Judgment 21 of 1972

IN THE PRIVY COUNCIL

No. 28 of 1971

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

(COURT OF APPEAL DIVISION)

IN THE MATTER of the Estate of GEORGE BRERETON SADLEIR FALKINER deceased

AND IN THE MATTER of the Stamp Duties Act, 1920-1959

B E T W E E N :

PAULINE ARNOLD FALKINER and PERPETUAL TRUSTEE COMPANY LTD. — Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES — Respondent

CASE FOR THE RESPONDENT
THE COMMISSIONER OF STAMP DUTIES

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IN THE PRIVY COUNCIL — No. 28 of 1972

ON APPEAL

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THE COMMISSIONER OF STAMP DUTIES

In the Court of Appeal of the Supreme Court of New South Wales

Record.

B 1. This is an Appeal from a final judgment of the Supreme Court of New South Wales (Court of Appeal Division) given on 20th May, 1971. Final leave to appeal to Her Majesty in Council from the said judgment was granted by the said Court on 18th October, 1971.

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2. The said judgment was given upon the hearing of a case stated by the Commissioner of Stamp Duties (the Respondent herein) on the requisition of the Appellants herein, pursuant to Section 124 of the

C Stamp Duties Act, 1920 (as amended) of the State of New South Wales.

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3. The more material parts of Section 124 of the said Act are as follows:

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"124.(1) ... any administrator or other person liable to the payment of death duty, who is dissatisfied with the assessment of the Commissioner may ... deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Court of Appeal.

(2) The Commissioner shall thereupon state and sign a case accordingly, setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided ...

... (4) On the hearing of the case the Court of Appeal shall determine the question submitted, and shall assess the duty chargeable and also decide the question of costs.

... (7) On the hearing of the case the Court of Appeal shall be at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom if proved at a trial.

..."

4. The Appellants are the administrators, within the meaning of the said Section 124, and are liable to the payment of death duty in respect of the estate of George Brereton Sadleir Falkiner deceased (hereinafter called "the Settlor") who died domiciled in the State of New South Wales on 15th October 1961.

5. The substantial question decided in the judgment of the Supreme Court and which arises on this Appeal is whether for the purpose of the assessment and payment of death duty there should be included in the dutiable estate of the Settlor 100,000 shares in Booka Pty. Limited and 320,000 shares in Senior Park Pty. Limited (hereinafter called "the Trust Property") which at the time of the death of the Settlor were held by a trustee upon the trusts of 10 separate settlements each created by the Settlor shortly before his death, namely on 4th October, 1961.

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Pages 1-4

6. The material facts relating to the said 10 settlements are set forth in the above-mentioned stated case.

7. The Court of Appeal (Asprey and Mason JJ.A. & Taylor A.J.A.) unanimously held that the Trust Property was brought into the dutiable estate of the Settlor by virtue of the operation of Sections
A 102(2)(a) and 102(2A) of the Stamp Duties Act, 1920 (as amended). The more material provisions of those Sections are as follows:

> "102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property -
>
> (1) (a) All property of the deceased which is situate in New South Wales at his
> B death.
> And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death ...
>
> to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person
> C under a disposition not made by the deceased.
>
> (2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of
> D appointment, whether exercisable by the deceased alone or jointly with another person:
>
> Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.
>
> ...

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(2A) All personal property situate outside New South Wales at the death of the deceased, when -

...

(b) the deceased was, at the time of his death, domiciled in New South Wales; and

(c) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of paragraph (2) of this Section.

..."

8. It is apprehended that two principal issues will arise on the hearing of this Appeal, namely:-

(a) Whether Clause 3(b)(v) of the respective deeds of settlement contains a "trust ... to take effect after" (the Settlor's) "death" within the meaning of Section 102(2)(a);

(b) Whether the effect of that part (hereinafter called "the final part") of Section 102(2)(a) introduced by the words "Provided that" is to bring to duty only so much (if any) of the specific property disposed of by a deceased person by a settlement containing a trust of the requisite kind as remains subject to that trust at the time of the deceased's death.

It is convenient to deal separately with these issues.

9. <u>WHETHER CLAUSE 3(b)(v) OF THE RESPECTIVE DEEDS OF SETTLEMENT CONTAINS A "TRUST ... TO TAKE EFFECT AFTER" (THE SETTLOR'S) "DEATH" WITHIN THE MEANING OF SECTION 102(2)(a)</u>.

(a) With respect to the expression "trust ... to take effect after his death", it is submitted that the following propositions are well established and correct:

(i) "after" means "subsequent in point of time" and not "at" or "upon" in the

sense of eo instanti (Rosenthal v Rosenthal 11 C.L.R.87);

(ii) "take effect" means "become vested in possession or enjoyment" (Elder's Trustee and Executor Co. Limited v Federal Commissioner of Taxation 118 C.L.R. 331 and cases cited at 336.);

A (iii) a trust is a trust to take effect after the Settlor's death if it cannot take effect until the death of the Settlor (Keighley v Commissioner of Stamp Duties 45 A.L.J.R. 620);

(iv) a trust is a trust to take effect after the Settlor's death notwithstanding that its taking effect is contingent upon the happening of an B event in addition to and independent of the Settlor's death, provided that at the death of the Settlor the possibility of the contingency happening still exists (Kent v Commissioner of Stamp Duties 106 C.L.R. 366; Keighley v Commissioner of Stamp Duties 45 A.L.J.R. 620 at 623).

(b) The class described in Clause 3(b)(v) of the C respective deeds of settlement as "the next-of-kin of the Settlor as determined by the provisions now in force of the Wills Probate & Administration Act 1898-1954 of the State of New South Wales" cannot be ascertained until the death of the Settlor, because -

(i) prima facie a gift by settlement (or by will) to the next-of-kin of a specified person is, as a matter of D construction, to be read as referring to the class of next-of-kin living at the death of that person (Deane v Lombe 25 S.R. (N.S.W.) 502);

(ii) the relevant provisions of the Wills Probate & Administration Act 1898-1954

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of the State of New South Wales in force as at the date of the respective deeds of settlement require the death of a person as a condition precedent to ascertaining those entitled upon his intestacy and thus his next-of-kin.

(c) No one can have any estate or interest at law or in equity, contingent or otherwise, as a potential member of the class of next-of-kin of a person until the event occurs upon the happening of which that class is to be ascertained, whether it be the death of that person or some other event upon the happening of which the class is to be notionally ascertained (In re Parsons 45 Ch.D.51; Ogden Industries Pty. Limited v Lucas 1970 A.C.113 at 126).

(d) Accordingly, the beneficiaries under the trust contained in Clause 3(b)(v) of the respective deeds of settlement could not be ascertained until, and had no interest prior to, the death of the Settlor; the said trust could therefore not take effect in possession or enjoyment before the death of the Settlor, but could take effect thereafter, and was thus a trust to take effect after the Settlor's death.

10. WHETHER THE EFFECT OF THE FINAL PART OF SECTION 102(2)(a) IS TO BRING TO DUTY ONLY SO MUCH (IF ANY) OF THE SPECIFIC PROPERTY DISPOSED OF BY A DECEASED PERSON BY A SETTLEMENT CONTAINING A TRUST OF THE REQUISITE KIND AS REMAINS SUBJECT TO THAT TRUST AT THE TIME OF THE DECEASED'S DEATH.

(a) This question was not argued in the Court of Appeal in the present case as it had recently been the subject of decision by the Court of Appeal in Atwill v Commissioner of Stamp Duties 92 W.N.(N.S.W.)869. The Appellants however formally reserved the right to argue the matter on appeal.

(b) In Atwill's Case it was held unanimously by the Court of Appeal (Asprey, Mason & Moffitt JJ.A.) that the effect of the final part of

Section 102(2)(a) is to bring to duty all property which at the time of the death of the deceased is subject to the relevant trust, regardless of whether that specific property had been the subject of the deceased's disposition. An appeal was taken from that decision to the High Court of Australia, the decision on that appeal being given after the decision of the Court of Appeal in the present case. On appeal to the High Court in Atwill's Case it was held by the majority (Barwick C.J., Windeyer and Owen JJ.) that the effect of the final part of Section 102(2)(a) is to bring to duty only so much of the specific property which had been the subject of the deceased's disposition as at the time of the death of the deceased remains subject to the relevant trust. The dissenting Judges in the High Court (Menzies and Walsh JJ.) held that the effect of the final part of Section 102(a)(a) was as had been decided by the Court of Appeal. Special leave to appeal to Her Majesty in Council from the decision of the High Court in Atwill's Case has been granted.

(c) The question thus involves consideration of the matters the subject of the eight separate judgments given to date in Atwill's Case. The Respondent submits that in accordance with the respective judgments given in Atwill's Case by Asprey J.A., Mason J.A. and Moffitt J.A. in the Court of Appeal and of Menzies J. and Walsh J. in the High Court, the question stated in paragraph 8(b) above should be answered in the negative. The principal contentions which the Respondent would put in support of his submission are set forth in paragraphs 11, 12, 13 and 14 hereunder.

11. The relevant words of Section 102(2)(a) are plain and unambiguous. They state that "the property deemed" (i.e., by virtue of Section 102(2)(a)) "to be included in the state of the deceased" (and thus brought to duty) "shall be the property which at the time of his death is subject to" a trust fulfilling certain conditions. The conditions are (i) that the trust is contained in a settlement by which the deceased has disposed of property, (ii) that it was a trust in

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respect of the property so disposed of, and (iii) that it is a trust to take effect after the deceased's death. The section thus clearly brings to duty the Trust Property in the present case.

12. The construction of Section 102(2)(a) adopted by the majority of the High Court in Atwill's Case is inconsistent with the words of the Statute. Such a construction necessarily involves substituting for the words "the property which" in the final part of Section 102(2)(a) some such words as "so much of the said property as". To make such a substitution is contary to the first principle of Statutory interpretation that "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency but no further" (Grey v Pearson (1857) 6 H.L.C.61 at 106). In the present case adherence to the grammatical and ordinary sense of the words of the Section does not lead to any absurdity or any repugnance or inconsistency with the rest of the Act.

13. The construction of Section 102(2)(a) adopted by the majority of the High Court in Atwill's Case is inconsistent with the following decisions:

(i) The decision of the Supreme Court of New South Wales and of the Privy Council in Rabett v Commissioner of Stamp Duties 27 S.R.(N.S.W.)370, 1929 A.C. 444;

(ii) The decision of the Supreme Court of New South Wales in In re Gillespie 49 S.R. (N.S.W.)331 (reversed on other grounds by the High Court of Australia (79 C.L.R. 477) such reversal being confirmed by the Privy Council (1952 A.C.95));

(iii) The decision of the High Court of Australia in Kent v Commissioner of Stamp Duties 106 C.L.R.366.

14. The Respondent adopts as part of his submission the following statements from the judgments of Mason J.A. in the Court of Appeal and of Menzies J. in the High Court in Atwill's Case:

(a) Mason J.A. (at 876-878):

"When an examination of the language of s.102(2)(a) is made with the object of identifying the property which is included, or deemed to be included, in the dutiable estate of a deceased person, by force of the operation of the provision, it is immediately apparent that the language of the proviso, according to its natural and ordinary meaning, seems to answer that inquiry by saying that the property to be so included is the property which is subject to the trust at the time of the death of the deceased person. So much was, I think, conceded by the argument advanced on behalf of the appellants which called in aid countervailing considerations sought to be derived from reading the sub-paragraph as an entire provision, from the character of the proviso as a proviso and from judicial observations made in connection with other sub-paragraphs in s. 102(2).

The application of the first part of s. 102(2)(a) is not without its difficulties. Clearly enough it is capable of applying to property the subject of a trust taking effect after the death of a deceased person which is contained in a settlement where the deceased has disposed of the property by that settlement. No difficulty arises in circumstances where it is a deed of settlement that effects the disposition of the property and the property disposed of is subject to the trust at the date of the deceased's death, its identity not having changed. If, however, it is sought to apply the first part of the provision in circumstances where the legal title to property passes from the deceased otherwise than by means of a deed of settlement, the deed defining the trusts and the beneficial interests in the property, it is not as apparent that the property has been disposed of by the settlement. But in such a case it is the definition of the word "settlement" contained in s.100 of the Act

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that enables one to say that property has been disposed of by the settlement. As defined, "settlement" includes any disposition of property whereby any property is settled or agreed to be settled or containing any trust or disposition of any property to take effect after the death of any person, except a will.

There is a second difficulty which is not met by the first part of s.102(2)(a), if regard is had to that part alone. Were it not for the guidance furnished by the proviso the result might follow, indeed probably would follow, that only that property which was the subject of disposition by the settlement, valued at the date of death in accordance with s.105(2), would form part of the dutiable estate. Whatever the true outcome of that hypothetical question, the significant point is that, but for the existence of the proviso, a difficult problem of interpretation would have arisen, a problem of the kind that has loomed so large in the course of applying other sub-paragraphs of s.102(2) since they were first enacted - see Sneddon v. Lord Advocate (1954)A.C.257; Commissioner of Stamp Duties v. Gale (1958) 101 C.L.R.96; Gale v. Federal Commissioner of Taxation (1960) 102 C.L.R.1.

When the nature of the problem which would have arisen but for the presence of the proviso is fully appreciated, it seems inescapable that its function was to provide a solution for that problem by ensuring that what is to be included, or deemed to be included, in the dutiable estate is the property that is the subject of the relevant trust at the date of death. The true role of the proviso as it is thus suggested by the setting in which it is to be found confirms the interpretation which should be accorded to the language of the proviso according to its natural and ordinary meaning.

It is of no little importance that the proviso, as it is expressed, is directed not

to the mode of valuation of the property to which it relates, but to a preliminary matter, namely the description or identification of the property itself. Indeed, because it is not suggested that s.102(2)(a) displaces the ordinary rule enunciated by s.105(2), there is no occasion for the sub-paragraph to address itself to the mode of valuation.

A It is not a valid criticism of the conclusion which I have reached to say that it accords to a proviso a function which is too extensive in that it enlarges the operation of the principal provision. It is clear enough that on the construction which I favour what is denoted by the word "property" in the proviso may differ from that which is denoted by the word in the principal provision. In some cases property B which is subject to the trust at the date of death will be more extensive and more valuable than the property which initially was the subject of the disposition, but this will not always be so and in some cases the property subject to the trust will be less extensive than it was formerly. In these circumstances it is not correct to say that the function of the proviso is one of enlargement; its function is that of clari- C fication, for it may be said to qualify the operation which might otherwise be given to the principal provision if it stood in isolation.

The clarification provided does produce an apparent disharmony as between the references to "property" in the first part of s. 102(2)(a) and in the proviso. In each case the property is included in the dutiable estate, in the first case by the operation of D the opening words in s.102. That apparent disharmony which arises from any change in the nature of the trust property between the date of disposition and the date of death is resolved when paramount effect is given to the specific direction contained in the proviso".

(b) Menzies J. (45 A.L.J.R. 703 at 705-706).

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"I recall that the language of statutes imposing a duty must receive a strict construction; I recall too that an enactment expressed as a proviso is prima facie a limitation rather than a positive enactment; nevertheless, the more I look at s.102(2)(a) I find that the language is clear and unambiguous and requires that property which is, at the date of the death of a deceased person, subject to a trust to take effect after his death, contained in the settlement whereby he disposed of property, must be included in his dutiable estate. In these circumstances the rule of construction to be applied is the first rule of statutory construction, viz. "If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning". See Halsbury, 3rd ed., vol. 36, p.388.

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I reflect too, that, had it been intended merely to limit the operation of s.102(2)(a) to property disposed of by the deceased which, at the time of his death, remained subject to the trust contained in his settlement, it is difficult to imagine a choice of words less apt to do this and no more. That the proviso does this as part of its operation, as I think, perhaps explains why it is cast in the form of a proviso.

C

Furthermore, it seems to me highly unlikely that it was intended that, if a settlor did dispose of property by a settlement containing a trust in respect of that property, to take effect after his death, any change in the investment of the property subject to the trust would take that property beyond s.102(2)(a). Thus, if a deceased person were to have settled $100,000, paid to trustees in cash or by cheque, upon a trust to take effect after his death, with power in the trustees to invest the money, s.102(2)(a) would apply

D

only while the trustees held the cheque or cash and, as soon as they invested it, whatever be the investment, that investment would fall outside the operation of s.102(2)(a) because the property, then subject to the trust, had not been disposed of by the deceased."

15. The Respondent humbly submits that this appeal
A should be dismissed with costs for the following amongst other -

R E A S O N S

(1) Because Sections 102(2)(a) and 102(2A) of the Stamp Duties Act, 1920 (as amended) bring to duty the Trust Property in the present case namely, 100,000 shares in Booka Pty. Limited and 320,000 shares in Senior Park Pty. Limited.

(2) Because the respective decisions of the
B Supreme Court of New South Wales (Court of Appeal Division) in the present case and in Atwill's Case were correct.

Forbes Officer
M.H. McLelland

Counsel for the Respondent

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