HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

COMMISSIONER OF STATE TAXATION APPELLANT

AND

CYRIL HENSCHKE PTY LTD & ORS RESPONDENTS

Commissioner of State Taxation v Cyril Henschke Pty Ltd [2010] HCA 43
1 December 2010
A4/2010

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Supreme Court of South Australia made on 29 May 2009, and in its place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of South Australia

Representation

M G Hinton QC, Solicitor-General for the State of South Australia with M J Wait for the appellant (instructed by Crown Solicitor (SA))

M T Flynn with M St J R Butler for the respondents (instructed by Finlaysons Lawyers)

CATCHWORDS

Commissioner of State Taxation v Cyril Henschke Pty Ltd

Stamp duties – Conveyance – Partnership – Dissolution of partnership – Retirement Deed effected retirement of one partner and reconstitution of partnership and continuation of business by remaining partners – Nature of partner's interest in partnership assets – Whether Retirement Deed a conveyance of interest in personal property – Whether satisfaction of retiring partner's interest and creation of new partnership assured or vested interest in personal property.

Words and phrases – "conveyance on sale", "dissolution of partnership", "equitable interest of partner".

Stamp Duties Act 1923 (SA), s 60.
Partnership Act 1891 (SA), ss 20, 39.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. For some 50 years a partnership as constituted from time to time has been carrying on a winemaking business under the name CA Henschke & Co. The trade marks under which the wine has been sold have included "Hill of Grace" and "Mount Edelstone".

2 The partnership has produced the wine from grapes purchased from independent growers or grown by the partnership at vineyards owned by entities and persons associated with the Henschke family under unwritten licences or similar arrangements. These vineyards include the Eden Valley vineyard and the Hill of Grace vineyard. At no relevant time has the partnership itself owned real property.

3 Immediately prior to 23 December 2004 the partnership was conducted under a written agreement dated 17 January 1986 ("the 1986 Partnership Agreement"). This provided that the interests in the partnership were held as to one-third by Cyril Henschke Pty Ltd ("Cyril Henschke"), the first respondent; as to one-third by Henschke Cellars Pty Ltd ("Henschke Cellars"), the second respondent; as to one-sixth by Stephen Carl Henschke ("Mr Stephen Henschke"), the third respondent; and as to the remaining one-sixth by Mrs Doris Henschke, the mother of Mr Stephen Henschke. Subject to the terms of the 1986 Partnership Agreement, the provisions of the *Partnership Act* 1891 (SA) ("the Partnership Act") applied to the conduct of the partnership. Clauses 22 and 23 of the 1986 Partnership Agreement provided for retirement of partners upon the giving of particular notice, with an option for the continuing partners to purchase the share of the retiring partner, and, in default of such purchase, for dissolution and winding up of the partnership.

4 The issue on this appeal by the Commissioner of State Taxation for South Australia ("the Commissioner") is whether an instrument identified as a Deed of Retirement dated 23 December 2004 ("the Retirement Deed") was a "conveyance on sale" within the meaning of s 60 of the *Stamp Duties Act* 1923 (SA) ("the Act") and thereby was charged with stamp duty pursuant to s 4 of the Act.

5 Section 4 of the Act is a provision which attracts the general principle that stamp duty is levied on instruments, not on the underlying transactions to which

they give effect, so that it is a matter, in the present case, of ascertaining the subject matter with which the Retirement Deed deals according to its terms[1].

6 Section 3 of the Act requires that the statute be read in conjunction with the *Taxation Administration Act* 1996 (SA), with the result that in the present case an "appeal" lay to the Supreme Court of South Australia from the determination by the Treasurer of South Australia upholding the assessment to stamp duty in the sum of $316,669 upon the Retirement Deed which had been made on 16 March 2006 by the Commissioner. The dispute came before the Supreme Court (Gray J) upon a Statement of Agreed Facts. The primary judge dismissed the appeal[2]. However, an appeal to the Full Court (Doyle CJ, Bleby and Layton JJ)[3] was successful and the assessment to duty was set aside. For the reasons which follow, the appeal by the Commissioner to this Court should succeed and the decision of the primary judge should be restored.

7 Clause 4 of an instrument dated 8 December 2004 ("the Sale and Purchase Agreement"), the parties to which included, but were not limited to, the parties to the Retirement Deed (set out below), had required the execution of the Retirement Deed in the form of a schedule to the Sale and Purchase Agreement. The Sale and Purchase Agreement dealt also with the sale of certain shares in Cyril Henschke and Henschke Cellars, the sale and lease of the "Home Gardens Vineyard" and the "Eden Valley Vineyard" respectively, and other matters. Stamp duty has been assessed and paid on the Sale and Purchase Agreement. Its execution followed lengthy negotiations between members of the Henschke family which had commenced in December 1997.

8 The Sale and Purchase Agreement did not deal with the assets of the partnership. The principal asset shown in the accounts of the partnership as at 22 December 2004 was "goodwill" valued at $35,218,559. In previous accounts no value had been shown for "goodwill" in the balance sheet of the partnership. The "goodwill" represented that associated with the "Henschke" brand name and the trade marks to which reference already has been made.

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1 *Commissioner of Stamp Duties (Q) v Hopkins* (1945) 71 CLR 351 at 360; [1945] HCA 14; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 449; [1982] HCA 14.

2 *Cyril Henschke Pty Ltd v Commissioner of State Taxation* (2008) 104 SASR 1.

3 *Cyril Henschke Pty Ltd v Commissioner of State Taxation* (2009) 104 SASR 22.

9 The parties to the Retirement Deed were Cyril Henschke, Henschke Cellars, Mr Stephen Henschke and Mrs Doris Henschke. The Retirement Deed recited that those parties were partners in the partnership constituted by the 1986 Partnership Agreement trading under the name "CA Henschke & Co". It recited the respective interests of the partners in the partnership, that Mrs Doris Henschke "wishes to retire from the Partnership" and that the instrument set out "the terms upon which [Mrs Doris Henschke] shall retire from the Partnership".

10 It is fundamental to an appreciation of the issues which arise on this appeal that the partnership conducted before the date of the Retirement Deed and under the 1986 Partnership Agreement had no legal personality distinct from that of the individual partners[4]. It follows that the partnership carried on with Mrs Doris Henschke as a partner before the Retirement Deed was not the partnership conducted thereafter without her.

11 The general principles with respect to retirement of partners were explained as follows by Eichelbaum CJ in *Hadlee v Commissioner of Inland Revenue*[5]:

> "In law the retirement of a partner, or the admission of a new partner, constitutes the dissolution of the old partnership and the formation of a new one. Here, upon the happening of such events there were no overt signs of dissolution; the partnership's financial structure and arrangements were such that none was required but that does not alter the underlying legal significance of any retirement or new admission[6]. Nor, in my

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4 *Income Tax Commissioners for City of London v Gibbs* [1942] AC 402 at 413, 419, 430, 432; *SJ Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87 at 90.

5 [1989] 2 NZLR 447 at 455. That litigation culminated in an appeal to the Privy Council but upon other grounds: [1993] AC 524. See also the observations of Aickin J in *Watson v Ralph* (1982) 148 CLR 646 at 654-655; [1982] HCA 35 and the statements by McPherson JA in *McGowan v Commissioner of Stamp Duties* [2002] 2 Qd R 499 at 507 [15] and in *SJ Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87 at 90-91.

6 *Income Tax Commissioners for City of London v Gibbs* [1942] AC 402, particularly at 414 per Viscount Simon LC, 429, 430 per Lord Wright, 432 per Lord Porter;

(Footnote continues on next page)

opinion, is it possible to avoid those legal propositions by the terms of the partnership agreement: no doubt it is competent for partners to agree in advance that in the event of a retirement the remaining partners will continue to practise in partnership but that does not overcome the consequence that the partnership practising the day after the retirement is a different one from that in business the previous day."

12 These propositions reflect the distinction between what may be called a "technical" dissolution usually brought about by agreement, such as that in the Retirement Deed, and a "general" dissolution with a winding up of the partnership[7].

13 Clauses 1 and 2 of the Retirement Deed are as follows:

"1. Notwithstanding anything contained in the Partnership Agreement (including, without limitation, clauses 22 and 23):

(a) [Mrs Doris Henschke] hereby retires from the Partnership, with effect at the end of 30 June 2003, (without giving 6 calendar months' notice and despite the date of this Deed not being 30 June); and

(b) Cyril Henschke, Henschke Cellars and [Mr Stephen Henschke] (the **Continuing Partners**) *shall continue* the Partnership under the Partnership Agreement (*without purchasing* [Mrs Doris Henschke's] *interest in the Partnership and without the Partnership being dissolved*).

2. The Partnership shall distribute to [Mrs Doris Henschke] her share of the partners' funds of the Partnership (capital and income), amounting to $5,885,298, in full satisfaction of all claims she has against the Partnership." (emphasis added)

14 Reference has been made to the provisions in cll 22 and 23 of the 1986 Partnership Agreement with respect to the option to purchase and winding up in default of the exercise by the continuing partners of that option. The closing

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Brace v Calder [1895] 2 QB 253 at 258 per Lord Esher MR, 261 per Lopes LJ, 263 per Rigby LJ; *Lindley on the Law of Partnership*, 15th ed (1984) at 543, 983.

7 *Lindley and Banks on Partnership*, 18th ed (2002) at 675-676 [24-02]-[24-03].

words of cl 1 of the Retirement Deed serve to emphasise that there is to be no such winding up and that what is achieved by the Retirement Deed is a "technical" rather than a "general" dissolution, and, in consideration of the payment to be made to her, Mrs Doris Henschke relinquished any right to a winding up of the partnership and to her consequential share in any surplus which was identified on the taking of an account.

15 The remaining provisions of the Retirement Deed are as follows:

> "3. The Continuing Partners:
>
> (a) release [Mrs Doris Henschke] from all obligations under the Partnership Agreement; and
>
> (b) shall indemnify and keep indemnified [Mrs Doris Henschke] against all or any claims against the Partnership after the date of this deed.
>
> 4. Subject to clauses 2 and 3(b), [Mrs Doris Henschke] releases the Partnership from all or any claims she may have against the Partnership at any time.
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> 5. The Continuing Partners acknowledge that their interests in the Partnership (capital and income) are now as follows:
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> (a) Cyril Henschke – two fifths;
>
> (b) Henschke Cellars – two fifths; and
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> (c) [Mr Stephen Henschke] – one fifth."

16 Stamp duty is charged in respect of the instruments specified in Sched 2 to the Act (s 4). The litigation has been conducted on the footing that duty is chargeable on the Retirement Deed as a "[c]onveyance or transfer on sale of any property" under cl 3(1) of Sched 2. Section 60 of the Act contains definitions of "conveyance" and "conveyance on sale". The respondents, having regard to the provenance of the Retirement Deed as a schedule to the Sale and Purchase Agreement, presented their case on the basis that if the Commissioner were

correct that the Retirement Deed was a "conveyance", there was no further point that this instrument nevertheless was not a "conveyance on sale"[8].

17 The term "conveyance" is defined in s 60 as including every instrument "by which or by virtue of which or by the operation of which ... any ... personal property or any estate or interest in any such property is assured to, or vested in, any person". The term "interest" is defined in s 2(1) as including any inchoate equitable interest.

18 The reasoning of the Full Court[9] turned upon the proposition that the Retirement Deed did not effect any transfer of the one-sixth interest of Mrs Doris Henschke in the assets of the partnership; rather, that interest had ceased, because it was "satisfied" by the payment made under cl 2 of $5,885,298, "in full satisfaction of all claims she has against the Partnership".

19 However, the Commissioner submits, perhaps more emphatically than before the Full Court, that this characterisation of the Retirement Deed gives insufficient weight to its effect upon the legal relationship between the parties. Section 20(1) of the Partnership Act had required that all interests in property brought into the partnership conducted under the 1986 Partnership Agreement be held and applied by the partners exclusively for the purposes of that partnership. Upon the retirement of Mrs Doris Henschke as provided in cl 1 of the Retirement Deed, this partnership was dissolved, albeit without a "general" dissolution in the sense described above. The legal effect of the succeeding clauses of the Retirement Deed was to constitute a new partnership between Cyril Henschke, Henschke Cellars and Mr Stephen Henschke in the shares specified in cl 5 and otherwise on the same terms as those of the 1986 Partnership Agreement. The contract which had been expressed in the 1986 Partnership Agreement was discharged by accord and satisfaction, as described by Dixon J in *McDermott v Black*[10]. The assets previously committed to the dissolved partnership were, by reason of the operation of the Retirement Deed, to be held and applied, in accordance with s 20(1) of the Partnership Act, for the purposes of the second partnership.

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8 Cf *McCaughey v Commissioner of Stamp Duties (NSW)* (1914) 18 CLR 475 at 487, 492; [1914] HCA 45.

9 (2009) 104 SASR 22 at 33 [53].

10 (1940) 63 CLR 161 at 183-184; [1940] HCA 4.

20 The Commissioner submits that it follows that the Retirement Deed was an instrument, in the terms of the definition of "conveyance" in s 60 of the Act, by which, or by virtue of which, or by the operation of which, personal property vested in the members of the second partnership. That submission should be accepted.

21 The submissions to the contrary made by the respondents to a significant degree relied upon a particular view of the role of equitable doctrines and remedies in the conduct of partnerships. Much of what was submitted, and accepted by the Full Court, is uncontroversial. While the business conducted under the name CA Henschke & Co in the period before 23 December 2004 was the activity provided for by the 1986 Partnership Agreement, the relationships between the partners were not regulated purely by their contract. There was a fiduciary relationship between them, a critical feature of which was that each had agreed to act for or on behalf of or in the interests of all of them in the exercise of any power or discretion affecting their interests in a legal or practical sense[11].

22 The significance of the interplay between the law of contract and the doctrines and remedies of equity was further explained by Lord Millett in *Hurst v Bryk*[12]. His Lordship observed that disputes between partners and the dissolution and winding up of partnerships have always fallen within the jurisdiction of the Court of Chancery, and continued[13]:

> "This is because, while partnership is a consensual arrangement based on agreement, it is more than a simple contract (to use the expression of Dixon J in *McDonald v Dennys Lascelles Ltd*[14]); it is a continuing personal as well as commercial relationship. Neither during the continuance of the relationship nor after its determination has any partner any cause of action at law to recover moneys due to him from his fellow partners. The amount owing to a partner by his fellow partners is recoverable only by the taking of an account in equity after the partnership

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11 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; [1984] HCA 64.

12 [2002] 1 AC 185.

13 [2002] 1 AC 185 at 194.

14 (1933) 48 CLR 457 at 476; [1933] HCA 25.

> has been dissolved[15]. Only the Court of Chancery was equipped with the machinery necessary to enable such an account to be taken, and the basis upon which the account was taken reflected equitable principles. These could be modified by agreement, but they did not find their source in contract."

23 This foundation for the engagement of equitable doctrines and concomitant remedies has given rise to judicial consideration of the nature of the interest conferred by equity upon each partner with respect to partnership assets as they exist from time to time and in advance of a "general" dissolution under the control of a court of equity. Neuberger LJ[16] recently described as "conceptually somewhat opaque" the concept of a partner's share in the partnership assets as understood in the earlier English authorities. However, the matter has received attention in a series of decisions in this Court.

24 Any such interest with respect to partnership assets was described by Dixon CJ as[17]:

> "a right in respect of assets but ... a right, or a congeries of rights, growing out of the partnership articles".

As Windeyer J indicated in *Bolton v Federal Commissioner of Taxation*[18], the right is generally regarded as equitable and is "a fractional interest in a surplus of assets over liabilities on a winding up and in the future profits of the partnership business". In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd*[19], McTiernan, Menzies and Mason JJ said that the interest of the partner is *sui generis*.

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15 See *Richardson v Bank of England* (1838) 4 My & Cr 165 [41 ER 65]; *Green v Hertzog* [1954] 1 WLR 1309.

16 *Sandhu v Gill* [2006] Ch 456 at 462 [18].

17 *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation (Thomas' Case) [No 2]* (1955) 94 CLR 1 at 15; [1955] HCA 66.

18 [1965] ALR 481 at 485, 491; (1964) 9 AITR 385 at 389, 395.

19 (1974) 131 CLR 321 at 328; [1974] HCA 22. Cf *Hendry v The Perpetual Executors and Trustees Association of Australia Ltd* (1961) 106 CLR 256 at 265-266; [1961] HCA 44; *Watson v Ralph* (1982) 148 CLR 646 at 650.

25 The position here is not sufficiently or accurately expressed merely by use of the term "beneficial interest" any more than when considering the operation of discretionary trusts and unit trusts[20]. The critical point, putting to one side the prospect of future profits, was explained by Kitto J in *Livingston v Commissioner of Stamp Duties (Q)*[21]. It is that the interest of each partner can be ascertained finally only upon completion of the liquidation and the identification of any surplus share. That reasoning is reflected in the terms of s 39 of the Partnership Act[22], and exemplifies a proposition expressed by Viscount Radcliffe upon the further appeal in *Livingston*. His Lordship said[23]:

> "Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines."

26 The controversy in *Canny Gabriel* turned on the proposition that, if the equities otherwise are equal, the first of two competing equitable interests prevails, but that, if the first be but a "mere equity" of the kind considered in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liquidation)*[24], it may not retain priority over the subsequent equitable interest. The decision in *Canny Gabriel* was that the equitable interest of a partner in the assets before winding up was more than a "mere equity" and thus retained priority over a subsequent

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20 *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494 at 509 [34]; [1999] HCA 51; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 112 [25]; [2005] HCA 53.

21 (1960) 107 CLR 411 at 453; [1960] HCA 94. See also *Thomas' Case [No 2]* (1955) 94 CLR 1 at 27-28; *Chan v Zacharia* (1984) 154 CLR 178 at 192-193; [1984] HCA 36.

22 Section 39 provides that, on dissolution, each partner is entitled as against the others to the application of partnership property to pay the debts and liabilities of the firm and to have any surplus applied in payment of any balance due to the partners.

23 *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 at 22; [1965] AC 694 at 712. See also *Barns v Barns* (2003) 214 CLR 169 at 197-198 [78]; [2003] HCA 9.

24 (1965) 113 CLR 265; [1965] HCA 17.

equitable charge. That may be accepted but is not decisive of the present appeal, which does not concern the principles of priorities in equity.

27 *United Builders Pty Ltd v Mutual Acceptance Ltd*[25] decided that, as Mason J put it, with the agreement of Barwick CJ, Gibbs and Wilson JJ[26]:

> "according to long established principle, a mortgage or charge over a partner's share or interest in the partnership does not vest any interest in the assets of the partnership against the other partners. What the mortgage or charge does is to confer an entitlement on the holder on dissolution of the partnership in relation to the partner's share of the partnership assets. ...
>
> The vital consideration is that the partner's interest is in truth a chose in action, which, as [*Federal Commissioner of Taxation v Everett*] acknowledged, 'consists of a right to a proportion of the surplus after the realization of the assets and payment of the debts and liabilities of the partnership'[27]. A mortgage or charge is considered to vest rights over that chose in action but it is not considered to carry any title to the specific assets until dissolution.
>
> ... A fixed charge is appropriate to create a security over a partner's share. It gives rise to a present security over the chose in action which is the partner's share. Although it creates no specific interest in the partnership assets until dissolution, this is not because the charge is dormant; it is because the rights conferred by the charge relate to the existing chose in action and that the security over the chose in action confers no entitlement to the assets of the partnership until dissolution."

28 This reasoning, which is the established doctrine of the Court, does not determine in favour of the respondents the issue of the imposition of stamp duty upon the Retirement Deed. Rather, it points to the contrary result. The Retirement Deed operated with respect to the interest of Mrs Doris Henschke, which was a presently existing equitable chose in action against the other partners to effect an accord and satisfaction, by her acceptance of the payment

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25 (1980) 144 CLR 673; [1980] HCA 43.

26 (1980) 144 CLR 673 at 687-688.

27 (1980) 143 CLR 440 at 446; [1980] HCA 6.

under cl 2 in place of that chose in action against the other partners. The Retirement Deed further provided for the creation of a second partnership to conduct the business previously conducted under the 1986 Partnership Agreement and to do so upon the terms indicated earlier in these reasons. Pursuant to and by virtue of the provisions of the Retirement Deed, there were vested in the members of the second partnership the equitable choses in action representing their present partnership interests as described by Mason J in *United Builders*. As already stated, the Retirement Deed thus was a conveyance within the meaning of s 60 of the Act.

29 The respondents sought to avoid that outcome by reliance upon *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)*[28]. This was in support of the submission that the assets of the first partnership remained under the control of the "continuing partners" comprising the second partnership, and "once they had the release from Mrs [Doris] Henschke there was no need for a conveyance". But the present significance of *MSP Nominees* is found in the proposition in the reasons of the Court[29] to the effect that an essential characteristic of the "release" of an equitable interest, such as that of Mrs Doris Henschke, is the enlargement of the interests of the "continuing partners" in the assets to be applied by them in the conduct of the business of the second partnership.

30 Nor do the respondents derive support from the treatment by this Court in *McCaughey v Commissioner of Stamp Duties (NSW)*[30] of a particular clause providing for mutual releases between former partners. The case turned upon the construction of the deed containing that clause and the limited definition of "conveyance" in the *Stamp Duties Act* 1898 (NSW).

31 The appeal should be allowed with costs, the orders of the Full Court set aside and in place thereof the appeal to the Full Court should be dismissed with costs.

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28 (1999) 198 CLR 494.

29 (1999) 198 CLR 494 at 509 [33].

30 (1914) 18 CLR 475 at 486, 491.