HIGH COURT OF AUSTRALIA

BRENNAN CJ,
TOOHEY, GAUDRON, McHUGH AND GUMMOW JJ

CHIEF COMMISSIONER OF STAMP DUTIES ApPPELLANT

AND

WILLIAM FRANCIS BUCKLE & ORS RESPONDENTS

Chief Commissioner of Stamp Duties v Buckle (S 171-96) [1998] HCA 4
23 January 1998

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

A H Slater QC with H R Sorensen for the appellant (instructed by I V Knight, Crown Solicitor for New South Wales)

R W White with P P Wines for the respondents (instructed by Mallesons Stephen Jaques)

CATCHWORDS

Chief Commissioner of Stamp Duties v William Francis Buckle & Ors

Stamp duties - Deed of settlement establishing discretionary trust - Trust property comprised land purchased with proceeds of two loans - Duty assessed on supplemental deed altering destination of corpus of trust property in default of appointment - Ad valorem duty payable in respect of "unencumbered value of the property ... conveyed" - Identification of property conveyed - Whether duty payable on unencumbered value of assets which comprised the trust fund or amount which took into account vicissitudes inherent under the deed of settlement.

Trusts and trustees - Nature of trustee's right of exoneration and recoupment - Whether trustee's right constitutes beneficial interest in trust assets - Whether trustee's right an encumbrance on the interests of beneficiaries conveyed which is to be disregarded for purposes of s 66(1) of the *Stamp Duties Act* 1920 (NSW).

Stamp Duties Act 1920 (NSW), ss 65, 66.

1 BRENNAN CJ, TOOHEY, GAUDRON, McHUGH AND GUMMOW JJ. This is an appeal from a decision of the New South Wales Court of Appeal[1]. The appellant ("the Chief Commissioner") is charged by s 8(1) of the *Stamp Duties Act* 1920 (NSW) ("the Act") with the due administration of that statute. By majority (Kirby P and Sheller JA, Powell JA dissenting), the Court of Appeal dismissed an appeal by the Chief Commissioner against a decision of a Master sitting in the Administrative Law Division of the Supreme Court.

2 The Master had upheld an appeal by the respondents under s 124 of the Act[2]. The appeal to the Supreme Court had been by way of rehearing[3] of an objection to an assessment to duty in the sum of $208,581 upon an instrument dated 11 June 1993 ("the Supplemental Deed"). This was assessed to duty as a conveyance within the meaning of s 65 of the Act and was chargeable in accordance with s 66(1) with ad valorem duty in respect of the unencumbered value of the property thereby conveyed. In this Court, the Chief Commissioner seeks orders the effect of which would be to overturn the decision of the Court of Appeal and to dismiss the appeal to the Supreme Court which the respondents instituted under ss 124 and 124A of the Act.

3 The Supplemental Deed was a deed poll executed by Mr W F Buckle ("the trustee") in exercise of a power conferred upon him by cl 14 of an instrument styled a "Deed of Settlement" dated 7 August 1991 between a solicitor, Mr M B Connors, as settlor and Mr W F Buckle as trustee. Mr W F Buckle has two children, Mr W J Buckle, born 19 November 1957, and Mrs J M Jory, born 19 November 1959. They are respectively the three respondents to the present appeal.

4 The Chief Commissioner assessed duty upon the Supplemental Deed on the footing that the unencumbered value of the property thereby conveyed within the meaning of s 66(1) of the Act was the unencumbered value of the assets which on 11 June 1993 comprised "The Trust Fund" as defined in par 1.02 of the Deed of Settlement. The Deed of Settlement recited that the settlor had paid to the trustee the sum of $10 to be held by the trustee, together with such other sums or property

---

1 *Chief Commissioner of Stamp Duties v Buckle* (1995) 38 NSWLR 574.

2 *Buckle v Chief Commissioner of Stamp Duties (NSW)* (1995) 30 ATR 378.

3 Section 124A of the Act so provided.

as might thereafter be paid or transferred to the trustee, upon the trusts expressed in the Deed of Settlement. "The Trust Fund" was defined as meaning:

> "the sum aforesaid paid by the settlor to the Trustee and all accretions thereto including any moneys investments and property paid or transferred to or accepted by the Trustee as additions to the Trust Fund but excluding any part thereof transferred by the Trustee to a beneficiary pursuant to the provisions hereof".

5 On 11 June 1993, the Trust Fund comprised $10 cash together with certain land and improvements situated at Brookvale in New South Wales and valued at cost at $4,056,143. The site was used for a motor dealer complex and had been purchased and developed with the proceeds of two loans to the trustee. The first was a loan from Bill Buckle Autos Pty Limited of $1,198,952 and the other a loan by Toyota Finance Australia Limited of $2,860,289, giving a total of $4,059,241. This exceeded the value attributed to the trust assets by the sum of $3,088. In the financial year ended 30 June 1993, the trustee received rent of $126,904 which was exceeded by expenses comprising interest of $126,904 and borrowing costs of $3,098. The rental represented something over 3 per cent of the value at cost of the land and improvements in question.

6 Whilst the Chief Commissioner contends that duty is assessable on the unencumbered value of the assets comprised in the Trust Fund, the respondents submit that the Supplemental Deed did not effect any conveyance of property answering the description of "the Trust Fund". They accept that the Supplemental Deed constituted a conveyance of property within s 65 of the Act but say that the property thereby conveyed comprised the beneficial interests in remainder of the two children and that the liabilities to which we have referred were properly to be taken into account in identifying the unencumbered value of the property so conveyed.

7 Before turning to the relevant provisions of the Act, it is appropriate to consider the terms and effect of certain provisions of the Deed of Settlement and of the Supplemental Deed.

The Deed of Settlement and the Supplemental Deed

8 In submissions upon the appeal, the term "discretionary trust" was used as an overall description of the trusts for which the Deed of Settlement provided. The meaning of this term is disclosed by a consideration of usage rather than doctrine,

and the usage is descriptive rather than normative[4]. Accordingly, a "discretionary trust" is not a component of the doctrinal divisions by which there is determined the formal and essential validity of trusts. For this purpose, divisions are made between express trusts, implied or resulting trusts, and constructive trusts, between purpose trusts and non-purpose trusts, between trust powers and bare powers, and between testamentary trusts and settlements *inter vivos*. On the other hand, "discretionary trust" has no fixed meaning and is used to describe particular features of certain express trusts.

9 In the case of the Deed of Settlement, the identity of those who might receive income or capital, the amounts they might receive, the period or duration of the trusts, the content from time to time of the fund impressed with those trusts, and the very terms of the trusts themselves all depended wholly or significantly upon the exercise of, or the failure to exercise, powers bestowed by the Deed of Settlement upon the trustee. In such a case, the term "discretionary trust" serves a useful purpose in emphasising the strong position occupied by the trustee and the instability of the interests and prospective interests of those taking under the Deed of Settlement.

10 This strong discretionary element in the trusts created by the Deed of Settlement is significant for the present appeal in at least two respects. These are the identification of the property of which the Supplemental Deed was a conveyance within the meaning of the Act, and the value to be attributed to that property. In addition, a number of the authorities to which the Court was referred concerned stamp duty liability imposed upon instruments dealing not with discretionary trusts but with interests created under settlements of the traditional model, where the beneficiaries were ascertainable and their beneficial interests identified and no power was conferred upon the trustee or any other party to vary the class of beneficiaries or the quantum of their interests.

11 Mr W F Buckle was defined in the Deed of Settlement as "the father" and he was the "Original Trustee". He was resident in New South Wales. So long as Mr Buckle was alive and capable of acting, he also was "the Appointor". "The Children" was defined to mean his children. The term "beneficiaries" was defined in cl 1.07 as meaning:

---

4 *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547 at 551-552. See also Underhill and Hayton, *Law Relating to Trusts and Trustees*, 15th ed (1995) at 47-50.

> "the father, the children and other issue, and such persons or companies, whether beneficially or in their capacity as Trustee of any trust, and subject to such conditions, if any as the Appointor may, by notice given either orally or in writing to the Trustee, from time to time appoint".

This was subject to a qualification excluding any corporate trustee from inclusion as a beneficiary. The effect of cl 10 was that a trustee, not being Mr W F Buckle, might be removed by the Appointor.

12 Clause 6.1 of the Deed of Settlement gave the trustee authority to accept property conveyed, transferred or paid to the trustee by way of addition to or accretion to the Trust Fund. The trustee was empowered by cl 7.12 to conduct any business of any description in or at any place whatsoever which, in the trustee's opinion, was capable of providing any benefit to the Trust Fund or the beneficiaries. The trustee was also given power to borrow money (cl 7.209) and to apply it under the wide powers of investment given in respect of any moneys forming part of the "Trust Property" (cl 7.11 and cl 7.3).

13 The definition of "distribution date" was central to the operation of the dispositive provisions of the Deed of Settlement. This date was 7 August 2071, or such earlier date which "the Trustee in its absolute discretion shall appoint". The trustee was given (cl 4.2) an "absolute discretion" to determine the character of any receipt as income or capital.

14 There was no immediate gift of corpus to vest in possession before the distribution date. However, the Deed of Settlement conferred upon the trustee extensive powers of dealing with corpus before the distribution date, to the advantage of selected members of the defined class of "beneficiaries". Clause 5.1 gave the trustee a power to raise, advance or apply the whole or any part of the Trust Fund "towards the maintenance, education, advancement or otherwise for the benefit in life of any person who may take under the trusts hereof". Further, cl 5.4 empowered the trustee to appropriate any portion of the Trust Fund to or towards the share of any beneficiary whether the interest of such person be vested or contingent, or vested but liable to divestment. The same clause empowered the trustee to charge any share with such sum of money "by way of equality" and for such purpose to fix in value any real or personal property forming part of the Trust Property. Finally, cl 15 conferred upon the trustee, again in his "absolute discretion", a power of resettlement of the whole or any part of the Trust Fund to which any person or persons were "contingently, presumptively or prospectively entitled under this settlement".

15 Clause 2.1 dealt with the treatment of net annual income derived by the trustee before the distribution date. The trustee might determine that the whole or any part of this income was to be accumulated and, if so, it would be added to and form part of the capital of the Trust Fund (cl 2.11). The trustee also was given a broadly expressed power to pay or distribute the income among the beneficiaries and to apply it for their maintenance, education and advancement (cl 2.12). As to the balance not dealt with under cl 2.11 or cl 2.12, the trustee was required by cl 2.13 to hold it upon trust for such of the children as were living at the end of the year in question and, if more than one, in equal shares as tenants in common *per stirpes*.

16 The consequence was that, subject to the operation of cl 2.13, before the distribution date (being 7 August 2071 or an earlier date determined as a matter of "absolute discretion" by the trustee), receipt by any beneficiary of funds representing income or corpus would only come about by reason of the exercise of powers conferred upon the trustee with respect to the disposition of income and the making of advancements and appropriations from the Trust Fund. Moreover, the class of beneficiaries might be extended from time to time.

17 The position of the trustee was further strengthened by the power of variation conferred by cl 14. This gave the trustee a power exercisable upon the giving of notice to the Appointor being, in the events that happened, the same person. The power was one to vary, add to or revoke any of the terms of the Deed of Settlement or any of the trusts, powers or obligations conferred or imposed by it upon the trustee. This was subject to the proviso (cl 14.1) that the exercise of the power was not to have the effect of divesting or modifying in any way any interest of a beneficiary in income to which that beneficiary had become absolutely entitled. Nor was any interest or benefit, capital or income to be created thereby in favour of the trustee.

18 Counsel for the Chief Commissioner submitted that the power conferred by cl 14 was limited to the appointment of new trusts "in respect of the whole of the Trust Fund at the time it is exercised". The submission should be rejected. Clause 14.1 uses the expression "[v]ary, add to or revoke any of the terms hereof or any of the trusts, powers or obligations hereby conferred or imposed upon the Trustee".

19 The Supplemental Deed recited the power of variation held by the trustee and the receipt of written advice given by the Appointor that the Trust Deed might be varied as set out in the Supplemental Deed. The Supplemental Deed deleted cl 2.22 and inserted a substitute provision.

20 Clause 2.2 dealt with the terms on which the trustee was to hold the Trust Fund as from the distribution date. It thus was a provision of central importance. Its terms, before the variation, should be set out in full:

> "Trusts of Corpus
>
> 2.2 As from the distribution date the Trustee shall hold the Trust Fund on trust:
>
> .21 For such of the beneficiaries or any one or more of them to the exclusion of the other or others in such shares and proportions as the Trustee in its absolute discretion may on or before the distribution date appoint;
>
> .22 Provided that if the Trustee fails to make any appointment under paragraph 2.21 then the Trustee shall hold the Trust Fund on trust for such of the children as are alive at the distribution date and if more than one in equal shares as tenants in common provided that:
>
> .221 *If any of the children who would have been so entitled had he survived the distribution date dies before the date, his children shall take and if more than one in equal shares as tenants in common per stirpes the share that he would have taken had he survived the distribution date*:
>
> .23 Provided further that if the Trustee fails to make any appointment under paragraph 2.21 and there are no children or other issue alive at the distribution date then the Trustee shall hold the Trust Fund upon trust for such charitable institution or charitable institutions as the Trustee may in its absolute discretion determine." (emphasis added)

The term "issue" was defined in cl 1.06 as meaning "the lineal issue" of Mr W F Buckle. No appointments had been made under cl 2.21 before the execution of the Supplemental Deed.

21 The effect of cl 2.22 of the Deed of Settlement as it stood in its original form was that there was a gift over to such of the second and third respondents who were alive at the distribution date in 2071 or at such earlier date as was appointed by the trustee, and to the children (taking *per stirpes*) of such of these respondents who were not alive at the distribution date. The interests of the second and third respondents were contingent upon their being alive at the distribution date. Their

interests also were liable to displacement by exercise on or before the distribution date by the trustee of the power of appointment in cl 2.21.

22 The Supplemental Deed deleted from cl 2.22 the portion we have emphasised and inserted the following:

> "Provided that if the Trustee fails to make any appointment under paragraph 2.21 then the Trustee shall hold the Trust Fund on trust for the children in the following shares as tenants in common:
>
> Jane Margaret Jory - one third
> William John Buckle - two thirds
>
> provided that:".

23 The result was to require the trustee, as from the distribution date, to hold the Trust Fund as to two-thirds for the second respondent and one-third for the third respondent. The interest of each respondent was vested but subject to divesting upon death before the distribution date. The interest was also liable to divestment by the exercise of the power of appointment in cl 2.21[5].

24 Moreover, the extensive powers given the trustee, exercisable at discretion and from time to time, rendered unstable the content of those interests. For example, at any time the whole of the Trust Fund might be resettled under cl 15, the terms of the Deed of Settlement might be further varied, added to or revoked under cl 14, and the Trust Fund depleted or exhausted by the making of advancements under cl 5.1.

---

5 *Lutheran Church of Australia South Australia District Incorporated v Farmers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 653-654. See also *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54 at 62-63.

25 The position was summed up as follows by Sheller JA[6]:

> "Before the amendment the interests in corpus were contingent. After the amendment the two named children took vested interests. That apart, [the Deed of Settlement] enables the trustee to make determinations in any year which will affect and may absorb the disposition of income and to make an appointment which will create new interests and destroy the existing interests in corpus. Finally pursuant to [cl] 2.23 if the trustee fails to make any appointment and there are no children or other issue alive at the distribution date the trustee may determine the charitable institution or institutions for which the trustee shall hold the trust fund."

Stamp duty upon the Supplemental Deed

26 The interests identified by Sheller JA were vested in the second and third respondents by means of the Supplemental Deed. The submissions for the Chief Commissioner proceeded on the footing that, if the only subject-matter conveyed, within the meaning of the Act, by the Supplemental Deed to the second and third respondents were the interests we have identified, valuation would be so difficult and the amount of duty so small as to make it impracticable to assess more than nominal duty. The Chief Commissioner's submission was that the Supplemental Deed effected a resettlement or appointment of the Trust Fund as a whole and was subject to duty on that basis.

27 The Chief Commissioner challenges the conclusion which led Sheller JA to favour dismissing the appeal to the Court of Appeal. His Honour expressed his conclusion as follows[7]:

> "In my opinion in this case the [Supplemental Deed] did not involve a resettlement of the sum of the interests in the trust fund, making up full equitable ownership. The trusts of income prior to the date of distribution were unaffected. The [Supplemental Deed] resettled the interests in remainder as from the distribution date. The property conveyed was that estate and interest. It is the unencumbered value of that estate and interest which is charged with ad valorem duty."

---

6 (1995) 38 NSWLR 574 at 580-581.

7 (1995) 38 NSWLR 574 at 584-585.

The Act

28 The Schedules are to be read and construed as part of the Act (s 7). The Second Schedule is headed "STAMP DUTIES AND EXEMPTIONS". In the second paragraph appearing under the heading "CONVEYANCES OF ANY PROPERTY" it is provided that "[u]pon every conveyance of any property ... made without consideration in money or money's worth" there will be paid on whichever is the greater of "(a) the unencumbered value of the property" and "(b) the amount or value of all encumbrances (whether certain or contingent) subject to which the property is conveyed" the same amount of duty as on a conveyance, as if the greater of the amounts under (a) and (b) were the amount of the consideration. The persons primarily liable are the parties to the conveyance or any one or more of them.

29 Section 68 provides a means for the ascertainment of the value of property conveyed.

30 So far as relevant, s 66 states:

> "(1) Subject to the provisions of this Act every conveyance is to be charged with ad valorem duty in respect of the unencumbered value of the property thereby conveyed.
>
> ...
>
> (3) A conveyance of property made without consideration in money or money's worth is to be charged with ad valorem duty on whichever is the greater of:
>
> (a) the unencumbered value of the property ascertained in accordance with section 68; or
>
> (b) the amount or value of all encumbrances (whether certain or contingent) subject to which the property is conveyed."

"Property" is defined in s 3(1) as including:

> "real and personal property and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest".

31 Section 65 contains a detailed definition of "conveyance". It states:

> "For the purposes of this Act the expression '**conveyance**' includes any transfer, lease, assignment, exchange, appointment, settlement, surrender, release, foreclosure, disclaimer, declaration of trust, and every other instrument (except a will), and every decree, judgment or order of any court whereby any property in New South Wales is transferred to or vested in or accrues to any person, and also includes a covenant to pay money not made for a full consideration in money or money's worth, the money covenanted to be paid to be regarded as the property conveyed; and '**convey**' has a meaning corresponding with that of 'conveyance'. '**Conveyance on sale**' includes every instrument and every decree, judgment or order of any court whereby any property on the sale thereof is conveyed to a purchaser or other person on his behalf or by his direction."

32 The definition directs attention not to that which moved from the conveyor but to that which was received or acquired by the conveyee by reason of transfer to, vesting in or accrual to that person. Further, in its ordinary meaning, "whereby" identifies the means by which or owing to which a certain result or effect is obtained. In s 65 the whole of the expression "whereby any property in New South Wales is transferred to or vested in or accrues to any person" qualifies not merely the immediately preceding expression "every decree, judgment or order of any court" but all that precedes, and this includes the phrase "every other instrument (except a will)".

33 Such a construction is consistent with s 41. This brings to duty, to be chargeable as conveyances, certain agreements for sale or for conveyance. Where duty has been paid upon the agreement as required by s 41, a conveyance made in conformity with the agreement attracts only nominal duty (s 41(4)). Section 41(1) operates with the same territorial nexus as s 65. Section 41(1) states:

> "Every agreement for the sale or conveyance *of any property in New South Wales* shall be charged with the same ad valorem duty to be paid by the purchaser or person to whom the property is agreed to be conveyed as if it were a conveyance of the property agreed to be sold or conveyed and shall be stamped accordingly." (emphasis added)

This construction of s 65 also accords with the submission which appears to have been accepted in *Commissioner of Stamp Duties (NSW) v Yeend*[8]. That being so,

---

8 (1929) 43 CLR 235 at 241, 244.

the terms in s 65 "transfer, lease, assignment, exchange, appointment, settlement, surrender, release, foreclosure, disclaimer, declaration of trust, and every other instrument (except a will)" are to be read distributively with the description of the result brought about by that means, namely property which is "transferred to or vested in or accrues to any person".

34 It follows in the present case that there is no call for any refined analysis to determine whether the Supplemental Deed is to be classified as an "appointment" or "settlement" within the opening words of s 65. Undoubtedly, it was an instrument, not being a will. The issue is one of identification of that property in New South Wales which, by means of the instrument, was transferred to or vested in or accrued to the second and third respondents. To that extent only was there a conveyance within s 65 of the Act.

Prior authority

35 In this regard, little assistance is derived from the decisions of this Court in *Davidson v Armytage*[9] and *Davidson v Chirnside*[10] upon which the Chief Commissioner relied. These cases turned upon a provision of the *Stamps Act* 1892 (Vic) which brought to duty a class of instruments identified as follows:

> "Any instrument other than a will or codicil whether voluntary or upon any good or valuable consideration other than a *bonâ fide* adequate pecuniary consideration *whereby any property is settled or agreed to be settled* in any manner whatsoever, or is given or agreed to be given in any manner whatsoever, such instrument not being made before and in consideration of marriage." (emphasis added)

It will be apparent that, in contrast to the New South Wales legislation, the term "settlement" does not appear as part of a catalogue of varieties of instruments which are then further identified by reference to their effect. The Victorian statute uses the phrase "whereby any property is settled or agreed to be settled" rather than "whereby any property ... is transferred to or vested in or accrues to any person". The question with respect to the Victorian legislation concerned the scope of the term "settled". It was held that the term "settlement" was large enough to include an appointment under a special power if the context in the legislation showed an

---

9 (1906) 4 CLR 205.

10 (1908) 7 CLR 324.

intention to use it in that sense and that such a context was to be found in s 28 of the statute[11].

36 Nor is immediate assistance provided by the later decision in *Buzza v Comptroller of Stamps (Vict)*[12]. This turned upon the construction of a provision of the *Stamps Acts* 1946 (Vic) which was relevantly indistinguishable from that in the 1892 legislation. One issue concerned the identification of the property settled by the instrument in question. The terms of a testamentary trust required the trustee to hold the residuary estate on trust to pay one-third of the income to the testator's widow and, subject thereto, on trust as to capital and income for the testator's children. The interests of the children were vested and all were *sui juris*. The parties to the instrument were the trustee, the widow and the children. It was held by a majority of this Court that the trusts substituted by the instrument for those under the will amounted to a settlement of the whole of the residuary estate. The trusts were redefined by the instrument, in what Dixon J described as "an indivisible legal operation"[13]. No pre-existing vested interest was settled as a distinct proprietary interest. Rather, there were created in the residue as a whole different equitable interests to those which had vested under the testamentary trust.

37 In the present case, under the Deed of Settlement as it stood before the Supplemental Deed, no interests in corpus had vested. The Trust Fund was vested in the trustee, impressed with such trusts as were created by or pursuant to the Deed of Settlement. There was no hiatus or gap as to any outstanding beneficial interest in the Trust Fund. The assets comprising the Trust Fund were not impressed with trusts which gave rise to equitable interests therein which were so extensive as to leave the trustee with no more than the bare legal title. The trustee might accurately be described as the owner of those assets[14], but as subjected to the equitable obligations imposed by the Deed of Settlement[15]. The second and third respondents had no vested interests in corpus but they did enjoy rights to due

---

11 See *Davidson v Chirnside* (1908) 7 CLR 324 at 339.

12 (1951) 83 CLR 286.

13 (1951) 83 CLR 286 at 301.

14 See *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 463, 474; *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 at 712-713.

15 See *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 519.

administration of the trusts of the Deed of Settlement which a court of equity would protect[16].

38 More assistance in the present appeal is provided by a decision upon s 66 of the Act in *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co Ltd* (*Quigley's Case*)[17]. The settlor, Mr Quigley, had vested interests under certain settlements. These included undivided moieties under two settlements. One moiety was subject to a life interest in Mr Quigley's stepmother. All of his interests he then settled by deed dated 16 November 1925 on trust for himself for life with remainder to other persons. The first undivided moiety and the reversionary interest of Mr Quigley in the second moiety were provisionally accepted at values which were not specified as the value of the whole of the assets bound by the two earlier settlements[18]. The taxpayer submitted that the 1925 deed should be assessed to duty on a basis which deducted from the value of the property conveyed the value of the life interest Mr Quigley created thereby in his own favour. The submission was rejected. There was no pre-existing life interest in Mr Quigley which remained unaffected. Rather, he settled the whole of his interests under the earlier settlements and thereby created a new life interest[19]. What was valued was the whole of the interests settled in 1925. These were the relevant property upon which s 66(1) operated. The property was not the whole of the assets of the earlier settlements in which Mr Quigley held his interests.

Conclusion with respect to stamp duty

39 The operation of the Supplemental Deed and the bearing of the Act upon it are to be understood against the background of the provisions of the Deed of Settlement to which we have referred. The trustee held the Trust Fund upon what might compendiously be described as a discretionary trust. Beneficial interests

---

16 See *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 605-606, 617-618; *Spellson v George* (1987) 11 NSWLR 300 at 316; *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 313-314; *Harmer v Federal Commissioner of Taxation* (1991) 173 CLR 264 at 274.

17 (1926) 38 CLR 272.

18 See (1926) 38 CLR 272 at 273.

19 (1926) 38 CLR 272 at 277-278. See also *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 443-444, 450-451.

arose thereunder only in the limited sense which was identified earlier in these reasons.

40 The Supplemental Deed did not bring about the vesting in the second and third respondents of the whole of the Trust Fund in its then state of investment. Nor is it accurate to identify the legal operation of the Supplemental Deed as a "resettlement" of the entirety of beneficial interests which then existed in the Trust Fund as a whole, and to apply s 66 of the Act on that basis. The definition in s 65 identifies the conveyance charged with ad valorem duty as an instrument whereby property is transferred to or vested in or accrues to any person. The Supplemental Deed caused the vesting in the second and third respondents not of the Trust Fund but of interests of a lesser nature. These were vested interests in a technical sense. They might, given the presence in New South Wales of the trustee and the assets comprising the Trust Fund, and the broad definition in s 3(1) of "property", be treated as property in New South Wales within the meaning of the Act. However, their present value had to reflect the vicissitudes which were an essential element of the structure created by the Deed of Settlement.

41 On the construction we have given to the Supplemental Deed and to the Act, the property conveyed by the Supplemental Deed was such that, as was conceded in argument, only a minimal amount of stamp duty was exigible. It follows that the assessment against which the respondents appealed to the Supreme Court could not be supported, and the appeal to the Court of Appeal was correctly dismissed. This conclusion means that the appeal to this Court may be disposed of without the necessity to construe the phrase "unencumbered value" in the expression in s 66(1) of the Act "every conveyance is to be charged with ad valorem duty in respect of the unencumbered value of the property thereby conveyed". Further, upon that basis and as we understood the oral submissions of the Chief Commissioner, the position of the revenue would not be improved if s 66(1) were so construed as to treat the liabilities of the trustee to the lenders of the moneys applied in the acquisition and development of the Brookvale site as something to be disregarded in identifying the "unencumbered value" of the property conveyed by the Supplemental Deed.

42 However, the construction of the phrase "unencumbered value" in respect of liabilities such as those of the trustee in this case was fully considered in the Court of Appeal and in submissions to this Court. Further, the related issue of the nature of the so-called trustee's lien is of general importance. Accordingly, we shortly indicate our conclusions upon these matters. However, no issue arose, in the submissions concerning the trustee's lien, as to the subrogation of creditors of the trustee to the rights of the trustee. Nor was there any issue as to the personal right

of a trustee against beneficiaries which in some circumstances may arise under the principles considered in *Hardoon v Belilios*[20].

"Unencumbered value" and the trustee's exoneration and recoupment

43 We turn first to the phrase "unencumbered value" in s 66(1). In *Wallace v Love*[21], this Court considered a direction by a testator that the trustees distribute the estate in a certain way when and as soon as the estate should be free from all "encumbrances". By a majority (Knox CJ and Starke J, Higgins J dissenting), it was held that in this setting the term "encumbrances" included all debts of the estate whether secured or unsecured and whether incurred by the testator or by the trustees. Knox CJ and Starke J said[22]:

> "The word 'encumbrances', in its ordinary connotation, means that a person or estate is burdened with debts, obligations or responsibilities. True, the word is in law especially used to indicate a burden on property, a claim, lien or liability attached to property (see *Oxford Dictionary*, under title 'Encumbrance'). But when we remember that the whole estate of the testator is liable in the hands of his executor for payment of debts and the expense of administering his estate, it is not an extravagant use of language to say that his 'whole estate is not free from encumbrances' until those debts and expenses are paid."

In the course of reaching the opposite result with respect to the particular will in question, Higgins J gave the following example[23]:

> "A trustee's obligation to a caretaker or to other employees or to solicitors or others is not a liability attached to property. It would not be even 'a debt' of the testator or of his estate. Judgment for it would not be given *de bonis testatoris*. It would be 'a debt' of the trustees personally, although, if rightly

---

20 [1901] AC 118.

21 (1922) 31 CLR 156.

22 (1922) 31 CLR 156 at 164.

23 (1922) 31 CLR 156 at 172.

incurred, they would be entitled to be indemnified out of the trust estate as for a trust expense (*Staniar v Evans*[24])."

44 Section 66(1) charges the conveyance with ad valorem duty upon the property conveyed by means of that instrument. The effect of the Second Schedule, which is to be read in conjunction with s 66(1), in a case such as the present is to impose upon the instrument the same duty as if the unencumbered value were the amount of consideration for the conveyance. This suggests that "unencumbered" is used in s 66(1) not in a loose sense but to refer to security interests in, or charges or other liabilities which attach to, the property in question.

45 The liabilities of the trustee to the two companies which provided the funds for the acquisition and development of the Brookvale site had not given rise, when the Supplemental Deed was executed, to any encumbrance upon the interests vested thereby in the second and third respondents. Those interests were to be distinguished from the assets, notably the Brookvale site, comprising the Trust Fund at the date of the Supplemental Deed.

46 However, even if the trusts created by the Deed of Settlement were of the traditional kind, whereby, for example, A held a life estate and B and C interests in remainder, the liabilities of the trustee would not have given rise to an encumbrance upon those beneficial interests.

---

24 (1886) 34 Ch D 470.

47 In *Worrall v Harford*, Lord Eldon LC said[25]:

> "It is in the nature of the office of a trustee, whether expressed in the instrument, or not, that the trust property shall reimburse him all the charges and expences [sic] incurred in the execution of the trust."

The entitlement of a trustee who has borrowed moneys for application to trust purposes has been described as follows[26]:

> "Where the trustee acting within his powers makes a contract with a third person in the course of the administration of the trust, although the trustee is ordinarily personally liable to the third person on the contract, he is entitled to indemnity out of the trust estate. If he has discharged the liability out of his individual property, he is entitled to reimbursement; if he has not discharged it, he is entitled to apply the trust property in discharging it, that is, he is entitled to exoneration."

In aid of that right to reimbursement or exoneration for liabilities properly incurred in the administration of the trust, the trustee cannot be compelled to surrender the trust property to the beneficiaries until the claim has been satisfied[27]. In that sense, the entitlement to reimbursement or exoneration confers a priority in the further administration of the trust[28]. Accordingly, in an administration action, if it appears probable that the trust fund will be insufficient for the full recoupment of the

---

25 (1802) 8 Ves Jun 4 at 8 [32 ER 250 at 252]. See also *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576 at 585; *Dimos v Dikeakos Nominees Pty Ltd* (1996) 68 FCR 39 at 43. Section 59(4) of the *Trustee Act* 1925 (NSW) states:

> "A trustee may reimburse himself or herself, or pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers."

26 *Scott on Trusts*, 4th ed (1988), vol 3A, §246. See also the discussion by Dixon J in *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335.

27 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *Re The Exhall Coal Company (Limited)* (1866) 35 Beav 449 at 452-453 [55 ER 970 at 971]; *Scott on Trusts*, 4th ed (1988), vol 3A, §244.1.

28 Pettit, *Equity and the Law of Trusts*, 8th ed (1997) at 458-459.

trustee, the trustee is entitled to the insertion in the order for administration of a direction that there be payment in the appropriate order of priority[29].

48 Until the right to reimbursement or exoneration has been satisfied, "it is impossible to say what the trust fund is"[30]. The entitlement of the beneficiaries in respect of the assets held by the trustee which constitutes the "property" to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves. The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them[31]. To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not "trust assets" or "trust property" in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries[32].

49 The entitlement to reimbursement and exoneration was identified by Lindley LJ as "the price paid by *cestuis que trust* for the gratuitous and onerous services of trustees"[33]. The right of the trustee has been described as a first charge upon the assets vested in the trustee[34], as one upon the "trust assets"[35], and as conferring upon the trustee an "interest in the trust property [which] amounts to a proprietary interest"[36].

50 However, the starting point in the class of case under consideration is that the assets held by the trustee are "no longer property held solely in the interests of the

---

29 *Dodds v Tuke* (1884) 25 Ch D 617.

30 *Dodds v Tuke* (1884) 25 Ch D 617 at 619.

31 *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576 at 587.

32 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370.

33 *In re Beddoe* [1893] 1 Ch 547 at 558.

34 *Staniar v Evans* (1886) 34 Ch D 470 at 477.

35 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367. See also *Re The Exhall Coal Company (Limited)* (1866) 35 Beav 449 at 452-453 [55 ER 970 at 971].

36 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370.

beneficiaries of the trust"[37]. The term "trust assets" may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not "encumbered" by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment "takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation"[38]. A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the "trust assets" which may be enforced in the same way as any other equitable charge[39]. However, the enforcement of the charge is an exercise of the prior rights conferred upon the trustee as a necessary incident of the office of trustee. It is not a security interest or right which has been created, whether consensually or by operation of law, over the interests of the beneficiaries so as to encumber them in the sense required by s 66(1) of the Act. In valuing the interests of beneficiaries which are conveyed by an instrument, there is no encumbrance which the Act requires to be disregarded.

51 Accordingly, we agree with the following treatment of the matter by Sheller JA[40]:

> "If it be right, as in my opinion it is, that the trustee has a beneficial interest in the trust assets to the extent of its right to be indemnified out of those assets against personal liabilities incurred in the performance of the trust and that interest will be preferred to the beneficial interests of the cestuis que trust, the consequence is that the interest conveyed has no value. This does not depend in any way upon treating the interest as encumbered. It flows from the fact that the trustee has a preferred beneficial interest in the trust fund."

Orders

52 The appeal should be dismissed with costs.

---

37 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 370.

38 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335.

39 See *Hewett v Court* (1983) 149 CLR 639 at 663.

40 (1995) 38 NSWLR 574 at 586.