

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

IN THE MATTER of the Estate of MILTON SPENCER ATWILL deceased
AND IN THE MATTER of the Stamp Duties Act, 1920-1964

B E T W E E N :

THE COMMISSIONER OF STAMP DUTIES Appellant

- and -

10 ALAN CAVAYE ATWILL, MILTON JOHN NAPIER ATWILL and DAVID NAIRN
REID

Respondents

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

CASE FOR THE APPELLANT
THE COMMISSIONER OF STAMP DUTIES

Record

1. This is an Appeal from a final judgment of the Full Court of the High Court of Australia given on 3rd December, 1971. Special leave to appeal to Her Majesty in Council from the said judgment has been
20 duly granted by Order in Council. p.45 pp.74-5

2. The said judgment was given on appeal from a judgment of the Supreme Court of New South Wales (Court of Appeal Division) pronounced on 27th November 1970 upon the hearing of a case stated by the Commissioner of Stamp Duties (the Appellant herein) on the requisition of the Respondents herein, pursuant to Section 124 of the Stamp Duties Act, 1920 (as amended) of the State of New South Wales. p.11 pp.1-10

3. The more material parts of Section 124 of the said Act are as follows :
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"124.(1). . . any administrator or other person liable to the payment of death duty, who is

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(cont'd)

dissatisfied with the assessment of the Commissioner may . . . deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Court of Appeal.

(2) The Commissioner shall thereupon state and sign a case accordingly, setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided . . .

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. . .

(4) On the hearing of the case the Court of Appeal shall determine the question submitted, and shall assess the duty chargeable and also decide the question of costs.

. . .

(7) On the hearing of the case the Court of Appeal shall be at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom if proved at a trial.

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. . ."

4. The Respondents are the administrators, within the meaning of the said Section 124, and are liable to the payment of death duty in respect of the estate of Milton Spencer Atwill deceased (hereinafter called "the Settlor") who died domiciled in the State of New South Wales on 24th November 1965.

5. The substantial question decided in the respective judgments of the Supreme Court and the High Court and which arises on this Appeal is whether for the purpose of the assessment and payment of death duty there should be included in the dutiable estate of the Settlor 20 shares in Langton Pty. Limited (hereinafter called "the subject shares") which at the time of the death of the Settlor were held by trustees upon the trusts of a settlement created by the Settlor on 27th November, 1953.

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6. The said settlement was constituted by the payment by the Settlor to certain trustees of the sum of £200 contemporaneously with the execution by the Settlor and by the said trustees of a deed bearing date 27th November 1953 the terms of which are set out in the Schedule to the abovementioned stated case. In exercise of the powers conferred on them by the said deed the said trustees (of whom the Settlor was one) invested the said sum of £200 in

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the acquisition, by application and allotment, of the subject shares and thereafter continued to hold the subject shares on the trusts of the said deed until, and so held the same at, the time of the death of the Settlor.

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10 7. The Court of Appeal (Asprey, Mason & Moffitt JJ.A.) unanimously held that the subject shares were brought into the dutiable estate of the Settlor by virtue of the operation of Section 102(2)(a) of the Stamp Duties Act, 1920 (as amended) as extended by Section 102(2A) of the said Act in the case of three of the subject shares which were registered on a Register of Langton Pty. Limited situated outside New South Wales. pp.12-32

8. The High Court of Australia by majority (Barwick C.J., Windeyer and Owen JJ., Menzies and Walsh JJ. dissenting) held that the subject shares were not brought into the dutiable estate of the Settlor by virtue of the operation of the abovementioned provisions of the said Act. pp.45-71

20 9. The more material parts of Sections 102(2)(a) and 102(2A) of the said Act are as follows :

"102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property -

30 (1) (a) All property of the deceased which is situate in New South Wales at his death.

And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death . . .

to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.

40 (2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:

Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

. . .

(2A) All personal property situate outside New South Wales at the death of the deceased, when -

. . .

(b) the deceased was, at the time of his death, domiciled in New South Wales; and

(c) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of paragraph (2) of this Section.

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. . ."

10. It has at all stages been conceded that the above-mentioned deed of 27th November 1953, contains a "trust . . . to take effect after" (the Settlor's) "death" within the meaning of Section 102(2)(a), to which trust the subject shares were subject at the time of the Settlor's death. The substantial issue of law which arises in this Appeal relates to the effect of that part (hereinafter called "the final part") of Section 102(2)(a) introduced by the words "Provided that". It was held unanimously by the Court of Appeal that the effect of the final part of Section 102(2)(a) is to bring to duty all property which at the time of the death of the deceased is subject to the relevant trust, regardless of whether that specific property had been the subject of the deceased's disposition. On appeal to the High Court it was held by each of the Justices comprising the majority that the effect of the final part of Section 102(2)(a) is to bring to duty only so much (if any) of the specific property which had been the subject of the deceased's disposition as at the time of the death of the deceased remains subject to the relevant trust. Each of the Justices comprising the minority in the High Court held that the effect of the final part of Section 102(2)(a) was as had been decided by the Court of Appeal. The Appellant submits that the opinions of the members of the Court of Appeal and of the minority Justices in the High Court are correct. The principal contentions which the Appellant would put in support of his submission are set forth in paragraphs 11, 12, 13 and 14 hereunder.

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11. The relevant words of Section 102(2)(a) are plain and unambiguous. They state that "the property deemed" (i.e., by virtue of Section 102(2)(a)) "to be included in the estate of the deceased" (and thus brought to duty) "shall be the property which at the time of his death is subject to" a trust fulfilling certain conditions. The conditions are (i) that the trust is contained in a settlement by which the deceased has disposed of property, (ii) that it was a trust in respect of the property so disposed of, and (iii) that it is a trust to take effect after the deceased's death. The Section thus clearly brings to duty the subject shares in the present case.

12. The construction of Section 102(2)(a) adopted by the majority in the High Court is inconsistent with the words of the Statute. Such a construction necessarily involves substituting for the words "the property which" in the final part of Section 102(2)(a) some such words as "so much of the said property as". To make such a substitution is contrary to the first principle of statutory interpretation that "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency but no further" (Grey v Pearson (1857) 6 H.L.C:61 at 106). In the present case adherence to the grammatical and ordinary sense of the words of the Section does not lead to any absurdity or any repugnance or inconsistency with the rest of the Act.

13. The construction of Section 102(2)(a) adopted by the majority of the High Court is inconsistent with the following decisions :

- (i) The decision of the Supreme Court of New South Wales and of the Privy Council in Rabett v Commissioner of Stamp Duties 27 S.R. (N.S.W.) 370, 1929 A.C.444.
- 40 (ii) The decision of the Supreme Court of New South Wales in In re Gillespie 49 S.R. (N.S.W.) 331 (reversed on other grounds by the High Court of Australia (79 C.L.R.477) such reversal being confirmed by the Privy Council (1952 A.C.95));
- (iii) The decision of the High Court of Australia in Kent v Commissioner of Stamp Duties 106 C.L.R.366.

14. The Appellant adopts as part of his submission the following statements from the judgments of Mason J.A.

Record in the Court of Appeal and of Menzies J. in the
(cont'd) High Court in the present case :

p.28.1.1 (a) Mason J.A. (92 W.N.(N.S.W.) 869 at 876-878):
p.30.1.26

"When an examination of the language of s.102
(2)(a) is made with the object of identifying
the property which is included, or deemed to
be included, in the dutiable estate of a
deceased person, by force of the operation of
the provision, it is immediately apparent
that the language of the proviso, according
to its natural and ordinary meaning, seems to
answer that inquiry by saying that the property
to be so included is the property which is
subject to the trust at the time of the death
of the deceased person. So much was, I think,
conceded by the argument advanced on behalf of
the appellants which called in aid countervailing
considerations sought to be derived from reading
the sub-paragraph as an entire provision, from
the character of the proviso as a proviso and
from judicial observations made in connection
with other sub-paragraphs in s.102(2).

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The application of the first part of s.102(2)(a)
is not without its difficulties. Clearly enough
it is capable of applying to property the subject
of a trust taking effect after the death of a
deceased person which is contained in a settle-
ment where the deceased has disposed of the
property by that settlement. No difficulty
arises in circumstances where it is a deed of
settlement that effects the disposition of the
property and the property disposed of is subject
to the trust at the date of the deceased's
death, its identity not having changed. If
however it is sought to apply the first part of
the provision in circumstances where the legal
title to property passes from the deceased
otherwise than by means of a deed of settlement,
the deed defining the trusts and the beneficial
interests in the property, it is not as apparent
that the property has been disposed of by the
settlement. But in such a case it is the
definition of the word "settlement" contained in
s.100 of the Act that enables one to say that
property has been disposed of by the settlement.
As defined, "settlement" includes any
disposition of property whereby any property is
settled or agreed to be settled or containing
any trust or disposition of any property to take
effect after the death of any person, except a
will.

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10 There is a second difficulty which is not met by
the first part of s.102(2)(a), if regard is had
to that part alone. Were it not for the guidance
furnished by the proviso the result might follow,
indeed probably would follow, that only that
property which was the subject of disposition by
the settlement, valued at the date of death in
accordance with s.105(2), would form part of the
dutiabale estate. Whatever the true outcome of
that hypothetical question, the significant point
is that, but for the existence of the proviso, a
difficult problem of interpretation would have
arisen, a problem of the kind that has loomed so
large in the course of applying other sub-
paragraphs of s.102(2) since they were first
enacted - see Sneddon v. Lord Advocate (1954)
A.C.257; Commissioner of Stamp Duties v. Gale
(1958) 101 C.L.R.96; Gale v Federal Commissioner
20 of Taxation (1960) 102 C.L.R.1. When the nature
of the problem which would have arisen but for the
presence of the proviso is fully appreciated, it
seems inescapable that its function was to provide
a solution for that problem by ensuring that what
is to be included, or deemed to be included, in the
dutiabale estate is the property that is the subject
of the relevant trust at the date of death. The
true role of the proviso as it is thus suggested by
the setting in which it is to be found confirms the
interpretation which should be accorded to the
30 language of the proviso according to its natural and
ordinary meaning.

It is of no little importance that the proviso, as
it is expressed, is directed not to the mode of
valuation of the property to which it relates, but
to a preliminary matter, namely the description or
identification of the property itself. Indeed,
because it is not suggested that s.102(2)(a)
displaces the ordinary rule enunciated by s.105(2),
there is no occasion for the sub-paragraph to
40 address itself to the mode of valuation.

It is not a valid criticism of the conclusion which
I have reached to say that it accords to a proviso
a function which is too extensive in that it
enlarges the operation of the principal provision.
It is clear enough that on the construction which
I favour what is denoted by the word "property" in
the proviso may differ from that which is denoted
by the word in the principal provision. In some
cases property which is subject to the trust at the
50 date of death will be more extensive and more
valuable than the property which initially was the
subject of the disposition, but this will not
always be so and in some cases the property subject

to the trust will be less extensive than it was formerly. In these circumstances it is not correct to say that the function of the proviso is one of enlargement; its function is that of clarification, for it may be said to qualify the operation which might otherwise be given to the principal provision if it stood in isolation.

The clarification provided does produce an apparent disharmony as between the references to "property" in the first part of s.102(2)(a) and in the proviso. In each case the property is included in the dutiable estate, in the first case by the operation of the opening words in s.102. That apparent disharmony which arises from any change in the nature of the trust property between the date of disposition and the date of death is resolved when paramount effect is given to the specific direction contained in the proviso".

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(b) Menzies J. (45 A.L.J.R.703 at 705-706):

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"I recall that the language of statutes imposing a duty must receive a strict construction; I recall too that an enactment expressed as a proviso is prima facie a limitation rather than a positive enactment; nevertheless, the more I look at s.102(2)(a) I find that the language is clear and unambiguous and requires that property which is, at the date of the death of a deceased person, subject to a trust to take effect after his death, contained in the settlement whereby he disposed of property, must be included in his dutiable estate. In these circumstances the rule of construction to be applied is the first rule of statutory construction viz. "If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning". See Halsbury, 3rd ed., vol.36.p.388.

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I reflect too, that, had it been intended merely to limit the operation of s.102(2)(a) to property disposed of by the deceased which, at the time of his death, remained subject to the trust contained in his settlement, it is difficult to imagine a choice of words less apt to do this and no more. That the proviso does this as part of its operation, as I think, perhaps explains why it is cast in the form of a proviso.

Furthermore, it seems to me highly unlikely that it was intended that, if a settlor did dispose of

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10 property by a settlement containing a trust in respect of that property, to take effect after his death, any change in the investment of the property subject to the trust would take that property beyond s.102(2)(a). Thus, if a deceased person were to have settled \$100,000, paid to trustees in cash or by cheque, upon a trust to take effect after his death, with power in the trustees to invest the money, s.102(2)(a) would apply only while the trustees held the cheque or cash and, as soon as they invested it, whatever be the investment, that investment would fall outside the operation of s.102(2)(a) because the property, then subject to the trust, had not been disposed of by the deceased".

15. The Appellant humbly submits that this appeal should be allowed with costs and that the judgment of the Court of Appeal should be restored for the following amongst other -

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R E A S O N S

- (1) BECAUSE Sections 102(2)(a) and 102(2A) of the Stamp Duties Act, 1920 (as amended) bring to duty the subject shares in the present case namely, 20 shares in Langton Pty. Limited.
- (2) BECAUSE the decision of the Supreme Court of New South Wales (Court of Appeal Division) was correct.

FORBES OFFICER QC

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M.H. McLELLAND

Counsel for the Appellant

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF
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MILTON SPENCER ATWILL deceased

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B E T W E E N :-

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Appellant

- and -

ALAN CAVAYE ATWILL,
MILTON JOHN NAPIER ATWILL and
DAVID NAIRN REID

Respondents

CASE FOR THE APPELLANT
THE COMMISSIONER OF STAMP DUTIES

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