HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, CALLINAN AND HEYDON JJ

Matter No M222/2004 & M223/2004

CPT CUSTODIAN PTY LTD (previously trading under the name SANDHURST NOMINEES (VIC) LIMITED) APPELLANT

AND

COMMISSIONER OF STATE REVENUE RESPONDENT

Matter No M215/2004, M216/2004, M217/2004 & M218/2004

COMMISSIONER OF STATE REVENUE APPELLANT

AND

KARINGAL 2 HOLDINGS PTY LTD RESPONDENT

CPT Custodian Pty Ltd v Commissioner of State Revenue
Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd
[2005] HCA 53
28 September 2005
M222/2004 & M223/2004
and
M215/2004 to M218/2004

ORDER

Matter No M222/2004:

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 16 December 2003 and, in their place, order that:*

   (i) the appeal to that Court is dismissed with costs;

(ii) the cross-appeal to that Court is allowed with costs;

(iii) the orders of Nettle J made on 29 October 2002 are varied so that the appeal to the Supreme Court of Victoria in respect of amended assessment S 020601711-2 is allowed with costs, the amended assessment is set aside, and the subject-matter thereof is remitted to the Commissioner for reconsideration and determination in accordance with law.

Matter No M223/2004:

1. Appeal allowed with costs.

2. Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 16 December 2003 and, in their place, order that:

(i) the appeal to that Court is dismissed with costs;

(ii) the cross-appeal to that Court is allowed with costs;

(iii) the orders of Nettle J made on 29 October 2002 are varied so that the appeal to the Supreme Court of Victoria in respect of amended assessment S 020601703-2 is allowed with costs, the amended assessment is set aside, and the subject-matter thereof is remitted to the Commissioner for reconsideration and determination in accordance with law.

Matter No M215/2004:

1. Appeal dismissed with costs.

2. Cross-appeal allowed with costs.

3. Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 16 December 2003 and, in their place, order that:

(i) the appeal to that Court is dismissed with costs;

(ii) the cross-appeal to that Court is allowed with costs;

(iii) the orders of Nettle J made on 29 October 2002 are varied so that the appeal to the Supreme Court of Victoria in respect of amended assessment S 012493235-2 is allowed with costs, the amended assessment is set aside, and the subject-matter thereof is remitted to the Commissioner for reconsideration and determination in accordance with law.

Matter No M216/2004:

1. *Appeal dismissed with costs.*

2. *Cross-appeal allowed with costs.*

3. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 16 December 2003 and, in their place, order that:*

    (i) the appeal to that Court is dismissed with costs;

    (ii) the cross-appeal to that Court is allowed with costs;

    (iii) the orders of Nettle J made on 29 October 2002 are varied so that the appeal to the Supreme Court of Victoria in respect of amended assessment S 014593439-2 is allowed with costs, the amended assessment is set aside, and the subject-matter thereof is remitted to the Commissioner for reconsideration and determination in accordance with law.

Matter No M217/2004:

Appeal dismissed with costs.

Matter No M218/2004:

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

Matter No M223/2004 & M224/2004

D F Jackson QC with D R J O'Brien for the appellant (instructed by Gadens Lawyers)

J D Merralls QC with C J Horan for the respondent (instructed by State Revenue Office)

Matter No M215/2004 to M218/2004

J D Merralls QC with C J Horan for the appellant (instructed by State Revenue Office)

D F Jackson QC with D R J O'Brien for the respondent (instructed by Gadens Lawyers)

CATCHWORDS

CPT Custodian Pty Ltd v Commissioner of State Revenue
Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd

Land tax – Unit trusts – Registered proprietors of land were trustees of unit trusts in which taxpayers held issued units – Trustees also held issued units in similar trusts – Taxpayers assessed for land tax as owners of land – Whether holder of issued units in these trusts is an "owner" of the land for the purposes of the *Land Tax Act* 1958 (Vic) – Whether holder of issued units in a trust which itself holds issued units in a further trust, the trustee of which is the registered proprietor of land, is an "owner" of the land – Whether holder of only some of the issued units of a unit trust stands in a different position to a beneficiary owning all issued units – Relevance of the rule in *Saunders v Vautier* – Relevance of statutory definition of "joint owners".

Trusts – Whether "unit trusts" form any distinct class of trust the characteristics of which inform the meaning of the statutory term "owner" – Whether whenever the legal estate in property is vested in a trustee there must be some person entitled to beneficial ownership.

Trusts – Beneficiaries – Rule in *Saunders v Vautier* of beneficiaries' entitlement to terminate trust where *sui juris* and together absolutely entitled – Whether the rule applies when trust makes provision for trust property to be available for satisfaction of trustee's and manager's fees.

Words and phrases – "owner", "joint owners", "unit trust".

Land Tax Act 1958 (Vic), ss 3, 6, 8, 39, 49, 51, 52.

1 GLEESON CJ, McHUGH, GUMMOW, CALLINAN AND HEYDON JJ. These appeals (and two cross-appeals) were heard together and with appearances by the same counsel. The appeals are brought from orders made by the Victorian Court of Appeal which had heard together six appeals and cross-appeals. The Court of Appeal (Phillips, Buchanan and Eames JJA) delivered the one set of reasons[1]. The appeals to the Court of Appeal were brought by the Commissioner of State Revenue ("the Commissioner") against orders of the Supreme Court (Nettle J)[2] setting aside the disallowance of objections to certain amended assessments under the *Land Tax Act* 1958 (Vic) ("the Act") issued in 1999[3]. Objections to the assessments had been made by Karingal 2 Holdings Pty Ltd ("Karingal") and CPT Custodian Pty Ltd ("CPT"). The Commissioner had issued amended assessments of Karingal in respect of the land tax years 1996, 1997, 1998 and 1999[4], and amended assessments of CPT in respect of the land tax years 1998 and 1999[5].

2 On the same day as it delivered judgment in the present litigation, the Court of Appeal, constituted by the same bench, delivered judgment in *Arjon Pty Ltd v Commissioner of State Revenue*[6], and there are cross-references between the two judgments. There is no appeal to this Court from *Arjon*, though it will be necessary to refer to what was said in that case. Phillips JA gave the leading judgment in both appeals.

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1 *Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd* (2003) 8 VR 532.

2 *Karingal 2 Holdings Pty Ltd v Commissioner of State Revenue* (2002) 51 ATR 190.

3 Section 25 of the Act provided for the treatment of objections as "appeals" to the Supreme Court. The Supreme Court was empowered by s 29 to make such order as it thought fit and by such order to confirm, reduce, increase or vary the assessment.

4 The amended assessments were numbered respectively S 012493235-2, S 014593439-2, S 015758105-2 and S 018290287-2. In turn, these amended assessments are represented respectively in this Court in Appeals M215, 216, 217 and 218 of 2004.

5 The amended assessments were numbered respectively S 020601703-2 and S 020601711-2 and in turn are represented respectively in Appeals M223 and 222 of 2004.

6 (2003) 8 VR 502.

The litigation

3 The litigation concerns the application of the taxing provisions of the Act to parcels of land on which stand a number of shopping centres. The shopping centres known as the Glen Shopping Centre at Glen Waverley, the Keilor Downs Plaza at Keilor Downs, the Cranbourne Park Shopping Centre at Cranbourne and the Mildura Centre Plaza at Mildura stand on land the registered proprietors of which are trustees under trust deeds constituting what have been identified as unit trusts.

4 In making the assessments still in contention in this Court, the Commissioner relied upon ownership of issued units in these unit trusts and in unit trusts established on similar terms in which the first trust owns issued units. The Commissioner also relied upon s 44 of the Act. If the circumstances specified in s 44 apply and the Commissioner so determines, two or more related corporations may be taken to be a single corporation for the purposes of the Act. In this way, Karingal was assessed by reason of the holdings of its related corporations, 333 Queen Street Pty Ltd and Centro Properties Ltd.

5 The taxing provisions of the Act do not suggest that there can be only one taxable "owner" of land at any one time[7]. The registered proprietor of the lands on which stood the shopping centres just mentioned had a liability to assessment as legal owner and trustee[8] and there was no question of insolvency or other difficulty in recovery of tax in such cases. The suggestion was made in argument for the Commissioner that in issuing the assessments reliance had been placed upon ownership of units for ease of collection of the revenue.

6 Two further points should be made here. The first is that it appears that the units were not in the years of assessment listed securities. No question arises respecting the managed investment schemes provisions introduced by the *Managed Investments Act* 1998 (Cth)[9]. The second point is that no reliance was

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7 cf *Chief Commissioner of Land Tax v Macary Manufacturing Pty Ltd* (1999) 48 NSWLR 299 at 311.

8 See s 52 of the Act.

9 That Act contained transitional provisions for the previous prescribed interests legislation.

placed at any stage of the litigation upon the doctrine of merger between greater and lesser estates[10] in instances where the trustee held 100 per cent of the issued units in a unit trust of which it was trustee.

The Act

7 Sections 6, 8 and 39 of the Act impose at rates specified in the Second Schedule land tax, to be collected as a debt owing to the Crown in right of Victoria by the Commissioner, in respect of the total unimproved value of all land of which the taxpayer is "the owner" at midnight on 31 December of the immediately preceding year for which the tax is assessed. Various provisions of the Act[11] in terms deem certain persons to be the owner of land or the owner of a fee simple of land. These provisions are not directly in issue here. Thus it is upon the operation of the definition of "owner" that the outcome of the litigation largely turns. The Commissioner cannot prevail without success on this point.

8 Section 51 of the Act subjects "the owner of any equitable estate or interest in land" to assessment "as if the estate or interest so owned by him was legal". Section 52 obliges trustees to make returns and to be assessed as if beneficially entitled to the trust land. The Court of Appeal noted[12] the agreement of the parties that ss 51 and 52 were not charging provisions and that no party could be brought to tax under either provision unless it answered the definition of "owner" in s 3.

9 Section 3 includes as owner every person who by virtue of the Act "is deemed to be an owner". As indicated above, those deeming provisions are not presently relevant. The definition also states that owner "means", among other things:

> "(a) every person entitled to any land for any estate of freehold in possession".

Upon that component of the definition the Commissioner relies. It resembles par (a) of the definition of "owner" in s 3 of the *Land Tax Assessment Act* 1910

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10 *Property Law Act* 1958 (Vic), s 185.

11 See ss 41, 42, 43.

12 (2003) 8 VR 532 at 540.

(Cth) ("the 1910 Act"). This was construed in *Glenn v Federal Commissioner of Land Tax*[13] and it will be necessary to return to that case.

The Court of Appeal

10 In the Court of Appeal, counsel for the taxpayers had, correctly, submitted that, rather than approach the issues by looking broadly at the characteristics of a "unit trust", it was necessary to begin with the terms of the relevant trust deeds and the rights, powers, and restrictions for which they provided[14]. However, the Court of Appeal first considered the characteristics of "a unit trust". The Court concluded, with reference to the detailed reasoning in *Arjon*, that "the holder of *all* of the units in a unit trust may be said to be entitled, in equity, to the freehold estate in possession in land which is an asset of the trust", and that the reasoning applied "with equal force both to the sole unit holder in a land-holding trust and to the sole unit holder in a trust which is itself the sole unit holder in a land-holding trust"[15].

11 The Court of Appeal contrasted the position of a holder of less than all of the units, and in this Court, the Commissioner contends that it erred in doing so. The Court of Appeal held that[16]:

> "The holder of some only of the units has no more than those entitlements afforded by the trust deed to a unit holder; they are surely personal property quite different from the realty held by the trustee."

12 The result was that the Court of Appeal (a) upheld the holding of Nettle J that a unit holder with less than 100 per cent of the total issued units at the relevant date was not the owner of an estate of freehold in possession within the meaning of the statutory definition; and (b) set aside the holding of Nettle J with respect to the ownership of 100 per cent of issued units in a unit trust and instead held that in such a case the statutory definition was satisfied, and that this was so also where the land in question was vested in the trustee of a unit trust in which

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13 (1915) 20 CLR 490.

14 (2003) 8 VR 532 at 539.

15 (2003) 8 VR 532 at 540 (original emphasis).

16 (2003) 8 VR 532 at 543.

the first trust held the issued units. This last situation was described in submissions as a "sub-trust".

13 The Commissioner and the two taxpayers, Karingal and CPT, challenge the outcome in the Court of Appeal, each to the extent that it was adverse to their interests. As noted above, there are six appeals and two cross-appeals, and there are also two notices of contention. Their resolution should produce a result that the Court of Appeal's holding (a) identified above should be affirmed and holding (b) reversed. The overall result would thus favour the taxpayers.

Statutory construction and the general law

14 Something now should be said respecting the task of statutory construction which was presented to Nettle J and then to the Court of Appeal. There were two steps to be taken. They were correctly identified in the submissions by the taxpayers to the Court of Appeal[17]. The first step was to ascertain the terms of the trusts upon which the relevant lands were held. The second was to construe the statutory definition to ascertain whether the rights of the taxpayers under those trusts fell within that definition.

15 In taking those steps, *a priori* assumptions as to the nature of unit trusts under the general law and principles of equity would not assist and would be apt to mislead. All depends, as Tamberlin and Hely JJ put it in *Kent v SS "Maria Luisa" (No 2)*[18], upon the terms of the particular trust. The term "unit trust" is the subject of much exegesis by commentators[19]. However, "unit trust", like "discretionary trust"[20], in the absence of an applicable statutory definition, does

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17 (2003) 8 VR 532 at 539-540.

18 (2003) 130 FCR 12 at 33.

19 See Ford, "Unit Trusts", (1960) 23 *Modern Law Review* 129; Ford, "Public Unit Trusts", in Austin and Vann (eds), *The Law of Public Company Finance*, (1986) 397; Sin, *The Legal Nature of the Unit Trust*, (1997); Thomas and Hudson, *The Law of Trusts*, (2003), Ch 51.

20 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8].

not have a constant, fixed normative meaning which can dictate the application to particular facts of the definition in s 3(a) of the Act[21].

16 To approach the case, as both Nettle J and the Court of Appeal appear to have done in response to submissions by the Commissioner, by asking first whether, as was said to be indicated by *Costa & Duppe Properties Pty Ltd v Duppe*[22], the holder of a unit "in a unit trust" has "a proprietary interest in each of the assets which comprise the entirety of the trust fund", and answering it in the affirmative[23], did not immediately assist in construing the definition of "owner" in the Act. That definition does not speak of ownership of proprietary interests at large, but of entitlement to any estate of freehold in possession.

17 In *Schmidt v Rosewood Trust Ltd*[24], the Privy Council recently stressed that the right to seek the intervention of a court of equity to exercise its inherent authority to supervise and, if necessary, to intervene in the administration of trusts, "does not depend on entitlement to a fixed and transmissible beneficial interest". In a sense, the Commissioner's submissions tend to prove too much[25]. In any event, as Lord Wilberforce emphasised in *Gartside v Inland Revenue Commissioners*[26], it is one thing to identify rights protected by a court of equity, and another to identify an interest which has "the necessary quality of definable extent which must exist before it can be taxed". In the present case, the "definable extent" is that specified by the definition in the Act. No doubt, unit holders accurately may be said to have had rights protected by a court of equity, but that does not require the conclusion that in the statutory sense they were "owners" of the land held on the trusts in question[27].

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21 Section 102D(1) of the *Income Tax Assessment Act* 1936 (Cth), for the purposes of Pt III, Div 6B, defines a "unit" in relation to a "prescribed trust estate" as including "a beneficial interest, however described, in any of the income or property of the trust estate". Nothing for these appeals turns upon the income tax legislation.

22 [1986] VR 90.

23 (2003) 8 VR 532 at 539.

24 [2003] 2 AC 709 at 729.

25 cf *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729.

26 [1968] AC 553 at 617-618.

27 cf *Kent v SS "Maria Luisa" (No 2)* (2003) 130 FCR 12 at 34-35.

The trust deeds

18 The relevant trust deeds were not in identical form. However, their relevantly salient features appear sufficiently from a consideration of the Keilor Downs Deed ("the Deed") to which the Court was taken at the hearing of the appeals.

19 At all material times the Trustee of the trusts of the Deed was CPT. The parties to the Deed were CPT and a party defined as "the Manager", in which the management of the Fund was vested exclusively (cll 2.5, 16.2). The Fund was vested in the Trustee upon trust for the Unit Holders (cll 2.4, 26.3). Both the Trustee (cl 23.2) and the Manager (cl 23.1) were entitled to fees in significant amounts to be paid out of the Fund, and also to monthly reimbursement from the Fund of their costs, charges and expenses (cl 23.5).

20 The beneficial interest in the Fund was divided into units, each said to confer an equal interest in all property for the time being held by the Trustee upon the trusts of the Deed, but excluding that part of the Fund credited to a distribution account for distribution to unit holders (cl 3.2). But no unit conferred "any interest in any particular part of the Trust Fund or any investment" and each unit had "only such interest in the Trust Fund as a whole as [was] conferred on a Unit under the provisions contained in [the Deed]" (cl 3.2)[28]. Unit holders were not entitled to require the transfer of any property comprised in the Fund, save as provided by the Deed (cl 28.13) but, by agreement with the Manager, distributions in specie might be made upon determination of the Fund (cl 15.5.5). A unit holder was not entitled to lodge a caveat claiming an estate or interest in any investment, being realty (cl 7.1.3)[29]. Unit holders were bound by the terms of the Deed as if parties to it (cl 8). The

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28 Clause 5 of the Cranbourne Park Unit Trust Deed stated that "each Unit Holder shall not be entitled to any particular asset, investment, or property of whatever kind of the Fund".

29 It is unnecessary to enter upon the question whether such a negative stipulation would be enforced in equity, given the policy of the law perceived from the scope and purpose of the Torrens system legislation: *Nelson v Nelson* (1995) 184 CLR 538; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215. See, generally, Campbell, "Contracting Around the Right to Caveat", in Grinlinton (ed), *Torrens in the Twenty-First Century*, (2003) 203.

Deed contemplated that all units might be held beneficially by a single unit holder (cl 29.4).

21 Clause 20 provided for the distribution to unit holders of periodic income entitlements, and cl 15 for the realisation of the Fund upon its determination and distribution of the proceeds among unit holders. In the circumstances detailed in cl 14 the Manager was obliged to repurchase units which would then be cancelled or be available for resale by the Manager[30].

The Commissioner's submissions

22 Counsel for the Commissioner, with reference to provisions such as those of the Deed just described, submitted in this Court that (i) as a matter of general law, because the trust deeds conferred upon each unit holder fixed and ascertainable rights, in relation to the distribution of income and capital, and not depending upon the exercise of discretion, the trust deeds conferred upon each unit holder an equitable estate or interest in each asset from time to time comprising the trust fund; (ii) no other person or class had any such rights or interests; and (iii) these equitable estates or interests answered the statutory requirement in the definition of "owner" of entitlement to land for any estate of freehold in possession.

23 The Commissioner added that the position was no different where there was a sub-trust, with a unit holder holding units in a unit trust, the trustee of which in turn held units in a land-holding trust. Such a position arose in the 1996 and 1997 land tax years with respect to the Keilor Downs Plaza Land and in 1997 with respect to the Cranbourne Park Shopping Centre Land. The Commissioner's submissions respecting sub-trusts cannot succeed if the primary propositions (i), (ii) and (iii) fail.

24 Propositions (i) and (ii) may be put to one side and attention first given to proposition (iii) which is the critical issue posed by the taxing law itself. It then is necessary to return to *Glenn* and what was said there respecting the similar definition of "owner" in the 1910 Act.

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30 cf *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494.

Glenn v Federal Commissioner of Land Tax[31]

25 In that case, Griffith CJ said of an argument for the Revenue that it was[32]:

> "based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable."

That statement was a prescient rejection of a "dogma" that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership[33]. The current state of authority, exemplified by *Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)*[34], bears out what was said in *Glenn* by Griffith CJ. General remarks in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*[35], a case referred to extensively in *Arjon*[36], may be at odds with what was said in *Glenn* to the extent that they go beyond construction of the particular New South Wales stamp duty legislation, but it is unnecessary to pursue the question here.

26 In *Glenn*, Griffith CJ construed the statutory expression "estate in possession" as denoting "an estate of which some person has the present right of enjoyment", saying that land tax being an annual tax, "the 'owner' of the land is the person who is in the present enjoyment of the fruits which presumably afford

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31 (1915) 20 CLR 490.

32 (1915) 20 CLR 490 at 497.

33 See Harris, "Trust, Power and Duty", (1971) 87 *Law Quarterly Review* 31 at 47.

34 (2005) 79 ALJR 913 at 919 [30]; 215 ALR 1 at 9. See also *Kent v SS "Maria Luisa" (No 2)* (2003) 130 FCR 12 at 32-33.

35 (1998) 45 NSWLR 639 at 654.

36 (2003) 8 VR 502 at 515-517.

the fund from which it is to be paid"[37]. Where a trust for accumulation was in operation, those who thereafter were to take the trust estate were not entitled to an "estate of freehold in possession" and were not "owners". The Chief Justice continued[38]:

> "In my opinion, therefore, when the equitable rights created by a will, which may be as diverse as the testator thinks fit, are such that the beneficial enjoyment of property by a particular object of his bounty cannot begin until the expiration of a determinate or indeterminate period, there is no present estate in possession in that property in any person other than the trustees of the will. In one sense, perhaps, the persons who are for the time being entitled to share in the fruits of the land may collectively be called the equitable owners, but that point is not material to the present case."

27 Thereafter, this Court decided that it followed from *Glenn* that, while "in one sense" those between whom a testamentary estate would be appropriated at the end of a stipulated period of accumulation of income were equitable owners of land included in the estate, they were not taxable as owners under the 1910 Act[39].

28 In the present case, Nettle J, who was upheld on this issue by the Court of Appeal, applied to the definition of "owner" in s 3(a) of the Act the reasoning in *Glenn*. His Honour rejected the submission for the Commissioner, in essence renewed in this Court, that the entitlements of the unit holders made each unit holder an "owner" in the relevant sense. His Honour was correct in doing so.

Hallmark of the unit trust?

29 To a significant degree the proposition advanced by the Commissioner and encapsulated in proposition (iii) set out above depended upon what in propositions (i) and (ii) was treated as the hallmark of any unit trust. The alleged hallmark is that, unlike shareholders with respect to the property of the company, unit holders do have beneficial interests in the assets of the trust; no other

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37 (1915) 20 CLR 490 at 496-497.

38 (1915) 20 CLR 490 at 498.

39 *Union Trustee Co of Australia Ltd v Federal Commissioner of Land Tax* (1915) 20 CLR 526 at 531.

persons or class of persons has such an interest and, if not with the unit holders, where else rests the beneficial interest?

30 Similar reasoning is manifest in what was said in *Duppe*[40] concerning the interest of each unit holder in the three parcels of land comprising the assets of the unit trust considered in that case. That trust deed (in cll 7, 8) contained provisions in similar form to cl 3.2 of the Deed considered above. The issue in *Duppe* was whether each unit holder had an estate or interest in land within the meaning of s 89(1) of the *Transfer of Land Act* 1958 (Vic), which was necessary to support a caveat. Brooking J, in answering that question in the affirmative, said[41]:

> "If there is a proprietary interest in the entirety, *there must be* a proprietary interest in each of the assets of which the entirety is composed." (emphasis added)

31 However, in *Gartside*, Lord Wilberforce had said[42]:

> "It can be accepted that 'interest' is capable of a very wide and general meaning. But the wide spectrum that it covers makes it all the more necessary, if precise conclusions are to be founded upon its use, to place it in a setting: Viscount Radcliffe, delivering the Board's judgment in *Commissioner of Stamp Duties (Queensland) v Livingston*[43] shows how this word has to do duty in several quite different legal contexts to express rights of very different characters and that to transfer a meaning from one context to another may breed confusion."

In *Livingston* itself, Viscount Radcliffe had observed that[44]:

> "the terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the

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40 [1986] VR 90.

41 [1986] VR 90 at 96.

42 [1968] AC 553 at 617.

43 (1964) 112 CLR 12 at 28-29; [1965] AC 694 at 719.

44 (1964) 112 CLR 12 at 22; [1965] AC 694 at 712.

words 'interest' and 'property'. Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition."

When *Livingston* had been before this Court, Fullagar J and Kitto J each had spoken to similar effect[45]. Hence, perhaps, the development of the "dogma" respecting concurrent and exhaustive legal and beneficial interests which has been referred to earlier in these reasons and which was decisively discounted by the Privy Council in *Livingston*. Terms are used here which lack a universal contemporary or historical meaning, divorced from the context, particularly any statutory context in which they are employed[46].

32 It is unnecessary for the instant appeals to determine whether *Duppe* correctly decided the requirements in Victoria for a caveatable interest. But what was said there provides, after *Gartside* and *Livingston*, and more recently *Linter Textiles*[47], no authority of the general significance assumed for it by the submissions here by the Commissioner.

33 However, something must be said here respecting the decision of this Court in *Charles v Federal Commissioner of Taxation*[48]. That case was referred to extensively in *Duppe*[49] as the most important authority for the purposes of that case. *Charles* was said by the Commissioner to be consistent with the analysis urged in the Commissioner's submissions on the present appeals.

34 The significant conclusions expressed by Dixon CJ, Kitto and Taylor JJ in *Charles* appear in a passage where, after emphasising that a share in a company

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45 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 438 per Fullagar J, 450 per Kitto J.

46 See Speed, "Beneficial Ownership", (1997) 26 *Australian Tax Review* 34.

47 (2005) 79 ALJR 913; 215 ALR 1. See also the remarks of Aickin J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 463.

48 (1954) 90 CLR 598.

49 [1986] VR 90 at 95.

confers upon the holder no legal or equitable interest in the assets of the company, they continued[50]:

> "But a unit *under the trust deed before us* confers a proprietary interest in all the property which for the time being is subject to the trust of the deed[51]; so that the question whether moneys distributed to unit holders under the trust form part of their income or of their capital must be answered by considering the character of those moneys in the hands of the trustees before the distribution is made." (emphasis added)

35 The reference by the Court in *Charles* to the first of the *Archer-Shee* cases[52] cannot attribute to that decision a general significance which today, in the light of the more recent authorities to which reference has been made above, it does not have. Lady Archer-Shee held a life interest in the income of the residuary estate of her father. The will was in simple form, with one tenant for life and no other object of the trust to be considered[53]. The contrast between that situation and the trusts with which Karingal and CPT are concerned will be readily apparent. No one, as Kitto J later pointed out, doubted that Lady Archer-Shee had a beneficial interest in the income[54]. But, did the moneys paid by the trustees to her account answer the statutory description of income of Lady Archer-Shee "arising ... from"[55] the stocks and shares in which the residuary estate was invested? Lord Wrenbury held that the answer was "yes" because she had "an equitable right in possession to receive during her life" the dividends, subject to deduction for the costs, charges and expenses of the trustees, and for United States tax[56].

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50 (1954) 90 CLR 598 at 609.

51 *Baker v Archer-Shee* [1927] AC 844.

52 *Baker v Archer-Shee* [1927] AC 844; *Archer-Shee v Garland* [1931] AC 212.

53 See the remarks of Viscount Sumner [1927] AC 844 at 853.

54 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 450.

55 See the speech of Lord Wrenbury [1927] AC 844 at 863.

56 See [1927] AC 844 at 866.

36 The deed considered in *Charles* divided the beneficial interest in the trust fund into units (cll 6, 7), and the trustees were bound to make half-yearly distributions to unit holders, in proportion to their respective numbers of units, of the "cash produce" which had been received by the trustees (cll 13A, 13B)[57]. Karingal and CPT rightly stress that the deeds with which this litigation is concerned were differently cast and in terms which do not support any direct and simple conclusion respecting proprietary interests of unit holders such as that reached in *Charles*.

The interest of a unit holder under the Deed

37 On this issue, remarks by Nettle J are in point and conclusive. His Honour said[58]:

> "It may well be that the income of the fund as finally constituted and distributed will include all of the rents and profits generated by a particular parcel of land within the fund. But it is distinctly possible that it will not. Each of the deeds gives power to the trustee to provide out of receipts for future and contingent liabilities; to apply receipts in the purchase of any property or business; to invest receipts in authorised investments and to deal with and transpose such investments; and the only right of the unit holder is to a proportionate share of the income of the fund for the year.
>
> The Commissioner contends that the trustees' powers of disposition and transposition make no difference. He submits that insofar as receipts from particular properties may be applied in making payments other than to a unit holder, they must be seen as made on behalf of the unit holder and in that sense as received by the unit holder. He says that it is in principle no different to the case of a simple trust of land with only one beneficiary, under the terms of which the trustee is entitled to apply receipts in the payment of obligations and in the making of provisions in connection with the management of the land. The Commissioner

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57 (1954) 90 CLR 598 at 600, 606-607. See also the capital growth unit trust considered in *Read v The Commonwealth* (1988) 167 CLR 57 at 61, the terms of which were said by Mason CJ, Deane and Gaudron JJ to confer upon a unit holder a beneficial interest in the trust assets.

58 (2002) 51 ATR 190 at 205.

contends that in such a case there can be no doubt that the beneficiary would be liable to tax as 'owner'.

But I think there is a difference. In the case of a simple trust of the kind instanced by the Commissioner the entitlement of the trustee to apply part of the receipts in defined ways determines the amount of the income which the beneficiary has a right to receive. Contrastingly, in a case of a complex unit trust of the kind with which I am concerned, the entitlement of the trustee to apply receipts in defined ways informs the nature of the income that the unit holders have a right to receive: not a total of all of the receipts derived from each asset the subject of the fund but rather such if any income as may be derived from the product of the application of gross receipts in various ways." (footnotes omitted)

38 The Commissioner referred to s 45 of the Act as essential to his case. Section 45 provides, among other things, for the separate assessment of each "joint owner" of land in respect of the individual interest of that owner in the land (s 45(3)). The term "joint owners" is so defined in s 3(1) as to identify persons "who own land jointly or in common, whether as partners or otherwise". The 1910 Act contained a definition in those terms. It is apparent from the reasoning of Knox CJ in *Terry v Federal Commissioner of Taxation*[59], a case upon the 1910 Act, that in order to be a joint owner the person in question must jointly occupy the same position with regard to entitlement for an estate of freehold in possession (ie, as "owner" in the defined sense) as an individual would occupy in his own person. That requirement means that the notion of joint ownership in s 45 cannot overcome the failure of the Commissioner's case with respect to the definition of "owner" in s 3 of the Act.

39 Further, the units are discrete bundles of rights; each unit is not held in joint ownership with the totality of issued units. It appeared to be conceded in argument by the Commissioner that unit holders did not hold any land as joint tenants. However, they were said necessarily to own together the whole of the beneficial ownership which, on the Commissioner's case, must subsist. The Commissioner further submitted that this ownership, however understood, was within the closing words of the definition of "joint owners", namely, "or otherwise".

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59 (1920) 27 CLR 429 at 434-435.

40 There are two answers to these submissions. First, the concluding words are no more than part of the phrase "whether as partners or otherwise", and do not lessen the requirement for ownership jointly or in common. Secondly, as already demonstrated, the assumption respecting beneficial ownership is misplaced.

The sole owner of all issued units

41 There remains the distinction upon which turned the outcome in the Court of Appeal. The distinction was drawn with reference to the reasons in *Arjon* where Phillips JA stated[60]:

> "where the trust deed itself declares that the trust fund as a whole is vested in all the unit holders together and there is but one person holding all the issued units, it seems to me to follow that that sole unit holder must be regarded as in equity entitled to an interest, vested in possession, in all of the trust assets".

Earlier in his reasons, his Honour had said of the sole unit holder[61]:

> "As the only person beneficially interested in the assets, it also has the power to bring the trust to an end at will and to require the transfer to it of the assets (even if only after satisfying any claim that the trustee might have to reimbursement or recoupment for expenses incurred as trustee)."

This meant that the unit holder of all issued units had more than the accumulation of the rights attaching to each of the units considered severally. In particular, with a reference to *Saunders v Vautier*[62], Phillips JA said that[63]:

> "quite apart from the terms of the trust deed, the holder of all of the units will ordinarily have the power to bring the trust to an end and, if it so chooses, appropriate the trust assets to itself".

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60 (2003) 8 VR 502 at 520.

61 (2003) 8 VR 502 at 515.

62 (1841) 4 Beav 115 [49 ER 282]; affd (1841) Cr and Ph 240 [41 ER 482].

63 (2003) 8 VR 502 at 515.

42 Karingal and CPT challenge these propositions and deny that the holder of all of the issued units was in a position to bring to an end the relevant unit trusts. The issue of statutory construction concerning the phrase "entitled to any land for any estate of freehold in possession" in the definition in the Act of "owner" must not be overlooked whilst pursuing any inquiry respecting *Saunders v Vautier*. The operation of the rule attributed to that case was taken by the Court of Appeal to override the complex stipulations of the Deed respecting its determination. The result was apparently that, because at each relevant 31 December there was an unrealised potential for the holder of all of the issued units to put the trusts to an end, the unit holders were on that date entitled to an estate of freehold in possession within the meaning of the statutory definition.

43 *Saunders v Vautier* is a case which has given its name to a "rule" not explicitly formulated in the case itself, either by Lord Langdale MR (at first instance) or by Lord Cottenham LC (on appeal). In Anglo-Australian law the rule has been seen to embody a "consent principle" recently identified by Mummery LJ in *Goulding v James*[64] as follows:

> "The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument."

44 A different view was taken long ago by the United States Supreme Court. In *Shelton v King*[65], the Court repeated what had been said by Miller J in 1875 when speaking for the Supreme Court in *Nichols v Eaton*[66]. He saw no reason in the principles of public policy concerning frauds upon creditors, restraints upon alienation, the prevention of perpetuities and of excessive accumulations, or in the necessary incidents of equitable estates, which supported a rule of the width engrafted upon the law (then comparatively recently) by the English Court of Chancery as a limitation upon effecting the intent of testators and settlors[67].

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64 [1997] 2 All ER 239 at 247.

65 229 US 90 (1913).

66 91 US 716 at 725 (1875).

67 See further *Claflin v Claflin* 20 NE 454 (1889); *Scott on Trusts*, 4th ed (1989), vol 4, §337.3; Sin, *The Legal Nature of the Unit Trust*, (1997) at 114-120.

However that may be, there is force for Anglo-Australian law in the statement that the rule in *Saunders v Vautier* gives the beneficiaries a Hohfeldian "power" which correlates to a "liability" on the part of the trustees, rather than a "right" correlative to a "duty". This is because, in the words of Professor J W Harris[68]:

> "[b]y breaking up the trust, the beneficiaries do not compel the trustees to carry out any part of their office as active trustees; on the contrary, they bring that office to an end". (footnote omitted)

45 Whilst the reasoning of the Court of Appeal respecting the special case of the holder of all issued units depended largely upon the rule in *Saunders v Vautier*, in oral argument in this Court the Commissioner said that, in effect, here the rule was a red herring. The rule was but a corollary of the beneficial ownership for which the Commissioner contended in his earlier submissions; this did not depend upon the exercise of the entitlement to terminate the trust.

46 The submissions respecting the beneficial ownership by each unit holder have been rejected earlier in these reasons. The trusts exemplified in the Deed recognised (cl 29.4) that all issued units might be in the one beneficial ownership, but the trusts were drawn in terms conferring individual rights attached to each unit. They were not drawn to provide a single right of a cumulative nature so that the whole differed from the sum of the parts. There could be no such single right unless held jointly or in common, but the Deed was not cast in such terms[69].

47 There is a further consideration. The facts of the present cases do not, in any event, answer the modern formulation of the rule in *Saunders v Vautier*, stated as follows in *Thomas on Powers*[70]:

> "Under the rule in *Saunders v Vautier*[71], an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and

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68 "Trust, Power and Duty", (1971) 87 *Law Quarterly Review* 31 at 63.

69 cf *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 605.

70 (1998) at 176.

71 (1841) 4 Beav 115 [49 ER 282]; affd (1841) Cr and Ph 240 [41 ER 482].

> income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation."

Lightman J said in *Don King Productions Inc v Warren*[72] that the rule only applies if, as was not so there, the beneficiaries were entitled to wind up the trust and require the trustee to assign to them the subject-matter of the trust.

48 Notwithstanding these references to beneficiaries, the repositories of the power to override the terms of a trust by bringing to an end its further administration have been variously identified. For example, it has been asked to whom do the trustees owe their duties of administration? Looking at the testamentary trusts considered in *Glenn*, Isaacs J considered the scope of the duties of the trustees and asked whether the trusts were exclusively for the benefit of the appellants[73]. The appellants' interests in the residuary estate were subject to the payment of annuities to the widow of the testator for her life and to his unmarried daughters until marriage[74]. Isaacs J concluded[75]:

> "The trustees have prior duties to other legatees having definite interests, and the strict performance of those duties requires the trustees to retain possession of the property, to receive the profits, and to deal with them otherwise than by paying them to the appellants. … It is obvious, therefore, that the principle of *Saunders v Vautier*[76] cannot apply, for the trusts are not exclusively for the appellants' benefit."

More recently, in *Sir Moses Montefiore Jewish Home v Howell and Co (No 7) Pty Ltd* [77], Kearney J treated the power to achieve immediate payment of the trust property as reposed in the entire range of persons entitled to call for the due administration of the trust in question.

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72 [2000] Ch 291 at 321; affd [2000] Ch 291 at 324ff.

73 (1915) 20 CLR 490 at 504.

74 (1915) 20 CLR 490 at 495.

75 (1915) 20 CLR 490 at 504.

76 (1841) 4 Beav 115 [49 ER 282]; affd (1841) Cr and Ph 240 [41 ER 482].

77 [1984] 2 NSWLR 406 at 410-411.

49 But that approach to the rule in *Saunders v Vautier* would not meet the case of the Deed considered in this litigation. In the Deed, the Manager covenanted with the Trustee (cl 23.4) to ensure that there were at all times sufficient readily realisable assets of the Trust available for the Trustee to raise the fees to which the Manager and the Trustee were entitled under cl 23.1 and cl 23.2 respectively. These stipulations made the Trustee and the Manager interested in due administration of the trusts of the Deed, in the sense identified by Kearney J in *Moses Montefiore*. Put somewhat differently, the unit holders were not the persons in whose favour alone the trust property might be applied by the trustee of the Deed[78].

50 The classic nineteenth century formulation by the English courts of the rule in *Saunders v Vautier* did not give consideration to the significance of the right of the trustee under the general law to reimbursement or exoneration for the discharge of liabilities incurred in administration of the trust. In *Wharton v Masterman*[79], Lord Davey approached the rule in *Saunders v Vautier* from the viewpoint of the law respecting accumulations of income for an excessive period; if no person had any interest in the trust other than the legatee, the legatee might put an end to the accumulation which was exclusively for the benefit of that person and as a result there was no effective or enforceable direction for any accumulation[80]. However, his Lordship's discussion of the authorities[81] does indicate that the rule in *Saunders v Vautier* could not apply if, by reason of the charging of legacies on the fund and accumulations, the persons seeking to put an end to the accumulations were "only entitled to an undetermined and uncertain surplus (if any) which might be left of the fund after payment of the legacies"[82].

51 In the present case, the unsatisfied trustees' right of indemnity was expressed as an actual liability in each of the relevant accounts at each 31 December date and rendered applicable the sense of the above words of Lord

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78 See *Blair v Curran* (1939) 62 CLR 464 at 498, 501; *Thomas on Powers*, (1998) at 380.

79 [1895] AC 186.

80 [1895] AC 186 at 198-200.

81 [1895] AC 186 at 200-201.

82 [1895] AC 186 at 201.

Davey. Until satisfaction of rights of reimbursement or exoneration, it was impossible to say what the trust fund in question was[83].

52 There is a further, and related, point. This is suggested by remarks of Tamberlin and Hely JJ in *Kent v SS "Maria Luisa" (No 2)*[84]. It is one thing to say, as in *Wharton v Masterman*[85], that a court of equity will not enforce a trust for accumulations in which no person has an interest but the legatee, and another to determine for a statutory purpose that there is a presently subsisting interest in all of the trust assets at a particular date (midnight on 31 December of the immediately preceding year) because of what could thereafter be done in exercise of a power of termination of the trust in question but at that date had not been done. Equity often regards as done that which ought to be done, but not necessarily that which merely could be done. In any event, what is at stake here is the operation of statutory criteria upon general law concepts of equitable ownership.

Other issues

53 These conclusions make it unnecessary, given the agreement noted by the Court of Appeal[86] that ss 51 and 52 of the Act were not charging provisions, and that neither could apply unless there was first found to be an "owner" within the definition in s 3, to consider arguments concerning the construction of and relationship between ss 51 and 52.

Orders

54 In appeals M217 and 218, each appeal should be dismissed with costs. In appeals M215 and 216, each appeal should be dismissed with costs and the cross-appeal allowed with costs. On the cross-appeals, there should be consequential orders, including costs orders. The consequential orders are that the orders of the Court of Appeal are set aside and in place thereof the appeal to that Court is dismissed with costs, the cross-appeal to that Court is allowed with costs, and the

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83 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246 [48].

84 (2003) 130 FCR 12 at 35-36.

85 [1895] AC 186 at 198.

86 (2003) 8 VR 532 at 540.

orders of Nettle J are varied so that the appeal to the Supreme Court in respect of amended assessment S 012493235-2 (appeal M215) and S 014593439-2 (appeal M216) is allowed with costs, the amended assessment is set aside and the subject-matter thereof is remitted to the Commissioner for reconsideration and determination in accordance with law.

55 In each of appeals M222 and 223, each appeal should be allowed with costs, the orders of the Court of Appeal set aside, the appeal to the Court of Appeal dismissed with costs, the cross-appeal allowed with costs, and the orders of Nettle J varied so that the appeal to the Supreme Court in respect of amended assessment S 020601703-2 (appeal M223) and S 020601711-2 (appeal M222) is allowed with costs, the amended assessment set aside and the subject-matter thereof remitted to the Commissioner for reconsideration and determination in accordance with law.