

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

TRUST COMPANY OF AUSTRALIA LTD

APPELLANT

AND

COMMISSIONER OF STATE REVENUE

RESPONDENT

Trust Company of Australia Ltd v Commissioner of State Revenue
[2003] HCA 23
1 May 2003
B44/2002

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders made by the Queensland Court of Appeal dated 20 July 2001 and, in place thereof, order that:*
 - (i) *the questions in the Case Stated be answered as follows:*

Question (a): is the Form 1 Transfer (Annexure "D") an instrument whereby property was conveyed, transferred or assigned to or was vested in the person within the meaning of s 49(1)(a) of the Stamp Act 1894?

Answer: yes.

Question (b): if "yes" to (a), is the Assessment Notice issued 27 March, 2000 the result of a reassessment by the Commissioner pursuant to s 80 of that Act?

Answer: unnecessary to answer.

Question (c): if "yes" to (b), is the original assessment that which is contained in the document entitled "ASSESSMENT NOTICE", bearing Lodgement Number 011 858 466 - 9 and, if so, is such assessment the result of the forming of the opinion by the Commissioner pursuant to s 22(2)(a) of that Act that the Form 1 Transfer was not chargeable with any duty because of s 54(6)

of that Act consequent upon duty having been paid on the Contract of Sale (Annexure "C")?

Answer: unnecessary to answer.

Question (d): if "yes" to (c), is the assessment of the Commissioner, contained in the Assessment Notice issued 27 March, 2000, on the Form 1 Transfer instrument valid?

Answer: unnecessary to answer.

Question (e): if "no" to (b), should the appellant be entitled to the benefit of the application of s 54(6) of that Act?

Answer: the condition in the question may be ignored and the balance of the question answered "yes".

Question (f): is the assessment of the Commissioner contained in the Assessment Notice issued 27 March, 2000 in the sum of \$653,475.00 on the Form 1 Transfer instrument correct and, if not, what duty, if any, is payable?

Answer: No, and s 54(6) takes effect according to its terms.

Question (g): how should the costs of and incidental to the stating of this case and of the appeal be borne and paid?

Answer: the costs of and incidental to the stating of the case and the appeal should be borne by the Commissioner of State Revenue.

- (ii) costs of and incidental to the proceedings in the Queensland Court of Appeal to be borne by the Commissioner of State Revenue.*

On appeal from the Supreme Court of Queensland

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Kirby J
Hayne J
Callinan J

3.

Representation:

D G Russell QC with M L Robertson for the appellant instructed by Creagh Weightman Lawyers)

K D Dorney QC with D Marks for the respondent (instructed by Crown Solicitor for the State of Queensland)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Trust Company of Australia Ltd v Commissioner of State Revenue

Stamp duties – Where land intended to be subject of managed investment scheme – Contract of sale between vendor, responsible entity of scheme and custodian of scheme property – Transfer pursuant to contract made to custodian alone – Ad valorem duty paid on contract – Whether transfer liable to ad valorem duty – Whether transfer to custodian was a transfer made to the purchaser within s 54(6) *Stamp Act 1894 (Q)*.

Words and Phrases: "made to the purchaser".

Managed Investments Act 1998 (Cth).

Stamp Act 1894 (Q), ss 54(1), 54(3), 54(6), 54(6A).

1 GLEESON CJ. This is an appeal from a decision of the Court of Appeal of the Supreme Court of Queensland (McMurdo P, Thomas JA, Helman J)¹. The issue in the case concerns stamp duty on a contract for sale, and then on a transfer, of land intended to be the subject of a managed investment scheme. The *Managed Investments Act* 1998 (Cth), required the appointment of an independent party (in this case, the appellant) to acquire and hold scheme property. In order to determine whether that resulted in liability to two amounts of ad valorem duty, it became necessary to apply s 54 of the *Stamp Act* 1894 (Q) ("the Stamp Act"). The Stamp Act has since been repealed. Moreover, the particular problem revealed by this case was later dealt with by special legislation². However, the present case must be resolved by reference to the Stamp Act in the form it took at the time.

2 There were three parties to the contract of sale. Riverfront Developments Pty Ltd was described in the contract as Vendor. Cromwell Property Securities Ltd ("Cromwell") was described as Purchaser. The appellant was described as Custodian. A Custody Agreement previously entered into between Cromwell and the appellant was annexed to the contract. The land the subject of the contract was to be scheme property of a managed investment scheme. The central question is whether the transfer of the land to the appellant pursuant to the contract was a transfer made to the purchaser, within the meaning of s 54(6) of the Stamp Act. If it was, then, ad valorem duty having been paid upon the contract, it was not further payable upon the transfer. If it was not, then ad valorem duty was also payable upon the transfer.

3 The facts, and legislative provisions, are set out in the reasons of Gummow and Hayne JJ, and Callinan J. I will refer to them only to the extent necessary to explain my conclusion.

4 The provisions of the contract of sale were not perfectly consistent. However, the respective roles of Cromwell and the appellant were evidently intended to give effect to the Custody Agreement, which was referred to in, and annexed to, the contract, and which formed the commercial setting for the transaction.

5 The purchase price was \$17,500,000. The deposit was to be paid by the Purchaser. Special Condition 12, dealing with payment of the balance of purchase price, contained an irrevocable direction from the vendor to Cromwell as Purchaser *and* the appellant as Custodian to pay the amount payable on

1 *Trust Company of Australia Limited v Commissioner of Stamp Duties* (2001) 47 ATR 418.

2 *Revenue Laws Amendment Act* 2000 (Q), s 29.

completion in a certain manner. Special Condition 11, headed "Limitation of Liability", contained the following provision:

"11.6 The Vendor acknowledges and agrees that the Purchaser and the Custodian enter into this Contract only in their capacity as Responsible Entity and Custodian respectively of the Scheme and in no other capacity. Any liability of the Purchaser and the Custodian arising under or in connection with this Contract is strictly limited to the extent to which (and can be enforced against the Purchaser and the Custodian only to the extent to which) it can be satisfied out of property of the Scheme out of which the Purchaser and the Custodian are actually indemnified for the liability."

6 The same Special Condition also provided:

"11.1 The Vendor and the Purchaser acknowledge that the Custodian is a party to this Contract solely for the purpose of accepting a transfer of the Property in its capacity as Custodian of the Riverfront Planned Investment ('the Scheme') pursuant to a Custody Agreement ... a copy of which is annexed to this Contract ..."

7 The Custody Agreement, in cl 4, identified the responsibilities of the Custodian. They included a duty "to enter into a contract to purchase the Scheme Property", and "to hold the Scheme Property ... on [Cromwell's] behalf".

8 At first sight, the Custody Agreement might suggest that, as between Cromwell and the appellant, it was only the appellant which would enter into the contract to purchase the scheme property. That would be consistent with the language of cl 4 of the Custody Agreement. However, the purchase price was being provided by, or at least through, Cromwell, and the property was to be acquired and held by the appellant as trustee for Cromwell. Cromwell would in turn be bound by the trusts of the managed scheme. As Special Condition 11.6 of the contract of sale acknowledged, neither Cromwell nor the appellant was to be the beneficial owner of the land, and both of them contracted only in their respective capacities under the managed investment scheme. One thing is clear. As between Cromwell and the appellant, on completion of the contract the appellant was entitled to a transfer of the subject land in its own capacity, and not merely as nominee of Cromwell. It was of the essence of the managed scheme that legal title to the subject property would be acquired by the appellant, and not by Cromwell. Clause 4(b) of the standard conditions of contract, as amended, provided that, on completion, there would be delivered "a properly executed transfer of the Land from the Vendor to the Custodian".

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9 If it had become necessary for the Vendor to bring an action for specific performance of the contract of sale, then both Cromwell and the appellant would have been necessary parties to the proceedings³. The framing of an order for payment of the balance of purchase price would have been complicated by the contractual provisions set out above. Subject to the limitation of liability contained in Special Condition 11, the effect of Special Condition 12, read together with the references in the Custody Agreement to the responsibilities of the appellant, would be to justify an order against both defendants. And the order would have contained a requirement that the balance of the purchase price be paid upon delivery of a transfer of the subject land to the appellant⁴.

10 That is the contractual context in which the provisions of s 54 of the Stamp Act must be applied. The relevant provisions are sub-ss 54(1), (3), (6) and (6A). The following features may be noted.

11 First, s 54(1) imposes ad valorem duty, not only on a contract for the sale of property, but also on any contract whereby any person becomes entitled, or may become entitled, to the conveyance or transfer of any property. Such a contract might not necessarily involve any dealing of a kind that could ordinarily be described as a purchase. Nevertheless, ad valorem duty is imposed; and the question then arises as to how the Act deals with duty on a transfer to the person entitled under the contract. That question is addressed (if it is addressed at all) by sub-s (6).

12 Secondly, s 54(3) deems an option to purchase, for the purposes of s 54, to be an agreement for sale of the subject property, and attracts ad valorem duty accordingly. Once again, the grantee of the option would not ordinarily be described, at least at that stage, as a purchaser, but ad valorem duty is paid and the same question arises when a transfer is executed in favour of the grantee of the option.

13 Thirdly, s 54(6) provides that, where duty has been paid in conformity with the foregoing provisions, the transfer made to the purchaser shall, upon production of the stamped contract, not be chargeable with any duty. The clear intent is to negate liability for double duty where a contract is charged with ad valorem duty, and then there is a transfer pursuant to the contract, where it can be described as a transfer to the purchaser.

3 *Fry on Specific Performance*, 6th ed (1921) at 75, 639.

4 Seton, *Forms of Judgments and Orders*, 7th ed (1921), vol 3 at 2171.

14 Fourthly, s 54(6A) provides that s 54(6) does not apply in respect of a transfer made to a person other than the person named as purchaser in the contract to which the transfer is intended to be pursuant unless the commissioner is satisfied that the person named in the contract as purchaser was acting as agent for the transferee.

15 The argument for the respondent, upheld in the Court of Appeal, is that, in the present case, Cromwell was the only party capable of being described as "the purchaser" within the meaning of s 54(6); the transfer to the appellant executed pursuant to the contract was not a transfer "made to the purchaser"; and therefore s 54(6) had no application. This conclusion, it is said, is reinforced by s 54(6A), which refers, in connection with s 54(6), to "the person named as purchaser in the contract". In my view, that argument depends upon an over-simplification of both the contract and s 54.

16 As was noted above, the contract referred to, and reflected, the managed scheme, which was its genesis, and the respective roles of the appellant and Cromwell Property Securities Ltd in that scheme. Although the contract described Cromwell as Purchaser and the appellant as Custodian, they would both have been necessary parties to an action for specific performance. Subject to the limitations of their liability, an order for the payment of the purchase price could have been made against both. That order would have been conditional upon the delivery by the vendor of a transfer to the appellant as Custodian. In those circumstances, quite apart from the scheme of s 54, it is far from clear that Cromwell is correctly described as the purchaser, to the exclusion of the appellant. When regard is had to their roles, and their respective rights and obligations, under the contract, the appellant has as much claim as Cromwell to be identified as the purchaser.

17 Section 54(6), as its introductory words make plain, applies to the whole of s 54(1), and also to s 54(3). The expression "the purchaser" must be construed as being sufficiently flexible to enable it to have that application. In relation to what might be described as the second limb of s 54(1), if there is a contract whereby a person becomes entitled to a transfer of property, and the contract is charged with ad valorem duty, and a transfer is made to that person, then, either there is relevantly a transfer made to the purchaser, or s 54(6) would have no application. In relation to s 54(3), the grantee of an option is not, under the option agreement, a purchaser, yet s 54(6) appears to be intended to apply to a transfer to such a person if the option agreement has been charged with ad valorem duty as a contract.

18 I do not regard it as necessary for the appellant to rely on the second limb of s 54(1); although it would be available. Rather, I refer to the second limb of s 54(1), and to s 54(3), to indicate the need to give a sufficiently flexible interpretation to s 54(6) in order to enable it to achieve its evident purpose. This

5.

seems to me to be consistent with, and required by, ordinary principles of statutory construction. To give the word "purchaser" in s 54(6) a narrow and inflexible interpretation would deprive it of its capacity to achieve its manifest purpose. It would apply to only part of s 54(1), and not at all to s 54(3). It requires a degree of flexibility. Furthermore, the contract to which it must be applied in the present case is one in which the search for a single "purchaser" does not yield an unequivocal answer. In my view, having regard to the structure of the contract, the first limb of s 54(1) can be applied, and for the purposes of s 54(6), it can be concluded that the transfer to the appellant was a transfer made to the purchaser. The definite article in s 54(6) does not require that, where there are two potential candidates for the description, one of them must be identified as purchaser to the exclusion of the other. That would serve no legislative purpose. To treat the appellant as purchaser conforms to the purpose of s 54(6), and does no violence to the language.

19 Section 54(6A), although in form expressed as a qualification to s 54(6), in substance expands its operation, subject to a certain condition. It does not narrow the meaning of s 54(6), but deals with a particular issue, that is to say, agency.

20 It was said on behalf of the respondent that the argument for the appellant amounted, in effect, to the contention that s 54(6) would apply in any case in which a transfer was made in conformity with the contract of sale. There is more to the present case than that. The role of the appellant, the nature of the appellant's responsibilities under the Custody Agreement annexed to the contract of sale, the obligation to pay the balance of purchase price, and the right to receive a transfer as a condition of payment of the price, mean that the transfer was a transfer made to the purchaser, with the result that s 54(6) is satisfied.

21 The appeal should be allowed with costs. I agree with the consequential orders proposed by Gummow and Hayne JJ.

22 GUMMOW AND HAYNE JJ. The appellant, Trust Company of Australia Limited ("TCA") challenged an assessment by the respondent ("the Commissioner") to duty under the *Stamp Act* 1894 (Q) ("the Act")⁵, in the sum of \$653,475 upon a Form 1 transfer under the *Land Title Act* 1994 (Q) ("the Transfer"). That instrument was dated 29 November 1999 and it identified Riverfront Developments Pty Ltd ("Riverfront") as transferor and TCA as transferee. These were the only parties to the instrument. The subject property was the land and improvements at 301 Coronation Drive, Milton ("the Land"). The purchase price was \$17.5 million.

23 Section 24 of the Act establishes a procedure to test in the Supreme Court of Queensland the decision of the Commissioner upon an objection to an assessment. This involves the stating by the Commissioner of a case setting out the questions submitted for judicial determination. The present Case Stated was heard in the first instance by the Court of Appeal.

24 Stamp duty is charged by s 4 of the Act upon the several instruments and at the rates specified in Sched 1, subject to any applicable exemption. The duty is payable by each and every person who signs or executes the instrument in question (s 26(1)(a)). One of the headings in Sched 1 is "Conveyance or Transfer".

25 The Transfer was made on completion of a contract of sale ("the Contract") made the same day. The parties to the Contract were identified therein as Riverfront as the "Vendor", Cromwell Property Securities Limited ("Cromwell") as "Purchaser" and TCA as "Custodian". Pursuant to the terms of the Contract, the purchase price was paid in exchange for a properly executed transfer from Riverfront to TCA. The Commissioner assessed the Contract and the Transfer to duty in each case in the sum of \$653,475. The Commissioner determined that an "exemption" pursuant to s 54(6) of the Act did not apply to the transfer to TCA because that transfer had not been made to the "purchaser" under the Contract. The "purchaser" spoken of in s 54(6) was, so the Commissioner determined, Cromwell, not TCA, and Cromwell was not a party to the transfer.

5 The Act was repealed by s 509 of the *Duties Act* 2001 (Q), but s 512 thereof provides for the continued application of the repealed statute to instruments executed before the commencement of the new statute.

26 The Court of Appeal (McMurdo P, Thomas JA, Helman J) answered the questions in the Case Stated in a manner favourable to the position adopted by the Commissioner⁶.

The nature of the transaction

27 When producing the Contract and the Transfer to the Commissioner, the solicitors for Cromwell had written to describe the nature of the transaction. Cromwell was the responsible entity and trustee for a syndicate of investors known as the Riverfront on Coronation Planned Investment Scheme ("the Scheme"). Pursuant to a document styled "Custody Agreement" and dated 4 October 1999 between Cromwell and TCA, TCA had been appointed Custodian of the assets of the Scheme. The solicitors wrote that that appointment was "a requirement of the Managed Investments Act amendments to the Corporations Law which require separation of legal and equitable title in Managed Investment Schemes". They added that the role of TCA was "limited to holder of the legal title pursuant to the [Custody] Agreement". Paragraphs (a) and (b) of cl 4.1 of the Custody Agreement stated the duties of the Custodian as including the entry into a contract to purchase the Land and to hold the Land "on [Cromwell's] behalf".

28 At the material time, by force of changes introduced by the *Managed Investments Act* 1998 (Cth), Ch 5C (ss 601EA-601QB) of the Corporations Law ("the Law") made provision for the regulation of managed investment schemes. Provision also was made in Pt 7.3 (ss 780-840) of Ch 7 for the issue of licences authorising the operation of managed investment schemes. Section 784(2) empowered the Australian Securities and Investments Commission ("ASIC") to attach conditions to the grant of licences. A licence under s 784 was issued by a delegate of ASIC to Cromwell on 15 March 1999. Condition 10 required Cromwell not to hold scheme property of a registered scheme and to appoint another person to hold scheme property, unless there applied certain provisions relieving it from that obligation.

29 The result in the present case appears to have been that TCA held the legal (ie registered) title to the Land on trust for Cromwell which, in turn, was trustee of the equitable title in favour of the syndicate of investors whose moneys had funded the purchase of the Land⁷.

6 *Trust Company of Australia Limited v Commissioner of Stamp Duties* (2001) 47 ATR 418.

7 *Comptroller of Stamps (Vict) v Howard-Smith* (1936) 54 CLR 614 at 621-622.

30 In the Court of Appeal, Thomas JA said⁸:

"In this matter the Commissioner has exacted ad valorem stamp duty twice in respect of what was in substance a single sale of property. The relevant parties did not seek to avoid duty on the sale of the property or engage in manoeuvres for any extraneous purpose. In relation to the acquisition of a property they simply followed the rather complicated requirements of the [Law] and the *Managed Investments Act 1998* (Cth) which are designed to protect members of the public in relation to managed investment schemes. Those provisions require the appointment of a 'custodian' to hold the relevant property.

The State of Queensland has now apparently recognised the undesirability of subjecting entities to additional duties by reason of their compliance with such statutory requirements. There is now an express exemption applicable to a situation such as the present one⁹. However, this provision only took effect on 17 November 2000 and is not retrospective."

The Contract

31 Before turning to consider the text and construction of the relevant provisions of the Act, it is convenient to identify more fully the salient provisions of the Contract.

32 For the purposes of the application of the Act, what is essential is the legal characterisation of the obligations provided in the Contract, not the identification of the labels used therein as a means of identification of the particular parties. What is to be ascertained is "the real and true meaning" of the instrument sought to be brought to duty¹⁰.

33 The Contract was based upon the first edition of the form adopted by the Real Estate Institute of Queensland Limited and approved by the Queensland Law Society Incorporated for conveyances of Torrens title, Crown leasehold title of commercial land, buildings and units. The Contract incorporated standard conditions identified as the "Standard Commercial Conditions". These were then

8 (2001) 47 ATR 418 at 420.

9 *Revenue Laws Amendment Act 2000* (Qld); see Explanatory Notes 2000 at 1708, 1714.

10 *Limmer Asphalte Paving Co v Commissioners of Inland Revenue* (1872) LR 7 Ex 211 at 214-215.

amended by Annexure A to the Contract. Reading these provisions together, the following emerges.

34 TCA was identified as "Custodian", Riverfront as "Vendor" and Cromwell as "Purchaser". The balance of the purchase price was to be paid on completion in exchange for a properly executed transfer of the Land from the Vendor to the Custodian (cl 4(b)). The Vendor was required to do all acts and to execute all documents necessary for the purpose of completing the sale and ensuring that the Custodian obtained good and valid title to the Land (cl 10.1). If the Purchaser failed to pay the balance of the purchase price as provided in cl 4, then the Vendor was empowered to terminate the contract (cl 13.1). Clauses 11.4 and 11.5 of the "Special Conditions" of the Contract contained respectively covenants by the Custodian to do all things required of it under the Custody Agreement to enable the Purchaser to observe and perform its obligations under the Contract, and by the Purchaser to do all things, including the giving of instructions to the Custodian, to enable the Custodian to comply with its obligations under the Contract. Clause 11.3 contained an acknowledgment by the parties that the rights of the Purchaser and the Custodian under the Contract were several and not joint or joint and several.

35 The Purchaser acknowledged that the consideration for the payment of the purchase price to the Vendor was satisfied by the Vendor complying with the requirement under cl 4(b) for a transfer to the Custodian (cl 11.2). Finally, cl 11.1 stated that the Vendor and Purchaser acknowledged that the Custodian was a party to the Contract "solely for the purpose of accepting a transfer of the Property in its capacity as Custodian of [the Scheme] pursuant to [the] Custody Agreement".

The contractual relationships

36 The Contract thus was so framed as immediately to create tripartite relationships. This was not, for example, the case of a contract between Riverfront and Cromwell with TCA, by subsequent arrangement, becoming a sub-purchaser from Cromwell. There was to be but one transaction, the terms for the performance of which were fixed from the outset and between all the actors. That situation may be contrasted with the various situations considered by Aickin J in *Lord v Trippe*¹¹. His Honour referred to the proposition by Sir George Jessel MR in *Earl of Egmont v Smith*¹² that:

11 (1977) 51 ALJR 574 at 582; 14 ALR 129 at 143-144.

12 (1877) 6 Ch D 469 at 474.

"[a]n ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct."

Here, there was but one obligation expressly stipulated as to conveyance and that was conveyance in favour of the Custodian; the conveyance that was made thus was not in exercise of any power to direct a conveyance but in discharge of an obligation to convey to a particular party to the Contract itself.

37 Aickin J also referred to¹³:

"a common enough practice in real estate transactions for the contract itself to provide that the transfer is to be made to the purchaser or his nominee, but that gives a power to substitute or nominate a different transferee, not a different contracting party. The vendor becomes bound to transfer to the nominee upon the purchaser paying or procuring the payment of the purchase money and otherwise complying with the terms of the contract."

Again, the Vendor at all times under the Contract was bound to transfer to the Custodian because the Contract so stipulated, not because there was a subsequent nomination of the Custodian by the Purchaser.

38 Finally, Aickin J referred to another quite different situation, that where¹⁴:

"a purchaser under a contract of sale may, in the absence of special circumstances, assign his interest in the contract and the assignee then becomes entitled to all the rights of the purchaser upon notice being given to the vendor. The vendor has, in this sense also, a right to nominate a transferee to take the transfer of the property comprised in the contract."

39 Arrangements falling within one or other of these categories possibly may give rise to issues in assessment for stamp duty under s 54 and other provisions of the Act¹⁵. But they would not be the issues which arise on this appeal.

13 (1977) 51 ALJR 574 at 582; 14 ALR 129 at 143.

14 (1977) 51 ALJR 574 at 582; 14 ALR 129 at 144.

15 cf *Lake Victoria Ltd v Commissioner of Stamp Duties* (1949) 49 SR (NSW) 262; *Vickery v Woods* (1952) 85 CLR 336.

Section 54

40 The provisions of s 54 immediately relevant to the issues on this appeal are as follows:

"(1) Any contract or agreement for sale of any property or any contract or agreement *whereby a person becomes entitled or may, provided the terms and conditions thereof are met, become entitled to the conveyance or transfer* of any property shall be charged with the same duty *as if it were* an instrument of conveyance of the property.

...

(6) *Where duty has been duly paid in conformity with the foregoing provisions*, the conveyance or transfer or conveyances or transfers *made to the purchaser* shall upon production of the contract or agreement or contracts or agreements, duly stamped not be chargeable with any duty, and the commissioner, upon application, either shall denote the payment of the ad valorem duty upon the conveyance or transfer or conveyances or transfers, or shall transfer the ad valorem duty thereto." (emphasis added)

41 The terms "conveyance" and "transfer" include every instrument whereby property is conveyed, transferred or assigned to or is vested in any person (s 49(1)).

42 Provisions such as s 54 have a long history in revenue law. This appears to have begun in the United Kingdom with s 18 of the *Customs and Inland Revenue Act 1889* (UK)¹⁶ which was repealed and replaced by s 15 of the *Revenue Act 1889* (UK)¹⁷, in turn replaced by s 59 of the *Stamp Act 1891* (UK)¹⁸. These provisions were introduced to remedy a perceived defect in s 70 of the *Stamp Act 1870* (UK)¹⁹, which had been disclosed by the decision in *The Commissioners of Inland Revenue v G Angus & Co*²⁰.

16 52 Vict c 7.

17 52 & 53 Vict c 42.

18 54 & 55 Vict c 39.

19 33 & 34 Vict c 97.

20 (1889) 23 QBD 579. See Piper, *The Stamp Laws and Duties*, (1912) at 195; *Sergeant and Sims on Stamp Duties and Capital Duty and Stamp Duty Reserve Tax*, 9th ed (1988) at 143-144.

43 In its original form, s 54(1) of the Act provided:

"Any contract or agreement made in the Colony of Queensland, under hand and seal or under seal only, or under hand only, for the sale of any equitable estate or interest in any property whatsoever, shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

The origin of the present s 54(6) is found in the original s 54(3):

"Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the Commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped."

44 The references in the original s 54(3) to sub-purchasers, those acting on behalf of another, and those taking by direction, have been removed. Counsel for the appellant carefully traced the series of legislative steps by which these and other changes to s 54 were brought about. However, the issue which arises on this appeal is best approached by turning immediately to construe sub-ss (1) and (6) of s 54 as they stood at the relevant time. It may be added that the conclusion yielded by that effort does not appear inconsistent with anything in the legislative history.

45 Section 54(1) does not distinguish between contracts and agreements but does deal distinctly with (i) contracts or agreements for the sale of any property and (ii) contracts or agreements whereby a person becomes entitled to the conveyance or transfer of any property or may become so entitled provided the terms and conditions of the contract or agreement are met. It may be, as counsel for the appellant suggested, that category (ii) was introduced at least partly on the footing that category (i) dealt only with immediately executed rather than executory contracts or agreements. However that may be, the Contract fell within category (ii). Provided the terms and conditions thereof were met, for example, the tendering of the purchase money on completion, the Custodian became entitled to the transfer of the Land. That entitlement arose by reason of the terms and conditions of the Contract. That meant that the connecting factor made requisite by the term "whereby" in s 54(1) is satisfied. It followed that the Contract was properly charged with the same duty as if it had been an instrument of conveyance of the Land. No party suggests the contrary.

46 The next step is to construe sub-s (6) in its relation to sub-s (1) in the circumstances of this case. The matters just discussed concerning the application here of sub-s (1) indicate that the condition precedent to the operation of sub-s (6) was satisfied. That condition is expressed by the words "[w]here duty has been duly paid in conformity with the foregoing provisions". The balance of sub-s (6) assumes and operates expressly upon the footing that in respect of the instrument attracting the payment of duty in conformity with sub-s (1), there will be a party to answer the statutory description "the purchaser" to whom a transfer of the land is made. The phrase "made to the purchaser" identified the Transfer made under and in performance of those provisions of the Contract whereby the Custodian became entitled to the Transfer.

47 The term "the purchaser" in s 54(6) takes its colour not simply or exclusively from the law of vendor and purchaser, but from the earlier provisions of s 54, in particular, in this case, s 54(1). Section 54(1) is so drawn that a covenant under seal to transfer, unsupported by consideration, will attract duty under that provision. The transferee would not ordinarily be described as "the purchaser" but the transfer made in performance of the covenant would attract the operation of s 54(6) because duty had been paid in conformity with s 54(1).

48 An understanding of the operation of s 54(6) may be further assisted by regard to s 54(3). This deals with options and states:

"Where an agreement which creates an option or right of purchase of any property provides that such property, or any part thereof, shall be conveyed or transferred to any person pending the exercise of the option or right of purchase, or where, in connection with such an agreement, such property, or any part thereof, shall be, or be agreed in any other manner to be, so conveyed or transferred, the agreement creating the option or right of purchase shall, for the purposes of this section, be deemed to be an agreement for the sale of the whole of the property the subject of the option or right of purchase."

As a deemed agreement for the sale of the whole of the property the subject of the option, the agreement becomes an agreement which attracts the charging of duty under s 54(1). The grantee of the option would not ordinarily be described as a "purchaser". That is not to deny to that party the character of "the purchaser" for the subsequent operation of s 54(6).

49 Something also should be said respecting s 54(6A). This provides that s 54(6) may apply where the Commissioner is satisfied of various matters, even though the instrument is a conveyance or transfer made to a person *other than* the person named as purchaser in the contract or agreement of sale to which the conveyance or transfer is intended to be pursuant. Once it be concluded, as it

should be, that, in the present case, TCA was "the purchaser" for the purposes of s 54(6), s 54(6A) is not engaged. Certainly s 54(6A) does not deny or qualify the beneficial operation s 54(6) already has.

50 In the result, the construction of s 54(6) for which TCA contends should have been accepted by the Court of Appeal.

Other authorities

51 Something should be said of two authorities referred to in the judgments of the Court of Appeal and relied upon by the Commissioner. Each is a decision of this Court. Neither was concerned with the construction of the Act.

52 The first decision is *Dudley Buildings Pty Ltd v Rose*²¹. This was a vendor and purchaser dispute. The Court was concerned with which of two persons who were, at various times, entitled to a transfer of certain lands and buildings in Melbourne, was the purchaser thereof at a particular time. The Court held that this was the person who had certain obligations *in addition* to the right to a transfer. Turning to the present appeal, TCA under the Contract had the right to a transfer of the Land and it covenanted for the benefit of Riverfront that it would do all things required of it under the Custody Agreement to enable Cromwell to observe and perform its obligations to Riverfront. *Dudley Buildings* does not assist the Commissioner.

53 The second decision is *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd*²². The Court there was concerned with two provisions in the *Stamp Duties Act* 1920 (NSW). The first was s 17(1). This restated the general principle that an instrument containing or relating to several distinct matters is to be separately and distinctly charged with duty in respect of each of them. In that regard, reference was made²³ to *Limmer Asphalte Paving Co v Commissioners of Inland Revenue*²⁴. Nothing in the present case turns upon that rule of construction.

54 The second provision in the New South Wales statute comprised certain paragraphs under the heading "Declaration of Trust" in the Second Schedule. These included the phrase "a person in whom property is vested as the apparent

21 (1933) 49 CLR 84.

22 (1989) 167 CLR 1.

23 (1989) 167 CLR 1 at 10, 24, 34.

24 (1872) LR 7 Ex 211 at 217.

purchaser". But, whilst the judgments in *Pendal* were the subject of detailed examination in oral submissions on this appeal, the unsurprising result is that what was determined in *Pendal* is of no assistance in determining the construction of s 54 of the Act.

Conclusions

55 TCA emphasised in its submissions the statement by Dixon J in *Executor Trustee & Agency Co of South Australia Ltd v Federal Commissioner of Taxation*²⁵ to the effect that unless the intention "is clear beyond any doubt", a taxing statute should not be interpreted in a fashion which "results in the imposition of double taxation". These remarks were made when dealing with an income tax case. The statute with which the Court is presently concerned relevantly imposes a duty upon particular instruments rather than overall transactions. Therefore it may be a little difficult to rely upon detestation of double taxation as a guiding principle of statutory construction.

56 It is true, as Thomas JA pointed out in the passage set out earlier in these reasons, that the Commissioner seeks to recover ad valorem stamp duty twice in respect of what in substance was but one sale by Riverfront of the Land. Nevertheless, the conclusion that the submissions of TCA should be accepted in preference to those of the Commissioner has been reached directly upon the construction of s 54, and without regard to any overriding or general considerations of the nature referred to by Dixon J.

Orders

57 The appeal should be allowed with costs. The orders made by the Court of Appeal should be set aside and in place thereof it should be ordered that the appeal to that Court be allowed and that the questions in the Case Stated be answered as follows:

- (a) "Yes."
- (b), (c), (d) Unnecessary to answer.
- (e) "The condition in the question may be ignored and the balance of the question answered 'Yes'."
- (f) "No, and s 54(6) takes effect according to its terms."

25 (1932) 48 CLR 26 at 44.

16.

- (g) "The costs of and incidental to the stating of the case and the appeal should be borne by the Commissioner of State Revenue."

58 To supplement the answer to question (g), it also should be ordered that the costs of and incidental to the proceedings in the Queensland Court of Appeal be borne by the Commissioner.

59 KIRBY J. This appeal²⁶ raises an awkward point of contested statutory construction. Historically the point arises because of the superimposition of an amending law (namely the *Managed Investments Act* 1998 (Cth)) ("the federal law") having the consequence of altering the then Corporations Law of the State of Queensland in a way that had implications for the operation upon the parties of Queensland revenue legislation then in force, namely the *Stamp Act* 1894 (Q)²⁷ ("the State Act"). Keeping this historical fact in mind provides the key to resolving the present controversy.

The issues and purposive construction of revenue laws

60 The ultimate issue in the appeal is whether an instrument of transfer of property to the appellant was chargeable with stamp duty in accordance with the State Act. The only basis propounded to sustain the submission of the appellant (Trust Company of Australia Ltd) that the instrument of transfer was not liable to the duty levied by the Commissioner (the respondent) was that, for the purposes of the State Act, the appellant was to be characterised as the "purchaser" of the property thereby conveyed to it. The facts are set out in other reasons. I will not repeat them.

61 There may be "merits" arguments that support the appellant's submission. One could contend that the law at the relevant time *should* have so provided (as the judges of the Court below appeared to acknowledge²⁸). The outcome urged by the respondent may appear somewhat unfair in that what was "in substance a single sale of property"²⁹ is thereby subjected to *ad valorem* stamp duty twice by the decision under appeal. On the face of things, that might seem a surprising result for the operation of the State Act. But if it is one that the mind would naturally resist, the struggle can only continue to the extent that the terms of the legislation permit.

26 From a unanimous judgment of the Court of Appeal of the Supreme Court of Queensland: *Trust Company of Australia Ltd v Commissioner of Stamp Duties* (2001) 47 ATR 418 ("*Trust Company*").

27 The legislation has since been repealed and replaced by the *Duties Act* 2001 (Q) but without affecting its operation upon instruments earlier executed. The Commissioner of Stamp Duties provided for in the repealed legislation has been replaced by a Commissioner of State Revenue from 1 March 2001. See *Taxation Administration Act* 2001 (Q), s 7(1).

28 See *Trust Company* (2001) 47 ATR 418 at 420 [2] per McMurdo P, 420 [5] per Thomas JA.

29 *Trust Company* (2001) 47 ATR 418 at 420 [5] per Thomas JA.

62 The Court below was aware of the element of discordancy in the result that it favoured. It felt unable to overturn the respondent's assessment. It concluded that the language of the State Act, applied to the facts of the case, was not susceptible to techniques of judicial re-interpretation designed to stretch the words to produce what might be considered a "just" outcome.

63 I generally favour a purposive construction of legislation³⁰. It is the approach that represents the contemporary doctrine of this Court³¹. Indeed, I go further and consider that it is emerging as a common mode of solving problems not only in words contained in written laws made by, or under the authority of, a legislature but also in disputed language in contracts and other legal instruments³². Revenue legislation is not in a category immune from the general principles of statutory interpretation³³. The purposive approach applies to the ascertainment of the meaning of such legislation as to that of other written laws³⁴.

64 If the Queensland Parliament had considered in advance the consequences for stamp duty on instruments executed in relation to the transactions in question it might well have provided a clarification, or express exemption, to prevent the imposition of what effectively amounts to a form of double taxation upon what was in essence one inter-dependent transaction. In the end, that Parliament did act. However, it did so too late to assist the appellant.

65 The other members of this Court have concluded, contrary to the opinion of the Court of Appeal, that the State Act may be interpreted in a way that avoids the apparent injustice of the exaction of a second amount of duty. If I could

30 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 686 [383]; 195 ALR 609 at 695.

31 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

32 *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 234-235. See also Kirby, "Towards a Grand Theory of Interpretation - The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95.

33 *Deputy Commissioner of Taxation v Chant* (1991) 24 NSWLR 352 at 356-357.

34 *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459 at 477 [52]; *Austin v Commonwealth* (2003) 77 ALJR 491 at 514 [102], 542 [251]; 195 ALR 321 at 352, 390-391; cf *Wilson v Commissioner of Stamp Duties* (1988) 13 NSWLR 77 at 79-80.

agree I would, because it is a happy outcome when legal analysis permits a result that accords with a decision-maker's opinion of what is just or fair in the merits sense.

66 It would be naïve to deny that, in the process of statutory interpretation, judges, at every level of the hierarchy, are affected by their sense of justice in giving meaning to words. It may have been enough in 1872 to say that a court simply ascertains and declares "the real and true meaning of the instrument" sought to be brought to duty³⁵. But today we know that the adjectives "real and true" add little to the process of interpretation. Contemporary theories of legal construction – indeed of decision-making more generally – are alive to the much more complex process of reasoning that is ordinarily involved. Presuppositions, unconscious inclinations and other like mysteries doubtless affect a judge's ultimate decision. I will not delve into any of these. It will be enough for me to state briefly the legal considerations on the basis of which I differ from the majority in this Court.

67 I would uphold the decision of the Court of Appeal and dismiss the appeal.

The instrument was correctly brought to tax

68 *Statutory context and legislative intention:* The duty of a court, where the law has been reduced to written form (whether in an act of Parliament or a law made with the authority of the same) must be, and only be, to uphold the law so made³⁶. A court's duty is not to the principles of the common law that preceded the legislative form nor to early, or other, or foreign statutes. Obedience to the text of legislative provisions is founded on a critical postulate of democratic governance that is inherent in the Australian Constitution. In our Commonwealth it is the first duty of the courts to give effect to a valid legislative purpose where it is expressed in law. The primacy of that obligation derives from the special legitimacy of the written law that may, in turn, be traced to the imputed endorsement of such a law by legislators elected by the people. This means that courts must give effect to the purpose of the lawmaker, ascertained by reference to the language in which that purpose is expressed.

35 *Limmer Asphalte Paving Co v Commissioners of Inland Revenue* (1872) 7 Ex 211 at 214. See reasons of Gummow and Hayne JJ at [32].

36 *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 579 [146]-[147]; 187 ALR 1 at 40.

69 Courts may sometimes perceive, and feel able to overcome, injustices, mistakes and omissions in the written law³⁷. But if the text is relevantly clear, and applicable to the case in hand, no court may substitute its own view of what the law *should* be (or perhaps *would* have been if only Parliament had considered the case and foreseen the instance that arose to present a difficulty).

70 The critical term in the State Act in question in this appeal is "purchaser". It is the key word in s 54(6) of that Act. It is true that such a word, like any other, takes its colour and meaning from its context. In a case such as the present, the process of characterisation must necessarily take account of the circumstances of the transaction and the terms of the contract, in order to identify the character and role of each of the parties to that transaction. It must also have regard to the legislative context in order to ascertain the meaning of the term "the purchaser" in the applicable statutory provision. That legislative context undoubtedly includes the succeeding sub-section of the State Act. That sub-section, s 54(6A), reads:

(6A) Subsection (6) does not apply in respect of a conveyance or transfer made to a person other than *the person named as purchaser* in the contract or agreement for sale to which the conveyance or transfer is intended to be pursuant unless the commissioner is satisfied that at the time the contract or agreement for sale was executed *the person named therein as purchaser* was acting in the transaction evidenced by such contract or agreement as agent for the person to whom the conveyance or transfer is made ... and was so acting under authority given to him or her by such person in writing executed prior to the execution of the contract or agreement for sale." (emphasis added)

71 It is a serious error of interpretation to approach the meaning of "purchaser" in s 54(6) of the State Act without paying regard to the elaboration of that sub-section introduced by s 54(6A). The need to interpret the two sub-sections together is signalled by the opening words of s 54(6A) and by the highly specific language in which the qualification thereby introduced is stated. The Queensland Parliament has addressed the identification of the "purchaser" for the purposes of s 54(6) of the State Act in very precise language. Presumably it has done so to overcome the risk of schemes of tax avoidance whereby a person might claim that someone else, and not it, was the "purchaser" and thus liable to duty. To avoid such disputes, strict preconditions to the application of s 54(6)

37 cf *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283; *Birmingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292 at 302.

are laid down, since that provision affords a mechanism for exemption from duty that would otherwise be levied.

72 Relevantly, the "purchaser" must be "named as [such] in the contract or agreement for sale" unless the Commissioner reaches a satisfaction (not available in the present case) that the person named as "purchaser" was acting as an agent under authority. The high particularity of the conditions for receiving the benefits of the effective exemption from duty in s 54(6) speak strongly against the construction urged by the appellant. If the Queensland Parliament took the trouble to address, in such a specific way, the prerequisites to the application of the exemption, it is no part of the function of this Court to brush those preconditions aside and to read s 54(6) as if s 54(6A) did not exist.

73 A statutory text must be read as a whole. Words or sub-sections should not be read in isolation³⁸. The only proper way to ascertain the relevant purpose of Parliament is to read the entire Act, or at least the Chapter or Part in question, and certainly the whole section of the provision in dispute. With respect, s 54(6A) does not say that s 54(6) may apply where the Commissioner is satisfied of various matters although the instrument is a conveyance or transfer made to a person *other than* the person named as purchaser in the contract or agreement for sale to which the conveyance or transfer is intended to be pursuant. On the contrary, by its terms, s 54(6A) clearly states that "[s]ubsection (6) does not apply" in the particular circumstances.

74 The first logical step in considering a suggested invocation of s 54(6) of the State Act in the particular case is therefore to ask the question: "First, does s 54(6) apply at all?" In the present case, the transfer pursuant to the contract for sale was to a person "other than the person named as purchaser in the contract", namely the appellant. The appellant was identified in the contract as the "custodian". Further, as the Court of Appeal recognised, the person identified as the "purchaser" in the contract for sale (Cromwell Property Securities Ltd) could not be characterised as the appellant's agent. Therefore, the relief against the payment of duty on the instrument of transfer pursuant to s 54(6) (as expanded by s 54(6A)) was not available to the appellant. Within the four walls of the applicable section, this tells against the construction urged by the appellant.

75 *Self-description and identifying the purchaser:* It is true that the word "purchaser" is not expressly defined either in the State Act or the instrument in question in this case and, as a general proposition, is susceptible to various

38 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 686-687 [385]-[386]; 195 ALR 609 at 696.

meanings depending on the context³⁹. However, the position of the appellant can only be described as the "purchaser" in the present case by doing a measure of violence to that concept as it is ordinarily understood in the English language. This Court should not undertake such a course simply to avoid what may seem to be an instance of "double taxation"⁴⁰.

76 The appellant was not the "purchaser" within the ordinary meaning of that word. As contemplated by s 54(1) of the State Act, a "purchaser", under a relevant contract, was the person bearing the contractual obligations ordinarily borne by a purchaser. Principally, these obligations include the purchaser's contractual obligation to pay the purchase price. No such obligation was assumed by the appellant. To be a "purchaser" a person must normally assume a purchaser's *obligations* as well as enjoy its *rights*⁴¹. In the cases, a distinction is commonly drawn between a person entitled to take a conveyance, on the one hand, and a "purchaser" on the other⁴². According to such authority, the appellant is not readily characterised as the "purchaser" of the subject property. As the respondent submitted before this Court, any obligations undertaken by the appellant under the contract for sale were minimal.

77 This is an unsurprising conclusion given that, in the contract for sale, another party (Cromwell) is specifically *named* as the "purchaser". As the text of that instrument, set out with added emphasis in the reasons of Callinan J⁴³ shows, there was a perfectly good "purchaser" in these transactions. That was Cromwell. For this Court now to say, contrary to the terms of the instruments and notwithstanding the nomenclature used by the parties to describe the way they saw themselves, that there were in fact two "purchasers", namely the appellant as well as Cromwell, is unconvincing.

78 Self-description cannot compel a particular decision under the State Act concerning the character of a party propounded as a "purchaser". But whilst the descriptions adopted by the parties are not determinative of the effect of the

39 cf *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd* (1989) 167 CLR 1 at 16-17.

40 cf reasons of Gummow and Hayne JJ at [55]; reasons of Callinan J at [121] with reference to *Executor Trustee & Agency Co of South Australia Ltd v Federal Commissioner of Taxation* (1932) 48 CLR 26 at 44.

41 *Dudley Buildings Pty Ltd v Rose* (1933) 49 CLR 84 at 97.

42 eg *Vickery v Woods* (1952) 85 CLR 336 at 343-344; *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd* (1989) 167 CLR 1 at 16, 21-22, 32.

43 See reasons of Callinan J at [98]-[104].

statutory provisions on the relevant instruments, in the present instance, as the Court of Appeal correctly recognised, the identification of the parties accords with the roles they respectively performed as understood after reading the applicable statutory provisions. It is therefore unsurprising that the Court of Appeal should have taken the instrument and the requisite character of the appellant at face value. Its opinion that the appellant was not the "purchaser" for the purposes of s 54(6) of the State Act is unremarkable. Without more, I would reach the same conclusion.

79 *The supervening federal law:* This conclusion is strongly reinforced when it is remembered that the true character of the appellant for the purposes of the scheme and the instant transaction was that introduced into the Corporations Law following the passage of the federal law. It introduced a capacity quite distinct from that of a "purchaser" under the State Act. Indeed, the distinct capacity was superimposed by law upon the private intentions of the parties (if any) as evidenced in their written instruments.

80 Put shortly, the appellant was appointed as a "custodian", as contemplated by the legislative scheme instituted by the Corporations Law⁴⁴. That arrangement operated throughout Australia for the purposes of regulating a "managed investment scheme". Pursuant to the legislative scheme, initiated by the federal law for the protection of the investing public in Australia, and given effect by the amendments to the Corporations Law, the appellant had a special statutory function. Whilst, in some cases, it might be possible for such a person to be a "purchaser" under the State Act, or under a private instrument, in my view, that was not the scheme contemplated by the law applicable to this case. Under that law, the status assigned to the appellant was that of a special kind of statutory "trustee".

81 The appellant was thus interposed between the "vendor" and the "purchaser" (namely, Riverfront Developments Pty Ltd and Cromwell). As contemplated by the legislative scheme (and consistent with the identification of the parties in the contract for sale), the appellant was neither the "vendor" nor the "purchaser". The duties and functions required of the appellant by the Corporations Law deny either appellation to it. Specifically, they deny that the appellant was, or could be, a "purchaser" for the purposes of s 54(6) of the State Act. The federal law and consequent amendment to the Corporations Law are each expressed in terms of "trustee" and "beneficiary"⁴⁵.

44 See now the *Corporations Act* 2001 (Cth), s 601EA(2)(a).

45 See eg *Corporations Law* s 601ED(4)(b).

82 To the complaint that this construction is unduly narrow and condones a form of double taxation, the answer is that it is the meaning clearly expressed by the law enacted by the Queensland Parliament. There are two aspects to the legislative purpose evidenced in s 54(6) of the State Act, as read in its statutory context, and the distinction there drawn between a purchaser and a transferee. On the one hand, the provision aims to ensure that any instrument of transfer of real property pursuant to a contract for sale is dutiable if the transfer is to someone other than the purchaser. As a corollary, the purchaser is relieved from paying double duty where duty has been paid on the contract for sale. Therefore, Parliament considered that in some instances the transferee of property would not be the same as the purchaser. Such an arrangement can be effected for a variety of reasons, sometimes commercial, or sometimes in order to comply with statutory conditions similar to those imposed on Cromwell as the responsible entity of the managed investment scheme in the present instance. Had Cromwell purchased the property first, and then sought to put in place the arrangement with the appellant as a custodian in order to comply with its licence, duty would have been payable on both steps of that transaction.

83 When Parliament enacted s 54(6) of the State Act, it had no reason to anticipate, or provide for, the eventuality that supervened with the passage of the federal and State laws requiring the interposition between the vendor and purchaser of a party having the "custodial" or "trustee" functions of the appellant. The Queensland Parliament can therefore scarcely be blamed for not having anticipated, and provided for, such a statutory development.

84 *Taxation and serial property transactions:* The supposed presumption against a construction of revenue laws that results in "double taxation"⁴⁶ does not, in my view, represent the present approach of this Court to the interpretation of ambiguous taxing legislation. Old approaches of this kind, favouring the taxpayer, are less persuasive today given the democratic legitimacy of the legislature to enact revenue laws as it chooses, the larger needs of modern government served by taxation and the proliferation of sophisticated schemes for tax avoidance⁴⁷. However that may be, I agree with Gummow and Hayne JJ⁴⁸ that

46 *Executor Trustee & Agency Co of South Australia Ltd v Federal Commissioner of Taxation* (1932) 48 CLR 26 at 44. See reasons of Callinan J at [121].

47 *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 79-80 per Murphy J (diss); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 319-323; *Austin v Commonwealth* (2003) 77 ALJR 491 at 514 [102], 542 [251]; 195 ALR 321 at 352, 390-391; cf Hill, "A Judicial Perspective on Tax Law Reform", (1998) 72 *Australian Law Journal* 685 at 688-690.

48 Reasons of Gummow and Hayne JJ at [55].

any such presumption as stated by Dixon J in *Executor Trustee & Agency Co of South Australia Ltd v Federal Commissioner of Taxation*⁴⁹, is not available in this case. Dixon J was there dealing with income taxation. Different considerations arise in cases of stamp duty. As illustrated by the present case, the impost of the latter form of taxation may fall upon the business dealings of propertied interests. In such cases it cannot necessarily always be assumed that Parliament intended to avoid double taxation. It remains, in each instance, to ascertain the meaning of the statutory provision from its language.

85 In this area of the law, duty is typically levied upon the instruments executed by the parties and not upon their substantive dealings or transactions⁵⁰. Like other statutes of this kind, the State Act levies duty on instruments, rather than on transactions (with some specific amelioration provided in s 54(6), as elaborated and expanded by s 54(6A)). In a particular case, by focusing on the instruments, this approach may occasionally produce an outcome that may seem to impose an unfair result given the "real" or "practical" effect of composite transactions or inter-related dealings between the parties. However, as this is the way such revenue laws are typically expressed (and as the State Act is expressed here), it is beside the point to emphasise the nature of the transactions or dealings if the analysis of the instruments in question results in a different conclusion, as it does here.

86 There is no reason why the present State Act should be assumed to depart from the foregoing basic principle. It is a principle that applies the purposive rule of construction to legislation that imposes taxation. As Rowlatt J noted in *Cape Brandy Syndicate v Inland Revenue Commissioners*⁵¹:

"[I]n a taxing Act one has to look merely at what is *clearly* said ... There is no equity about a tax. There is no presumption as to a tax ... One can only look *fairly* at the language used."

A hard case affords no occasion to depart from such time-honoured legal concepts.

87 *Subsequent legislative repair:* A further consideration should be mentioned. Following the execution of the instrument brought to duty in this

49 (1932) 48 CLR 26 at 44.

50 cf *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 449; *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 76 ALJR 1534 at 1540 [34]; 192 ALR 56 at 64.

51 [1921] 1 KB 64 at 71 (emphasis added).

case, the Queensland Parliament enacted the *Revenue Laws Amendment Act 2000 (Q)*⁵². By that Act⁵³, exemptions were enacted that would have the effect, after 2000, of exempting a "custodian" (such as the appellant) from liability for duty on a transfer such as the one brought to duty in this case.

88 Citing authority⁵⁴, the respondent pointed to this amendment, to the explanatory notes distributed with the Bill that became the Act of 2000 (explaining the need for the amendment) and to the fact that the construction urged by the appellant would, in effect, leave such amendment with no work to do⁵⁵. It would hold that Parliament had made a mistake and enacted an alteration to the State Act that was never necessary.

89 I accept⁵⁶, and have been party to⁵⁷, decisions in which this Court has thrown cold water on the assumptions, inherent in the old approach, that legislatures pay vigilant attention to the decisions of courts concerning legislative meaning, that they always act in a consistent way and that they never make a mistake in the understanding of the written or unwritten law. Such assumptions are, as Dixon J remarked of one of them in *R v Reynhoudt*⁵⁸, "quite artificial". Nevertheless, without embracing the view that the supervening legislative amendment is conclusive as to the meaning of s 54(6) of the State Act at the relevant time (as the respondent's argument seemed to suggest) I agree with what Dawson J said in *Taikato v The Queen*⁵⁹:

52 ss 29, 30.

53 s 29(1).

54 eg *Grain Elevators Board (Vict) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86 per Dixon J.

55 This is a relevant consideration: *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 76 ALJR 1534 at 1544 [52]; 192 ALR 56 at 69.

56 eg *Flaherty v Girgis* (1987) 162 CLR 574 at 594; *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539.

57 eg *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 351. See also at 328-329.

58 (1962) 107 CLR 381 at 388: noted in *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329.

59 (1996) 186 CLR 454 at 471-472 (footnote omitted). See also the point reserved by Callinan J in *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 76 ALJR 1534 at 1544 [54]; 192 ALR 56 at 69.

"Whilst it is not possible to take the amendments to [the legislation] into account in interpreting the section as it was before the amendments, at least upon the view which I take which is that the prior legislation is unambiguous, those amendments serve to indicate the kind of circumstances which are relevant in determining whether the appellant [could invoke] the unamended section."

90 In effect, the amendments enacted by the Queensland Parliament in 2000 acknowledged that an adjustment to the State Act was needed to remove a potential source of unfairness and prospects of double taxation. This was, in substance, the response of the Queensland Parliament to the alteration in the Corporations Law in consequence of the supervening federal law, whose impact had, by inference, not been foreseen or appreciated at the relevant time.

91 It is possible (as Callinan J considers) that, in enacting its amending statute in 2000, to correct the position for future cases like the appellant's case, the Queensland Parliament was making a mistake. I would certainly not go so far as to say that it was necessarily confirming the application of the previous law or decisions of courts (if any) and decisions of the respondent as to the view of the State Act that is under scrutiny in this appeal. However, the alternative interpretation of the amendment is that an unintended legislative disharmony arising from laws originating from different Australian law-makers was eventually noted and corrected where it should be – by the legislature, and not by a court.

92 *Respecting limited parliamentary reform:* Much has recently been made of the duty of courts, including this Court, to give effect to legislation and to leave amendment to the proper place in Parliament. Where, as here, the relevant Parliament has acted with due speed, this Court should hesitate long to come to the view that it enacted a futility.

93 Unfortunately for the appellant, the amending Act of 2000 was not expressed to have retrospective operation so as to apply to the appellant's case. That omission itself seems to affirm the purpose of the Queensland Parliament that, for cases such as that of the appellant, falling in the interval between the passage of the amendment to the Corporations Law (following the enactment of the federal law) and the passage of the amendment to the State Act, the successive instruments would be brought to tax according to their respective terms and in accordance with the State Act as it stood at that time. Were it otherwise, it would have been easy to provide that the amendment should have had a retrospective application. But that was not done.

Conclusion and orders

94 The result is that, in my view, the Court of Appeal was correct in the conclusion that it reached about the meaning of the State Act as derived from the language in which that Act was then expressed. The respondent was correct to assess the Form 1 transfer, in issue in the case, as an instrument within the State Act⁶⁰. He was right to conclude that such instrument was liable to duty as the Act then stood. The exemptions provided for in the State Act had no application. The specifically worded concession did not apply. The subsequent statutory reform gave no relief. The Court of Appeal was right to uphold the respondent's decision.

95 When future problems of statutory interpretation are presented to this and other courts the outcome in the present appeal may be cited to emphasise the scope of judicial choice in discharging the interpretive function. Choice in such matters is inescapable, as the division of judicial opinion about the meaning of the legislation in this case shows. But the selection of the preferred choice, that is ultimately made by a court, is more transparent if the relevant considerations of legal history, principle and policy are identified. Rarely is the choice to be elucidated solely from the language of the statutory text. What is "over-simplified", or "narrow" and "inflexible" to one judge is simply fidelity to the proper understanding of the legislation for another⁶¹.

96 The appeal should be dismissed with costs. The answers given to the Case Stated by the Court of Appeal of the Supreme Court of Queensland were correct and should be confirmed.

60 s 49(1)(a).

61 cf reasons of Gleeson CJ at [15], [18].

97 CALLINAN J. Cromwell Property Securities Limited ("Cromwell") was granted a dealer's licence under s 784 of the Corporations Law on 1 September 1997. The licence authorized Cromwell to operate managed investment schemes relating to real property and to carry on a securities business as the responsible "entity" of those schemes. It was a relevant condition of the licence that Cromwell not hold scheme property in its own name but appoint a custodian to do so. Managed investment schemes are subject to the provisions of Ch 5C of the Corporations Law (ss 601EA to 601QB), which commenced on 1 July 1998. Under s 601FB(2) of that Law the responsible "entity" of a registered scheme has the power to appoint an agent, or otherwise engage a person, to do anything that it is authorized to do in connexion with the scheme. One purpose of the sub-section is to permit the appointment of a custodian⁶². A custodianship agreement between Trust Company of Australia Limited (the appellant) and Cromwell (as manager) was executed on 4 October 1999. The agreement contained these recitals:

- "A. The Manager proposes to be the responsible entity of Riverfront on Coronation Planned Investment (*the Scheme*).
- B. The Manager has the power and authority to appoint an agent to hold assets in relation to the Scheme.
- C. The Custodian has indicated to the Manager that it is willing to act as custodian of the Scheme on the terms and conditions set out in this Agreement.
- D. In its capacity as trustee and responsible entity of the Scheme and in that capacity only, the Manager wishes to appoint the Custodian as custodian of the Scheme. The Custodian has agreed to accept that appointment on the terms and conditions set out in this Agreement."

98 Clauses 4(1) and 4(2) of the agreement contemplated that the appellant would act and stand in all respects as the purchaser and legal owner of the scheme property:

"4.1 Scope of appointment

Having regard to the nature of the Scheme, it is intended that the Custodian's duties will be as follows:-

62 *Robson's Annotated Corporations Law*, 6th ed (2001) at 806.

- (a) *to enter into a contract to purchase the Scheme Property (and contracts to purchase any other land which is to become an Asset);*
- (b) *to hold the Scheme Property (and any other land or other Assets of the Scheme) on the Manager's behalf;*
- (c) to open and maintain Bank Accounts to hold:
 - (i) application money; and
 - (ii) rent and other income of the Scheme;
- (d) to enter into Leases of Land of the Scheme on the Manager's behalf;
- (e) to do such other things as are agreed in writing between the Manager and the Custodian from time to time;
- (f) the Manager agrees that the Custodian or any Sub-custodian may hold any property including any Assets on a pooled basis or in an omnibus account in accordance with any class order issued by ASIC or any specific relief from the requirements of section 601FC(I)(i) of the *Corporations Law* granted by ASIC in relation to the Scheme;
- (g) the Custodian may appoint or engage at the Manager's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counter parties, couriers or other persons (not being persons appointed under clause 5) where it considers their appointment or engagement necessary or desirable for the purpose of exercising its powers or performing its duties under this Agreement. The Custodian is not liable for any loss, damage or expense suffered or incurred as a result of any act or omission whatever, including a negligent act or omission, of a person appointed or engaged under this clause 4.1(g);
- (h) the Custodian may in the ordinary course of business, without reference to the Manager, effect transactions in which the Custodian has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict of the Custodian's duty to the Manager, and the Custodian is not liable to account to the Manager for any profit, commission or remuneration made or received in relation to those

31.

transactions or any connected transactions. A reference in this clause to the Custodian includes a Sub-custodian;

- (i) the Custodian is authorised to comply with any obligation imposed on it by law;
- (j) the Custodian may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause;
- (k) *subject to this Agreement, the Custodian has absolute discretion as to the exercise of all powers, authorities and discretions vested in it under this Agreement;*
- (l) the services of the Custodian under this Agreement are not exclusive. The Custodian is free to provide similar service to others, and is not obliged to disclose to the Manager anything which comes to its notice in the course of providing services to others or otherwise than in the performance of this Agreement;
- (m) the Custodian is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Proper Instructions, the person issuing the Proper Instructions is acting in proper exercise or performance of his powers or duties; and
- (n) the Custodian is not responsible for checking or ascertaining the value of any property or whether the price to be paid for any property is proper or reasonable or whether any transaction which it is instructed to effect accords with the constitution, compliance requirements, prospectus, information memorandum, investment policy or limit for the time being established for or in force in relation to the Scheme.

4.2 **Holding property**

The Custodian must hold Assets as follows:

- (a) In the case of Land, unless the Manager agrees otherwise, in its own name. To the extent permitted by the relevant Governmental Agency the Custodian must ensure that all Certificates of Title record that the Land in question is held by the Custodian on the Manager's behalf." (emphasis added)

Other relevant clauses were as follows:

"10. LIABILITY AND INDEMNITY

10.1 Standard of care

The Custodian agrees to exercise and to procure that its agents and Subcustodians exercise all due care and diligence in carrying out the provisions of this Agreement. The Custodian will not be liable to the Manager for any action taken or omitted to be taken by it or any Subcustodian or other agent where the Custodian or the Subcustodian or agent acted in good faith and without negligence, but will be liable for any action taken or omitted to be taken by it or any Subcustodian or other agent in breach of the standard of care specified in this clause.

10.2 Specific instructions

Subject to the Custodian meeting the requisite standard of care specified in clause 10.1, the Custodian will not be liable to the Manager for any damage, loss or expense resulting from or caused by:

- (a) errors by the Manager or the Property Manager in their Proper Instructions to the Custodian;
- (b) acts, omissions or insolvency of a Securities System; or
- (c) complying with a Proper Instruction.

10.3 Responsibility for loss

If the Manager suffers any loss:

- (a) arising from the Custodian's, its Subcustodian's or other agent's performance of, or failure to perform, its obligations under this Agreement; and
- (b) for which the Custodian is liable under this Agreement.

The Custodian shall indemnify the Manager for the direct loss suffered by it, but shall not indemnify the Manager against any consequential or special damages, economic loss or loss arising from any special circumstances of the Manager.

10.4 Disputes or conflicting claims

33.

If any dispute or conflicting claim is made by any person or persons with respect to any asset in an Account, the Custodian shall be entitled to refuse to act in respect of that asset until either:

- (a) such dispute or conflicting claim has been finally determined by a court of competent jurisdiction or settled by agreement between conflicting parties, and the Custodian has received written evidence satisfactory to it of such determination or agreement; or
- (b) The Custodian has received an indemnity, reasonably satisfactory to it, to hold it harmless from and against any and all loss, liability and expense which the Custodian may incur as a result of its actions.

10.5 The Custodian not responsible for title

The Custodian shall not be responsible for the title, validity or genuineness, including good deliverable form, of any Asset or evidence of title to an Asset.

10.6 Indemnity

The Manager agrees to indemnify the Custodian for any action taken or omitted to be taken by it and from all claims, expenses, demands, damages, losses and liabilities relating to Assets and the holding of Assets where the Custodian acts in good faith and without negligence, but the Manager will not indemnify the Custodian for any action taken or omitted to be taken by the Custodian in breach of the standard of care specified in this clause."

100 On 29 November 1999, notwithstanding the clear words of cl 4(1) of the custodianship agreement which imposed upon the appellant the duty of entering into the contract as purchaser, Cromwell (naming itself as purchaser) and the appellant entered into a contract for the purchase of land and improvements in Brisbane for the sum of \$17,500,000 (subject to some non-relevant adjustments). The contract was generally in accordance with a form approved by the Queensland Law Society Incorporated. Some changes and additions were however made to it. The parties to the contract and others involved in its preparation and completion were described as follows:

Custodian:	Trust Company of Australia Limited
Vendor:	Riverfront Developments Pty Ltd
Vendor's solicitors:	Hickey Lawyers
Purchaser:	Cromwell Property Securities Limited

Purchaser's solicitors: Creagh Weightman Lawyers
Stakeholder: Creagh Weightman Lawyers

101 In a number of instances the appellant and Cromwell were treated by the drafter of the contract interchangeably as purchaser by the insertion of the words "or custodian" after the word "purchaser" in the contract but not invariably so. Clause 4(b) of the standard form was amended to read as follows:

"The balance of the Purchase Price shall be paid on the Date for Completion in exchange for:

...

- (b) *A properly executed transfer of the Land from the Vendor to the Custodian* capable of immediate registration (after stamping) in the appropriate office free from Encumbrances (other than those set out in Item L) and title to the Property (other than the Land) free from Encumbrances (other than those set out in Item L) but subject to the conditions of this Contract." (emphasis added)

102 New cll 5(1)(c) and 5(1)(d) were inserted so that cl 5 in its entirety read as follows:

"5 KEYS

5.1 Immediately on completion, the Vendor shall deliver all Keys, which are in the possession or under the control of the Vendor, in accordance with any notice given in writing by the Purchaser to the Vendor and failing such notice the Vendor shall deliver the Keys:

- (a) to the *Purchaser*, if the *Purchaser* is present personally at completion;
- (b) to the Purchaser's solicitor at completion, if the Purchaser is not present personally;
- (c) *to the Custodian, if the Custodian is present personally at Completion;*
- (d) *to the Custodian's solicitor at Completion if the Custodian is not present personally at Completion;*
- (e) to the Vendor's Agent at the address shown in Item B, if neither the Purchaser nor any solicitor acting for the Purchaser is present personally at completion;

35.

- (f) to and left at the Property if none of the provisions of clauses 5.1(a), 5.1(b), 5.1(c), *5.1(d) or 5.1(e)* are applicable." (emphasis added)

103 As a result of further amendments cll 6, 10, 21.2, 24 and 27.4 became as follows:

"6 INVESTMENT OF DEPOSIT

- 6.1** If either *the Vendor or the Purchaser* directs by notice in writing to the Stakeholder to invest the Deposit then (where the Stakeholder is lawfully able) the Stakeholder shall invest the Deposit with any Financial Institution permitted by law for the investment of trust money until the Date for Completion.
- 6.2** If this Contract is completed, all interest accruing on the investment of the Deposit shall be shared equally between the Vendor and the Purchaser. If this Contract is not completed for any reason, the interest accruing on the Deposit shall be paid to the party entitled to the Deposit upon termination of this Contract.
- 6.3** The Deposit and any accrued interest shall be invested at the risk of the party to whom the Deposit and accrued interest is ultimately payable and the Stakeholder shall not be liable for any loss suffered by *the Vendor or the Purchaser* in consequence of an investment pursuant to clause 6.1.
- 6.4** To facilitate investment of the Deposit, the *Vendor and the Purchaser* shall notify its tax file number to the Stakeholder within 4 Business Days following the date of this Contract.
- 6.5** *The Vendor and the Purchaser* authorise the Stakeholder to prepare and lodge any taxation return necessary in respect of the Deposit and interest and to pay any tax assessed out of the Deposit and interest and indemnify the Stakeholder against any taxation assessed in respect of such interest.
- 6.6** The Vendor and the Purchaser shall be deemed to be presently entitled in equal shares to any interest accrued for the purposes of the Income Tax Assessment Act 1936.

...

10 EXECUTION AND PRODUCTION OF DOCUMENTS

- 10.1** Subject to compliance by the Purchaser with the Purchaser's obligations under or by virtue of this Contract the Vendor shall as

required do all acts and execute all documents necessary for the purpose of completing the sale and ensuring that the *Custodian* obtains a good and valid title to the Property but all transfer documents, any declaration required pursuant to clause 4(c), and all instruments or declarations required pursuant to clause 4(d) shall be prepared by and at the expense of the Purchaser and delivered to the Vendor within a reasonable time prior to the Date for Completion.

- 10.2** If so requested by the Purchaser *or the Custodian*, the Vendor shall deliver to the Purchaser *or the Custodian*, prior to the Date for Completion, photocopies of the documents executed by the Vendor.
- 10.3** After execution of the transfer, if so requested by the Purchaser *or the Custodian* and upon payment of the usual production fee by the Purchaser, the Vendor shall cause the transfer to be tendered to the Office of State Revenue for stamping, together with any declaration referred to in clause 4(c) and thereupon the Vendor shall be deemed to have complied with the Vendor's obligations under clause 4(c).
- 10.4** If an instrument of title is required to register a transfer of the Land and the instrument of title relating to the Land also relates to other land, the Vendor shall not be obliged to deliver it to the Purchaser *or the Custodian* but shall enter into such reasonable covenants with the Purchaser *or the Custodian* as the Purchaser *or the Custodian* may require for production of the instrument of title.
- 10.5** If the instrument of title is partially cancelled the Vendor shall not be obliged to produce a separate instrument of title on completion.
- 10.6** Where either clause 10.4 or clause 10.5 apply, the Purchaser shall bear the cost of any new instrument of title relating to the Land.

...

- 21.2** The Vendor authorises the Purchaser *or the Custodian* or the Purchaser's *or the Custodian's* solicitor to inspect all records relating to the Property held by the Local Government or other body maintaining any such records and will if requested by the Purchaser *or the Custodian* sign an appropriate authority to the Local Government or other body for the purposes of this clause 21.

...

24 MERGER

Despite completion and despite the registration of the transfer in favour of the *Custodian*, any general or special condition (or any part or parts thereof) to which effect is not given by completion or registration and which is capable of taking effect after completion or registration shall remain in full force and effect.

...

27.4 For the purposes of this clause 27, a party's address for notices shall in the case of the Vendor be the address specified in Item C and in the case of the Purchaser shall be the address specified in Item E *and in the case of the Custodian, shall be at the following address:*

213 St Paul's Terrace

BRISBANE QLD 4000." (emphasis added)

104 Settlement of the purchase was effected on 20 November 1999 by the exchange of the balance of the price for the title deed to the land, and an executed transfer of it in favour of the appellant in Form 1 version 3 of the Schedule to the *Land Title Act* 1994 (Q) dated 29 November 1999. It is in par 5 of that document, beside the word "transferee" that the appellant's name appears.

105 The vendor, Cromwell and the appellant also brought into existence a document designated as Form 24 setting out an apportionment of the price as between real property and personal property. There, after the words "Details of Transferee/Purchaser" the name of the appellant appears.

106 The appellant's solicitors submitted the contract and the transfer to the Commissioner of State Revenue (the respondent) for stamping with a letter of 3 December 1999 which purported to explain the transaction in this way:

"The enclosed Contract and transfer deal with the transfer of land described on the transfer to a syndicate of investors known as Riverfront on Coronation Planned Investment Scheme.

Cromwell Property Securities Limited is the responsible entity and trustee of the Scheme and is the proper party to be nominated as the Purchaser in the Contract of Sale.

Pursuant to a Custody Agreement dated 4 October 1999 between Cromwell Property Securities Limited and Trust Company of Australia Limited, Trust Company of Australia Limited is appointed as Custodian of

the Scheme. The appointment of a Custodian is a requirement of the Managed Investments Act amendments to the Corporations Law which require separation of legal and equitable title in Managed Investment Schemes.

The role of Trust Company of Australia Limited is limited to holder of the legal title pursuant to the Custodian Agreement. We refer you to the following clauses of the Custody Agreement which sets out the following duties:

- 4.1(a) – entering into a contract to purchase the Scheme property;
- 4.1(b) – holding the Scheme property on the Manager's behalf."

107 The respondent on the same date replied as follows:

"I refer to your letter of 3 December 1999 and note that you act for a party in relation to this matter.

Although I am not yet in a position to issue an assessment of duty, I am prepared to release the transfer to you as requested upon payment of the sum of \$653,475 on account of the duty to be assessed together with your undertaking to satisfy any further requisitions and to pay any further duties assessed in addition to \$653,475.

This offer has been extended to you on the understanding that the matter is of the utmost urgency and should not be taken as a precedent for any future transactions.

This matter will receive prompt attention, and you will be advised of the outcome in the near future."

108 On 29 November 1999 the respondent issued a nil assessment on the transfer. On the same date however it issued a further assessment as follows:

"My assessment of stamp duty for the documents lodged is as follows:

Doc No	Date of Document	Consideration/Value	Duty
		Duty Category	
1	29 NOV 1999	\$17,500,000.00	\$653,475.00
	Document	CONV/TRANSFER – OTHER	
	Description	CONTRACT OF SALE	

39.

Parties	CROMWELL PROPERTY SECURITIES PTY LTD	
	RIVERFRONT DEVELOPMENTS PTY LTD	
2 29 NOV 1999	\$17,500,000.00	\$653,475.00
Document Description	CONV/TRANSFER – OTHER TRANSFER OF REAL PROPERTY	
Parties	TRUSTEE COMPANY OF AUSTRALIA LTD	
	CROMWELL PROPERTY SECURITIES PTY LTD	
	RIVERFRONT DEVELOPMENTS PTY LTD	
3 04 OCT 1999	NO DUTY PAYABLE	\$0.00
Document Description	AGREEMENT	
Parties	TRUSTEE COMPANY OF AUSTRALIA LTD	
	CROMWELL PROPERTY SECURITIES PTY LTD	
Assessment Total		\$1,306,950.00
Less Amount Paid		\$653,475.00
Amount Due		\$653,475.00"

The appellant objected to the assessment on several grounds as follows:

"1. The assessment is an amended assessment.

2. By assessment notice dated 6 January 2000 the Commissioner assessed duty on the Transfer and, after allowing a rebate pursuant to subsection 54(6) of the Act in relation to duty paid on the contract of sale, determined that no amount of duty was exigible on the Transfer.
3. The Commissioner did not ascertain any facts after the date of the making of the assessment of 6 January 2000 which established that the duty as so assessed was assessed at an insufficient amount.
4. In the premises the assessment is ultra vires and void.
5. The Transfer was executed and delivered to the transferee in completion of a certain contract dated 29 November 1999.
6. The contract was duly stamped and duty was paid thereon in accordance with section 54 of the Act.
7. In the premises a rebate of duty was allowed to the Objectors pursuant to subsection 54(6) of the Act such that no duty was chargeable on the Transfer."

110

In disallowing the objection the respondent wrote this:

"The Contract was assessed under Section 54(1) of the *Stamp Act 1894* ("the Act") and the duty was calculated at the rates set out in paragraph 4(a) of the Conveyance or Transfer head of charge in Schedule 1 of the Act.⁶³

63 "(4) Of any property (except stock or marketable security or right in respect of shares) -

(a) upon a sale for a consideration in money or money's worth of not less than the full unencumbered value of the property -

Duty calculated on the amount or value of the consideration at the following rate -

Not exceeding \$20 000 - **\$1.50 duty for every \$100 and also for any fractional part of \$100 of the value of the consideration.**

Exceeding \$20 000 but not exceeding \$50 000 - **\$300 duty plus \$2.25 for every \$100 and also for any fractional part of \$100 of the value of the consideration in excess of \$20 000.**

(Footnote continues on next page)

The Transfer was assessed under Section 49(1) of the Act and the duty was calculated at the rates set out in paragraph 4(a) of the Conveyance or Transfer head of charge in Schedule 1 of the Act."

111 The correctness of the respondent's disallowance of the appellant's objection was put in issue in a case stated for the determination of the Court of Appeal of Queensland (McMurdo P, Thomas JA and Helman J) which unanimously found for the respondent.

112 Helman J, who wrote the leading judgment, was of the opinion that the appellant was not a, or the purchaser, within the meaning of s 54(6) of the *Stamp Act* 1894 (Q), (the "Act")⁶⁴ and accordingly was not entitled to a rebate of stamp duty to the extent stamp duty had been levied and paid on the contract. His Honour stated his conclusion in this paragraph⁶⁵:

"While the purchaser under a contract of sale of land will generally be the transferee of the land it does not follow that the transferee is always the purchaser. A purchaser has the right at common law to nominate a transferee to take title instead of the purchaser, unless of course the vendor

Exceeding \$50 000 but not exceeding \$100 000 - **\$975 duty plus \$2.75 for every \$100 and also for any fractional part of \$100 of the value of the consideration in excess of \$50 000.**

Exceeding \$100 000 but not exceeding \$250 000 - **\$2 350 duty plus \$3.25 for every \$100 and also for any fractional part of \$100 of the value of the consideration in excess of \$100 000.**

Exceeding \$250 000 but not exceeding \$500 000 - **\$7 225 duty plus \$3.50 for every \$100 and also for any fractional part of \$100 of the value of the consideration in excess of \$250 000.**

Exceeding \$500 000 - **\$15 975 duty plus \$3.75 for every \$100 and also for any fractional part of \$100 of the value of the consideration in excess of \$500 000. ..."**

⁶⁴ The Act was repealed by s 509 of the *Duties Act* 2001 (Q), but s 512 thereof provides for the continued application of the repealed statute to instruments executed before the commencement of the new statute.

⁶⁵ *Trust Co of Australia Ltd v Commissioner of Stamp Duties* (2001) 47 ATR 418 at 425.

and purchaser exclude that right by agreement: *Egmont v Smith*⁶⁶, *Re Davies*⁶⁷, and Peter Butt, 'Purchaser "or nominee"'⁶⁸. Mr Butt continued⁶⁹:

'If the purchaser exercises the right, the vendor must transfer the property to the nominee instead of to the purchaser. However, a nomination does not substitute the nominee as the purchaser. The parties to the contract remain the vendor and the purchaser. If the purchaser breaches the contract, it is to the purchaser that the vendor must look for recourse, not the nominee: *Nguyen v Taylor*⁷⁰. In this regard, a nomination is to be contrasted with an assignment of the contract. An assignee becomes entitled to all the purchaser's rights under the contract, once notice has been given to the vendor: *Shaw v Harris (No 2)*⁷¹. A nomination is also to be contrasted with a novation of the contract. A novation substitutes a new contract for the old one: *Olsson v Dyson*⁷².'

Special conditions 11.1 and 11.3 of the contract of sale make it clear that the appellant was restricted to the role of transferee and that the role of purchaser, as it is understood in this context, fell to Cromwell and to it alone. That conclusion is enough to dispose of the argument advanced for the appellant that the appellant is entitled to the exemption provided for in s 54(6)."

113 Thomas JA accepted that the term "purchaser" might bear different connotations in different contexts but thought that a dictum of Dixon J in *Dudley Buildings Pty Ltd v Rose*⁷³ apt to disqualify the appellant from being the purchaser here because it did not assume obligations under the contract⁷⁴:

66 (1877) 6 Ch D 469 at 474.

67 [1989] 1 Qd R 48 at 53.

68 (1997) 71 *Australian Law Journal* 12.

69 (1997) 71 *Australian Law Journal* 12 at 12.

70 (1992) 27 NSWLR 48 at 60.

71 (1992) 3 Tas R 167 at 207.

72 (1969) 120 CLR 365 at 389

73 (1933) 49 CLR 84.

74 (1933) 49 CLR 84 at 97.

43.

"The position of purchaser involves contractual obligations as well as rights. The very expression 'purchaser' connotes some of these obligations."

The appeal to this Court

114 The appellant's appeal is confined to one ground in this Court:

"The Court below was wrong in deciding that the Appellant was not the purchaser named in the agreement dated 29 November 1999 between Riverfront Developments Pty Ltd, the Appellant and Cromwell Property Securities Ltd (that had been charged with duty pursuant to subsection 54(1) of the Act) for the purposes of subsection 54(6A) of the Act and, thus, was wrong in deciding that the instrument of transfer dated 29 November 1999 between Riverfront Developments Pty Ltd and the Appellant was not exempt from duty pursuant to subsection 54(6) of the Act."

115 Section 49(1)(a) to (d) of the Act defines some of the terms used in it.

"49(1) For the purposes of this Act:

'conveyance' and **'transfer'** include every instrument and every decree or order of a court:-

- (a) whereby property is conveyed, transferred or assigned to or is vested in a person; or
- (b) whereby property is vested, without an instrument of conveyance, transfer or assignment, in any person upon notification to or registration or recording by the registrar or other person having the duty under an Act of noting, registering or recording a vesting or dealing in property; or
- (c) whereby property is vested, without an instrument of conveyance, transfer or assignment, whether by operation of law or otherwise; or
- (d) whereby a vesting of the kind specified in paragraph (c) is notified to or registered or required to be noted, registered or recorded by the registrar or other person having the duty under an Act of noting, registering or recording vestings or dealings in property ..."

116 And the same sub-section defines **"transferee"**:

"transferee", in respect of a conveyance or transfer, means the person to whom property is conveyed, transferred or assigned or in whom property is vested."

117 The term "transferee" is used in one place, in sub-s (6B) of s 54 of the Act which provides as follows:

"Certain contracts to be chargeable as conveyances"

- 54(1) Any contract or agreement for sale of any property or any contract or agreement whereby a person becomes entitled or may, provided the terms and conditions thereof are met, become entitled to the conveyance or transfer of any property shall be charged with the same duty as if it were an instrument of conveyance of the property.
- (2) Subsection (1) does not apply to a contract or agreement for sale of any property (other than any equitable estate or interest in any property) which is property outside Queensland or which is solely comprised of any goods, livestock, wares or merchandise.
- (3) Where an agreement which creates an option or right of purchase of any property provides that such property, or any part thereof, shall be conveyed or transferred to any person pending the exercise of the option or right of purchase, or where, in connection with such an agreement, such property, or any part thereof, shall be, or be agreed in any other manner to be, so conveyed or transferred, the agreement creating the option or right of purchase shall, for the purposes of this section, be deemed to be an agreement for the sale of the whole of the property the subject of the option or right of purchase.
- (3A) The determination of such option or right of purchase shall be deemed to be a rescission of an agreement for sale.
- (3B) In order to obtain a refund of the duty on the rescission of any such agreement, the application for the refund of duty may be made at any time within the time limited by subsection (7A) or within 6 months after the date of such rescission whichever period is last to expire.
- (3C) Where any property has been conveyed or transferred pursuant to, or in connection with, the agreement, no refund of duty shall be made pursuant to subsection (7A) unless evidence is produced, satisfactory to the commissioner, that

45.

the property has been reconveyed or retransferred to the person by whom it was so conveyed or transferred and there shall be deducted from any such refund of duty, the duty which would have been paid on the consideration for such option or right of purchase but for the provisions of subsections (3) to (3B).

- (4) If a company incorporated in Queensland or a corporation registered in Queensland acquires for a consideration in money or money's worth any property in Queensland and a contract or an agreement for the sale or an instrument of conveyance of the property is not executed or, being executed, is not duly stamped with ad valorem duty, then in the case of a company incorporated or a corporation registered in Queensland, the certificate of incorporation shall be deemed to be the instrument of conveyance of such property and, for the purposes of section 4B to have been signed or executed by the company or corporation and shall be chargeable accordingly with ad valorem conveyance duty.
- (5) Where any property locally situate in Queensland is acquired for a consideration in money or money's worth, and the whole or any part of the conditions of such sale are set out or referred to in any instrument executed subsequently by any of the parties thereto, such instrument shall, unless a contract of sale or other instrument relating to the acquisition of the property, duly stamped, is produced, be chargeable with ad valorem conveyance duty in respect of the said sale, in addition to any other duty payable on the said instrument.
- (6) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer or conveyances or transfers made to the purchaser shall upon production of the contract or agreement or contracts or agreements, duly stamped not be chargeable with any duty, and the commissioner, upon application, either shall denote the payment of the ad valorem duty upon the conveyance or transfer or conveyances or transfers, or shall transfer the ad valorem duty thereto.
- (6A) Subsection (6) does not apply in respect of a conveyance or transfer made to a person other than the person named as purchaser in the contract or agreement for sale to which the conveyance or transfer is intended to be pursuant unless the commissioner is satisfied that at the time the contract or

agreement for sale was executed the person named therein as purchaser was acting in the transaction evidenced by such contract or agreement as agent for the person to whom the conveyance or transfer is made (either as a general agent or in relation to the particular transaction) and was so acting under authority given to him or her by such person in writing executed prior to the execution of the contract or agreement for sale.

(6B) The commissioner shall not be satisfied for the purposes of subsection (6A) solely on the basis of a document which purports to be an authority given to the purchaser by the transferee in writing executed prior to the execution of the contract or agreement for sale.

(6C) Where the purchaser under a contract or agreement for sale is expressed to be a named person or his or her nominee, then for the purposes of subsection (6A) the purchaser named therein shall be taken to be such named person.

..."

118 Neither the transaction nor the documents evidencing it with which the Court is concerned is within sub-ss (2), (3), (4), (5) or (6C) of s 54 of the Act. Sub-sections (6A) and (6B) will require separate consideration.

The respondent's argument

119 The Court of Appeal accepted the respondent's principal argument that duty had not been paid in conformity with s 54(1): that accordingly s 54(6) did not operate to relieve the appellant from liability for stamp duty on the transfer to it. The respondent's argument can be distilled into four propositions. The reference in s 54(6) to a purchaser must be taken to mean literally the person expressly named or identified as "purchaser" in the contract. The "purchaser" named in the contract is Cromwell and not the appellant. The use of the words "named as purchaser" in s 54(6A) shows that there is a real distinction between a person designated by a purchaser in, and by a contract, and anyone else who may take a transfer of the property the subject of it. It follows that the appellant is not the purchaser for the purposes of, or within the meaning of s 54(6) of the Act, and is therefore not entitled to any rebate of duty to the extent that stamp duty may already have been paid by a party to the contract.

120 The argument, the respondent submits, is correct notwithstanding the purpose of the transaction and the consequences of it which Thomas JA in the Court of Appeal summarized in this passage⁷⁵:

"In this matter the Commissioner has exacted ad valorem stamp duty twice in respect of what was in substance a single sale of property. The relevant parties did not seek to avoid duty on the sale of the property or engage in manoeuvres for any extraneous purpose. In relation to the acquisition of a property they simply followed the rather complicated requirements of the Corporations Law and the *Managed Investments Act 1998* (Cth) which are designed to protect members of the public in relation to managed investment schemes. Those provisions require the appointment of a 'custodian' to hold the relevant property."

The respondent's argument fails

121 Otherwise than to the extent that the Act may make provision for the payment of stamp duty in respect of transactions, or in respect of documents which the Act might require be brought into existence for the purpose of the imposition of stamp duty upon them, it is instruments upon which stamp duty has traditionally been leviable. If it were otherwise, and the parties were bound to look to the substance of the matter, there would be no question that the assessment by the respondent of the transfer for full ad valorem duty should be regarded as opportunistic and unmeritorious. Although it is not for the Court to decide the case on issues of merit, and effect must be given to the language of the Act, regard may, indeed should, be had in construing the Act to another dictum of Dixon J, in *Executor Trustee & Agency Co of South Australia Ltd v Federal Commissioner of Taxation*⁷⁶:

"No interpretation of a taxing Act should be adopted which results in the imposition of double taxation unless the intention to do so is clear beyond any doubt."

122 I would reject the respondent's arguments. Among other matters, they fail to give due effect to s 54(1) of the Act in respect of which these points need be made. First, it refers to a "contract ... for sale of any property". The emphasis should be upon the singular: a contract, that is an arrangement for [one] sale of ... [the] property: an entitlement to the [one] conveyance or [one] transfer of ... property. The second matter to notice is that it does not use the word "purchase", "purchaser" or "transferee", but instead the person "entitled to the conveyance or

⁷⁵ *Trust Co of Australia Ltd v Commissioner of Stamp Duties* (2001) 47 ATR 418 at 420.

⁷⁶ (1932) 48 CLR 26 at 44.

transfer". Right from the outset here it was always intended, and the contract made clear that there would be only one and the same transferee under it, to the appellant.

123 The contract here was a contract within the meaning of s 54(1) of the Act. It was a contract for the sale of a property. And it was one whereby a person, the appellant, became entitled to a transfer or conveyance of the property. Indeed, cl 10.1 of the contract obliged the vendor to ensure that the appellant obtain a good and valid title to it. The appellant acquired other rights under the contract. Each of these was enforceable by it. That is so in terms of the contract itself without recourse to ss 54 and 55⁷⁷ of the *Property Law Act 1974* (Q) which

77 "54 Effect of joint contracts and liabilities

(1) Subject to this and to any other Act -

- (a) a promise made by 2 or more persons shall, unless a contrary intention appears, be construed as a promise made jointly and severally by each of those persons; and
- (b) a liability which is joint shall not be discharged, nor shall a cause of action with respect to the liability be extinguished, because of any fact, event, or matter except to the extent that the same would because of the fact, event or matter be discharged or extinguished if the liability were joint and several and not joint.

(2) In this section -

'promise' includes a promise under seal, a covenant, whether express or implied under this Act, and a bond or other obligation under seal.

...

55 Contracts for the benefit of third parties

- (1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Prior to acceptance the promisor and promisee may, without the consent of the beneficiary, vary or discharge the terms of the promise and any duty arising from it.
- (3) Upon acceptance -
 - (a) the beneficiary shall be entitled in the beneficiary's own name to such remedies and relief as may be just and convenient for the enforcement of the

(Footnote continues on next page)

duty of the promisor, and relief by way of specific performance, injunction or otherwise shall not be refused solely on the ground that, as against the promisor, the beneficiary may be a volunteer; and

- (b) the beneficiary shall be bound by the promise and subject to a duty enforceable against the beneficiary in the beneficiary's own name to do or refrain from doing such act or acts (if any) as may by the terms of the promise be required of the beneficiary; and
- (c) the promisor shall be entitled to such remedies and relief as may be just and convenient for the enforcement of the duty of the beneficiary; and
- (d) the terms of the promise and the duty of the promisor or the beneficiary may be varied or discharged with the consent of the promisor and the beneficiary.

...

- (5) In so far as a duty to which this section gives effect may be capable of creating and creates an interest in land, such interest shall, subject to section 12, be capable of being created and of subsisting in land under any Act but subject to that Act.
- (6) In this section -

'acceptance' means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on the promisor's behalf, in the manner (if any), and within the time, specified in the promise or, if no time is specified, within a reasonable time of the promise coming to the notice of the beneficiary.

'beneficiary' means a person other than the promisor or promisee, and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified or in existence at the time when the promise was given.

'promise' means a promise -

- (a) which is or appears to be intended to be legally binding; and
- (b) which creates or appears to be intended to create a duty enforceable by a beneficiary;

and includes a promise whether made by deed, or in writing, or, subject to this Act, orally, or partly in writing and partly orally.

'promisee' means a person to whom a promise is made or given.

(Footnote continues on next page)

almost certainly would also have independently conferred a right upon the appellant to call for the [one] transfer of the property. What is obvious is that the drafter of the contract did not pay sufficient attention to the formulation of the various parties' rights and obligations arising under it. The provisions of cl 4(1) which imposed the duty of purchasing upon the appellant (and not Cromwell) was, for a start, apparently overlooked. But the true nature of the transaction is equally obvious from the contract itself: as one of sale to be effected by one vendor to one transferee, as legal owner, for money from one original source, the investors. Accordingly the contract was chargeable "with the same duty as if it were an [or the] instrument of conveyance of the property" in accordance with s 54(1) of the Act. The fact of only one sale, one contract, one purchase price, and one person entitled to the transfer, all strongly suggests, and the language of s 54(1) in my opinion, requires, that there should, and will be only one exaction of stamp duty.

124 Duty has, therefore, to use the language of s 54(6) "been duly paid in conformity with [one of] the foregoing provisions", that is s 54(1) of the Act. Even so, the respondent submits, there is a further requirement imposed by sub-s (6), that the transfer be made to "the purchaser", a requirement that is not satisfied here.

125 It is true that the legal personality identified as the purchaser in the contract is Cromwell. It is also true that the solicitors who submitted the contract and the transfer to the respondent for assessment of stamp duty described Cromwell as the "proper party to be nominated as the Purchaser in the Contract of Sale" in their letter of 3 December 1999 which I earlier set out. Neither a description nor a misdescription in the letter, or indeed in the contract itself, can be determinative of the question whether the appellant is capable of being "the purchaser" within the meaning of s 54 of the Act, any more than a misdescription of a purchaser as someone other than a purchaser could be determinative of the application of the section.

126 The Act does not contain any definition of a purchaser. There is no reason here why "purchaser" as used in s 54(6) should not be regarded as a term which is relevantly interchangeable with the expression, "whereby a person becomes entitled ... to the ... transfer" pursuant to the contract, referred to in s 54(1). The language of the whole section does not dictate any contrary conclusion. Furthermore, an analysis of the contract itself does not require any different an answer.

'promisor' means a person by whom a promise is made or given.

(7) Nothing in this section affects any right or remedy which exists or is available apart from this section."

127 The appellant was at all times intended to be, and is described as "the custodian", an expression which has no particular significance except for the purposes of the Corporations Law. As a result of the amendments to the standard form contract, the appellant became entitled, for example, to all documents in the possession of the vendor which it or Cromwell might reasonably require to manage the property, and to prepare custodian terms in respect of it. By the amended cl 7.4 of the contract, the custodian or Cromwell was entitled to terminate the contract in the event of default by the vendor. And in the event of such a termination, the custodian would be entitled to a refund of the deposit and other money that may have been paid to the vendor pursuant to the contract. These provisions are sufficient to indicate that the appellant, which was a party to the contract, had real and substantial rights under it, including its enforcement, rights in effect as an alternative to Cromwell. It was always contemplated that the custodian would become the legal owner, that is to say, the registered owner under the *Land Titles Act* 1994 (Qld) of the property. This follows from the express language of cll 11.1 and 11.2 of the contract. And cl 11.6 is an acknowledgment by the vendor that Cromwell and the appellant entered into the contract as "responsible entity" and as "custodian" of the scheme and in no other capacity, and that accordingly their liability under the contract is strictly limited to the extent that it can be satisfied out of the property of the scheme, and to the extent that they can be actually indemnified for any such liability.

128 It seems to me that there is no reason why, under the contract the appellant might, or could not have been described as the purchaser. Indeed, the custodianship agreement expressly contemplated it. It was no more the original source of the purchase price than the appellant was. The funds for the purchase were sourced from the money provided by the investors under the scheme which both Cromwell and the appellant were bound to use strictly in accordance with it, including the provision of one purchase price to the vendor to enable, not Cromwell but the appellant to take one transfer and title to the property. Cromwell had no right to nominate any other transferee or purchaser. Only the appellant could be the transferee. It seems to me to have been a misnomer to describe Cromwell, which was the mere manager, and relevantly a conduit pipe of the investor's funds to the vendor, as the purchaser. Again, to paraphrase language used by Dixon J, this was a case in which "the [that is one] contract entered into by the appellant contemplated and the [appellant] ... took the transfer because that is what the parties to the contract intended."⁷⁸ In those circumstances, the requirements of s 54(1) have been satisfied. I am prepared to read "purchaser" in s 54(6) as a reference to the appellant, as the legal personality actually taking the transfer following production of the agreement under, and in pursuance of which it was executed. It may also be noted that it was not

78 *Vickery v Woods* (1952) 85 CLR 336 at 345.

suggested by the respondent that a reading of the sub-section in this way had any bearing upon, or implications for the operation of any other sections of the Act.

129 Something should be said about s 54(6A) of the Act. It could not in my opinion operate to exclude the operation of s 54(6) even if the appellant were not "named as purchaser in the contract". Cromwell is nowhere described as an agent, but the relationship between it and the appellant was governed by obligations of a fiduciary kind and of a strict nature well capable of being described as giving rise to a relationship of agency. Indeed, the custodianship agreement did not permit Cromwell to purchase the property or take a transfer of it itself. Accordingly, in entering the contract, Cromwell must have been acting in a fiduciary capacity or as an agent on behalf of the appellant (and ultimately the scheme members) for the proposed legal owner, the appellant. Furthermore, there was in existence before the execution of the contract an authority, the custodianship agreement itself, obliging Cromwell not to take the transfer, but so to conduct itself as to ensure that the appellant did so.

130 One of the respondent's arguments was that amendments which were made to the Act in 2000 were designed to cover this situation, and to relieve a custodian such as the appellant from liability for duty on the transfer: accordingly, if the Act before 2000 had that effect, the amendments were unnecessary. Assuming, as I am prepared to do, that the amendments would cover this case and operate to relieve the appellant from a liability for duty, I still do not regard the fact of the amendments as requiring a different interpretation of s 54 as it stood at the time of this transaction. Section 54 before 2000 is far from pellucid. The amendments may have been designed to make clear what was obscure before. Recently, this Court has expressed reservations about the use to which amendments to enactments may be put to construe pre-amendment legislation⁷⁹. Misapprehensions are from time to time held by legislatures about the effect of legislation: for example, in *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd*⁸⁰ the Privy Council held that an enactment of the United Kingdom Parliament which had been expressly repealed by the Queensland Legislature had never applied in the State.

131 I would allow the appeal with costs and make the following orders.

132 The questions posed in the Case Stated to the Queensland Court of Appeal should be answered as follows:

79 *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 76 ALJR 1534; 192 ALR 56.

80 [1989] 1 Lloyd's Rep 205.

53.

- Question (a) Yes;
- Question (b) Unnecessary to answer;
- Question (c) Unnecessary to answer;
- Question (d) Unnecessary to answer;
- Question (e) (the condition can be ignored) Yes;
- Question (f) No; Nil;
- Question (g) The costs of and incidental to the stating of the case and the appeal should be borne by the respondent.

133 The costs of and incidental to this appeal should be borne by the respondent.