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IN THE PRIVY COUNCIL

No.18 of 1970

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

DOLORES HAY McCLELLIAND Appellant

and

THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA Respondent

CASE FOR THE APPELLANT

RECORD

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- 10 1. The questions raised by this appeal are:
Was any part of the sum of £153,632 (\$307,264)
received by the Appellant as the sale price of
land either income according to ordinary
concepts or rendered income by Section 26(a)
of the Income Tax Assessment Act of the Common-
wealth of Australia.
- 20 2. Windeyer J of the High Court of Australia
at first instance and Sir Garfield Barwick CJ
on appeal thought not. Kitto, Menzies and Owen
JJ thought that it was. It is from their
majority decision that this appeal (by special
leave of this Board) is brought. p.48 1.44
p.58 1. 6
p.66 1.26
p.66 1.32
p.67 1. 3
3. The circumstances in which the Appeal is
presented are set out in the following para-
graphs numbered 4 to 22 inclusive of this Case.
4. Henry John Spaven of Shark Bay in the State
of Western Australia Pastoralist died on the
27th September 1958 and by his will left his p. 3 1.28

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p.77 1.10		
p. 3 1.31 p.20 1.40	5. Part of the estate consisted of an area of land at Rockingham in the said State. The land was let on agistment.	
p. 4 1.24	6. In July 1962 conversion of the assets of the estate into money had not been completed and in particular the trustees still retained the Rockingham land. The Appellant wished the land to remain unconverted and to be conveyed to herself and her said brother in equal shares.	10
p.26 1.28	7. The trustees were unwilling to convey the land to the Appellant and her brother until £10,000 was provided to secure the interests of other persons under the Will. The Appellant's brother wished to realise his interest immediately and claimed to have a potential buyer for it for the sum of £40,000. The Appellant was anxious not to sell her interest or the land, but desired to retain them against the future when she thought the land would become more valuable, particularly if then sold for subdivision. She did not want a stranger as her co-tenant and therefore desired, if her brother did not retain his interest, to be in sole control of the land. She asked for the land to be partitioned, thus giving her sole control of what would then be hers, but to this her brother would not agree. Thus, to achieve her purpose, she had no alternative but to buy out her brother but she lacked the ready money to do so. To achieve her purpose of retaining at least the more valuable portion of the land, she conceived a plan which involved the purchase of her brother's interest at his price by means of money obtained by the sale of some of the less valuable land. The Appellant's purpose in conceiving and carrying out this plan was to	
p. 5 1. 9 p. 6 1.18		20
p. 4 1.26		
p. 5 1.14		30
p. 6 1.26		
p.14 1.23		40

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- to ensure as far as she could that the land would
 140 not be sold until some time in the future and
 that she would be in control of it. to 1.40
- p.83 8. On the 26th July 1962 the Appellant obtained p.83 1. 1
 from her brother an option expressed as
 follows :-
- 10 "I hereby agree to give you an option to
 purchase my $\frac{1}{2}$ share in Rockingham land of
 the Estate of the late H.J. Spaven for
 £40,000 cash, option to be exercised in
 writing by 15/9/62 at 5.00 p.m. Deposit
 10% to be paid on exercise of option,
 balance on transfer of title.
- Reg Spaven"
9. The Appellant had consulted a town planning p.14 1.23
 specialist as to how much of the land would
 have to be sold to provide the £40,000 and the
 further £10,000 which the trustees required to
 be paid to them for purposes of the estate
 20 before they would part with the land.
10. Acting on the advice so received the p. 7 1.18
 Appellant had a plan prepared which divided
 the land into three parts of which one
 (identified by the number 5) was the area
 which would have to be sold. to 1.32
11. On the 10th September 1962 the Appellant p.17 1.29
 was assured that she could find a buyer and she
 exercised the option by notice in the following
 terms -
- 30 "I hereby exercise the option the subject p.83 1.14
 of your memorandum of 26/7/1962 to purchase
 for £40,000 your half share in Rockingham
 land of the estate of the late H.J. Spaven.
 Herewith £4,000 being 10% deposit as
 required".
12. On the 5th October 1962 the Appellant p. 9 1.23
 entered into a contract to sell the part p.89 1. 1
 required to be sold at a price to be determined
 on an acreage basis after survey, but providing

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for a deposit of £50,000 to cover the £10,000 required by the trustees and the £40,000 required by the aforesaid Reginald Spaven.

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13. On receipt of the deposit of £50,000 the Appellant paid the amount required by the trustees and the balance payable to her brother and the Trustees transferred to her an unencumbered estate in fee simple in possession of the whole of the Rockingham land.

p.84 1.00

14. The price for the land sold was determined and paid to the Appellant before the 30th day of June 1963, and title given to the purchasers. The net amount received by the Appellant in respect of the sale (after deduction of certain expenses but inclusive of deposit) was £153,632 (£307,264).

p.47 1.28

15. Section 26 of the Income Tax Assessment Act 1936-1965 of the Commonwealth of Australia reads so far as material:

"The assessable income of a taxpayer shall include - 20

(a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit - making undertaking or scheme";

p.71 1.00

16. By assessment dated the 5th day of August 1966 the Deputy Commissioner of Taxation for the State of Western Australia on behalf of the Respondent assessed the Appellant for income tax under the aforesaid Act on, inter alia, £113,902 as profit arising from the aforesaid sale during the year ended 30th June 1963. The amount is calculated by assuming that of the price received by the Appellant half (£153,632) was the sale price of the interest of the said Reginald Spaven and that of the amount of £80,000 (£40,000) paid to him by the Appellant £38,730 represented the consideration for his

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interest in the part sold, the difference (i.e. \$153,632 less \$38,730 viz \$113,902) being taxable profit

17. In accordance with the procedure provided by the Income Tax Assessment Act the Commissioner on the 11th day of August 1967 treated the Appellant's objection to his assessment as an appeal and forwarded it to the High Court of Australia. The appeal was heard by Windeyer J on the 28th September 1967 and on the 8th November 1967 His Honour allowed the Appellant's appeal with costs and set the Commissioner's assessment aside. His Honour further directed the Commissioner to re-assess the tax payable by the Appellant without including in her assessable income any part of the proceeds of the sale by her of any part of the land at Rockingham which formed part of the Estate of Henry John Spaven, deceased. The Commissioner thereupon appealed from that decision to the Full Court of the High Court of Australia which by a majority, consisting of Kitto, Menzies and Owen JJ. on the 28th February 1969 allowed the appeal with costs and set aside the order made by Windeyer J. From that decision the Chief Justice Sir Garfield Barwick CJ dissented.
18. On the 28th November, 1969 special leave was granted to the Appellant by Her Majesty in Council to appeal from the order of the Full Court to Her Majesty in Council.
19. The Appellant submits that the decision of the Full Court should be reversed and the Order of Windeyer J restored for the reasons hereinafter appearing
20. Windeyer J decided that no part of the sum received by the Appellant was income under either limb of S.26(a) of the Income Tax Assessment Act. (It was not contended before Windeyer J or the Full Court that the sum was income under ordinary concepts).

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21. Sir Garfield Barwick C.J. decided that no part of the sum received was income either under S.26(a) or according to ordinary concepts.

22. Kitto J with whom Menzies J and Owen J concurred decided that the amount brought to assessment by the Respondent was income of the Appellant both under the second limb of S.26(a) and under ordinary concepts.

23. The judgment of the majority of the Justices of the Full Court agrees that the Appellant bought nothing for resale. It is not in dispute that what she bought from her brother and all she bought from him, was his interest in the land. As a result, the entire interest in the land became hers. 10

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The judgment accepts that "in order to be able to retain most of the part that she expected would increase greatly in value" the Appellant was forced to buy out her brother and to sell part of the land. It was thus to retain her inheritance as far as possible that she enlarged it by extinguishing her brother's interest and as a step to that end sold part of her inheritance as so enlarged. 20

24. Yet the judgment finds in that sale the essential to support the assessment. The Appellant has sold no more and may never sell more, than the part sold in order to buy out her brother, for her evidence in this connection, was "I was not interested in selling at all. I wanted to hold the land. I have a family." 30

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to
1.36

"I just know I wanted to hold the land and I did not know how much I could afford to sell because I had to meet this price."

25. The Appellant contends that her dominant purpose at all times was to retain her inheritance. The finding of the learned trial judge (Windeyer J) in this respect was: "She was keenly interested in turning to account to the best advantage of herself and her family 40

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to
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what her uncle had left her. To this end, she wished that the land should not be sold, but that it should be retained against a rise in its market value. ---- I am satisfied that her dominant purpose throughout was to ensure as far as she could that the land would not be sold until sometime in the future and that she would be in control of it."

p.44 1.30

10 26. Despite this Kitto J. inferred that the only purpose of the Appellant was:

"To enable herself to sell the fee simple in these lands, that is to say, to sell a part of it immediately and the rest at a future time. She had no other purpose than that of selling the entirety and doing so in such a way as would bring the best price".

p.62 1.13

20 The learned judge went on to say that this meant sale in subdivision. It is true that the main purpose of the Appellant as found by the trial judge was that the land should be kept for subdivision later but there is no justification for the inference that the Appellant herself would engage in subdivisional sales. Furthermore, if the motive of the Appellant was to benefit her family as contrasted with herself then whatever the methods she adopted her scheme would not produce income for her.

p.38 1.48

30 27. Even if the purpose of the Appellant had been as inferred by Kitto J. it is submitted that the purpose and effect of the steps taken by the Appellant were to realise an inheritance and that the steps taken to that end (as found by Windeyer J and the Chief Justice) did not constitute a profit-making scheme within the meaning of Section 26(a) of the Act nor can the Appellant be considered to have utilised her inheritance in an adventure in the nature of trade so as to make any part of the proceeds of sale taxable as income on ordinary concepts.

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28. The majority in the words of Kitto J say:

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"In the present case, what the Respondent bought was her brother's half interest in the Rockingham lands, and her purpose was to enable herself to sell the fee simple in those lands, that is to say, to sell part of them immediately and the rest at a future time. She had no other purpose than that of selling the entirety, and of doing so in such a way as would bring in the best price. This means that the plan she finally worked out and adopted was a plan for the making of profit by selling part of the lands immediately and the rest at a future time, at prices which would show her a profit over what she had laid out. The learned judge rightly held that her purpose was not one of profit-making by sale of the brother's half interest either in Lot 5 or in the whole of Rockingham land; but the point to which I respectfully think that his Honour did not give due weight is that the purpose was one of profit-making by a process which involved bringing both that half interest and her own to an end by uniting them in her own hands and then selling the resulting entirety in subdivision, over a period for more than the entirety had cost her." 10

29. As to this the Appellant submits:

- p.62 1.25 (a) to say that the purpose of acquiring the brother's half interest was the making of profit is inconsistent with the finding that the Appellant had no purpose of profit-making by sale of the brother's half interest in part or whole of the land. The Appellant would respectfully adopt what was said by Sir Garfield Barwick CJ and Windeyer J to that effect. 30
- p.54 1.38 et seq.
- p.43 1.29 (b) this inconsistency led their Honours to disregard the distinction between gain resulting from an enhancement of value on the realisation of a security and a gain made in an operation of business in carrying out a scheme for profit-making. 40

10 On the true analysis the Appellant got her half interest in the land by gift and thus on capital account. This interest she expanded by buying out her brother. What she acquired was not something intended to be re-sold but the removal of an impediment to the retention of her inheritance. Her expanded interest she held on capital account. Part of that expanded interest she exchanged for cash. The cash shared the character of the asset realised and was held on capital account. That she sold part immediately merely recognizes that this was the only way in which she could retain her interest; it does not determine the character either of her original or her expanded interest in the land.

20 (c) If the dominant motive of a taxpayer is not the sole criterion of the assessability of a monetary gain and regard is to be had to the method of implementing that motive, the Appellant respectfully adopts the conclusion of the learned Chief Justice that neither alone nor in conjunction did any of the formal steps taken by the Appellant support the view that the Appellant had decided to carry on a business or a profit-making scheme within S.26(a).

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p.54 1.16
p.55 1.23
to
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30 30. The judgment of the majority proceeds: "What it had cost her consisted of the half interest she became entitled to under the will plus £40,000. The excess arising from the carrying out of the scheme would plainly be profit which would answer the description in the second limb of Section 26(a) and would also, I think, be income according to ordinary concepts since it would be the net proceeds of an adventure in the nature of trade".

40 p.62 1.36

31. Of this the Appellant submits that it is wrong to say that the entirety had cost the Appellant anything. To say that in fact it cost

her her inheritance at a valuation denies a gift its nature and treats it as the opposite of what it is: it treats it as a purchase and the donee as a purchaser and indeed a purchaser who bought for resale. There is no provision in the Income Tax Assessment Act that permits an assessment upon a fiction. The necessity to resort to one but illustrates the error, so the Appellant submits, of the reasoning. That error is the greater when it is later said that Section 170(9) permits the attribution of a purchase price to what is in fact a gift. The truth of the matter is that there was no profit derived by her either as that term is used in Section 26(a) or at all. 10

32. The Appellant will submit that no part of what the Appellant received was income on ordinary concepts or made assessable income by Section 26(a) for the following reasons viz:-

Income on ordinary concepts 20

(a) The question to be determined is - Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

Californian Copper Syndicate (Limited and Reduced) v. Harris (1904) 5 T.C. 159, 165-166; White v. Commissioner of Taxation of the Commonwealth (1968) 43 ALJR 26 (per Barwick C.J.), 27-28 (per Taylor and Owen JJ); The Alabama Coal, Iron and Colonization Co. Ltd. v. Mylam (1926) 11 T.C. 232. It is not contended that repetition is necessary in order to identify an operation as one of business. Barry v. Cordy (1946) 2 AER 396; but whether what has been done in any particular case is simply the realisation of an inheritance or amounts to an embarking upon a trade is a question of degree: Pilkington v. Randall (1966) 42 T.C. 662. In this case there has been no repetition nor are there any other indicia of an embarkation upon a trade. As found by 30 40

the learned trial judge the Appellant's reason for acquiring her brother's share was "so that she might realise her plan of retaining her interest under her uncle's will as far as possible in the form of land". It is implicit in this finding that the making of a profit by realising her brother's share was not her reason and consequently her gain was not income.

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Section 26(a)

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(b) The section does not reach capital gains. Premier Automatic Ticket Issuers Ltd. v. Federal Commissioner of Taxation (1933) 50 CLR 268 at 297. It but repeats the language of the Lord Justice Clerk in Californian Copper Syndicate (Limited and Reduced) v. Harris (1904) 5 T.C. 159, 165-166. In Hobart Bridge Co. Ltd. v. Federal Commissioner of Taxation (1951) 82 C.L.R. 372, 383 Kitto J said "In my opinion the receipt of the compensation moneys was a receipt on capital account and the profit which those moneys contained was a capital increment. A long line of cases from Californian Copper Syndicate v. Harris (1904) 5 T.C. 159 to Scottish Australia Mining Co. Ltd. v. Commissioner of Taxation (1951) 81 C.L.R. 188 establishes that such a profit is not within the category of assessable income either on general principles or by reason of the express provision contained in S.26(a)". The decision of the High Court in Official Receiver v. Federal Commissioner of Taxation (Fox's case) (1956) 96 C.L.R. 370 contains nothing to the contrary: see White v. Commissioner of Taxation of the Commonwealth (1968) 43 ALJR 26, 27-28. It is to be noted that S.26(a) does not purport to determine what is income but to determine what income is assessable and some guide as to what is comprehended within the meaning of 'income' is to be derived from the definition of "income from personal exertion" in Section 6(1). The interpretation contended for by the Appellant is consistent with that applied to

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Section 52. English cases deciding whether a receipt is in truth capital are also directly in point. One of such cases is Leeming v. Jones (1930) 1 KB 279, (1930) A.C.415, 15 T.C. 333. Thus the Appellant submits that Section 26(a) does not render any part of what she received assessable income.

33. The decision of the Full Court of the High Court should be set aside and that of Windeyer J restored for the following among other

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Reasons

- (1) What the Appellant received was capital not income.
- (2) No part of what she received was made assessable income by the second limb of Section 26(a) of the Income Tax Assessment Act.
- (3) The decision was wrong in holding that the Appellant utilised her inheritance for the purpose of an adventure in the nature of trade. 20
- (4) The attribution to the Appellant of an intention herself to sell the land by subdivision was against the evidence and the findings of the learned trial Judge.
- (5) The judgments of Sir Garfield Barwick C.J. and of Windeyer J were right and that of the majority was wrong.
- (6) For the reasons advanced in this Case.

M.H. BYERS Q.C.,
PE. Whitworth

IN THE PRIVY COUNCIL

No.18 of 1970

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

DOLORES HAY McCLELLAND Appellant

and

THE COMMISSIONER OF TAXATION OF
THE COMMONWEALTH OF AUSTRALIA
Respondent

CASE FOR APPELLANT

M.L. MOSS AND SON /
Solicitors,
Western Australia House,
115 Strand,
London, W.C.2.

Agents for the Appellant and
her Solicitors

DWYER & THOMAS,
49, William Street,
Perth,
Western Australia.