HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

WARREN HALLORAN AND THE PERSONS NOMINATED
IN THE ATTACHED SCHEDULE OF OWNERSHIP APPELLANTS

AND

MINISTER ADMINISTERING NATIONAL PARKS
AND WILDLIFE ACT 1974 RESPONDENT

Halloran v Minister Administering National Parks and Wildlife Act 1974
[2006] HCA 3
9 February 2006
S215/2005

ORDER

1. *Vary Order 2 of the Court of Appeal of the Supreme Court of New South Wales entered on 17 August 2004, so as to read:*

   "Declare that upon the admissible evidence tendered at the proceeding before Talbot J the applicant, Pacinette Pty Ltd, has not established that it is the owner of an interest in the land the subject of the Notice of Acquisition published in the Government Gazette dated 19 June 1998 and is entitled for the purposes of these proceedings to maintain its claim under s 37 of the Land Acquisition (Just Terms Compensation) Act *1991 in respect of nominated lots 140, 1629 and 1063."*

2. *Vary Order 3 of the Court of Appeal of the Supreme Court of New South Wales entered on 17 August 2004, so as to read:*

   "Declare that upon the admissible evidence tendered at the proceeding before Talbot J, the Beneficial Ownership Claimants in Class 2 referred to in the Amended Points of Claim dated 28 December 2000 have not established that they are entitled to maintain claims under s 37 of the Land Acquisition (Just Terms Compensation) Act *1991 in respect of land resumed by Notices of Acquisition published in the Government Gazette on 19 June 1998 and on 18 September 1998."*

3. *Otherwise, appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

S D Rares SC with R G McHugh for the appellants (instructed by Blake Dawson Waldron)

A H Slater QC with H R Sorensen for the respondent (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

Halloran v Minister Administering National Parks and Wildlife Act 1974

Compulsory acquisition – Compensation – Minister acquired land by compulsory process pursuant to *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW), s 19 – Where land comprised many individual parcels each of which was a separate lot in a deposited plan – Transactions purportedly undertaken with the effect that lots beneficially held by a small number of registered proprietors were distributed among a larger number of equitable owners ("May 1998 transactions") – May 1998 transactions included dealings between Sealark Pty Ltd ("Sealark") and Pacinette Pty Ltd ("Pacinette") – Sealark held equitable interest in land – Pacinette constituted as trustee of unit trust in which Ordinary Class and A Class units could be allotted – A Class unit holders entitled to fractional interest in assets received in consideration of the allotment of the units, which assets were to form a separate fund to the ordinary fund – Pacinette as trustee empowered to redeem A Class units – A Class units intended to be allotted to Sealark in consideration of the transfer of Sealark's interest in the land to Pacinette as trustee – Pacinette intended to acquire equivalent number of Ordinary Class units paid for by bill of exchange drawn by Pacinette on Sealark as an accommodation party – Sealark intended to redeem all A Class units and Pacinette to pay redemption moneys by endorsing bill of exchange to Sealark – Assets of A Class fund were thereby to become assets in the ordinary fund the entire equitable interest in which was vested in Pacinette – Whether transactions effective in law – Whether claimants for compensation had an equitable interest in the land compulsorily acquired.

Company law – Meetings – Transaction between Sealark and Pacinette was one of 770 similar transactions which made up the May 1998 transactions – Documents for the May 1998 transactions were mostly signed in one sitting in the offices of the appellants' solicitors, where those documents included minutes of meetings of the boards of directors of both Sealark and Pacinette – Whether evidence disclosed that May 1998 transactions occurred – Whether the meetings said to be recorded in the minutes occurred.

Statute of frauds – Requirement of writing – Disposition of equitable interests – Whether requirements of *Conveyancing Act* 1919 (NSW), s 23C(1)(c) were complied with in the course of dealings between Sealark and Pacinette.

Bills of exchange – Delivery – Negotiation by indorsement and delivery – Whether bill of exchange tendered in payment for units – Whether bill of exchange negotiated by indorsement and delivery – Whether mere intention to take steps involving tender and negotiation of bill of exchange sufficed to effectuate equitable transfer of interest in land to Pacinette.

Stamp duty – May 1998 transactions designed to ensure that *Stamp Duties Act* 1920 (NSW) ("Stamp Duties Act"), Pt 3, Div 3A was inapplicable to those transactions – No duty paid on those transactions – Whether transactions dutiable – Whether change in beneficial ownership occurred as a result of transfer by Sealark of its interest in the land to Pacinette as trustee in consideration of the issue of A Class units – Whether no change in beneficial ownership because Sealark was sole unit holder of A Class units – Whether change in beneficial ownership occurred as the consequence of the issue or redemption of units in a unit trust scheme for the purposes of s 44(2)(d) of the Stamp Duties Act – Whether s 29(3) of the Stamp Duties Act applied to bar admission of any documentary evidence to prove the transaction creating the equitable interests in the land in proceedings for compensation for compulsory acquisition of the land.

Words and phrases – "beneficial ownership", "occurring as the consequence of the issue or redemption of units in a unit trust scheme".

Bills of Exchange Act 1909 (Cth), s 33(1).
Conveyancing Act 1919 (NSW), s 23C(1)(c).
Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 19, 20, 37.
Land and Environment Court Act 1979 (NSW), s 57(1).
Stamp Duties Act 1920 (NSW), ss 29(3), 44-44F.

1 GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. The respondent, the Minister administering the *National Parks and Wildlife Act* 1974 (NSW) ("the Minister"), is an "authority of the State" within the meaning of the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("the Compensation Act"). Section 19 of that statute empowers an authority of the State to acquire land by compulsory process with the effect, given by s 20, that the land vests in the acquiring authority "freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land".

2 Section 37 of the Compensation Act confers upon "[a]n owner of an interest in land" which has been divested, extinguished or diminished by the acquisition, an entitlement to payment by the acquiring authority of compensation. The expression "[a]n owner of an interest in land", as a consequence of definitions in s 4, identifies any person who has "a legal or equitable estate or interest in the land" or "an easement, right, charge, power or privilege over, or in connection with, the land". The appellants assert entitlements to compensation under s 37 of the Compensation Act, which the Minister disputes.

3 It should be noted that the compulsory acquisition is effected on the date of publication in the New South Wales *Government Gazette* ("the Gazette") of an acquisition notice (s 20). In February 1997, the Director-General of National Parks and Wildlife had been served with notices requesting acquisition of the land in question in this case. Thereafter, and following urging by the appellants that the matter be expedited, by notices published in the Gazettes of 19 June 1998 and 18 September 1998, there was vested in the Minister by the compulsory processes of the Compensation Act parcels of land totalling about 2,639 hectares. The land was acquired for the Jervis Bay National Park. The situation of the land adjacent to Jervis Bay has the significance that will now be described.

The resumed land

4 The resumed land included parcels in various certificates of title issued under the provisions of the *Real Property Act* 1900 (NSW) ("the RP Act"). There was a large number, said to be several thousands, of parcels of land each of which was a separate lot in a deposited plan. Few, if any, of the lots of a suitable size for development as dwellings have ever been so occupied and the development of the land does not reflect this state of subdivision.

5 This state of affairs provided the occasion for the transactions to which reference will be made, undertaken with a view to the obtaining for the appellants of a greater measure of compensation on resumption than that which otherwise

would have been payable. The reasons for the existence of that state of affairs are found in the history of the Jervis Bay area. The *Jervis Bay Territory Acceptance Act* 1915 (Cth) ratified and confirmed an agreement between the Commonwealth and the State of New South Wales for the surrender to and acceptance by the Commonwealth of territory to be annexed to, and to form part of, what was then known as the Territory acquired by the Commonwealth for the Seat of Government (s 4)[1]. In the Second Reading Speech in the House of Representatives on the Bill for that statute, the responsible Minister said that the Royal Australian Naval College was already situated within the area in question and that in due course other buildings such as dockyards would be constructed there[2]. It appears that a large tract of land to be retained within New South Wales was subdivided into parcels of a suitable size for town development to support the development of the proposed port in the federal Territory. The anticipated town development did not take place.

6 It may be noted that, in its form as enacted in 1900, s 113 of the RP Act had provided for the deposit with the Registrar-General of a map showing allotments into which the land for a proposed township was divided. Section 113 was repealed by s 196(12) of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act"). The modern New South Wales system of subdivision and deposited plans was not introduced until 1919[3].

The litigation

7 The Compensation Act deals with compensation claims by a system of objections and appeals to the Land and Environment Court of New South Wales[4]. The appellants appeal to this Court against a decision of the New South Wales Court of Appeal (Spigelman CJ, Ipp and Bryson JJA)[5] allowing an appeal by the

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1 *The Commonwealth v Woodhill* (1917) 23 CLR 482 at 486.

2 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 July 1915 at 4722.

3 By s 196 of the Conveyancing Act and Pt XII (ss 320-342) of the *Local Government Act* 1919 (NSW).

4 Pt 3, Div 5 (ss 66-68).

5 *Minister Administering National Parks and Wildlife Act 1974 v Halloran* (2004) 12 BPR 22,391.

Minister against orders made by the Land and Environment Court (Talbot J) in compensation proceedings[6].

8 Limited provision for an appeal to the Court of Appeal was made by the *Land and Environment Court Act* 1979 (NSW). Section 57(1) of that statute conferred a right to appeal "on a question of law". One of the complaints made by the appellants in this Court is that the Court of Appeal itself engaged in fact-finding and thus exceeded its statutory mandate.

The proceedings in the Land and Environment Court

9 Talbot J required the appellants (the applicants in that Court) to deliver points of claim that identified the value of the claims they made, the components of the claim, and the basis of the valuations relied on. This was done by dividing the land into a number of different categories and the appellants into three different classes – "bare trustee claimants", "beneficial ownership claimants" and "registered proprietors with beneficial ownership". For present purposes, the categories into which the land was divided may be ignored. Attention must be given to land, of any category, in respect of which the second class of appellants (the "beneficial ownership claimants" or "class 2 claimants" as they were called in the proceedings in the Land and Environment Court) claimed to have a beneficial interest. Pacinette Pty Ltd ("Pacinette") was one of these class 2 claimants.

10 By consent of the parties, Talbot J ordered, on 27 October 1999, that there be determined, as a separate question, whether Pacinette established, on the evidence led at the hearing of the question, that it is an owner of an equitable interest in three lots the subject of the first of the two notices of acquisition, that which appeared in the Gazette of 19 June 1998. By order made on 9 December 1999 the separate question was answered in the affirmative[7].

11 The Minister then sought to reagitate that question before Talbot J, at least in so far as it was to be understood as deciding whether other class 2 claimaints had obtained an equitable interest in land the subject of either acquisition.

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6 *Halloran and Sealark Pty Ltd v Minister Administering National Parks and Wildlife Act 1974* (1999) 105 LGERA 405; *Halloran v Minister Administering the National Parks and Wildlife Act 1974* [2003] NSWLEC 171.

7 *Halloran and Sealark Pty Ltd v Minister Administering National Parks and Wildlife Act 1974* (1999) 105 LGERA 405 at 426.

Talbot J declined to permit that to be done, holding that the earlier judgment precluded the Minister from contending that other class 2 claimants had not obtained the equitable interests each claimed[8]. The upshot was that the two proceedings before Talbot J established the entitlement of each class 2 claimant, and all those entitlements have been involved in the subsequent appeals to the Court of Appeal and this Court.

The Court of Appeal

12 By leave, the Minister appealed to the Court of Appeal against both the interlocutory order made by Talbot J on 9 December 1999 answering the separate question, and the order made by Talbot J on 17 July 2003 on the motion in which the Minister had sought to reagitate the issue determined in Pacinette's case in its application to other class 2 claimaints.

13 The Court of Appeal allowed the Minister's appeal[9]. The central conclusion reached by Bryson JA (with whose reasons Spigelman CJ and Ipp JA agreed) was that the appeal be allowed for the reason that the transactions which the appellants alleged had taken place in May 1998 had not occurred. Bryson JA said[10]:

> "On [the] evidence the only conclusion reasonably available is that the meetings did not occur, the written offers which were purportedly authorised were not delivered and the oral acceptances on which the scheme depends were never made."

The appellants complain that this statement represented impermissible fact-finding by the Court of Appeal.

14 The Court of Appeal set aside the answer given by Talbot J to the separate question. In its place the Court of Appeal ordered that there be a declaration that Pacinette is not the owner of an interest in the land the subject of the notice of acquisition, and is not entitled, for the purposes of the proceedings in the Land and Environment Court, to maintain its claim under s 37 of the Compensation

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8 *Halloran v Minister Administering the National Parks and Wildlife Act 1974* [2003] NSWLEC 171.

9 *Minister Administering National Parks and Wildlife Act 1974 v Halloran* (2004) 12 BPR 22,391.

10 (2004) 12 BPR 22,391 at 22,413.

Act. The Court further ordered that there should be a declaration that the other class 2 claimants are not entitled to maintain claims under s 37 of the Compensation Act in respect of land the subject of either of the notices of acquisition.

15 By special leave the appellants now appeal to this Court. The questions of preclusion considered by Talbot J at the second hearing do not arise in this Court.

The fiscal considerations

16 The present appellants claimed compensation of more than $46.7 million. They alleged that some of those individuals and companies included as appellants held no more than a bare legal title to parts of the resumed land but that the remaining appellants (all of them corporations controlled by the first appellant, Mr Warren Halloran) had at the date of the relevant notice in the Gazette an equitable interest in one or more of the parcels of land which thereby attracted an entitlement to compensation under s 37 of the Compensation Act.

17 The equitable interests in question were said to have been created or acquired as a result of events occuring during May 1998. This was after the giving of the initial notices in February 1997, to which reference has been made, and after the scheme of arrangement, to which reference will be made. In the approach that we take, the question for this Court is whether the Court of Appeal erred in concluding that the appellants had not established, within the available evidence, as a result of the May events described by the Minister as steps taken in pursuance of a "scheme", that the equitable interest had been created or acquired so as to attract the entitlement to compensation upon subsequent resumption.

18 It will be necessary to refer to the events of May 1998 in fuller detail. At this point it is to be emphasised that what was done was informed by two particular fiscal considerations. The first was identified by Bryson JA as follows[11]:

> "The general effect of these transactions is that whereas earlier a small number of registered proprietors each held a large number of lots in deposited plans, now each of 283 different equitable owners owns a number of non-contiguous lots. Underlying these events is the view that if compensation is assessed on proper principles a larger sum in total would

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11 (2004) 12 BPR 22,391 at 22,393.

be payable to the many claimants who each hold non-contiguous lots than will have been payable to a small number of claimants who held the same lots agglomerated into large contiguous parcels."

19 The second fiscal consideration was the incidence of stamp duty imposed by Div 3A of Pt 3 of the *Stamp Duties Act* 1920 (NSW) ("the Stamp Duties Act") with respect to the steps taken in May 1998 to vest an equitable interest in the non-contiguous parcels of land. Division 3A (ss 44-44F) departs from the traditional form of stamp duty legislation by in substance imposing a duty on transactions rather than instruments. In *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*[12], Mason P described Div 3A as an anti-avoidance measure designed to strike at a broad sweep of tax avoidance schemes, some of which had been described in the Second Reading Speech on the Bill for the *Stamp Duties (Amendment) Act* 1987 (NSW).

20 Among other situations, Div 3A applies to "a transaction which ... causes or results in a change in the beneficial ownership of an estate or interest in ... land situated in New South Wales" (s 44(1)(a)). However, this reference to a change in beneficial ownership does not include such a change "occurring as the consequence of ... the issue or redemption of units in a unit trust scheme" (s 44(2)(d))[13].

21 A party to a transaction to which Div 3A applies which is not effected or evidenced by an instrument chargeable with ad valorem duty as, or as on, a conveyance, which that person would have been liable to pay, is obliged by s 44A(1) to lodge a statement with respect to the transaction; this is then deemed to be a chargeable instrument (s 44A(5)).

22 No unstamped instrument in respect of a transaction to which Div 3A applies but for which there has been no compliance with s 44A shall in non-criminal proceedings be pleaded or given in evidence for the purpose of proving that a change in the beneficial ownership to which the transaction relates

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12 (1998) 45 NSWLR 639 at 642.

13 The expression "Unit trust scheme" is defined in s 3(1) as meaning:

> "any arrangements made for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under a trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever pursuant to that trust".

occurred (s 29(3)). Thus, s 29(3) "strikes that instrument with sterility ... unless and until the public requirement of taxation has been complied with"[14].

23 The sequence of steps taken in May 1998 and their form were designed by the appellants to attract the holding by the majority of the Court of Appeal (Meagher JA and Fitzgerald A-JA; Mason P dissenting) in *ISPT* that the particular transaction in issue in that case did not attract duty under Div 3A. However, three points should be made. The first is that, after a detailed analysis of *ISPT* in the later case of *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue (NSW)*[15], Barrett J concluded[16] that he was bound by the Court of Appeal's decision only in so far as it included a decision that the transaction in question there did not engage s 44(1) of the Stamp Duties Act, and that there was no majority view on questions respecting formalities for the creation of trusts and the characteristics of sub-trusts. The second is that *ISPT* involved consideration of unit trust deeds but in advance of the decision of this Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue*[17]. Further reference will be made to *CPT* later in these reasons. The third is that success of the avoidance scheme implemented in *ISPT* depended on a matter of timing. As Mason P pointed out[18], it was critical to the taxpayer's argument based on s 44(2)(d) that no change in beneficial ownership occurred until step 7 of the 11 steps listed by him[19]. Hence the importance of sequence.

24 The purely equitable nature of the interest held by Sealark Pty Ltd ("Sealark") (to which further reference will also be made) further distinguishes the facts of this case from those in *ISPT*. There, Coles Myer Property Investments Pty Ltd ("CMP") had been the owner of the shopping centres at Forster and Bondi Junction[20]. As such, it was inaccurate to speak of CMP as the

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14 *Dent v Moore* (1919) 26 CLR 316 at 324.

15 [2003] ATC 4,697 at 4,734-4,744. The judgment of Barrett J is incompletely reported (2003) 59 NSWLR 196.

16 [2003] ATC 4,697 at 4,744.

17 (2005) 79 ALJR 1724; 221 ALR 196.

18 (1998) 45 NSWLR 639 at 645.

19 (1998) 45 NSWLR 639 at 643-644.

20 (1998) 45 NSWLR 639 at 642-643, 655.

owner of a distinct legal and beneficial title or interest; it had the whole right of property in the land[21].

25 In response to the oral submissions for the appellants in this Court, the Minister submitted that (a) as just remarked, it was difficult to discern any true ratio decidendi in the majority reasons in *ISPT*, (b) there were material differences between the steps taken in *ISPT* and those in the present case, particularly with the purported use of an accommodation bill of exchange, (c) the Minister reserved the State's position as to the incidence of stamp duty upon a transaction which differed from the *ISPT* transaction, and (d) if, as the appellants had contended in oral submissions, there had been a "direct passage" of beneficial ownership from Sealark to Pacinette by what was called the "first event", Div 3A of Pt 3 of the Stamp Duties Act would have applied; in the absence of compliance with s 44A, the "sterilisation" provision of s 29(3) of that statute would bar the admission of any documentary evidence to prove the transaction in the compensation proceedings.

26 The propositions respecting the Stamp Duties Act upon which the Minister now relies are of a technical legal nature. Talbot J dealt with the admissibility of documents, in the light of Div 3A of Pt 3 of the Stamp Duties Act, in his first judgment, that upon the separate question. His Honour admitted the documents, having regard, in particular, to what appeared to follow from *ISPT*. There can be no successful objection to the Minister advancing them if, although in play before Talbot J, the stamp duty issues were not pressed in the Court of Appeal.

27 The appellants referred to a letter dated 25 March 2004, post-dating the proceedings before Talbot J but received in evidence in the Court of Appeal, in which the Chief Commissioner of State Revenue had indicated that there was no liability under Div 3A in respect of "the Pacinette transaction". That indication cannot bind the Minister in the present litigation which concerns the operation of the Compensation Act. This is so particularly where, as will be made apparent later in these reasons, the evident assumption upon which the Chief Commissioner was encouraged by the appellants to act, namely that all of the steps proposed to be taken in May 1998 had been taken, is shown to be false.

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21 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 442, 463, 473-474; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 79 ALJR 1724 at 1729 [25]; 221 ALR 196 at 202-203.

28 It is yet to be decided whether the amount of compensation will be increased by the segmentation of the land into non-contiguous lots. This is because both in the interlocutory proceedings in the Land and Environment Court and in the Court of Appeal argument has turned on the resolution of the separated question relating to the efficacy of the steps taken in May 1998 to vest in Pacinette a distinct equitable (and compensable) interest in each of its non-contiguous parcels of land. Later in these reasons, under the heading "Conclusions", it will be necessary to consider the significance of the outcome of the appeal in this Court for further proceedings in the Land and Environment Court.

Pacinette

29 As has been noted, the position of Pacinette has been treated as representative of the entitlement of the class 2 claimants. Something more needs to be said of Pacinette.

30 There were three lots of land dealt with in the first of the notices of acquisition, that of 19 June 1998, and in the first proceeding before Talbot J. Before 12 December 1997, the registered proprietor in respect of each lot was Port Stephens Development Pty Ltd ("Port Stephens"). By order of the Federal Court of Australia made that day and entered on 19 December 1997, the Court approved a scheme of arrangement and ordered that the whole of the undertaking, property and liabilities of Port Stephens be transferred to Sealark. The Court also ordered that Port Stephens be dissolved without winding up.

31 These orders were expressed as having been made pursuant to ss 411 and 413 of the "Corporations Law". The reference is to be taken as invoking (a) the application in New South Wales, by force of s 7 of the *Corporations (New South Wales) Act* 1990 (NSW), of the Corporations Law ("the Law") as set out in s 82 of the *Corporations Act* 1989 (Cth), and (b) the exercise of the jurisdiction purportedly conferred upon the Federal Court by s 42(3) of the State statute as originally enacted. The making of these Federal Court orders preceded the decisions of this Court in *Re Wakim; Ex parte McNally*[22] and *Re Macks; Ex parte Saint*[23]. The upshot of these decisions is that, by the valid operation of s 6 of the *Federal Courts (State Jurisdiction) Act* 1999 (NSW), the rights and liabilities of all persons are and always have been the same as if the order made by the Federal

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22 (1999) 198 CLR 511.

23 (2000) 204 CLR 158.

Court with respect to Port Stephens had been a judgment of the Supreme Court of New South Wales ("the Supreme Court").

32 Section 86 of the RP Act authorised the Registrar-General to record a court order which had been served upon the Registrar-General and which vested in any person land under the provisions of the RP Act, whereupon that person would become the registered proprietor. Section 46C empowered the Registrar-General on the Registrar-General's own motion, and obliged the Registrar-General when given a written request, to register a person vested by the operation of a statute. At the time of the preparation of an agreed statement of facts for the second hearing by Talbot J in 2003 no entries had been made in respect of the vesting of land in the Minister pursuant to the 1998 acquisition notices.

33 At the time of the May 1998 transactions and the date of the acquisition notices, the registered proprietor of the lots in question was still shown as Port Stephens. Sealark was not registered as proprietor until 2 October 1998. The transfers by which the registration of Sealark was achieved were expressed as made pursuant to the order of the Federal Court and on their face were executed under the common seal of Port Stephens on 5 March 1998.

34 Section 413 of the Law, which it must be remembered is to be treated as a law of New South Wales, indicates that, by virtue of what is now the deemed order of the Supreme Court, the property in question was transferred to and vested in Sealark. The order in terms was expressed as effecting a transfer to Sealark pursuant to s 413. However, there was some consideration in argument as to whether the appropriate provision of the Law was not s 413 but s 1336. The latter is a generally expressed provision dealing with the vesting of property pursuant to court orders. Section 1336 makes it clear that, where a transfer or transmission may be registered under a law such as the RP Act, the property does not vest at law until those registration requirements are satisfied although it has earlier vested in equity.

35 With respect to the land registered under the provisions of the RP Act, references to vesting at law and vesting in equity are apt to mislead. The Torrens system is one of title by registration, not of registered title[24]. The assimilation of the registered title to a legal title may be convenient so long as it is appreciated what is involved. It is likewise with respect to the use of the term "equitable" to

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24 *Breskvar v Wall* (1971) 126 CLR 376 at 385; *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245 at 264 [27].

describe interests recognised in accordance with the principles of equity but not found on the Register[25].

36 As has been explained, whether the relevant vesting section with respect to the order was s 413 or s 1336 of the Law, these provisions were made by New South Wales statute law, to be read with the basic provisions of another law of that State, namely the RP Act[26]. The vesting referred to in s 413, unlike that in s 1336, in terms does not refer to unregistered or equitable interests. However, that is how both provisions should be understood when read with the RP Act.

37 This apparent digression is of importance for the present case. At the time of the May transactions and the date of the first acquisition notice, 19 June 1998, Sealark was not the registered proprietor of the three lots in which Pacinette later claimed to have had an interest. At best, as the appellants conceded in argument, Sealark had an unregistered, and, in that sense, an equitable interest. The compensation claim which Pacinette made thus could only be in respect of an equitable interest acquired or derived from the equitable interest of Sealark. The question then becomes one of the legal efficacy in the compensation proceedings of the steps by which, before the resumption date of 19 June 1998, Sealark dealt with its equitable interest. Did these steps lead to the result that on 19 June 1998 Pacinette had an equitable interest in the lots? To consideration of those steps we now turn.

The events of May 1998

Creation of unit trusts

38 On 6 May 1998, Mr Philip Howell, a director of both Pacinette and Sealark, gave a power of attorney to a Canberra solicitor, Mr Gerald Santucci, authorising Mr Santucci to execute trust deeds on his behalf. Seven hundred and seventy trust deeds were prepared including deeds for a trust to be established by Mr Howell as settlor to be called The Pacinette Property Trust. Pacinette was to be the trustee of the trust.

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25 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 256-257, 261.

26 See *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35]; cf *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 622, 630, 635; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 33-35.

39 On 5 May 1998, $7,680 had been deposited to a bank account as the settlement sum of $10 in respect of 768 of the trusts. Subsequently, a further $20 was deposited. The evidence does not reveal which two trusts were the subject of the second deposit of $20, but nothing was said to turn on this. On 9 May 1998, Mr Santucci, as attorney for Mr Howell, executed the 770 deeds of trust.

The Pacinette Property Trust Deed

40 The Pacinette Property Trust Deed ("the Pacinette Trust Deed") provided that the trustee (Pacinette) would hold the capital and income of the "Trust Fund" (all the property held by the trustee upon the trusts of the deed) on trust for the "Registered Holders in proportion to the number of Units held by them, subject to the rights and restrictions specified in the Schedule for A Class units". A "Registered Holder" was defined as "the person for the time being registered under the provisions of this Deed as the holder of a Unit and includes persons jointly registered". The deed obliged the trustee to "keep and maintain an up-to-date register of all Registered Holders" showing certain information.

41 The Pacinette Trust Deed provided that initially there should be two classes of units – Ordinary Class and A Class. No special rights or restrictions attached to Ordinary Class units; A Class units had the rights, and were subject to the restrictions, specified in the schedule to the deed. Those rights and restrictions were as follows:

(a) If the trustee allotted A Class units, the cash or property received in consideration of the allotment was to form a separate fund (the "A Fund"). A Class unit holders were entitled to a fractional interest in the corpus of the A Fund. A Class unit holders were not entitled to any interest in the assets of the Trust Fund, and Ordinary Class unit holders were not entitled to any interest in the assets of the A Fund.

(b) The trustee was empowered, on the request of an A Class unit holder and without the consent of Ordinary Class unit holders, to redeem units held by an A Class unit holder at a price of $1 per unit. There could be no redemption of A Class units unless all the units of that class were redeemed at the same price. Upon redemption of the A Class units, the assets previously part of the A Fund ceased to be assets of that fund and became a part of the Trust Fund.

(c) The deed provided that Sealark was to be the Registered Holder of the initial 10 A Class units.

42 Subject to the rights and restrictions attaching to the A Class units, the Pacinette Trust Deed further provided that every unit conferred an interest in the Trust Fund, but did not confer any interest in any particular part of the Fund or any investment[27].

43 The appellants submitted that the Pacinette Trust Deed permitted Pacinette, as trustee, to deal with itself by issuing units to itself, redeeming those units, or dealing with property held or to be held by Pacinette in its capacity as trustee. The respondent did not submit to the contrary and questions of self-dealing may be set aside from further consideration.

The scheme

44 It is necessary, at this point, to distinguish between the several steps the appellants thereafter *sought* to take and what was done. Before spelling out the steps that were intended, it is as well to describe the essence of the intended scheme. It was:

(a) Land of which Port Stephens was registered proprietor would be vested in Sealark by order made on approval of a scheme of arrangement between Port Stephens and its members.

(b) Sealark (holder of the 10 issued A Class units in The Pacinette Property Trust) would, by acceptance of a written offer made by Pacinette, sell its land to Pacinette, as trustee, in consideration of the issue to Sealark of a further 79,000 A Class units and the land would be an asset of the A Fund.

(c) Pacinette, personally, would acquire 79,010 Ordinary Class units in The Pacinette Property Trust and pay for those units by a bill of exchange drawn by Pacinette on Sealark, for an amount of $79,010, accepted by Sealark as an accommodation acceptor, and payable on demand to Pacinette as trustee.

(d) Sealark would redeem all its A Class units and Pacinette would pay the redemption moneys by endorsing the bill of exchange to Sealark.

(e) Because all the A Class units were redeemed, what had been an asset in the A Fund (the land) would become an asset in the Trust Fund.

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27 cf *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 79 ALJR 1724 at 1728 [18]-[21]; 221 ALR 196 at 201-202.

(f) Pacinette as trustee would sell the land to Pacinette in its personal capacity, in consideration of the redemption of all the units Pacinette held in the trust (79,010 Ordinary Class units).

45 Section 23C of the Conveyancing Act requires, among other matters[28], that a disposition inter vivos of an equitable interest subsisting at the time of the disposition "must be in writing" signed by the disponer or the agent of the disponer lawfully authorised in writing (s 23C(1)(c)); but this requirement "does not affect the creation or operation of resulting, implied, or constructive trusts" (s 23C(2)). Nothing in s 23C affects "the operation of the law relating to part performance" (s 23E(d)). Section 54A is a distinct provision[29]. It is concerned not with dispositions but with the bringing of *actions upon contracts* for the sale or other disposition of land or any interest in land; the requirement in s 54A(1) for a signed memorandum or note does not affect the law relating to part performance (s 54A(2)). The focus of the Minister's submissions was on s 23C rather than s 54A.

46 The steps described above were designed on the expressed assumption, erroneous for the reasons given, that the subject of the sale to Pacinette as trustee (point (b)) was ownership of the land the subject of the scheme of arrangement, rather than an unregistered or subsisting equitable interest therein within the terms of s 23C(1)(c) of the Conveyancing Act. The desired outcome in point (f), if the trust property be properly identified, was that the whole of the equitable interest in the land was thereby vested in Pacinette, freed from any trust obligation of Pacinette in respect of it and compensable under s 37 of the Compensation Act.

47 On one view, the scheme represented by these steps failed by reason of misidentification of the subject-matter. But the ultimate issue concerns the existence of a compensable interest in Pacinette at the resumption date. The

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28 Paragraph (a) of s 23C(1) deals with the creation or disposition of an interest in land and par (b) with declarations of trust respecting any land or any interest therein; the content of the writing requirement is not expressed in the same way in pars (a), (b) and (c), which may make significant the suggested overlap between the other terms of the three paragraphs: see *Adamson v Hayes* (1973) 130 CLR 276. The present appeal may be determined without embarking upon those questions.

29 See *Theodore v Mistford Pty Ltd* (2005) 79 ALJR 1503 at 1505 [4], 1508 [29]; 219 ALR 296 at 298, 303.

appeal may be considered on the footing that what was proposed and what was actually done was in respect of properly identified subject-matter.

48 The Minister emphasises that for Pacinette to have acquired a compensable interest in the resumed land it was necessary to establish the occurrence of two sequential events. The "first event" was that the interest of Sealark had become an asset of The Pacinette Property Trust (point (b)). If that cannot be established by the appellants, then the second event would not be material because of the lack of the necessary subject-matter in that trust. The "second event" is the issue and redemption of units leading to point (f).

The particular intended steps

49 First, there were five steps intended to set up The Pacinette Property Trust and issue A Class units to Sealark. Those steps were:

(i) Mr Howell would request Pacinette to accept appointment as trustee of The Pacinette Property Trust and pay the settlement sum.

(ii) The directors of Sealark (Mr Halloran and Mr Howell) would resolve to accept the issue of 10 A Class units at $1 per unit in The Pacinette Property Trust.

(iii) Sealark would execute an acceptance of the 10 A Class units.

(iv) The directors of Pacinette (Mr Halloran and Mr Howell) would resolve that the company accepted appointment as trustee, and accepted the tender of the settlement sum, and would resolve that the company apply the settled sum to the issue of 10 A Class units to Sealark and issue a Unit Certificate to Sealark.

(v) Pacinette would issue a Unit Certificate to Sealark.

50 Then there were to be a further 18 steps intended to vest in Pacinette the beneficial interest in land previously owned by Sealark. Steps (vi)-(x) together constituted the "first event" identified in the Minister's submissions, and the balance the "second event".

(vi) The directors of Pacinette, as trustee for The Pacinette Property Trust, would resolve to make a written offer to buy the land in consideration of the allotment to Sealark of 79,000 $1 A Class units in The Pacinette Property Trust and to authorise Mr Howell to execute that offer on behalf of Pacinette as trustee and deliver it to Sealark.

(vii) The written offer, executed by Mr Howell on behalf of Pacinette, would be delivered to Sealark.

(viii) The directors of Sealark would resolve to accept the offer and authorise Mr Howell to inform a meeting of the trustee of The Pacinette Property Trust of its acceptance.

(ix) The directors of Pacinette would resolve to allot 79,000 $1 A Class units in The Pacinette Property Trust to Sealark and issue a Unit Certificate.

(x) The Unit Certificate would be issued.

(xi) The directors of Pacinette would then resolve to apply for 79,010 $1 Ordinary Class units in The Pacinette Property Trust and authorise Mr Howell to execute the necessary application.

(xii) Mr Howell would execute the necessary application by Pacinette for those units.

(xiii) Pacinette would pay for the Ordinary Class units by a bill of exchange drawn by Pacinette on Sealark in an amount of $79,010, accepted by Sealark as an accommodation acceptor, and payable on demand to Pacinette as trustee.

(xiv) The directors of Sealark would then resolve to ask for redemption of all the A Class units at a price of $1 and authorise Mr Howell to execute the necessary request for redemption.

(xv) Mr Howell would execute the necessary request for redemption.

(xvi) The directors of Pacinette, as trustee, would resolve:

(a) to allot 79,010 Ordinary Class units in The Pacinette Property Trust to Pacinette; and

(b) to redeem all the A Class units in the trust held by Sealark.

(xvii) Pacinette, as trustee, would then indorse the bill of exchange to Sealark and satisfy payment of the redemption proceeds in this way.

(xviii) Pacinette, as trustee, would issue a Unit Certificate to itself as holder of 79,010 Ordinary Class units.

(xix) The directors of Pacinette would then resolve to make a written offer to purchase the land held by the trust in consideration of the redemption of 79,010 Ordinary Class units and authorise the directors to make a written offer to be delivered to The Pacinette Property Trust.

(xx) Pacinette would then make and deliver the written offer.

(xxi) The directors of Pacinette, as trustee, would resolve to accept the offer and authorise Mr Howell to inform the directors of Pacinette of its acceptance.

(xxii) The directors of Pacinette would then note that the offer had been accepted.

(xxiii) At some point in the process (a point not identifiable by reference to any proposed resolution of directors) Sealark was to give an irrevocable power of attorney to Pacinette (expressed to be in consideration of $10) to deal with the land in any way it saw fit.

The events

51 Documents were prepared to record each of these intended steps in respect of each of the 770 transactions. The documents included minutes of meetings (including those of separate meetings for steps (ii), (iv), (vi), (viii), (ix), (xi), (xiv) and (xvi)), offers to sell land, unit certificates and bills of exchange. They did not include any separate registers of unit holders for the various trusts. (It may be assumed that this failure, of itself, would not necessarily deny the entitlement of unit holders[30].) Over all these documents there hovered the sterilising effect of s 29(3) of the Stamp Duties Act if they were "in respect of" a Div 3A transaction.

52 On 11 May 1998, Mr Halloran, Mr Howell, Ms Earleen Kenny (the secretary of Pacinette) and two solicitors for the Halloran interests (Mr Seller, the partner of the firm having carriage of the matter, and Ms Cleary, then an employee solicitor of the firm) met at the offices of that firm of solicitors. Mr Seller explained to the meeting the intended steps and did so by reference to one particular set of documents that has not since been identified beyond the fact that it was *not* the Pacinette documents. Mr Seller then asked Mr Halloran, Mr Howell and Ms Kenny to agree that "as regards each other transaction and

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30 See *Simultaneous Colour Printing Syndicate v Foweraker* [1901] 1 KB 771.

transfer of land [other, that is, than the one taken as an example] that they occur in the same order and fashion". He said that "[a]ll the transactions are exactly the same and by going through one transaction we are effectively going through all the transactions and then all that remains is the signing of the completed documents". Mr Halloran, Mr Howell and Ms Kenny all said that they understood this.

53 Subsequently, each of Mr Halloran, Mr Howell and Ms Kenny signed all of the various documents, but each did that separately and the documents were not shown to have been signed in an order that reflected the sequence of steps described above. The Pacinette documents were dated 14 May 1998. It appears that this date was chosen because it was the day on which the last of the necessary signatures was appended to documents relating to the Pacinette transaction.

54 In addition to the various documents that were said to record or to give effect to the intended steps described above, Ms Kenny subsequently made two statutory declarations in respect of each transaction. In one she declared that she had been present at a meeting on 14 May 1998 of directors of Sealark at which she "heard" Mr Halloran and Mr Howell hold a meeting resolving to accept a written offer by The Pacinette Property Trust to sell the land in consideration of the allotment of 79,000 $1 A Class units in the trust; in the other she declared that she had been present at a meeting of directors of Pacinette as trustee of The Pacinette Property Trust at which she "heard" Mr Halloran and Mr Howell hold a meeting resolving to accept a written offer to sell the land in consideration of the redemption of units in The Pacinette Property Trust by Pacinette. Each statutory declaration was made on 22 May 1998.

The Minister's contentions

55 First, the Minister contends, as the Court of Appeal held, that Talbot J erred because the evidence and agreed facts do not establish that the steps said to have taken place in May 1998 actually occurred. The submission was developed by saying that, because the elaborate and sequential steps (particularly respecting the drawing, acceptance and negotiation of a bill of exchange) had not been taken, the scheme had not been implemented in accordance with its design; as a result, Pacinette had held at the resumption date no compensable equitable interest.

56 Several points should be made immediately concerning the width of the Minister's first contention. One is that it is not said that the transactions were

integers in a scheme which was a "sham" in the received sense given in the authorities referred to in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*[31]. Another is that the Minister accepts that contractual assent may be inferred from conduct, and that, any requisite statutory formalities apart, company directors may act informally and may manifest unanimous consent without the passage of formal resolutions. In that regard, the Minister accepts the authorities collected by Powell JA in *MYT Engineering Pty Ltd v Mulcon Pty Ltd*[32]. Furthermore, the mere fact that a number of meetings are held simultaneously does not deprive the resolutions of efficacy. If, for example, three people are the sole shareholders in each of a number of companies, however large that number may be, they could effectively resolve, on a single occasion, in their capacities as the shareholders of all those companies, in a manner binding all those companies; assuming, of course, that the subject-matter of such resolution was otherwise within the power of a general meeting of the shareholders of each company.

57 The Minister's second contention is that if, contrary to the first contention, all the steps in the scheme actually occurred, they were ineffective to vest the equitable interests for which Pacinette claims compensation because there was a fatal want of compliance with statutory formalities. The statutory formalities were those made necessary by s 23C of the Conveyancing Act.

58 Thirdly, if neither of the two above objections succeeds in supporting dismissal of the appeal, the Minister further contended in oral submissions noted above that because stamp duty which was properly exigible was not paid, proof of the transaction relied upon for the first event was denied by s 29(3) of the Stamp Duties Act. For reasons which will be stated after dealing with further matters, it is upon this third ground that the appeal should be dismissed.

The significance of what was done in May

59 From what happened at the offices of the solicitors, it may be concluded that the parties expressed assent to the taking of the various intended steps. Those who controlled both Sealark and Pacinette (and the other companies

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31 (2004) 218 CLR 471 at 486-487 [46].

32 (1997) 140 FLR 247 at 266; 15 ACLC 1057 at 1073-1074; 25 ACSR 78 at 92. (An appeal to this Court was allowed, but on grounds not presently material: *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636.) See also the analysis by Dixon CJ, Williams and Kitto JJ of the transaction in *War Assets Pty Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 53 at 86-91.

involved), both as controllers of the corporators of those companies and as directors, agreed that the steps be taken. Some of those steps required the execution of documents. Not all of those steps were taken. In particular, the steps constituting the "second event", involving the issue and redemption of units, were to be taken in consideration of dealings with the bill of exchange. Something more should be said respecting the bill.

60 The bill of exchange was drawn by Pacinette and accepted by Sealark as an accommodation party. That is, Sealark signed the bill "without receiving value therefor, and for the purpose of lending his name to some other person" (*Bills of Exchange Act* 1909 (Cth) ("the Bills of Exchange Act"), s 33(1)). As an accommodation party, Sealark was liable on the bill to a holder for value[33] but had a right of indemnity against Pacinette as drawer[34]. Sealark's acceptance was effective whether or not Sealark accepted the bill before it had been signed by Pacinette as drawer, or while otherwise incomplete[35].

61 On its face, the bill ultimately executed by Pacinette as drawer and Sealark as acceptor was valid according to its tenor and gave rise to the liability of Sealark as acceptor prescribed by s 59 of the Bills of Exchange Act and the liability of Pacinette as drawer prescribed by s 60 of that Act, as well as Sealark's right against Pacinette to be indemnified against its liability.

62 The intended dealings with the bill were: first, its use by Pacinette to pay for Ordinary Class units in The Pacinette Property Trust, and then its negotiation by indorsement by Pacinette as trustee to Sealark to satisfy payment to Sealark of the proceeds of redemption of Sealark's A Class units in the trust.

63 As has already been noted, the evidence led at trial, in this respect, as in others[36], revealed what was *intended* to be done with the bill rather than what was done. In particular, there was no direct evidence given that the bill was ever tendered in payment for units[37], or that the bill, payable as it was to order, was

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33 s 33(2).

34 *Coles Myer Finance Ltd v Federal Commissioner of Taxation* (1993) 176 CLR 640 at 656-659.

35 s 23(1)(a).

36 (2004) 12 BPR 22,391 at 22,409-22,410.

37 Bills of Exchange Act, s 26.

ever negotiated by indorsement and delivery of the bill[38]. The evidence about the way in which the documents were signed precludes a finding that there was at any *particular* point in a series of transactions either a delivery of the bill or a negotiation of the bill by indorsement and delivery.

64 It may fairly be said that this must not be permitted to obscure the facts that:

(a) there was a bill of exchange drawn by Pacinette on Sealark, accepted by Sealark, and payable to Pacinette as trustee; and

(b) the bill was indorsed by Pacinette as trustee to Sealark.

65 Moreover, as Mason P properly emphasised in *ISPT*[39], equity does not work to defeat the lawful intentions of parties; its preference of substance to form and its regard for what ought to be done as having been done are indications of the contrary inclination.

66 The parties agreed, for the valuable consideration of mutual promises of future performance, that the several intended steps would thereafter be taken. A failure to consummate that agreement in its terms would not necessarily discharge equity from any further concern with the matter where, as in this case, an issue is presented for later curial determination whether one or other or none of the parties subsequently held an equitable interest compensable upon resumption by a public authority. If one or more of the parties had released its equitable rights, or perhaps, for reason of a defence of laches, acquiescence, delay or estoppel, had lost its claim to equitable protection, that would be another matter. But no such case was presented by the Minister.

67 The Court of Appeal allowed the appeal because of its opinion that the purported transactions did not occur. We will assume, without deciding the point, that it was open, on the limited appeal before that Court, for the Court of Appeal to proceed to that conclusion. However, that conclusion did not compel the further conclusion that Pacinette and the other appellants did not hold a compensable equitable interest.

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38 Bills of Exchange Act, ss 13(4), 36(3).

39 (1998) 45 NSWLR 639 at 650.

68 Nevertheless, that does not mean that the appellants must succeed in this Court. Their appeal fails on another ground.

Change in beneficial ownership

69 Was the design for the first event one for a "transaction" which would cause or result in "a change in the beneficial ownership [by Sealark] of an estate or interest in ... land situated in New South Wales", as stated in s 44(1)(a) of the Stamp Duties Act? The term "beneficial ownership" used in s 44(1) is apt to include as the subject-matter of that "ownership" an equitable estate or interest. The interest of Sealark was of this nature.

70 Where an interest to be transferred is, as here, a creature of equity, equity requires a clear expression of intention to make an immediate disposition; that, in the absence of an applicable statutory requirement, suffices[40]. If the transaction is a contract rather than a conveyance, then consideration is essential to attract the support of equity[41].

71 It was essential for the design respecting the first event that there be no written contract for the sale by Sealark to Pacinette as trustee of The Pacinette Property Trust. What might be called stamp duty considerations dictated that absence of a written contract. However, there was to be a written offer, accepted by Sealark and recorded in minutes, and the issue of a certificate for the 79,000 $1 A Class units which was the consideration moving to Sealark.

72 At the time when that consideration was provided to Sealark, if not earlier upon acceptance by Sealark of the written offer[42], a change in the relationship between Sealark and Pacinette took place. The equitable interest in the land later to be resumed was now vested in Pacinette as a trustee of The Pacinette Property Trust. In the eye of equity, which provided the critical conspectus because the subject-matter was purely equitable, nothing remained to be done in order to define the respective rights of Sealark and Pacinette with respect to that equitable interest; a court of equity might be asked to protect rights completely defined in

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40 See *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 30-31.

41 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 31.

42 The authorities considering the extent to which it is accurate to say that a trust may have arisen at that earlier stage were considered in *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 330-331 [47], 332-333 [53], 351 [106].

this way[43]. It may be convenient to describe Sealark in these circumstances as in the position of a trustee for Pacinette under a bare trust involving no duties. But there would be much to be said for the view that the intrusion of the notion of a trust at that stage would be superfluous, were it not for s 23C of the Conveyancing Act.

73 On one view of the situation of the parties, the absence of a disposition in writing signed by Sealark to comply with par (c) of s 23C(1) would be met by reliance upon s 23C(2) and a constructive trust binding Sealark, in the events that had happened, in favour of Pacinette. On another view of the matter, any assertion of a lack of efficacy for want of compliance with par (c) of s 23C(1) would be to use the statute as an instrument of fraud[44].

74 Whichever form of reasoning be employed, and it is unnecessary for this appeal to choose between them, the result is that in the circumstances postulated there has been a change in the "beneficial ownership" spoken of in s 44(1) of the Stamp Duties Act.

75 However, it no doubt is true that Sealark would hold all the issued A Class units in The Pacinette Property Trust. Would the fact that Sealark was sole unit holder of those units have the consequence, as the appellants submitted, that the "beneficial ownership" of the equitable interest in land had not changed because that interest was still to be found, by reason of the issue of the units, in the hands of Sealark? The answer must be that there had been a change. Consistently with the reasoning in *CPT Custodian Pty Ltd v Commissioner of State Revenue*[45] and with the terms of the Pacinette Trust Deed, to which reference has been made earlier in these reasons, Sealark would not have any interest in any particular part of the Trust Fund or in any investment thereof.

76 It may then be said, as the appellants appeared to submit, that as a result of the first event there would be a "direct passage" of the beneficial ownership to Pacinette and that, disregarding the second event as superfluous, this sufficed to identify a compensable equitable interest in Pacinette at the time of the resumption of the land.

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43 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 547.

44 *Theodore v Mistford Pty Ltd* (2005) 79 ALJR 1503 at 1508-1509 [30]-[31]; 219 ALR 296 at 303.

45 (2005) 79 ALJR 1724; 221 ALR 196.

77 However, that conclusion would require proof in compensation proceedings that the first event had occurred. The first event critically depended upon proof of written materials, short of a written contract of sale, but still essential to the scheme. The appellants set out to prove these matters, including the written offer and acceptance recorded in the minutes, and the issue of the Unit Certificate (steps (vi), (viii) and (x)). Talbot J held that they had done so. But the sterilising operation of s 29(3) of the Stamp Duties Act denied that proof.

78 The conclusion that s 29(3) applied is only made good if the materials were proffered in proof of a transaction to which Div 3A applied. What has been said so far is that the terms of s 44(1) were satisfied. However, regard must be had to s 44(2). In its form at the date of the May 1998 events, this stated:

> "A reference to a change in beneficial ownership in this section does not include a reference to a change in beneficial ownership *occurring as the consequence* of:
>
> (a) the appointment of a receiver or trustee in bankruptcy,
>
> (b) the appointment of a liquidator,
>
> (c) the making of a compromise or arrangement under Part VIII of the Companies (New South Wales) Code which has been approved by the court,
>
> (d) *the issue or redemption of units in a unit trust scheme*,
>
> (e) the surrender of a lease,
>
> (f) the transfer or conveyance of any estate or interest in property as a security, including the pledging or charging of property, or
>
> (g) the release or termination of an option for the purchase of property." (emphasis added)

79 In written submissions provided after the conclusion of oral argument, the parties developed their conflicting constructions of s 44(2), particularly of par (d), in its application to the circumstances of the litigation and in light of the reasoning in *CPT Custodian Pty Ltd*[46].

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46 (2005) 79 ALJR 1724; 221 ALR 196.

80 Section 44(2) fixes upon a list of dispositive events in the law which have the consequence that there occurs a change in beneficial ownership. Such steps as the creation of a security, the surrender of a lease and the appointment of a trustee in bankruptcy may readily be seen as having this character. Cases may be envisaged where the critical event for a change in beneficial ownership is the issue or redemption of units in a unit trust scheme. It is unnecessary to determine whether the redemption of units involved in the second event would answer this description.

81 However, in the present case, the change in the beneficial ownership of the relevant subject-matter, the equitable interest of Sealark, was not brought about as the consequence of the issue of units in a unit trust. The change was brought about, and was the consequence of, the fact that the consideration (no matter what form that consideration took) was provided by Pacinette to Sealark. The change was thus the consequence of the operation of the doctrines of constructive trusts or of the use of statutes as instruments of fraud or both. As with so many questions of causation, it may be possible to say that the result that Pacinette itself held the equitable interest upon the trusts of the Pacinette Trust Deed was the product of many circumstances. And one feature of one of the circumstances, the provision of the consideration by Pacinette to Sealark, was the form of consideration provided: the issue of units in a unit trust scheme. But, within the sense of s 44(2), the result that Pacinette held the equitable interest upon the trusts of the Pacinette Trust Deed was the consequence of the equitable doctrines and principles that have been identified.

82 The result is that s 44(1) of the Stamp Duties Act applied to the first event and that s 29(3) was engaged in the proceedings before Talbot J. The Minister's submission that the appellants have not established by admissible evidence in the compensation proceedings the occurrence of what has been described as the first event should be accepted. That being so, there was no relevant subject-matter upon which the second event might operate and it need not now be further considered.

Conclusions

83 The separate question decided affirmatively by Talbot J was framed in terms asking whether Pacinette had "established on the admissible evidence tendered at the hearing of this question" that it is an owner of an interest in the land in question and is entitled to maintain its claim under s 37 of the Compensation Act. That question should have been answered in the negative.

84 On the view it took of the facts and of the efficacy of what had been attempted but not achieved, the Court of Appeal went further than returning a negative answer to the separate question. The Court of Appeal ordered that there be a declaration that Pacinette "is not the owner of an interest in the land" and "is not entitled" to maintain its claim under s 37 of the Compensation Act.

85 Talbot J had dismissed the motion in which the Minister had sought to deal with the other class 2 claimants and made no declaration respecting those claimants. The Court of Appeal set aside Talbot J's order and declared that the relevant class 2 claimants "are not entitled to maintain claims under s 37 of the [Compensation Act]".

86 Given the basis in the Stamp Duties Act upon which the appeal is decided in this Court, declaratory relief cast in the absolute terms of that given by the Court of Appeal is inappropriate.

87 The proceedings in the Land and Environment Court are still on foot. Upon resumption of those proceedings, it may be open to the appellants, without foundering upon principles of issue estoppel and related doctrines, to remove the sterilising effect of the revenue legislation by compliance with Div 3A of the Stamp Duties Act and payment of stamp duty and fines to the satisfaction of the Commissioner[47]. We express no view as to whether that course would be open to the appellants, a matter upon which submissions were not made, but the possibility re-emphasises the need for attention to the precise issue set aside for separate determination by Talbot J[48]. This in terms fixed upon what was established by the admissible evidence.

88 The order of the Court of Appeal should be varied to reflect that state of affairs.

Orders

89 The following orders should be made:

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47 cf *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 382-385; *Commercial Banking Co of Sydney Ltd v Love* (1975) 133 CLR 459 at 481.

48 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 358 [53]; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 308-309 [61]; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 91 [89]-[90].

1. Order 2 of the Order of the Court of Appeal entered 17 August 2004 should be varied so as to read:

   "Declare that upon the admissible evidence tendered at the proceeding before Talbot J the applicant, Pacinette Pty Ltd, has not established that it is the owner of an interest in the land the subject of the Notice of Acquisition published in the Government Gazette dated 19 June 1998 and is entitled for the purposes of these proceedings to maintain its claim under s 37 of the *Land Acquisition (Just Terms Compensation) Act* 1991 in respect of nominated lots 140, 1629 and 1063."

2. Order 3 of that Order should be varied so as to read:

   "Declare that upon the admissible evidence tendered at the proceeding before Talbot J, the Beneficial Ownership Claimants in Class 2 referred to in the Amended Points of Claim dated 28 December 2000 have not established that they are entitled to maintain claims under s 37 of the *Land Acquisition (Just Terms Compensation) Act* 1991 in respect of land resumed by Notices of Acquisition published in the Government Gazette on 19 June 1998 and on 18 September 1998."

3. Otherwise, appeal dismissed with costs.

90 HEYDON J. I agree with the orders proposed by Gleeson CJ, Gummow, Kirby and Hayne JJ.

The majority reasoning

91 The majority reasoning concentrates on steps (viii)-(x) of the 23 steps involved. It states:

(a) that when a certificate for 79,000 $1 A Class units was issued (step (x)), if not earlier, upon acceptance by Sealark of Pacinette's written offer, a change in the relationship between Sealark and Pacinette took place, in particular so far as beneficial ownership of Sealark's equitable interest in the land was concerned;

(b) that s 29(3) of the *Stamp Duties Act* 1920 (NSW) prevents proof of step (x) and the steps antecedent to it, unless s 44(2)(d) applies;

(c) that s 44(2)(d) does not apply because the change in the beneficial ownership was not brought about "as the consequence of the issue of units in a unit trust", but was rather brought about as the "consequence of … the fact that the consideration (no matter what form that consideration took) was provided by Pacinette to Sealark"[49];

(d) that the "change was thus the consequence of the operation of the doctrines of constructive trusts or of the use of statutes as instruments of fraud or both", rather than the consequence of the issue of units in a unit trust[50].

A qualification to the majority reasoning

92 I agree with this reasoning, except in one respect.

93 Step (viii) created a contract to transfer Sealark's equitable interest in the land to Pacinette in return for the issue by Pacinette in favour of Sealark of 79,000 $1 A Class units. At that moment a constructive trust arose and the beneficial ownership of Sealark's equitable interest changed, at least to some extent[51]. The interest of Pacinette as purchaser was commensurate with its ability

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49 At [81].

50 At [81].

51 *Oughtred v Inland Revenue Commissioners* [1960] AC 206 at 227-228 per Lord Radcliffe; *Neville v Wilson* [1997] Ch 144 at 157 per Nourse, Rose and Aldous LJJ;

(Footnote continues on next page)

to protect that interest by obtaining specific performance[52]. In the present circumstances there was no impairment of that ability by reason of any termination of the contract by Sealark as vendor. Hence there is no circularity, and no other difficulty[53], in viewing Pacinette as having obtained an interest under a constructive trust in such a way as to change the beneficial ownership of Sealark's equitable interest to some extent. It is unnecessary to consider whether the creation of a beneficial interest in Pacinette by way of constructive trust in consequence of step (viii) meant that there was nothing more of Sealark's equitable interest in the land to pass in consequence of steps (ix) and (x), or whether after step (viii) but before steps (ix) and (x) Sealark retained some equitable title which only passed when steps (ix) and (x) took place.

94 To the extent that any change in beneficial ownership took place when steps (ix) and (x) were carried out – the allotment of the 79,000 $1 A Class units and the issue of the certificate relating to them – that was a change that occurred as the consequence of the issue of units in a unit trust scheme within the meaning of s 44(2)(d). However, this does not assist the appellants. A different change in beneficial ownership occurred earlier, at step (viii). That change in beneficial ownership, occurring when the constructive trust arose as the consequence of the promise to issue units in the unit trust scheme, was not a change in beneficial ownership occurring as the consequence of the issue of those units. It was only a change occurring as the consequence of the promise to issue them. Hence, s 44(2)(d) does not apply. Therefore, s 29(3) prevents proof of step (viii). That in turn prevents establishment of Sealark's acceptance of Pacinette's offer to buy Sealark's equitable interest in the land. In consequence it is impossible to prove the passing of that equitable interest, and the scheme thus fails at that point.

95 In written submissions filed after the conclusion of oral argument, the appellants advanced the contention that these conclusions do not follow. That contention was not based on any view that step (viii) did not change the beneficial ownership of Sealark's equitable interest; indeed the appellants accepted that a "change in beneficial interests in, as opposed to an absolute change of beneficial ownership of, Sealark's land could have occurred when Sealark accepted Pacinette's written offer". In a similar vein, the appellants conceded that by reason of step (viii) equity would impose a constructive trust over Sealark's proprietary interest in favour of Pacinette, and this gave Pacinette a proprietary interest in the land. Rather, the appellants' contention that s 29(3)

Baloglow v Konstantinidis (2001) 11 BPR 20,721 at 20,750-20,751 [120]-[123] per Priestley JA (Mason P concurring).

52 *Stern v McArthur* (1988) 165 CLR 489 at 537 per Gaudron J.

53 See *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 332-333 [53].

did not prevent proof of step (viii) was based on giving the word "transaction" in s 44(2)(d) a broad meaning. In the present context, on that meaning, the word "transaction" referred to "the whole of the dealings pursuant to the contract formed by Sealark's acceptance of Pacinette's written offer". The "transaction", it was said, comprised not only the contract itself (step (viii)) but the steps taken to carry it into execution (including steps (ix) and (x)).

96 That broad construction of the word "transaction" is unsound. Section 44(2) sets out seven precisely defined events. The respondent submitted that the legislature, in speaking of "a change in beneficial ownership occurring as the consequence of" one of those events, required the event to be an operative cause of the change. The construction underpinning that submission is sound. It requires, in contexts like the present, identification of an event which both falls within the expression "the issue or redemption of units in a unit trust scheme" and is the operative cause of a change in beneficial ownership. On that construction, s 44(2)(d) does not extend to events other than the issue or redemption of units, even if they are part of the dealings pursuant to a contract relating to the change in beneficial ownership.

Consequences of the majority reasoning

97 The reasoning of the majority, whether or not qualified in the respect just described, leads to the conclusion that the orders proposed should be made. Any attempt by the appellants to outflank s 29(3) by paying the stamp duty not yet paid would have to overcome several difficulties. One may be the conventional understanding that the trial of a separate question is a process, subject to relevant rules of court, having all the finality of any other trial. Another may be the apparent failure of the appellants to leave open the possibility of payment in the event that their arguments against the application of s 29(3) failed, whether at trial or on appeal, by reserving liberty to reopen their case in that connection. A third is the difficulty in inviting the Land and Environment Court to apply the reasoning of Talbot J favourable to the appellants' case that the purported transactions had in fact occurred in the face of the Court of Appeal's reasoning that they had not – reasoning which the majority in this Court has not determined to be wrong. There may be further difficulties. However, as the majority have said, no submissions were made to this Court about the possibility of the appellants attempting at this late stage to mend their hand by paying the stamp duty, let alone any difficulties attending that attempt, and nothing further need be said about these matters.