. The trustees considered themselves bound by commercial morality to complete with the original purchaser and therefore refused the higher offer. Wynn-Parry, J. said at p. 195:

> "The first claim in the statement of claim is for a declaration that the trustees are not entitled to sell the premises except for the best price reasonably obtainable. It is admitted by

counsel for the trustees that that declaration, taken by itself, does no more than express the law, and it is not disputed that that is the duty cast on the trustees."

And - "It has been argued on behalf of the trustees that they were justified in the circumstances in not pursuing the offer made by Canon Buttle and in deciding to go forward with the transaction with Mrs. Simpson. It is true that persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of property, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. It redounds to the credit of a man who acts like that in such circumstances. Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries."

Wynn-Parry, J. went on to say at p. 195:

"It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: 'A bird in the hand is worth two in the bush.' I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must, of necessity, depend on its own facts."

But there are not, in the case at bar, competing offers so as to put the Trustee in the position of having to decide between an existing and an increased offer. There is in my opinion only the "overriding duty" on the Trustee to get

the best price possible for the shares. It is obvious from the evidence before us that to carry out this duty, the price at which the shares are offered to the other shareholders should be the value of the shares at the time the offer is made. Moreover, if the value of the shares were fixed as at some prior date, the Trustee would be conferring an advantage upon some of the beneficiaries of the trust at the expense of the other beneficiaries - something which is obviously improper. The fact that the sale of the shares was not completed under s. 39(a) within a reasonable time after the testator's death is perhaps unfortunate for the other shareholders, but this does not alter the duty of the Trustee now to get the best price it can for the shares in the interests of the trust. Furthermore, it seems to me that the natural and ordinary meaning of s. 39(a) of the Articles of Association is that the value to be placed on the shares offered for sale is the value as at the date of the offer. I think it would be an unnatural construction to hold that some prior date must be taken. If that had been the intention, there should be something in s. 39(a) so to indicate and there is nothing of the sort.

Counsel for the appellants relied upon Re Gunther's Will Trusts, [1939] 3 All E.R. 291, where the point at issue was the date at which the estate of the testator was to be valued for the purpose of adjusting the rights of the parties inter se in the final distribution.

Farwell, J. said at pp. 294-5:

> "A question of this sort must be primarily a question of the construction of the particular will in each case. That is to say, the court must look at the will and see whether there is anything in the will which indicates that the testator intended that the valuation should be made at any particular time. There may be provisions in the will which, although not expressly stating any particular date, may point to a conclusion as to what the testator did intend. In the present case, however, I am unable to find anything in the will which is sufficient to say that the testator contemplated any particular date. There is nothing in the will which I can say indicates that he had some particular date in his mind. I have, therefore, to consider, as it were, at large, what is the appropriate date. The three dates which have been suggested to me in argument as being the appropriate dates are (i) the date of the death of the testator, (ii) the date of retainer for legacy duty purposes [Dec. 31, 1936], and (iii) the date of distribution."

Farwell, J. came to the conclusion, at p. 296, that the right date "in this case at any rate, is the date "of the death of the testator". Re Gunther's Will Trusts is clearly distinguishable from the case at bar. The facts are vastly different as is most readily apparent from what Farwell, J. said at p. 295:

> "It is a question of fixing the date at which the estate is to be valued, or has been valued, for the purpose, not of ascertaining what the residue is, but of adjusting the rights of the parties in a case of this sort, where there are hotchpot provisions in the ultimate distribution."

What falls to be determined in the case at bar does not arise

under a Will, much less a Will where there are hotchpot provisions in the final distribution, but involves interpretation of a section of Articles of Association of a Company.

I would therefore dismiss the appeal. Costs of all parties will be paid out of the estate, those of the Trustee as between solicitor and client and as to all other parties, on the party and party scale.

J.A.

Halifax, N. S.,
May 15, 1970.