

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

MSP NOMINEES PTY LTD & ANOR

APPELLANTS

AND

COMMISSIONER OF STAMPS

RESPONDENT

MSP Nominees Pty Ltd v Commissioner of Stamps [1999] HCA 51
30 September 1999
A39/1998

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 13 June 1997 and in place thereof order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of South Australia

Representation:

P L G Brereton SC with M J Leeming and B M Cowell for the appellants
(instructed by Cowell Clarke)

B M Selway QC, Solicitor-General for the State of South Australia with N A Manetta for the respondent (instructed by Crown Solicitor for the State of South Australia)

Notice: This copy of the Court's Reasons for Judgment is
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Commonwealth Law Reports.

CATCHWORDS

MSP Nominees Pty Ltd v Commissioner of Stamps

Stamp duties – Conveyance – Redemption of units in unit trust scheme – Register of units recorded cancellation – Whether register an instrument evidencing a deemed conveyance – Meaning of "transfer" in s 71(15) of the *Stamp Duties Act* 1923 (SA) – Whether beneficiary surrendered or renounced beneficial interest in, or in relation to, property upon redemption of units.

Trusts – Unit trust – Provision for redemption of units – Whether redemption a surrender, release or renunciation by unit holder of beneficial interest.

Words and phrases – "transfer" – "surrender" – "renounce" – "release".

Stamp Duties Act 1923 (SA), ss 24(4), 71.

1 GLEESON CJ, GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ. This appeal from the Full Court of the Supreme Court of South Australia¹ concerns the construction of the *Stamp Duties Act* 1923 (SA) ("the Act") and its application in respect of the redemption of what has been identified as units in a unit trust established by a trust deed dated 31 August 1990 ("the Trust Deed") and known as the Acacia Roofing Tiles Unit Trust ("the Unit Trust").

2 The facts are not in dispute. At all material times, the first appellant, MSP Nominees Pty Ltd ("MSP") was the trustee of the Unit Trust ("the Trustee"). Initially there were three Unit Holders, Budget Investments Pty Ltd ("Budget"), the second appellant, Sharrard Pty Ltd ("Sharrard") and Galaxy Homes Pty Ltd ("Galaxy"). The term "The Trust Fund" was defined in cl 1 of the Trust Deed as meaning:

"the initial sum and any sums specified for Units pursuant to these provisions and any other moneys and any investments and property paid or transferred to and accepted by the Trustee whether by way of loan or gift and accumulations of income hereinafter directed or empowered and other accretions of the moneys investments and property from time to time representing the same or any part or parts thereof respectively".

3 Clause 4 provided for the beneficial interest in the Trust Fund to be divided into units of equal value and that no Unit Holder was to have an interest in the Trust Fund other than in its entirety or to be entitled to interfere in the exercise of the right of the Trustee as owner of the Trust Fund. This clause also stipulated that, except as provided by cl 11, no Unit Holder was to be entitled to require the transfer to him of any of the investments of the Trust Fund or any part thereof or of any property comprised in the Trust Fund. Provision was made (in cl 13) for determinations by the Trustee from time to time to distribute the net income of the Trust Fund to Unit Holders or to accumulate it as an accretion to the Trust Fund.

4 The Trust Deed specified three mechanisms for distributions from the Trust Fund. First, cl 11 dealt with the commencement and determination of the trusts created by the Trust Deed. As soon as practicable after the Vesting Day, as defined in cl 1, the Trustee was obliged to convert into money the investments in property constituting the Trust Fund and to divide the proceeds, upon the registered holders delivering up their certificates to the Trustee for cancellation, among the Unit Holders in proportion to the number of units of which they were respectively registered. At its discretion, and at the request of any Unit Holder, the Trustee was

1 *MSP Nominees Pty Ltd v Commissioner of Stamps* (1997) 68 SASR 266.

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empowered to transfer to that Unit Holder any assets of the Trust Fund in specie in satisfaction or part satisfaction of its entitlement upon termination of the trust (cl 11(b)). The term "Vesting Day" was defined in cl 1(g) as meaning the first to occur of three days. The first was the 21st anniversary of the death of the last survivor under a Royal lives clause, the second 60 years, and the third such earlier day as the Trustee might appoint in its absolute discretion. It is conceded by the respondent, the Commissioner of Stamps ("the Commissioner") that, upon a distribution in accordance with cl 11, the Unit Holders would not have "surrendered" or "renounced" their beneficial interests.

5 Secondly, at any time and from time to time before the Vesting Day the Trustee might, with the consent of at least 75 per cent of the Unit Holders, raise any sum from the capital of the Trust Fund to pay it to the Unit Holders in proportion to the units registered in their respective names. Clause 37 so provided.

6 Thirdly, the Trust Deed permitted redemptions to occur before the Vesting Day if a Unit Holder so requested. In particular, cl 34 stated:

"The Trustee may in the Trustee's absolute discretion:

- (a) At the written request of a Unit Holder redeem all or any of the Units of the Unit Holders at a price of not more than the value of the quotient derived by dividing the total number of units issued into the value of the Trust Fund determined in the manner provided for by clause [36] hereof but otherwise on such terms and conditions as the Trustee shall in the Trustee's absolute discretion think fit.
- (b) Appropriate any part of the Trust Fund in its then actual state of investment in or towards the satisfaction of any liability on the redemption of any Units as is provided for by sub-clause (a) hereof or in satisfaction of the interest of any Unit Holder in the Trust Fund and any such appropriation shall be final and binding on all persons claiming under the trusts hereof."

Clause 35 read:

"The redemption of any Unit by the Trustee under Clause [34] hereof shall notwithstanding any other provision hereof cancel such Unit and all right title and interest both legal and beneficial therein and the Trustee shall forthwith record such cancellation in the register of Unit Holders."

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Clause 36 provided for the valuation of the Trust Fund if required by all the Unit Holders or by any of the provisions of the Trust Deed. These three clauses are of prime importance for an understanding of the issues which arise on this appeal.

7 The significant provisions made by the Trust Deed for the exercise of powers and discretions by the Trustee with respect to distributions to Unit Holders support the description of the trusts established by the Trust Deed as discretionary trusts². Clause 4 denied any entitlement to Unit Holders to require a distribution, other than pursuant to cl 11. Of the methods for distributions specified in the Trust Deed, only the first, that in cl 11 for distributions after the Vesting Date, conferred upon Unit Holders rights not dependent upon or preconditioned by a requirement of consent by the Trustee or the exercise of a power vested in the Trustee. Accordingly, any scope for the operation of the rule in *Saunders v Vautier*³ was limited.

8 However, all three methods of distribution, including that provided by cl 34, shared a significant characteristic. Within the charter of rights and obligations established by the Trust Deed, they were the only means for the working out and effectuation of the rights or interests of the Unit Holders in respect of the Trust Fund. A redemption under cl 34 did not yield up those rights and interests so as to discard them or to swell the interests of any remaining Unit Holders. Rather, the redemption effectuated, fulfilled or realised those rights and interests⁴. Upon a favourable exercise of the Trustee's discretion under cl 34, the Unit Holder in question had, at least, an absolute right to the price for the redemption.

9 The Commissioner referred in argument on this appeal to the use of the term "surrender" with respect to the adjustment of the positions of the parties to a contract of life insurance which is discharged, not by performance when the life has dropped, but at some earlier time. However, here, on the Commissioner's hypothesis, the object of the contract would never be fulfilled.

10 A better analogy appears from the situations in company law discussed by this Court in *Union Trustee Co of Australia Ltd v Greater Melbourne Realty Co*

2 See *Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234.

3 (1841) 4 Beav 115 [49 ER 282]. See Underhill and Hayton, *Law of Trusts and Trustees*, 15th ed (1995) at 95, 710-716.

4 cf *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)* (1958) 100 CLR 392 at 407-409.

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*Pty Ltd (In Liquidation)*⁵ and *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)*⁶. The former authority makes the point that a surrender of shares, unless it be in exchange for others, diminishes the capital of the company. Further, except with the necessary sanction of the court, such a dealing cannot be supported⁷ unless, perhaps, in respect of shares liable to forfeiture for unpaid calls, the surrender is a bona fide arrangement to achieve the end of forfeiture⁸. *Archibald Howie* established that a return of capital to shareholders upon a duly confirmed reduction of capital satisfies "the absolute right of the shareholders arising from the resolution and order [for the reduction of capital]"⁹. In that situation, it would be inappropriate to describe what occurred as involving a surrender of rights by the shareholders.

11 In the course of 1992, Budget and then Galaxy requested MSP to exercise the discretion conferred upon it by cl 34 and to redeem all of their units. MSP did so and paid to each of Budget and Galaxy the value of their units, calculated as a proportion of the value of the Trust Fund. Sharrard then remained as the sole Unit Holder. The value of the units redeemed by Budget was agreed between MSP and Budget as \$686,000 and that in respect of the redemption by Galaxy was agreed between it and MSP as \$481,289. The prices for the redemptions within the meaning of cl 34(a), being these values, were not paid. It appears that they were left as debts due and owing by MSP to Budget and Galaxy, as the case may be, with the right in MSP to recoupment from the trust assets¹⁰.

12 Clause 1 of the Trust Deed defined "Unit Holders" as those so registered and cl 5 obliged MSP to keep a register of Unit Holders. Clause 35 obliged the Trustee

5 (1932) 47 CLR 44.

6 (1948) 77 CLR 143.

7 In submissions to this Court, the Commissioner referred to the decision of Warrington J in *Rowell v John Rowell & Sons, Limited* [1912] 2 Ch 609, which may suggest a wider view of the matter, but the correctness of that decision has been doubted: Wallace and Young, *Australian Company Law and Practice*, (1965) at 257-258.

8 (1932) 47 CLR 44 at 48.

9 *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)* (1958) 100 CLR 392 at 408.

10 See *Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 244-247.

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to record cancellations in that register. MSP recorded in the register the cancellation of units held by Budget and Galaxy.

13 The Commissioner assessed the register to duty on the basis that each redemption of units was a "transfer" of a beneficial interest in property and this was evidenced by the entries in the register. The Commissioner assessed duty on the register, describing the instrument in the Stamp Duties Notice of Assessment dated 7 September 1995 ("the Notice") as a "Conveyance". The Budget redemption was described in the Notice by reference to the entry in the register on 17 January 1992 and identified the parties as "Budget Investments (redeeming), MSP Nominees P/L [as trustee for] Acacia Roofing Tiles Unit". In respect of the Galaxy redemption, the entry was identified as 21 April 1992 and the parties as "Galaxy Homes P/L (redeeming), MSP Nominees P/L [as trustee for] Acacia Roofing Tiles".

14 Section 5 of the Act charges certain "instruments" with the stamp duties specified in Sched 2. Every party who executes such an instrument is liable to pay the duty chargeable as a debt due to the Crown (s 5(2)). Included in the specification of instruments in Sched 2 are conveyances operating as a voluntary disposition inter vivos of any property.

15 Part III of the Act (ss 29-82) is headed "SPECIAL PROVISIONS WITH RESPECT TO CERTAIN STAMP DUTIES" and ss 60-71d are headed "*Conveyances and Conveyances on Sale*". Section 71(3) deems certain instruments to be conveyances operating as voluntary dispositions inter vivos.

16 The immediate starting point for the determination of this appeal is found in s 71(4). That sub-section states that it applies:

"to any instrument that relates to land, a marketable security or a unit under a unit trust scheme, or an interest or potential beneficial interest in land, a marketable security or a unit under a unit trust scheme".

It is accepted that the Trust Deed was an arrangement falling within the definition of "unit trust scheme" in s 4 of the Act. The definition provides:

"'unit trust scheme' means an arrangement 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 subject to the trust".

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17 Section 71(3) materially applies only to instruments to which s 71(4) applies. Paragraph (a)(iii) of s 71(3) then singles out instruments "effecting or acknowledging, evidencing or recording, any of the following transactions ... [including] a transfer of a beneficial interest in property subject to a trust or a potential beneficial interest in, or in relation to, property subject to a discretionary trust, whether or not any consideration is given for the transaction". The instrument to which sub-s (3)(a) attaches is deemed to have effected the transaction in question and to have been executed by the parties to that transaction at the same time as the transaction took place (s 71(9))¹¹.

18 "Trust" is defined as including an implied trust or a discretionary trust and "trustee" includes a person who holds property subject to a discretionary trust (s 71(15)). The term "discretionary trust" is defined in s 4 as meaning:

"an arrangement, however made, under which a person holds property, and the beneficial interest in all or any part of that property may be vested in a person (in this Act referred to as an 'object' of the discretionary trust) on the exercise of a discretion, whether subject to any other contingency or not and whether the exercise of the discretion is obligatory or optional".

19 In a case stated pursuant to s 24(4) of the Act¹², the opinion of the Supreme Court of South Australia was sought as to the liability to duty on the register of Unit Holders in respect of the two redemptions. The Commissioner determined that the redemptions were conveyances operating as voluntary dispositions inter vivos, and specifically that they were transfers of property within the meaning of s 71 of the Act. The Commissioner also determined that the register effected, acknowledged, evidenced or recorded those transfers within the meaning of s 71(3) of the Act.

20 For the purposes of s 71, the term "transfer" is defined in s 71(15). It is stated to mean:

11 No question arose as to whether, in any event, each of the redemptions was a disposition of an equitable interest which was required by s 29 of the *Law of Property Act* 1936 (SA) to be in writing "signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing".

12 See *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453.

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- "(a) transfer, assure or vest property (including a potential beneficial interest in, or in relation to, property) to or in any person, whether legally or equitably and whether or not subject to registration, the issue of a certificate of title or other similar requirement;
- (b) *surrender or renounce a beneficial interest or potential beneficial interest in, or in relation to, property; or*
- (c) surrender to the Crown any lease or other interest in land in order that the Crown may grant to a person other than the surrenderor a lease of, or other interest in, the same land or any part of the same land".
(emphasis added)

Both pars (a) and (c) turn upon the acquisition of property rights by reason of, or as a consequence of, the dispositions they identify. Is par (b) of a like nature? It is the construction of par (b) which is determinative of this appeal.

21 The Commissioner maintained that the entries in the register acknowledged, evidenced or recorded the surrender, within the meaning of par (b), of a beneficial interest or potential beneficial interest in, or in relation to, property. The effect of the orders of the Supreme Court (Debelle J) was to set aside the Commissioner's assessment and to require repayment of the amount of duty which had been paid together with interest and costs of the case stated. However, on appeal by the Commissioner to the Full Court¹³ the orders of Debelle J were set aside and in substitution thereof the assessment by the Commissioner for stamp duty and penalties in the total sum of \$59,400 was confirmed.

22 The Full Court (Doyle CJ, Matheson and Olsson JJ) held that Budget and Galaxy "lost"¹⁴ their respective "beneficial interest" in the Unit Trust, these being taken by the remaining Unit Holder and that, whilst the words "surrender" and "renounce" were to be given their ordinary meanings, the redemptions fell within the definition of "transfer" in s 71(15) of the Act. In particular, Doyle CJ held that each redeemed Unit Holder¹⁵:

13 (1997) 68 SASR 266.

14 (1997) 68 SASR 266 at 271.

15 (1997) 68 SASR 266 at 271.

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"lost (to use a neutral term) its beneficial interest in the trust property, and in exchange was paid the value of that interest by the trustee. It lost its beneficial interest because it, by its request to the trustee, offered or yielded it up and that was acted upon by the trustee."

His Honour added that¹⁶:

"the redemption of the units involved a termination of a beneficial interest previously held by a unit holder, and resulted in an increased (although no more valuable) beneficial interest on the part of the remaining unit holders".

The meaning of the reference to an increased (although no more valuable) beneficial interest is not entirely clear. Upon a redemption of the units of one Unit Holder, the remaining Unit Holders were no better off, and both the nature and worth of their interests remained the same.

23 Further, Doyle CJ added that the beneficial interest had been "received" or "acquired" (in the "passive sense"¹⁷) by the remaining Unit Holders.

24 Section 71, in its relevant form, was introduced into the Act by s 11 of the *Stamp Duties Act Amendment Act 1980* (SA) ("the 1980 Act"). The mischief to which the change in the stamp duty law was directed was identified in the Second Reading Speech of the Attorney-General in the Legislative Council on the Bill for the 1980 Act.

16 (1997) 68 SASR 266 at 271.

17 (1997) 68 SASR 266 at 271.

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25 The Attorney-General said¹⁸:

"The Bill proposes amendments to section 71 of the principal Act which presently deals with instruments chargeable as conveyances operating as voluntary dispositions *inter vivos*. The Bill makes a number of amendments to this section designed to counter avoidance schemes which make use of ordinary trusts, unit trusts, discretionary trusts or equitable mortgages. In general terms, the effect of these amendments is to make any transfer of property into trust chargeable with full *ad valorem* duty whether or not there is any change in beneficial ownership of the property affected. Any transfer of the beneficial ownership in property subject to a trust is also to be subject to *ad valorem* duty, as is any transfer of property to a beneficiary under a trust who does not have the beneficial interest by virtue of an instrument that is duly stamped. ... The amendments propose that instruments that merely acknowledge, evidence or record a transfer of property to a person as trustee, a declaration of trust or a transfer of a beneficial interest in property subject to a trust will also be dutiable as conveyances operating as voluntary dispositions *inter vivos*, in addition to instruments that effect such transactions. *This is necessary in order to counter schemes such as those used in relation to unit trusts whereby the units are not transferred by instruments but by the process of cancelling units and issuing new units.*" (emphasis added)

Provisions to deal with a similar state of affairs were introduced in 1982 in Western Australia¹⁹.

26 In submissions to this Court, the Solicitor-General for South Australia, who appeared for the Commissioner, did not suggest that the transactions which gave rise to this litigation fell within that mischief. That concession was rightly made. Further, the substance of the transactions effected by the redemptions did not involve any voluntary dispositions of property; rather, Budget and Galaxy obtained their rights to the price for the redemptions, and this price represented the outcome

18 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 December 1980, 2524 at 2525-2526. At common law, regard to such material may be had to identify the mischief sought to be remedied: *Owen v South Australia* (1996) 66 SASR 251 at 255-256; *Attorney-General (Cth) v Oates* (1999) 73 ALJR 1182 at 1187; 164 ALR 393 at 401.

19 *Commissioner of State Taxation (WA) v Merifield Cooksey Holdings Pty Ltd* [1994] ATC 4774 at 4783-4784.

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of the process of valuation required by the Trust Deed in such circumstances. If there be any apt analogy, it is that considered earlier in these reasons with respect to a return to shareholders pursuant to an authorised reduction of capital or, perhaps, a redemption of redeemable shares.

- 27 In the Full Court, Doyle CJ rejected a submission that the legislature could not have intended the result that the redemptions of the units held by Budget and Galaxy were surrenders of beneficial interests for the purposes of s 71(15). His Honour said²⁰:

"I am unable to discern any policy or rationale underlying s 71 that leads to the conclusion that Parliament could not have intended this result. To the contrary, there are indications in the section that the aim is to ensure that duty is paid on or in respect of a transaction which involves a dealing with a beneficial interest, when ad valorem duty has not already been paid on an instrument as a result of which the disposing party acquired the interest disposed of."

- 28 However, as the appellants submit, there were indications in the statute in its form at the time of the redemptions by Budget and Galaxy in 1992 which pointed the other way. Part IV of the Act (ss 91-105c) rendered dutiable as conveyances of land the acquisition of certain interests in companies and unit trust schemes which were "land rich". The term "acquisition" is defined in s 91(1) so as to include "the redemption, surrender or cancellation of a share in the company or a unit in the scheme".

- 29 In other States, provisions comparable with s 71 of the Act deal specifically with the "dispositions" of units in unit trust schemes and define "dispositions" of a unit so as to include the "redemption, surrender or cancellation of the unit"²¹. In the United Kingdom, provision of this nature was made by s 57(3) of the *Finance Act* 1946 (UK). This, among other things, treated a surrender of units in a unit trust scheme as a transfer to the trustees or managers and deemed any instrument

20 (1997) 68 SASR 266 at 271.

21 *Stamp Act* 1894 (Q), s 56B(1); *Stamp Act* 1921 (WA), s 73D(1).

by which the unit holder initiated the surrender to be liable to stamp duty as a conveyance or transfer on sale²².

30 Nevertheless, the Solicitor-General for South Australia submits that the two redemptions under cll 34-35 of the Trust Deed were properly classified as "surrenders" within the meaning of the definition of "transfer" in s 71(15) of the Act.

31 Reference was made in argument to the use of the terms "surrender" and "release" as terms of grant in old system conveyancing. "Release" was a proper term to employ to convey a remainder or reversion to the person in possession, or for a conveyance between joint tenants²³ (even though neither joint tenant had possession to the exclusion of the other²⁴). The releasee being already in possession, no livery of seisin was required²⁵. The "practical effect" of a release by the reversioner or remainderman to the life tenant in possession was "to enlarge the estate of the tenant for life"²⁶. On the other hand, the term "surrender" was appropriate where an estate for life or a term of years was assured to the holder of

22 *Arbuthnot Financial Services Ltd v Inland Revenue Commissioners* [1985] Simon's Tax Cases 211 at 214-215. Section 57(3) provided:

"Where a person authorises or requires the trustees or managers under a unit trust scheme to treat him as no longer interested in a unit under that scheme and does not authorise or require them to treat another person as entitled to that unit, he shall be deemed for the purposes of this Part of this Act to transfer that unit to the managers, and any instrument whereby he gives the authority or makes the requirement shall be deemed for the purposes of the enactments relating to stamp duty to be a conveyance or transfer of the unit on sale."

23 *Caraher v Lloyd* (1905) 2 CLR 480 at 492, 501.

24 *Wright v Gibbons* (1949) 78 CLR 313 at 329-332.

25 *Challis's Law of Real Property*, 3rd ed (1911) at 397; *Halsbury's Laws of England*, 4th ed, vol 39, §577.

26 *Caraher v Lloyd* (1905) 2 CLR 480 at 493.

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the reversion to the intent that it merge or "drown" in the latter²⁷. Hence, the statement²⁸:

"A surrender was the opposite of a release: in a release the greater future estate was abandoned to and enlarged the smaller particular estate; in a surrender the smaller particular estate was given up to and merged in the greater future estate."

32 These terms and the notions they expressed were adopted, by analogy, to conveyances which had as their subject-matter equitable rather than legal interests²⁹. Where, as in the case of the Trust Deed, the subject-matter is interests in a fund rather than in land, the analogy must be imperfect because possession in the sense used in old system conveyancing is not to be found. It also may be that, with respect to dealings in equitable interests, the distinction drawn between a surrender and a release is not necessarily observed and that "surrender" may be used to identify what technically is a "release".

33 However, there remains the essential characteristic of the enlargement of one interest by absorption or "drowning" of the other. This is of particular significance where the statutory context is directed to transfers and conveyances and, in particular, to the passing of value without reciprocal consideration. In the present case, contrary to the view taken in the Full Court, the effect of the redemptions was not the receipt or acquisition by the remaining Unit Holder of any "beneficial interest" held by the Unit Holders who had obtained the redemption of their respective units.

34 The use of terms such as "beneficial interest" is apt to mislead when applied to beneficiaries' interests in a discretionary trust. As effected by cl 4 of the Trust Deed, the Unit Holders were denied any specific interest in any item of property held in the Trust Fund³⁰. Rather, the rights enjoyed by Budget and Galaxy as Unit Holders were, upon favourable exercise by the Trustee of its discretion conferred by cl 34, transmuted by the redemption process into the entitlement to

27 *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 6.

28 *Halsbury's Laws of England*, 4th ed, vol 39, §577.

29 Spence, *The Equitable Jurisdiction of the Court of Chancery*, (1849), vol 2 at 874-876.

30 cf *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 313-314.

the price arrived at by the valuation for which cl 36 provided. This, as indicated earlier in these reasons, was in fulfilment of the rights of Budget and Galaxy, not the "surrender", in the sense of that term in the definition of "transfer" in s 71(15) of the Act, of a beneficial interest or potential beneficial interest in or in relation to the assets represented by the Trust Fund.

- 35 Paragraph (b) of the definition of "transfer" in s 71(15) also uses the term "renounce". It is not clear to what extent, in the alternative, the Solicitor-General for South Australia relied upon this as a basis for imposing the duties. Budget and Galaxy exercised rather than renounced their rights. "Renounce" may be used here in the sense of a disclaimer or abandonment which results in either refusal to accept a benefit³¹ or extinguishment, without replacement, of an interest held by one party and which, in either case, has the practical effect of conferring or swelling the value of the interest of another. An example, again from old system conveyancing, is the yielding up by the holder of a rent charge, *profit à prendre* or easement to the owner of the land subject thereto. This operates by way of an "extinguishment" of that burden, and is described by Challis³² as an instance of:

"the annihilation of a collateral thing in the subject out of which it issues, or in respect to which it is enjoyed".

The redemptions by Budget and Galaxy involved the cancellation (under cl 35) of their units but they were not renunciations in any of the senses discussed above.

- 36 The appeal should be allowed with costs. The orders of the Full Court should be set aside. In place thereof, the appeal to the Full Court should be dismissed with costs. This will have the effect of reinstating the orders made by Debelle J.

31 See *Federal Commissioner of Taxation v Cornell* (1946) 73 CLR 394 at 401-402; Crago, "Principles of Disclaimer of Gifts", (1999) 28 *University of Western Australia Law Review* 65.

32 *Challis's Law of Real Property*, 3rd ed (1911) at 88.