

PARTIES: CRAMBROOK NOMINEES P/L
(ACN 009 620 311)
v
COMMISSIONER OF TAXES

AND:

BLAKE CORPORATION P/L
(ACN 009 624 364)
v
COMMISSIONER OF TAXES

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: LA8/2000 (20006987)
LA15/2000 (20009576)

DELIVERED: 13 October 2000

HEARING DATES: 30 August 2000

JUDGMENT OF: THOMAS J

CATCHWORDS:

APPEAL – DECISION OF COMMISSIONER OF TAXES – OBJECTIONS AGAINST
ASSESSMENTS – STAMP DUTY

Appeal – appeal against decision of Commissioner of Taxes – objections against assessments of stamp duty – assessment be varied to nil or remitted for reassessment - transfer exempt from duty – instrument upon which duty can be assessed – trust property – subject to mortgage – amendment to trust deed – whether transfer for valuable consideration – appellants not cross-examined – established that transfer not made for valuable consideration – doctrine of fiscal nullity does not apply – transaction not equivalent of a sale – appeal allowed

Taxation (Administration) Act 1978 (NT) s 4 (1) and s 101; *Stamp Duty Act 1978 (NT)* s 4 and s 9A (b)

Mortimore v Commissioner of Inland Revenue [1864] 2 H & C 347; *The Great Western Railway Company v Inland Revenue Commission* [1894] 1 QB 507, *Merritt v Merritt* [1970] 1 WLR 1211; *Browne v Dunn* (1893) 6 R (HL) 67; *In Re The Land Tax Act 1887; Ex Parte Finlay* (1884) 10 VLR (E) 68; *Comptroller of Stamp (Vic) v Rylaw Pty Ltd* 81 ATC 4,411, cited

BL & M Grollo Homes Pty Ltd v Comptroller of Stamps (Vic) [1983] 1 VR 445;
Commissioner of Stamp Duties (NSW) v Buckle (1998) 192 CLR 226; *Comptroller of Stamps (Vict) v Ashwick (Vic) No. 4 Pty Ltd* (1987) 163 CLR 640, referred to

Gutwenger v Federal Commissioner of Taxation (Cth) 95 ATC 4,008, considered

REPRESENTATION:

Counsel:

Appellant:	D Russell QC
Respondent:	R Webb

Solicitors:

Appellant:	Noonans Lawyers
Respondent:	Morgan Buckley

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Crambrook Nominees P/L & Blake Corp P/L v Commissioner of Taxes
NTSC 86 No. LA8/2000 & LA15/2000

BETWEEN:

CRAMBROOK NOMINEES P/L
(ACN 009 620 311)
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

AND:

BLAKE CORPORATION P/L
(ACN 009 624 364)
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 13 October 2000)

- [1] These matters are both appeals pursuant to s 101 of the Taxation (Administration) Act 1978 NT (“the TAA”) against decisions of the Commissioner of Taxes (“the Respondent”) disallowing objections against assessments of stamp duty. Section 101 of the Taxation (Administration) Act states:

“(1) An objector who is dissatisfied with a decision of the Commissioner on his objection may, within 30 days after service on him of notice of that decision or within such further time as the Commissioner may allow, appeal to the Supreme Court.

(2) On appeal –

(a) the appeal shall be limited to the grounds stated in the objection; and

(b) the burden of proving that any assessment objected to is excessive lies on the objector.

(3) If a person’s liability or assessment has been reduced on an objection, the reduced liability or assessment shall be the liability or assessment appealed against.”

[2] There are no material differences between the two appeals which with the consent of all parties were heard together.

[3] The grounds of appeal in respect of matter LA8 of 2000 (20006987) are as follows:

- “1. The Appellant appeals to the Court pursuant to section 101 of the *Taxation (Administration) Act 1978* against an assessment of Stamp Duty made by the Respondent on 11 June 1999 (“the assessment”) purportedly on an agreement said to be made on 24 November 1998 in the sum of \$82,722.15.
2. The only material document submitted to the Respondent for assessment of duty was a transfer of certain lands dated 24 November 1998 (“the transfer”). The assessment relates to this instrument.
3. The transfer was not made subject to, and did not comprise an agreement within the meaning of that term as defined in the *Taxation (Administration) Act 1978* as applicable to the Stamp Duty Act 1978 (collectively “the Acts”).
4. The transfer was:
 - a) A conveyance
 - b) Made by a trustee, namely Better Homes Pty Ltd (“the trustee”), to the Appellant
 - c) Not made for valuable consideration

- d) In conformity with a validly constituted trust, namely the Rockton Unit Trust
- d)(sic)Of property which was acquired by the trustee by virtue of an instrument of which was duly stamped, namely the subject property details of the prior stamping in relation to which had previously been supplied to the Respondent.
- 5. In the premises the transfer was exempt from duty by reason of paragraph (b) of item 9A of Schedule 2 of the Stamp Duty Act 1978.
- 6. There is no principle of law, and no provision of any Act, which entitled the Respondent to assess the transfer otherwise in accordance with the provision referred to in paragraph 5.
- 7. Specifically, the fact that the subject property was at the time of transfer subject to an encumbrance did not entitle the Commissioner to assess duty thereon in the manner in which he did in the assessment or at all.
- 8. There is no instrument upon which duty of the type described in the notice can be assessed other than the transfer.
- 9. Alternatively, the foregoing grounds apply in relation to each such instrument.”

[4] The orders sought by the appellants in this matter are as follows:

- “(a) an order that the assessment be varied to nil or accordingly some other amount less than \$82,722.15;
- (b) alternatively an order that the assessment be remitted to the Respondent for reassessment according to law; and
- (c) costs.”

[5] The grounds of appeal in respect of matter LA15 of 2000 (20009576) are as follows:

- “1. The Appellant appeals to the Court pursuant to Section 101 of the *Taxation (Administration) Act* 1978 against an assessment of Stamp Duty made by the Respondent on 11 June 1999 (“the assessment”) purportedly on an agreement said to be made on 24 November 1998 in the sum of \$77,848.70.
- 2. The only material document submitted to the Respondent for assessment of duty was a transfer of certain lands dated 24

November 1998 (“the transfer”). The assessment relates to this instrument.

3. The transfer was not made subject to, and did not comprise an agreement within the meaning of that term as defined in the *Taxation (Administration) Act 1978* as applicable to the *Stamp Duty Act 1978* (collectively “the Acts”).
4. The transfer was:
 - (a) a conveyance;
 - (b) made by a trustee, namely Better Homes Pty Ltd (“the trustee”), to the Appellant;
 - (c) not made for valuable consideration;
 - (d) in conformity with a validly constituted trust, namely the Rockton Unit Trust;
 - (e) of property which was acquired by the trustee by virtue of an instrument which was duly stamped, namely the subject property details of the prior stamping in relation to which had previously been supplied to the Respondent.”
5. In the premises the transfer was exempt from duty by reason of paragraph (b) of item 9A of Schedule 2 of the *Stamp Duty Act 1978*.
6. There is no principle of law, and no provision of any Act, which entitled the Respondent to assess the transfer otherwise in accordance with the provision referred to in paragraph 5.
7. Specifically, the fact that the subject property was at the time of transfer subject to an encumbrance did not entitle the Commissioner to assess duty thereon in the manner in which he did in the assessment or at all.
8. There is no instrument upon which duty of the type described in the notice can be assessed other than the transfer.
9. Alternatively, the foregoing grounds apply in relation to each such instrument.

[6] The orders sought by the appellants in this matter are as follows:

- “(a) an order that the assessment be varied to nil or accordingly some other amount less than \$77,853.50;
- (b) alternatively, an order that the assessment be remitted to the Respondent for re-assessment according to law; and

(c) costs.”

[7] At the outset of the hearing the Court was presented with a Statement of Agreed Facts and Documents which are set out hereunder (Exhibit 1):

- “1. The Rockton Unit Trust was constituted by Deed of Settlement dated 13 March 1992 (“the Rockton Trust Deed”). (A copy of the Rockton Trust Deed is annexed and marked “1”).
2. The trustee of the Rockton Unit Trust was at all times Better Homes Pty Ltd ACN 054 999 567, formerly known as Rockton Pty Ltd ACN 054 999 567.
3. On and from 17 November 1998 the Appellant was a discretionary beneficiary of the Rockton Unit Trust.
4. The Trust Deed of the Rockton Unit Trust was amended by means of a Deed of Amendment (“the first Rockton Amending Deed) dated 6 December 1994. (A copy of the first Rockton Amending Deed is annexed and marked “2”).
5. The Rockton Trust Deed was further amended by a Deed of Amendment dated 17 November 1998 (“the second Rockton Amending Deed”). (A copy of the second Rockton Amending Deed is annexed and marked “3”).
6. Better Homes Pty Ltd ACN 054 999 567 as trustee of the Rockton Unit Trust was the registered proprietor of the following real property:
 - (a) Lot 5868 of Darwin;
 - (b) Portion 1797 of Bagot;
 - (c) Portion 1798 of Bagot;
 - (d) Portion 1796 of Bagot; and
 - (e) Lot 9219 of Nightcliff,and had become the registered proprietor of all those real properties prior to 1 January 1998.
7. On 2 July 1998 a transfer of a share in Jaguar Kitchens & Cabinets Pty Ltd and of units in Territory Cabinets Unit Trust were executed. (Copies of those documents are annexed and marked “4” and “5” respectively).
8. On 24 November 1998 the meetings and resolutions evidenced by the documents annexed were held and made (as the case may be) and the other documents annexed were executed.

- (a) Transfer of share in Bayview Homes (NT) Pty Ltd.
- (b) Transfer of share in Better Homes Pty Ltd.
- (c) Minutes of a meeting of unitholders of the Rockton Unit Trust.
- (d) resolution of the trustee of the Rockton Unit Trust.
- (e) Transfer of Lot 9219 of Nightcliff and Portion 1796 of Bagot to Blake Corporation Pty Ltd.
- (f) Transfer of Portions 1797 and 1798 of Bagot and Lot 5868 of Darwin to Crambrook Nominees Pty Ltd.
(Copies of these documents are annexed and marked “6-11”

- 8.(sic) The documents which are the subject of this appeal were lodged for assessment under cover of a letter from James Noonan to the Commissioner of Taxes dated 23 December 1998. (A copy of that letter is annexed and marked “12”).
- 9. Duty was assessed in respect of the transfers of units in the Territory Cabinets Unit Trust and in the Budget Homes 1993 Unit Trust and shares in Jaguar Kitchens & Cabinets Pty Ltd and Bayview Group Pty Ltd and the transfer forms stamped on 5 January 1999. Those stamped transfer forms are annexed and respectively marked “4, 5, 6 and 7”).
- 10. On 11 June [1]999 the respondent issued a Notice of Assessment. (A copy of that Notice is annexed and marked “13”).
- 11. On 9 July 1999 the appellant and Blake Corporation Pty Ltd delivered to the respondent a Notice of Objection. (A copy of that Notice is annexed and marked “14”).
- 12. By letter dated 14 January 2000 the respondent disallowed the objection. (A copy of that letter is annexed and marked “15”).”

[8] In addition to the agreed facts the appellants tendered an affidavit of Jeffrey William Dennis Blake sworn 29 August 2000 (Exhibit 2). Mr Blake is a director of Blake Corporation Pty Ltd and was a director of Better Homes Pty Ltd (formerly known as Rockton Pty Ltd), Jaguar Kitchen and Cabinets Pty Ltd, Bayview Homes (NT) Pty Ltd and Bayview Group Pty Ltd. Mr

Blake deposes that there has been no consideration agreed or provided in respect of the transfer of the subject property as described in his affidavit.

- [9] Mr Richard Pius Crambrook in affidavit sworn 29 August 2000 (Exhibit 3) and affidavit sworn 30 August 2000 (Exhibit 4), deposes that he is a director of Crambrook Nominees Pty Ltd and was a director of Better Homes Pty Ltd (formerly known as Rockton Pty Ltd, Jaguar Kitchen and Cabinets Pty Ltd, Bayview Homes (NT) Pty Ltd and Bayview Group Pty Ltd. Mr Crambrook deposes that there was no consideration agreed or provided in respect of the subject property as described in his affidavits.
- [10] The properties described in these affidavits are the properties referred to in the Transfer of Land (Annexure 10 and 11) in the Agreed Facts and Documents and the resolution which is Annexure 9 in the Agreed Facts and Documents.
- [11] The issue between the appellants and the respondent arises because the trustee of a trust which owned property which was subject to a mortgage made a decision to distribute trust property to the beneficiaries of the trust while it was subject to the mortgage. The Commissioner of Taxes has ruled that because the mortgage was subsequently paid out by the beneficiaries that the exemption which is normally available under the Stamp Duty Act 1978 for such a transaction ceased to be available.
- [12] The Stamp Duty Act imposes a tax on instruments by s 4 which provides:

“4. Imposition of duty

Subject to this Act, stamp duty is imposed on the instruments included in the classes of instruments specified in Schedule 1.”

- [13] The issue is whether the instrument which the Commissioner has stamped falls within item 5 of Schedule 1 which is a conveyance of dutiable property and if they do whether or not they also fall within the exemption provided by item 9A(b) of Schedule 2.
- [14] It is not in dispute that under Schedule 1 the property which is the subject of this appeal, was dutiable property. It is not disputed that two of the three instruments are conveyances which means that for all practical purposes it is of little consequence whether the first instrument was a conveyance.
- [15] The question then becomes whether or not the exemption in paragraph 9A(b) of Schedule 2 applies to these conveyances. Paragraph 9A(b) of Schedule 2 provides:

“9A. Conveyance –

- (b) made by a trustee to a beneficiary, where the conveyance is not made for valuable consideration and the conveyance is in conformity with a trust contained in a validly constituted trust and the property the subject of the conveyance was acquired by the trustee by virtue of an instrument which was duly stamped or has been exempted from duty under this Schedule or was not otherwise subject to duty; or”

- [16] The Rockton Unit Trust Deed is a deed of settlement dated 13 March 1992. Clause 19.25 of that Trust Deed provides as follows:

“19.25 Exercise of discretion by trustee corporation

Every Trustee who is a corporation or company may exercise or concur in exercising any discretion or power hereby conferred on the Trustee by a resolution of such corporation or company or by a resolution of its Board of Directors or governing body or may delegate the right and power to exercise or concur in exercising any such discretion or power to one or more members of its Board of Directors or governing body appointed from time to time by the said Board of Directors or governing body for that purpose.”

[17] Section 27 of the Trust Deed provided wide powers of amendment. There have been two amendments to the Trust Deed, the first made on 6 December 1994. The second Deed of Amendment made on 17 November 1998 effected two substantial changes to the Trust Deed.

[18] The first substantial change was to change the rules which applied in relation to distribution of income by entirely deleting and replacing Clause 22. The second substantial change was that Clause 17 of the original Trust Deed was deleted and replaced with new clauses relating to distributions of capital. Clause 17.4 provides as follows:

“The trustee shall have and may exercise in its absolute discretion at any time or times and from time to time prior to the Perpetuity Date power to pay or apply the whole or any part of the Trust Fund, or any of the assets of the Trust Fund in specie, to or for the benefit of all or any one or more exclusively of the others of the Discretionary Beneficiaries then living or in existence and in such proportions or manner as the Trustee shall in its absolute discretion from time to time think fit, whether for consideration or not.”

[19] Counsel for the appellants Mr Russell QC, submits that under the provisions of Clause 17.4 the trustee may actually hand over the property. The effect

of the trustee's decision to do so comes not from the decision of the trustee itself but from the actual appointment.

[20] Document No. 9, in the book of Agreed Facts and Documents, is titled Rockton Unit Trust; Resolution of the trustee, Better Homes Pty Ltd ACN 954 999 567. The resolution is dated 24 November 1998. It is this document which purports to transfer the subject property and is the document on which stamp duty has been assessed. It is the submission on behalf of the appellants that this resolution did nothing. It was a decision by the directors of the trustee company that they would transfer the property to the beneficiaries. This decision was effected by the subsequent execution of the transfers.

[21] The questions for this Court on appeal are whether:

1. the resolution was an agreement or otherwise falls within the definition of a conveyance;
2. the resolution, or alternatively the transfers, were made for valuable consideration;
3. the doctrine of fiscal nullity applies in the Northern Territory;
4. if so, whether it applies in the present circumstances.

[22] The appellants contend that all questions should be answered in the negative. The appellants contend the respondent no longer relies on the

resolution as an agreement but now contends that it “effects an appropriation of the relevant trust assets”.

[23] It is the appellants’ argument that this is not a correct construction of the Trust Deed as amended. Until the property actually passed from the trustee it remained part of the property of the fund, with the trustee free to make some other decision in relation to it. The appellants further maintain that a mere resolution of the trustee company cannot operate as a conveyance because it is a transaction not an instrument. If it were deliberate at all on the appellants’ submission, liability would arise under the Taxation Administration Act Division 15. No such assessment has been made.

[24] The definition of “conveyance” in s 4(1) of the Taxation (Administration) Act is as follows:

““conveyance’ includes a transfer or assignment (or an agreement to transfer or assign), grant, exchange, appointment, settlement, foreclosure, declaration of trust, a statement under section 83B and a decree, judgment or order of a court, whereby dutiable property or a marketable security is transferred or assigned to (or agreed to be transferred or assigned to), vested in or accrues to a person, but does not include the grant of a lease, other than a convertible Crown lease, or a patent;”

[25] The resolution effects an appropriation of trust property and is an “appointment” within the definition of “conveyance”. The consequential transfer documents are a conveyance. The resolution dated 24 November 1998 states that the subject properties are transferred by way of gift.

[26] The transfers of land were executed in Form 5 of Schedule 1 to the Real Property Regulations. The form of transfer states:

“... The seller in consideration of an agreement with the buyer transfers to the buyer the estate and interest in the land described and valued below subject to the encumbrances affecting the land including any created by dealings lodged for registration prior to the lodging of this transfer and the buyer accepts this transfer”.

[27] The appellants’ argument is that it was inaccurate to state that the transfer was made “in consideration of an agreement” and still more inaccurate to describe the parties as “buyer and seller” rather than as “transferor and transferee”. Note 1 to the Form of Transfer explains when this form of transfer is to be used and is set out hereunder.

“Schedule of Notes

1. This form must be used for all simple transfers by the owner other than –

- (a) transfers by a mortgagee exercising power of sale (Form 6)
- (b) transfers creating or reserving easements (Form 9 or 10)
- (c) transfer by a receiver (Form 7)
- (d) transfer pursuant to a court order (Form 15)
- (e) transfer of mortgage, encumbrance or lease (Form 28)

For those transfers the appropriate form must be used.

If the words “Buyer” and “Seller” are considered inappropriate other words may be used.”

[28] The appellants refer to the sworn affidavits of Mr Blake and Mr Crambrook (Exhibit 2, 3 and 4) to the effect that there was no consideration for the transfer meaning in this context there was no consideration passing to the trustee as part of the transaction. The appellants argue this evidence cannot

be rejected by the Court particularly as they were not required for cross examination.

[29] The appellants argue that the fact the parties subsequently paid out the liability of the former trustee to the bank and refinanced their own respective liabilities does not amount to consideration. On the appellants' argument it merely reflects the nature of the trust asset which passed to the beneficiary. It is the submission of counsel for the appellants that it does not mean there was an agreement between the beneficiary and the trustee that this would occur at a time following the transfer and there is no suggestion that it occurred at the time of the transfer accordingly there was neither actual nor executory consideration. The appellants maintain that there is nothing extraordinary in trust property being mortgaged property. A trust can be declared in respect of mortgaged property. Any beneficiary receiving trust property necessarily is required to provide the trustee with a release. The appellants argue that a trust can be declared in respect of mortgaged property, consequently there can be no reason why a trustee cannot also account to the beneficiaries by delivering of such property.

[30] Ms Webb, counsel for the respondent, referred to the letter dated 14 January 2000, annexure marked 15 in the statement of Agreed Facts and Documents in this matter which essentially contains the reasons the respondent would put forward as to why this appeal should be rejected.

- [31] Summarising the preliminary matters, counsel for the respondent stated that the initial trustee in the First Deed of Settlement (Annexure 1) established a common form unit trust under which unit holders have a proprietary interest in each asset of the trust (Clause 8.1 to 8.3 inclusive).
- [32] The Second Deed of Amendment dated 17 November 1998 (Annexure 3) converted the Trust Deed to a discretionary trust whereby the beneficiaries do not have legal or beneficial interest in trust assets. The trustee was a person other than the settlor. The Trust Deed as amended provided for the trustee either to distribute income each financial year among such beneficiaries as he chose. The relevant amendment is Clause 22 “Distributions of Income”. The amending Clause 17 provides for distributions of capital and provides at 17.1 that upon the termination of the trust the trust fund belongs to such beneficiaries and in such proportions as the trustee determines under that clause – see 17.1.1.1. Clause 17.6 provides that the trustee shall not exercise such discretion without the consent of the ordinary unit holders.
- [33] In that sense the ordinary unit holders retain some element of control over what happens with trust property. A reading of the Trust Deed indicates that the trustee has very wide powers of administration and a power to vary the Trust Deed.
- [34] The question for the respondent was whether the resolution of the trustee or in the alternative the transfer of land documents effect a conveyance of

dutiable property. It is relevant to note the definition of “instrument” in s 4(1) of the Taxation Administration Act which is: “‘instrument’ includes any document;”

[35] Under this definition both the resolution and the transfers are instruments for the purpose of the Taxation (Administration) Act and the Stamp Duty Act. The issue is whether the resolution or the transfers effect a conveyance of dutiable property. In this case the Commissioner of Taxes stamped the resolution dated 24 November 1998 Annexure 9. The reason he gave for stamping the resolution is because he formed the view it was an instrument of appointment of objects of a trust. It appointed beneficiaries to take the property specified in the resolution. Annexure 9 resolves that certain property be transferred to Crambrook Nominees as trustee of the Crambrook family trust and certain other identified property transferred to Blake Corporation Pty Ltd as trustee for the Blake family trust. In each case the transfers were expressly subject to existing encumbrances. The Commissioner ruled that this document was an instrument of appointment. It appoints beneficiaries. It is the argument on behalf of the respondent that the Commissioner could have or could still amend and instead stamp the relevant transfers (Annexures 10 and 11).

[36] The issue then is whether or not the conveyance, whether it be the resolution or the transfer, is exempt from stamp duty under s 9A(b) of Schedule 2 of the Stamp Duty Act. In determining what the effect of the instrument is for the purposes of stamp duty it is permissible to have regard to other material

in order to determine its true effect (*Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226).

[37] In deciding whether or not the conveyance, be it the resolution or the transfer is exempt from stamp duty under s 9A(b) of Schedule 2 the only issue is whether or not the transfer or conveyance was for valuable consideration.

[38] The respondent says that there was valuable consideration that being the assumption of a debt by Crambrook Nominees Pty Ltd and Blake Corporation Pty Ltd. The debt being the mortgage or “existing encumbrance” attached to the property when it was transferred (see *Mortimore v Commissioner of Inland Revenue* [1864] 2 H & C 347 and *The Great Western Railway Company v Inland Revenue Commission* [1894] 1 QB 507).

[39] In the more recent Australian case *Gutwenger v Federal Commissioner of Taxation (Cth)* 95 ATC 4008, it was held that an assumption of liability for a mortgage was not valuable consideration. However, that decision turned on the particular facts found by the trial judge and does not preclude the assumption of a liability from being a consideration. Black CJ, Shepherd and Jenkinson JJ said at 4019 – 4020:

“The question to be decided is a question of fact. The evidence which his Honour accepted in the present case establishes, in our opinion, that Mrs Gutwenger intended to make a gift of the land to her husband. That was the tenor of her evidence and also the tenor of her husband’s evidence. It is plain, as we have mentioned, that his

Honour accepted this evidence. Of course, there could be transactions in which the owner of mortgaged land transferred the land to another person in consideration of that person undertaking to indemnify the transferor in respect of the liability under a mortgage. The facts show that that is not the case here. The land is under Torrens title so that it is not correct to speak of there being an equity of redemption. But effectively what was transferred to the appellant was the land subject to the charge created in favour of the bank by the mortgage. There is no indication in the evidence that Mrs Gutwenger and the appellant discussed the question of what was to happen in relation to the discharge of the obligation to the bank. The subsequent facts indicate that he must have assumed that the liability was to be paid out of the sales of the allotments. That is what occurred. But that does not mean that it was not Mrs Gutwenger's intention to make a gift of the land, subject to the mortgage, to her husband. That is precisely what she intended to do and, in substance and effect, it is what his Honour found occurred. It was only because of his view about the effect of the appellant assuming his wife's liability for the mortgage debt – a view which, with respect, we disagree – that he reached the conclusion that he did.

In all the circumstances we are satisfied that there was a gift by Mrs Gutwenger of the land to her husband. His Honour's conclusion that the transaction was for consideration is, in our respectful opinion, incorrect.”

[40] One of the basis for the Federal Court finding the assumption of a mortgage did not amount to consideration was the finding of fact by the primary judge that there was no evidence Mrs Gutwenger and her husband, the appellants, had discussed the question of what was to happen in relation to the mortgage and the discharge of the obligation under the mortgage to the bank.

[41] In the matter before this Court, the Commissioner had quite a deal of written material before him from which counsel for the respondent submits the Commissioner could infer there had been discussions and agreement reached as to the assumption of the respective encumbrances on the properties.

[42] Annexure 18 in the book of Agreed Facts and Documents, is a letter dated 8 July 1998 from chartered accountant Mal Sciacca to Mr Richard Tucker, finance manager of the ANZ Bank Darwin. This letter omitting formal parts reads as follows:

“Re: The Bayview Group

Further to my discussions with Richard Crambrook and Jeffrey Blake we wish to advise that the group has decided to restructure and split its assets in the following ways:-

- Richard intends to take over the operations of the Bayview Business, the current Bayview office and warehouse and adjoining vacant block of land and the Cullen Bay display Home.
- Jeffrey intends to take over the Jaguar Kitchens business, the proposed new Jaguar office & factory, the old Jaguar office and factory and the Two and A Half Mile property. Jeffrey intends to continue in the joinery business and specialise as a property developer.

We have prepared summaries of values attributed to those assets and current borrowing's secured on those assets.

We would appreciate if you could review the security arrangements on the loans and effectively split those loans so that neither partner guarantees the other partners loan.

We have prepared a schedule of the proposed transfers and funding requirements that should be of assistance.

If you require any further information please do not hesitate to contact our office.”

[43] Attached to this letter are summaries of the properties of Mr Crambrook and his group of companies and Mr Blake and his group of companies. The summaries include agreed values of property including real estate and the amount of the loans and are set out hereunder:

“Richard Crambrook & His Group of Companies

	Agreed	
	<u>Value</u>	<u>Loans</u>
Bayview Shed – Lot 1797	700,000	240,000
Vacant Land – Lot 1798	400,000	
Cullen Bay Display Home – Lot 5868	700,000	450,000
Vacant Land – The Chase – Lot 6373	68,000	
The Bayview Group Pty Ltd	1,487,000	
Crambrook Residence – Berrimah	<u>900,000</u>	<u>130,000</u>
	4,255,000	820,000
Additional Finance Required		
Payout of Jeffrey Blake (approximately)		500,000
Guarantees to DHA		680,000
Overdraft		<u>350,000</u>
		<u>2,350,000</u>

Jeffrey Blake & His Group of Companies

	Agreed	
	<u>Value</u>	<u>Loans</u>
Funds to be received from R Crambrook	500,000	
Better Homes Pty Ltd – Cash	100,000	
Jaguar Kitchens & Cabinets Pty Ltd	384,000	
New Jaguar Shed – Lot 1796	1,100,000	670,000
Totem Road Jaguar Shed – Lot 9219	475,000	275,000
2 ½ Mile Stuart Highway, Parap	<u>2,251,000</u>	<u>2,025,000</u>
	<u>4,810,000</u>	<u>2,970,000</u>

[44] The resolution dated 24 November 1998 refers to the same real estate mentioned in the schedule to letter dated 8 July 1998 and set out above.

[45] Annexures 10 and 11 are the transfers of the properties referred to in Annexure 9 subject to encumbrances. These transfers are also dated 24 November 1998.

[46] Annexure 8 in the Agreed Facts and Documents is also dated 24 November 1998. It is a resolution from a meeting of unitholders held on that date. Present were Richard Pius Crambrook and Jeffrey William Dennis Blake. It was unanimously resolved that:

1. The notice and time requirements in Clause 25 of the trust deed are waived.
2. The trust be terminated forthwith.

[47] Annexure 19 in the Agreed Facts and Documents is a letter dated 22 December 1998 from the ANZ Bank to Mr Crambrook, Director Crambrook Nominees Pty Ltd which omitting formal parts reads as follows:

“Settlement – Bayview Group Pty Ltd

Further to your most recent discussions with Richard Tucker, we hereby advise having successfully attended settlement to payout Jeff Blake’s interest in Bayview Group Pty Ltd (as agreed by both parties) together with refinance of 2.5 Mile Depot site and properties previously held in the name of Better Homes Pty Ltd.

Transaction details are provided as follows:

Payout of Jeffrey Blake

Drawdown of Commercial Bill with face Value	\$230,000.00
Net proceeds	\$228,895.53
Payout to Blake Corporation Pty Ltd	\$225,713.27
Residual Credit proceeds	<u>\$ 3,182.26</u>

These residual credit proceeds were credited to the operating account of Crambrook Nominees Pty Ltd Number 1025-32892 under advice.

Refinance of properties held in the name of Better Homes Pty Ltd

Settlement to satisfy refinance of the first mortgage of Cullen Bay Estates Pty Ltd in relation to the Cullen Bay display and properties situated at Lots 1797 and 1798 Stuart Highway was also effected as follows:

(i) Cullen Bay Display Home

Bank Cheque Number 787138 in favour of Wyllie Group Pty Ltd	\$216,000.00
Clayton Utz fees	\$ 252.00
Total required to settle	<u>\$216,252.00</u>

(ii) Lots 1797 and 1798 Stuart Highway

Closure of Fully Drawn Advance Number 2595-78565 in the name of Better Homes Pty Ltd	<u>\$240,000.00</u>
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Reduction to Commercial Bill facility in the name of Better Homes Pty Ltd	<u>\$200,000.00</u>
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To effect (i) and (ii), Commercial Bill with face value of \$650,000.00 was drawn as follows:

[Total] proceeds	\$647,217.85
Less payouts as above	\$216,252.00
	\$240,000.00
	\$200,000.00
Total shortfall	<u>\$ 9,034.15</u>

This shortfall was debited the operating account of Crambrook Nominees Pty Ltd Number 1025-32892.

In terms of Letter of Offer documentation, the once only rearrangement fee of \$500.00 was debited the operating account of Bayview Group Pty Ltd 2588-82039.

We trust the above is in accordance with your understanding of arrangements, however please do not hesitate to contact me direct on 8982-3501 should you have any queries.”

[48] Annexure 29 to the Agreed Facts and Documents is a letter dated 28 July 1999 from the ANZ Bank to “Mr Rick Cranbrook (sic) Director Bayview Group Pty Ltd”, which omitting formal parts, reads:

**“Re: Property Transfer
From Better Homes to Crambrook Nominees**

We confirm that the above transfers have now been registered, the Mortgages in favour of Better Homes Pty Ltd discharged, new Mortgages in favour of Crambrook Nominees Pty Ltd registered.

Government discharge and registration costs in relation to the above totalled \$535.00 and were charged to the account of Crambrook Nominees Pty Ltd on 27 July 1999.

Should you require further details in this regard, please phone.”

[49] Annexure 30 to the Agreed Facts and Documents are search certificates from the Land Titles Office showing discharge of the respective mortgages.

[50] All of these documents were before the Commissioner when he made a decision to impose a stamp duty on the resolution.

[51] In summary, the information before the Commissioner was that the second amending deed that created the discretionary trust was made on 17 November 1998. This amendment expanded the beneficiaries to include the corporate entities, Blake Corporation and Crambrook Nominees.

[52] Shortly afterwards on 24 November 1998 there was a resolution to transfer certain properties to the corporate beneficiaries. Also on 24 November 1998, transfers of the subject land were executed and the trust terminated. Within one month there is a letter dated 22 December 1998 (Annexure 19) regarding the refinancing of the subject properties.

- [53] These actions all took place following the letter of 8 July 1998 (Annexure 18) advising of the arrangements that were being planned.
- [54] It is the submission of Ms Webb, counsel for the respondent, from the letters provided by the ANZ Bank it is clear there were discussions as to what would occur when there was a separation of the business interest.
- [55] It is reasonable to assume that in going through the exercise of separating business interests the parties intend to have matters cut and dried legally before a separation took effect (*Merritt v Merritt* [1970] 1 WLR 1211).
- [56] The fact that in the resolution it states the properties are to be transferred by way of gift is not in itself conclusive. In the matter of *BL & M Grollo Homes Pty Ltd v Comptroller of Stamps (Vic)* [1983] 1 VR 445 the Court held that the statement in the transfer that the consideration was “the transferee being entitled in equity” did not fully and truly set forth the consideration (Tadgell J at 448):

“The true consideration for the transfer in this case being unexplained by the instrument designed to effect it, the respondent was obliged and entitled to have regard to the surrounding circumstances to the extent necessary to explain the operation and effect of the instrument and to ascertain the actual consideration, if any.”

- [57] In this case the Commissioner has taken into account the documents referred to above and numerous other documents including the deed of settlement of the Rockton Trust, the second deed of amendment, the articles of

association, contracts and evidence of acquisition of the five lots of Better Homes Pty Limited.

[58] The resolution states the transfers of property are by way of gift. The documents clearly indicate that what was transferred was encumbered property which was shortly thereafter refinanced by the beneficiaries.

[59] The Trust was terminated by resolution on 24 November 1998. Clause 30.3 of the original Trust Deed reads as follows:

“Notwithstanding anything to the contrary herein contained and notwithstanding that but for this provision an obligation at law or in equity might arise the Trustee shall not:

....

in any circumstances be entitled to indemnity, reimbursement or recompense from the unit holders or any of them but if acting in good faith shall be entitled to be indemnified out of the fund in respect of all liabilities incurred relating to the execution or attempted execution of any powers, duties authorities or discretions vested in the Trustee under the provisions of this Deed and in respect of all actions proceedings costs, claims and demands relating to any matter or thing properly done or properly omitted to be done concerning the Fund.”

[60] As from 24 November 1998, there was no trust fund.

[61] In *Commissioner of Stamp Duties (NSW) v Buckle* (supra) at 246:

“Until the right to reimbursement or exoneration has been satisfied, ‘it is impossible to say what the trust fund is’. 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. 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.”

[62] I agree with the submission made by Ms Webb, counsel for the respondent, that in order to have been able to distribute the trust properties it would appear provision must have been made for the liabilities in question to have been discharged. On the material before the Commissioner the inference that he drew that the exemption under 9A(b) of Schedule 2 of the Stamp Duty Act was not available, was a reasonable inference.

[63] Mr Russell QC submits that it is for this Court to make findings of fact and to apply the law to those facts. The issue is whether a transfer of encumbered property involves an assumption of liability which makes it dutiable.

[64] Mr Russell QC submits that the matter being a factual issue for this Court the respondents are bound by the rule in *Browne v Dunn* (1893) 6R(HL)67. Counsel for the appellants referred specifically to Exhibits 2, 3 and 4. Mr Russell QC asserts that if the respondent wanted to put to the witnesses that their version of events was untrue or improbable then this should have been done in cross examination. Mr Russell QC argued that it is not open to this Court to disbelieve sworn evidence on affidavit that has not been cross examined upon. The appellants do not dispute that the transfers of property were made subject to an encumbrance. What occurred here is that land the

subject of an encumbrance was conveyed to beneficiaries of a trust. The issue is whether that encumbrance is indeed valuable consideration.

[65] In his reasons for disallowing the objections it was stated on behalf of the Commissioner at page 5 of the reasons set out in letter to Mr James Noonan dated 14 January 2000:

“Although the Trustee may have a beneficial interest in the trust property to the extent of its right of reimbursement or exoneration for the discharge of liabilities incurred in administering the Trust, there is no information placed before me to ascertain whether the Trustee was entitled to be exonerated and, if so, whether the Trustee was in fact exonerated by Crambrook and Blake in respect of the above debts (particularly in light of the conveyances occurring by “way of gift”) see, for example, *Chief Commissioner of Stamp Duties v Buckle* (supra) at 244 – 247; *Ong D.S.K.*, op cit at 256 – 262; subclause 30.3 of the Trust Deed).

Based on my conclusion in relation to the first query, it is my view that subitem 9A(b) of Schedule 2 to the SDA has no application to present considerations.”

[66] This conclusion drawn by the Commissioner was based on a lack of information. This Court has been presented with the sworn affidavit of Mr Crambrook and Mr Blake that no agreement or understanding was entered into between the parties named in the agreed facts except as set out in the agreed facts and further deposing to the fact that the appellants have not agreed to pay or provide, and have not paid or provided, any amount or other consideration to the Trustee.

[67] The appellants were not cross examined on their affidavit evidence.

[68] On all the material now before the Court, I consider the appellants have established that the transfer of the respective property was not made for valuable consideration. It is not appropriate to infer from the documentation that the appellants are being untruthful in their affidavit evidence or that this whole scheme was devised for the purpose of avoiding stamp duty on the transfer. There is authority for the proposition that property which is transferred as a gift is not necessarily transferred for consideration because it is subject to an encumbrance and therefore there must be an assumption of liability which amounts to a consideration (*Gutwenger v Commissioner of Taxation (Cth)* (supra); *In Re The Land Tax Act 1887*; *Ex parte Finlay* (1884) 10 VLR (E) 68; *Comptroller of Stamps (Vic) v Rylaw Pty Ltd* 81 ATC 4411).

[69] The next issue for consideration is whether the doctrine of fiscal nullity applies in the Northern Territory and if so whether it is applicable in the circumstances of this case

[70] The principle of fiscal nullity is contained in the decision of *Comptroller of Stamps (Vict) v Ashwick (Vic) No. 4 Pty Ltd* (1987) 163 CLR 640 at 652:

“First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax – not ‘no business *effect*’. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.’

[71] In his letter of disallowance Annexure 15, the Commissioner had this to say on the question of fiscal nullity (pp 5 – 7):

“As regards the second query, based on the current state of the law and the provisions of the Act and the SDA, it is my view that the fiscal nullity principle does apply to the statutory regime governing stamp duty in the Northern Territory, there being no anti-avoidance provision of a requisite nature in the Act and the SDA (see, for example, *Ingram v Inland Revenue Commissioners* (1986) Ch 585 at 600-604; *Comptroller of Stamps (Vic) v Ashwick No. 4 Pty Ltd* (1987) 163 CLR 640 at 654 cf *Re Australian Institute of Management (Vic) v Commissioner of State Revenue (Vic)* 95 ATC 2,179 at 2,193-2,195).

Furthermore, based on the information placed before me, it is my view that the principle applies to the factual matrix of this case, and accordingly, the Amending Deed (as a step in the composite transaction) should be disregarded for the purposes of ascertaining Crambrook and Blakes’ stamp duty liability, and accordingly, subitem 9A(b) of Schedule 2 to the SDA has no application to present considerations. In other words, applying the fiscal nullity principle (there being no anti-avoidance provision of a requisite nature in the Act and the SDA), the relevant transfers effected via the Resolution or Transfers are to be treated as conveyances from the Trustee to Crambrook and Blake (absent the effect of the Amending Deed) which are liable to ad valorem duty under the Act and the SDA.

In arriving at this conclusion, I have borne in mind the submissions set out in Messrs James Noonan’s letter of 29 April 1999 as to the circumstances surrounding the Amending Deed and the purpose of its adoption, however, for the following reasons I do not accept that (i) the Amending Deed was not part of one single composite transaction and (ii) that Amending Deed (as a step in the transaction) had a commercial purpose other than to obtain the stamp duty benefit under subitem 9A(b) of the SDA:

- the substance and nature of the Trust Deed and the Amending Deed (ie the latter Deed converts the Trust from a common form unit trust into a discretionary trust coupled with a power of appointment, increases the pool of potential beneficiaries to include Crambrook and Blake, and circumscribes the Trustee’s power – as set out below – giving Mr Crambrook and Mr Blake, in effect, a right to veto the distribution of income and capital) and the proximity in time between the execution of the Amending Deed (being 17 November 1998) and the termination of the

Trust and Resolution (being 24 November 1998) which effects an appropriation of the entirety of the trust assets.

- subclauses 17.6 and 22.9 of the Trust Deed as amended expressly circumscribe the Trustee's discretionary powers with respect to the distribution of capital and income; ie the Trustee must exercise their power, in effect, with the concurrence of the ordinary unitholders (Mr Crambrook and Mr Blake), thereby giving the ordinary unitholders an ability to preserve their own interests and to ensure that the Trustee would appropriate the trust property to beneficiaries they approved).

I observe that a trustee of a trust has, inter alia, a duty to act exclusively for the benefit of all beneficiaries and a duty to act personally (i.e. not to exercise a power under dictation nor fetter his/her/their discretion with respect to future conduct). Accordingly, a power of appropriation, being a fiduciary power, must not be exercised so as to prejudice the interests of other beneficiaries, but it is not incumbent upon the trustee to obtain the consent of other beneficiaries (see, for example Ford H.A.J. & Lee W.A., op cit at Chapter 9 and paras 1620-1621; Ong D.S.K., op. cit at page 197; Evans M., Outline of Equity and Trusts (1988) Butterworths at paras 1824-1828).

- the Amending Deed and the Resolution facilitate and effect a conveyance of dutiable property from the Trustee to corporate entities (Crambrook and Blake) whereunder the initial unit-holders of the Trust (being Mr Crambrook and Mr Blake) are directors and beneficiaries/shareholders of the relevant entities (see subclause 8.4 and Schedule 1 of the Trust Deed; ASIC Company searches relating to Crambrook and Blake; BDO Mal Sciacca's letter of 8 July 1998 and attachments).
- in relation to the Trust created under the Trust Deed (being a 'common form' unit trust under which the unit-holders obtained a proprietary interest in the trust – see page 3 herein), the Trustee (with the consent of the ordinary unit-holders Mr Crambrook and Mr Blake, being sui juris and absolutely entitled) could have conveyed the trust property to Blake and Crambrook or any other related corporate entity, thereby giving effect to the relevant matters set out in Messrs James Noonan's letter of 29 April 1999 (see subclauses 8.1-8.3 and clauses 16 and 25 of the Trust Deed and the First Schedule and Item 3.1 of the Second Schedule thereto; the terms of Resolution; *Aust-Wide Management*

Ltd v Chief Commissioner of Stamp Duties (NSW) (supra) at 4,746-4,747 and the authorities therein cited; Ford H.A.J. & Lee W.A., op cit at para 1610; Ong D.S.K., op. cit at pages 197-199).”

[72] In summary, the respondent asserts the fiscal nullity principle applies so that the relevant transfers are to be treated as conveyances from the trustee to Crambrook Nominees and Blake Corporation absent the effect of the amending deed (Annexure 3) which should be disregarded. On the respondent’s argument the effect of that would be that property was being transferred from the trustee to a corporate entity which was not a beneficiary and would not then come within the exemption in item 9A(b) and that it is not a conveyance made by a trustee to a beneficiary because the second amending deed and the effect of it should be disregarded.

[73] In Australia the cases that have considered the principle of fiscal nullity have not applied it in the circumstances of those cases (*Comptroller of Stamps (Vict) v Ashwick (Vic) No. 4 Pty Ltd* (supra).

[74] The Commissioner of Taxes argues that in the Northern Territory there was at the relevant time no anti avoidance provision in the legislation such as existed in the legislation the subject of consideration in other cases in Australia. That is there was no specific provision in the relevant legislation to the effect that with certain exceptions every instrument executed in order either directly or indirectly to evade the payment of stamp duty is void.

[75] In this case the respondent argues that what has happened is that in effect property has been transferred from the trustee to a corporate entity, the directors of whom are the same as the unit holders of the trust, that there was a composite transaction which was entered into for the purposes of avoiding stamp duty liability that would have been payable if the trustee had simply transferred the property directly to the corporate entities. It is the Commissioner's position that the amending deed and the resolution facilitated and effected a conveyance of dutiable property from the trustee to corporate entities the director and beneficiaries who were the initial unit holders of the trust. Those unit holders also had control through Clause 17.6 over the distribution of property. The argument for the respondent is that the second amending deed had no commercial purpose other than to obtain a tax benefit because in relation to the trust created under the trust deed the trustee could, with the consent of Mr Crambrook and Mr Blake, have conveyed the property to those corporate entities Crambrook Nominees and Blake Corporation or any other corporate entity giving effect to any intention that the property did not stay in the hands of Mr Crambrook and Mr Blake personally.

[76] I have already referred extensively to the documents that made up the transaction. In particular, the letter from Mr Mal Sciacca dated 8 July 1998 to the ANZ Bank (Annexure 18 to the Agreed Facts and Documents) establishes a business purpose.

[77] I accept the argument put forward by Mr Russell QC on behalf of the appellants that here there is no pre-ordained series of transactions which achieves a result which might be achieved by one document alone.

[78] The submissions made by Mr Russell QC on behalf of the appellants follow upon submissions made by Mr Noonan, solicitor for the appellants, in a letter dated 29 April 1999 to the Commissioner of Taxes (Annexure 28 to the Statement of Agreed Facts and Documents) which submissions on the issue of the fiscal nullity doctrine I accept.

[79] I am not able to find that steps were inserted into the transaction which had no commercial purposes apart from the avoidance of liability to pay duty. The second amending deed (Annexure 3) which counsel for the respondent urges should be disregarded does “ensure maximum flexibility for the purpose of the separation of the affairs of Mr Blake and Mr Crambrook, and in particular, with asset protection consideration in mind.” (Annexure 28).

[80] The transaction is not the equivalent of a sale. I am not persuaded that the doctrine of fiscal nullity whether or not it applies in the Northern Territory does apply in the circumstances of this case.

[81] Accordingly, I would allow the appeal.

[82] I will hear from the parties as to the consequential orders to be made including any orders for costs.
