PARTIES:	BRAMBLES AUSTRALIA LTD Appellant v COMMISSIONER OF TAXES Respondent
TITLE OF COURT:	In the Court of Appeal of the Northern Territory of Australia
JURISDICTION:	Appeal under the Taxation (Administration) Act
FILE No:	AP 17 of 1992
DELIVERED:	Delivered at Darwin 20 October 1993
HEARING DATES:	Heard at Darwin 1 and 2 June 1993
JUDGMENT OF:	Angel, Mildren and Morling JJ

CATCHWORDS:

Taxation and revenue - Stamp duty - Means of hiring arrangement - Whether a definition using the word "includes" is exhaustive - Whether cranes provided for use with an operator are used by a person other than the owner - Exercise of the Commissioner of Taxes' discretion to remit a penalty -

(NT) Taxation Administration Act 1978, ss4 94, 96(1), 96(6)

NT Stamp Duties Act 1978, s4

YZ Finance Co Pty Ltd v Cummings (1964) 109 CLR 395, applied.

FCT v Brambles Holdings Ltd (1991) 28 FCR 451; 99 ALR 523, considered.

Otto Australia Pty Ltd v FCT (1991) 28 FCR 477; 91 ATC 4305, considered.

REPRESENTATION:

Counsel

Appellant: I Gzell QC and S Southwood

Respondent: CEK Hampson QC and M Spargo

Solicitors

Appellant: Waters James McCormack

Respondent: Solicitor for the Northern Territory

Judgment Category classification: CAT A

Court Computer Code:

Judgment ID Number: ang93014

Number of pages: 30

General Distribution

ang93014

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 17 OF 1992

IN THE MATTER of an Appeal under the TAXATION (ADMINISTRATION) ACT

BETWEEN:

BRAMBLES AUSTRALIA LTD
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: ANGEL, MILDREN and MORLING JJ

REASONS FOR JUDGMENT

(Delivered 20 October 1993)

ANGEL J:

I agree with the reasons and conclusions of Morling J.

MILDREN J:

The main facts, legislation and questions arising in this appeal are set out in the judgment to be delivered by Morling J which I have had the advantage of reading. Except to the extent necessary to support the conclusions I have ultimately reached, I do not think it is necessary to set them out again.

The first question which arises is whether the definition of "hiring arrangement" is exhaustive. As Kitto J observed in *YZ Finance Company Pty Limited v Cummings* (1964) 109 CLR 395 at 401-2:

> "Unlike the verb 'means,' 'includes' has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears."

In *Dilworth v The Commissioner of Stamps* [1899] AC 99 Lord Watson said, at 105-6:

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words and phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares they shall include."

There are a number of examples of this kind of use of the word 'includes" in s4(1) of the Act; for example, "'court' includes a tribunal or other similar body." But I do not think it can be confidently asserted that the draftsman consistently uses the word 'includes' in this fashion. An obvious example is the definition of 'goods' which "includes all chattels personal other than money or things in action." In that instance, it seems to me that the draftsman has provided an exhaustive definition of 'goods'; he has excluded two things, "money," and "things in action" which are in law chattels personal. In modern times, 'chattels personal' is an expression used to denote any kind of property other than real property and chattels real: see Halsbury, 4th ed, Vol 35, para 1104. What room is there for the word 'goods' to be employed in its ordinary sense which would not otherwise be covered by the expression 'all chattels personal'?

The structure of the definition of 'hiring arrangement' is peculiar in that it seems that the purpose of the provisions in subparagraphs (a),(b) and (c) is to limit hiring arrangements to one

or other of the circumstances referred to in those subparagraphs so as to ensure that the definition is not so wide as to be unconstitutional. A similar approach is taken with the definition of 'hire-purchase agreement,' but there the verb employed is 'means.' Literally, the structure of the first part of the definition would seem to confine the words in subparagraphs (a),(b) and (c) to the type of hiring arrangement referred to in the words followed by the word 'includes,' but I do not think that that is what was intended. The words following "but does not include" clearly apply to all types of hiring arrangements. Ignoring the provisions to be found in subparagraphs (a),(b) and (c) of the definition, on the face of it, the words "includes an arrangement ... owner of those goods" are arguably intended to enlarge the meaning of 'hiring arrangement' in that there is only a requirement that the goods "may be used," even if in fact, they are not so used. Although the question is a difficult one, I think that, as the words in subparagraphs (a),(b) and (c) must have been intended to apply to all hiring arrangements, notwithstanding the strict literal structure of the language employed, and bearing in mind that it is difficult to think of any arrangement other than one of a kind referred to in the definition, which could be described as a hiring arrangement in ordinary parlance, the proper conclusion to be reached is that the true intention of the draftsman was to provide an exhaustive definition.

Whether or not this conclusion is correct, if on the facts of this case, the cranes were the subject of "an arrangement under which the goods are or may be used at or during any time by a person other than the owner of those goods," it is plain that this appeal must fail. The word 'arrangement' is defined by the *Macquarie Dictionary* to mean, *inter alia*, "the state of being arranged"; and 'arrange' is defined to mean, *inter alia*, "to come to an agreement or understanding regarding: to arrange a bargain." Obviously where there are formal contracts, as here, they are within the concept of 'arrangement.' The question thus resolves itself into whether the cranes (which are clearly 'goods' as defined) "are or may be used

.... by a person other than the owner," the owner in this case, being the appellant.

The appellant submitted that there is a distinction to be drawn between goods which may be "used by" a person other than the owner, and goods which may be "used for" a person other than the owner, and that on the facts of this case, the proper conclusion to be drawn in respect of "wet hires" was that the cranes were used by the appellant for its customers, and not "used by" its customers. Particular reliance was placed upon *Commissioner of Taxation v Brambles Holdings Limited* (1991) 28 FCR 451; 91 ATC 4285 and upon *Otto Australia Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 477; 91 ATC 4305. Both of these cases dealt with the interpretation to be given to the expression "goods for use ... by" in Item 78 Schedule 1 of the *Sales Tax (Exemptions and Classifications) Act* 1935 (Cth). In the *Brambles Holdings* case, which *Otto Australia* followed, it was held that these words have their ordinary meaning. The facts of the *Brambles Holdings* case were, in short, that Brambles Holdings had hired wheelie bins to a council which were delivered to the Council's residents, and as well collected the refuse placed in the bins in trucks which Brambles provided and maintained and which Brambles' employees operated. The Full Court of the Federal Court held that the bins were "for use by" the Council, but the trucks were not. In the case of the bins, the Court emphasised (a) the bins were hired to the Council; (b) the Council had passed a by-law requiring the use of the bins by residents, and requiring them to take care of the bins. By this means the Council had control over the bins and were entitled to demand possession of them; and (c) the Council was under a statutory obligation to provide a refuse service to the residents. Accordingly it was apt to describe the bins as being used by the Council, even though the use was not an exclusive one. But in the case of the trucks, whilst they were being used for the purposes of the Council, it was held that they were not being used by the Council. Sheppard J (at 457) emphasised that the Council could not interfere in the way the trucks were operated or otherwise exercise control over them; and

if they were lost or stolen, this was not the Council's affair. Beaumont J observed that the trucks were not in the Council's possession, nor did its servants operate them and nor were they hired to the Council. "What Brambles supplied to the Council was its services, not its goods" (at 466).

I note the observation of Sheppard J (at 457) that whether or not the goods were for use by the Council in that case involved questions of degree and proximity (see also Beaumont J at 464) and similarly, I think the same observation applies in this case. Like Thomas J in the Court below, I do not think that it is essential that there be a transfer of exclusive possession of the cranes to the hirer before it can be concluded, in ordinary language, that the cranes were "used by" the appellant's customers, although obviously if that were the case, there could be little doubt about the matter. Of more importance, in my view, is whether on the whole of the facts the 'hirers' exercised real control over the cranes in the tasks they were employed to perform, or whether the facts point to the provision of services only. In considering whether merely services were supplied, it will be appropriate to consider whether or not the appellant was employed to achieve a particular result, and whether how this was achieved was left up to it and its employees. In considering the level of control, it is relevant to consider the extent to which it was possible for the 'hirer' to exercise control over the crane's operations, bearing in mind that the operator was a skilled man who was required by law to have appropriate training and certification, and the extent to which the hirer could tell the operator what to do, and exercise real control over the machine both in its active and passive state, during the period of the 'hire.' Even if the control over the machine was not exclusively that of the hirer, it seems to me that it may nevertheless be appropriate, in ordinary language, to conclude that the machine was "used by" the hirer, depending on the circumstances.

The difficulty in this case is that whilst the circumstances of each transaction might differ, the parties have approached the case in a general way as if there were in reality no significant differences regardless of the circumstances of each transaction. Yet the degree of control exercised by the 'hirer' obviously could differ markedly. In some situations canvassed by the evidence, the hirer exercised no control over the crane at all. For example, if the 'hire' was a casual single operation to lift an object such as a boat into the water or a spa into the ground, the whole operation was usually left entirely to the appellant and its servants (see generally AB 137). In other cases, the lift required a rigger or dogman to assist in the operation, and these were usually, but not always, supplied by the 'hirer' (AB 129). In these circumstances the purpose of the rigger was to ensure that the load was correctly and safely slung, and the dogman's function was to assist the crane operator to deliver the load safely to the place required because the operator was himself unable to see properly. The fact that there was a rigger and/or dogman present supplied by the 'hirer' does not, *per se,* suggest to me that control over the crane had passed to the 'hirer.' The evidence shows that the crane operator had a right to refuse to lift any load he considered to be improperly slung (AB 191) and it is my view that the dogman merely acted as the crane operator's 'eyes.' There is no suggestion that anyone, other than the appellant's servants, has the authority or right to physically operate the crane concerned, or to place it in position to make a lift, although where it was placed would obviously be determined by what had to be lifted and where it was to be lifted. Another indication favouring the appellant's argument is that the evidence is clear that the driver never became the employee *pro hac vice* the 'hirer' but at all times remained in the employ of the appellant, although I consider that this is not a conclusive factor. There is evidence that, from time to time, when cranes were hired for a period longer than one day, the cranes were left on site if there was a satisfactory lockable site (AB 156, 165), but otherwise they were returned to the appellant's premises. This does not point in the

direction of a transfer of control or possession to the 'hirer.' The facts suggest that if the vehicles were left on site, this was simply as a matter of convenience. There is no evidence that any keys to operate the machines were handed over to the 'hirer' at any time. Although the contract documents are silent on the point, it appears that the appellant generally supplied the fuel and it was the appellant's operator's duty to ensure that there was enough fuel on site and that the crane was fuelled up (AB 125). The appellant's driver had the responsibility to ensure that the crane being used was suitable for the load and not overloaded. Only the appellant could repair the machines or authorise repairs in the case of a breakdown.

On the other hand, there are other factors pointing in the opposite direction. The 'hirer' generally provided instructions which the operator obeyed, as to what was to be lifted, in what order, and when and where it was to be placed. With respect to what was to be lifted, this was often known only in a general way by the crane operator until he arrived on site. The usual practice was for customers to order a particular type of crane, unless the customer was unsure of the crane required for the job, in which case the appellant would recommend the type of crane required. The conditions of hire up to 1987, precluded any warranty or condition that the crane was fit for any particular purpose unless the purpose was specified by the hirer at the time of hiring. Both before and after 1987 the hirer was not to use cranes for a purpose other than the purpose for which it was hired, and was not to use or direct the use of a crane for any load beyond its rated lifting capacity. Under the pre and post 1987 conditions of hire, the hirer indemnified the appellant for any loss of or damage to the plant whilst on hire or in the custody of the hirer, fair wear and tear excepted, provided that the loss or damage was not due to either the negligence of the appellant's employees or to the fact that the plant was in a defective state at the time. These particular conditions are suggestive of a bailment of the crane, and, as Morling J points out, Palmer *On Bailment* 2nd ed at 488 states:

> "... a contract for the supply of equipment and manpower ... will generally produce a bailment, regardless of the exclusive powers of operation and maintenance conferred on the supplier's operative, so long as the general course of work is to be directed by the person chartering the machine ..."

It seems clear that in practice no-one else other than the hirer was entitled to the use of the machine during the period of hire unless the hirer and the appellant consented to a new hiring by a third party (AB 155), although the general conditions entitled the appellant to determine the hire at any time. Finally, the conditions referred to the appellant's customers as the "hirer" and the transaction as a "hire."

In these circumstances, I agree with Morling J that the learned trial judge did not err in concluding that "wet hires" of the appellant's cranes fell within a 'hiring arrangement' as defined by s4(1) of the Act. I consider that, on balance, the better view is that the appellant did not, to adopt Beaumont J's expression in the *Brambles Holdings* case, merely supply crane services, except perhaps in the exceptional case where the appellant undertook a single, simple lift of say a boat or a spa, and the task was left entirely to the appellant's servants. There is no material upon which it is now possible to tell which of the 'wet hire' transactions subject to duty, if any, were of that kind. The burden of establishing that the assessments were excessive falls on the appellant *vide* s101(2)(b) of the Act, and in my opinion that burden was not discharged. Leaving aside those matters, in my opinion the hirers on the facts of this case, exercised sufficient control over the cranes for it to be proper to conclude that the cranes were, in ordinary language, "used ... by" them and not "used for" them.

As to the alternative argument that, even if appellant's "wet hiring" arrangements were liable to duty, the respondent wrongly exercised his discretion under s96(6) of the Act when considering whether he should remit the penalties for which the appellant became liable for its failure to furnish appropriate returns, I agree with

the conclusion of Morling J that it has not been shown that the respondent wrongly exercised his discretion, or that the court should itself fix penalty duty at amounts lower than those fixed in the assessments, for the reasons which he gives, and I have nothing to add.

I also agree with Morling J, for the reasons he gives, that formal orders disposing of the appeal should not be made until the question of whether or not the Act imposes a duty of excise contrary to s90 of the Constitution of the Commonwealth has been resolved.

MORLING J:

The appellant carries on business in the Northern Territory. It owns, inter alia, a number of cranes which it makes available for use by its customers. The customers pay appropriate charges for the right to use the cranes. Some cranes are made available to customers without an operator and arrangements of this kind are known as "dry hires". Other cranes are made available to customers only on the basis that they are accompanied by an employee of the appellant who operates the crane when it is in use. Arrangements of this kind are known as "wet hires".

The principle question which falls to be determined in this appeal is whether wet hires are hiring arrangements within the meaning of that term as defined in s4 of the Taxation (Administration) Act 1978 ("the Act"). If they are, instruments evidencing the arrangements are liable to stamp duty by virtue of s4

of the Stamp Duty Act 1978 and Schedule 1 thereto. If the principle question is answered adversely to the appellant, a second question arises, namely, whether the respondent wrongly exercised his discretion when considering whether he should remit the penalty for which the appellant became liable by reason of its failure to furnish returns including appropriate particulars of wet hiring arrangements.

The respondent issued assessments requiring the appellant to pay stamp duty in respect of amounts received by it under arrangements for wet hires. Being aggrieved by the assessments the appellant lodged objections pursuant to s100(1) of the Act. The objections were disallowed and thereupon the appellant appealed to this Court. The appeals were heard by Thomas J who dismissed them. From that decision the current appeal is brought.

"Hiring arrangement" is defined in s4(1) of the Act in the following terms:

> "'hiring arrangement' includes an arrangement under which goods are or may be used at or during any time by a person other than the owner of those goods where -
> (a) the arrangement is entered into in the Territory;
> (b) the goods are supplied or delivered or agreed to be supplied or delivered in the Territory; or
> (c) the goods may be used in the Territory
> but does not include -
> (d) an arrangement made under a hire-purchase agreement;
> (e) an arrangement relating to the use of an electricity, gas or water meter, a motion picture film or a book, or a caravan on a site in a caravan park (within the meaning of the *Caravan Parks Act*); or
> (f) an arrangement made under a lease of real property where the rental or other consideration in respect of

which duty is chargeable also includes rental or other consideration for goods; ..."

Section 71 of the Act requires a lender of goods to make an instrument at the time of entering into a hiring arrangement. Other sections of the Act make provision for registration of lenders and the making of returns in respect of hiring arrangements into which they have entered. A "lender" is defined in s4(1) as meaning "the person from whom goods are hired under a hiring arrangement"; and a "user" of goods is defined as meaning "the person to whom goods are hired under a hiring arrangement."

All the wet hires referred to in the relevant assessments were of mobile cranes and were made in the years 1985-1991 inclusive. In 1985 and 1986 the terms upon which the appellant hired plant to its customers were set out in a document styled "Crane and Plant Hire - General Conditions". In those years the appellant used this document in respect of both dry and wet hires. The document contained the following, inter alia, terms:

"2. (a) The Hirer indemnifies Brambles in respect of any loss damage death or injury caused by or in the course of or arising out of the use of the Plant whilst the Plant is on hire to or in the custody of the Hirer or his servant or agent or other person acting on behalf of the Hirer.

(b) The Hirer indemnifies Brambles against any loss of or damage to the Plant while it is on hire or in the custody of the Hirer his servant or agent or other persons on behalf of the Hirer, fair wear and tear only excepted provided that notwithstanding Conditions 2(a) and 2(b) the Hirer shall not be required to indemnify Brambles in respect of any liability for any loss damage death or injury where the same was caused by or arose out of the negligent act of Brambles or from the defective state or condition of the Plant or from vandalism beyond the reasonable control of the Hirer or from acts of God.

3. During the period of hire the Hirer shall observe and comply with all Acts Ordinances Regulations By-Laws and Proclamations and the requirements of

any statutory or local or other authority and all rules and requirements of the owner of any property in or about which the Plant is used in relation to

(a) the operation of the Plant;

(b) the work on which the Plant is employed;

(c) the manner of performance of that work in relation to the property in on or about which that work is being performed and shall indemnify Brambles from and against all claims for loss damage death or injury arising from any failure so to observe and comply.

4. Brambles shall have the exclusive right to determine the type of operation in which the Plant may be employed and the suitability of the Plant for the work to be performed and to terminate the hire at any time.

5. The Hirer shall use the Plant only for the work for which it was hired and shall not use or direct the use of the Plant for any load beyond its rated capacity. Brambles give no warranty condition or representation express or implied as to the capacity or fitness of the Plant for any particular purpose unless that particular purpose has been specified by the Hirer at the time of hiring.

6. The Hirer shall not be entitled to damages or compensation from Brambles for any loss suffered by reason of late delivery or breakdown of the Plant or if Brambles shall determine the hire or if the capacity of the Plant is reduced or impaired by the condition of the Place at which it is working.

...

11. The Hirer acknowledges that the rates for the hire of Plant do not include any provision for insurance on behalf of the Hirer. Insurance is the Hirer's responsibility."

Since 1987 the appellant has used a different form to record the arrangements for wet hires when hiring plant to customers. The form is styled "Terms and Conditions of Hire". Some of its terms are as follows:

"1. In these terms and conditions ...

(c) 'Plant' shall mean and include any machine or vehicle with all accessories and other equipment attached thereto or used in connection therewith hired out at any time to a Hirer.

...

2. **'INDEMNITY'**

(a) The HIRER is hereby required to and binds himself to hold BRAMBLES and the employees of BRAMBLES indemnified against all claims which may be made against them for damages or otherwise, in respect of any loss, damage, death or injury caused by or in the course of or arising out of the operation of the PLANT during all periods when the PLANT is on hire to the HIRER.

(b) The HIRER is hereby required to and binds himself to indemnify BRAMBLES for loss of or damage to the PLANT during all periods when the PLANT is on hire to the HIRER fair wear and tear only excepted.

Notwithstanding Conditions 2(a) and 2(b) the HIRER shall not be required to provide INDEMNITY in respect of any loss, damage, liability or claim where it can be shown that the same was caused by or arose out of the negligent act of any employee of BRAMBLES or by reason of the fact that the PLANT was in a defective state or condition (proof whereof in each case shall at all times rest upon the HIRER).

3. The HIRER is required during the period of hire to observe and comply with the provisions of all Statutes and Acts and Ordinances and Regulations thereunder in force during the hire in relation to the work on which the PLANT shall be employed and the manner of performance of such work in relation to the premises in or on or about which such work is required to be performed AND the HIRER shall be responsible for ensuring that the PLANT is not used for any purpose other than that for which it was expressly hired and that it is not employed to lift any load which is beyond its rated lifting capacity.

4. BRAMBLES shall have the exclusive right to determine the type of operation in which the PLANT may reasonably be employed and the suitability of the PLANT for the work required and to terminate the hire at any time AND the HIRER shall not make any claim for damages for delay through late delivery breakdown or accident or arising out of termination of the hire by BRAMBLES.

5. The HIRER acknowledges that the hourly rate charged for the hire of plant is fixed on the basis the PLANT will be used on weekdays only (excluding always Saturdays and Sundays) and then only between the hours

commencing at 7.30 a.m. and ending at 5.00 p.m. AND he agrees to pay in addition such charge as is fixed by BRAMBLES if he should during the period of hire use cause or permit or allow the PLANT to be used on any such weekday before or after the hours herein specified or on Saturdays and Sundays.

6. The HIRER further acknowledges that in addition to the charges for hire he is required to pay:
   (a) A charge in respect of each item of PLANT hired to cover the cost of delivery thereof from the depot of BRAMBLES to the site of the works or elsewhere as the HIRER shall require and for the subsequent return thereof to the said depot; and
   (b) Any amount BRAMBLES is required to pay any employee as an allowance under any Award for travelling expense and/or time spent in travelling to and from the site or sites where the equipment is being used."

The usual arrangement made in respect of the wet hire of a crane is that the customer contacts the appellant's office and indicates generally what type of crane is required. The customer will advise the nature of the work he desires to carry out. One of the appellant's employees will then determine, if necessary, what specific type of crane is appropriate for the job. The booking is then entered on the daily booking sheet specifying the type of equipment, the nature of the job involved and the time required on site. The job is then designated to a specific operator who holds a certificate authorising him to operate the crane allocated to the job.

At the required time the operator leaves the appellant's premises and travels with the crane to the site designated by the hirer. The operator is given instructions by the site manager as to what has to be moved and where it is to be placed. Often the crane operator will be required to work with a dogman or rigger employed by someone other than the appellant. It is the responsibility of the crane operator to ensure the job he has been asked to do can be carried out in a safe and satisfactory manner, that he has the

appropriate crane for the job and that it is not loaded beyond its rated capacity. Although the customer directs what work is to be done, the operator is at all times responsible for his machine. At the conclusion of the hire the operator drives the equipment back to the appellant's premises. When the work to be done cannot be performed within a day, the crane may remain on the customer's site overnight.

For a casual wet hire, the customer is charged on an hourly basis. For lengthy periods of hire the parties enter into a written agreement for payment of a sum that includes a figure for mobilisation and relocation of the crane and a figure for the cost of the equipment and of the operator's services.

Different arrangements obtain with regard to wet hires of cranes at Darwin wharf. The Court was informed on the hearing of the appeal that it is no longer contended by the appellant that such wet hires are not the subject of hiring arrangements within the meaning of the Act. It is therefore unnecessary to consider the terms upon which such wet hires are made.

I turn now to consider whether an arrangement for a wet hire falls within the definition in s4(1) of "hiring arrangement". As I have stated, the definition is, in part, as follows: "'hiring arrangement' includes an arrangement under which goods are ... used at ... any time by a person other than the owner of those goods ...". Mr Gzell QC, senior counsel for the appellant, submitted the definition was so wide that the word "includes" should be construed as meaning "means and includes" and that accordingly the definition is exhaustive.

The question whether the definition is exhaustive must be determined by ascertaining what was the intention of the legislature. As Kitto J said in *Y.Z. Finance Company Pty Limited v Cummings* (1964) 109 CLR 395 at 401-402:

> "Unlike the verb 'means', 'includes' has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears. The well-known statement of Lord *Watson* in *Dilworth v Commissioner of Stamps* [1899] A.C. 99, at pp. 105, 106 should not be taken so literally as to reduce the inquiry in a case like the present to an inquiry into the meaning of the word 'includes'. Strictly speaking, that word cannot be equivalent to 'means and includes'. But a provision in which it appears may or may not be enacted as a complete and therefore exclusive statement of what the subject expression includes. A provision which is of that character has the same effect as if 'means' had been the verb instead of 'includes'. The question whether a particular provision is exclusive although 'includes' is the only verb employed is therefore a question of the intention to be gathered from the provision as a whole."

There is some force in Mr Gzell's argument, that it is difficult to think of any arrangement, other than one of the kind referred to in the definition, which could be described in ordinary parlance as a hiring arrangement. Nevertheless, the draftsman of s4(1) was careful to use both "means" and "includes" when defining the various terms referred to in the subsection: compare, for example, the definitions of "bill facility", "Crown lease", and "dutiable property" ("means") and the definitions of "hiring arrangement" and "lease" ("includes"). In these circumstances it may be readily inferred that when he used "includes" he did not intend the definition to be exhaustive. This is plainly the case in the definition of "lease" which is defined as including "a sub-lease and an agreement for a lease or sub-lease ...". It seems reasonably clear that the draftsman deliberately used "means" when he intended a definition to be exhaustive and "includes" when his intention was that a definition should not be exhaustive. In my opinion, the definition of "hiring arrangement" is not exhaustive. The question therefore arises whether the contractual arrangements for wet hires of cranes fall within the ordinary meaning of the words "hiring arrangement".

I have already referred to the written terms and conditions of the arrangements made by the appellant with its customers and to the circumstances in which the cranes were taken to the customers' work-sites and operated by the appellant's employees. The appellant's Darwin manager, Mr Kelly, gave evidence which throws additional light on the relationship between the appellant and its customers. He was asked to describe the normal way in which a customer would ask the appellant to provide a crane. He replied: "The norm would be that the supervisor from the building company would ring up and say: 'We want a particular crane, XYZ.' Alternatively, if they are unsure of their [sic] type of crane that they require, they will ask us to go to site and do a - measure up the particular job in hand, and on that basis then we recommend to them what type of crane is required." (AB132)

He was also asked whether a customer would ever suggest to the appellant that it carry out the necessary crane work on a job as sub-contractor to the customer. He said this "didn't happen". He agreed with the proposition that "What happens is that (a customer) hires your cranes to do his work." (AB132-3)

With respect to the hire of a crane for an extended period he agreed that the operator would arrive on the job from day to day not knowing exactly what work he was to do and would not know until after he had arrived what his work would be for that day (AB136).

With respect to the customer's right to direct how the crane should be used, he gave the following evidence:

> Q: "Leaving aside extreme cases of where they [i.e. operators] were asked to do dangerous things or things beyond the capacity of the crane in which case, of course, the driver would say no, he's not going to do that, generally speaking the driver would be obliged to comply with whatever directions the hirer wanted, how the crane wanted [sic] to be used to lift this, that and the other thing, or where to use it and so on?--- Yes." (AB151)

Evidence was also given by Mr Campbell, an employee of one of the appellant's regular customers. He said his company made arrangements for the use of cranes on an annual basis and requested the appellant to quote an hourly rate on all cranes. The conditions of hire apparently included the following:

> "The Company [ie the customer] shall not sublet or lend, assign or part with the possession or control of the equipment hired by the Company under this Agreement to any third party without the written consent of the Contractor [ie the appellant] first obtained." (AB225)

I say the above condition was "apparently" included in the terms of hire because although the terms referred to in Mr Campbell's evidence were included in a 1992 transaction, he said that the document used for "transactions in 1990 was 'in the same format'."

A consideration of the whole of the circumstances under which the appellant hired its cranes leads me to conclude that the arrangements it made with its customers fell within the ordinary meaning of "hiring arrangement". I think the appellant and its customers correctly used the terms "hire" and "hirer" when describing their contractual relationship.

The expression "hiring arrangement" is of wide import and is apt to refer to contracts of the kind entered into by the appellant with its customers. It is not without significance that the appellant chose to describe itself as the "hirer" when providing a crane and operator to a customer. In so describing itself the appellant made appropriate use of the ordinary meaning of the word "hire". The ordinary meaning of "to hire" is: "To procure the temporary use of (any thing) for stipulated payment" (Oxford English Dictionary). Of course, misuse of language by parties to a transaction when describing it cannot alter the nature of it, but I do not think it should be assumed that the appellant and its customers were unaware of the legal significance of the terminology they used to describe their contractual relationship.

However, it is submitted on behalf of the appellant that a hiring arrangement cannot come into existence in the absence of a bailment by the owner of a chattel to the person who hires it, that a bailment cannot occur in the absence of the passing of possession of the chattel and that since possession of a crane does not pass under a wet hire arrangement, such an arrangement is not, in law, a hiring arrangement.

This argument attributes to the words "hiring arrangement" a more technical meaning than they have in ordinary English usage: cf the dictionary definition of "to hire" referred to above. But even if the more technical meaning be adopted I think the arrangements made by the appellant for wet hires of its cranes come within the meaning of "hiring arrangement" as defined in s4 of the Act. Before considering the appellant's argument that, under a wet hire, possession of a crane does not pass from the appellant to its customer it is instructive to note how hiring arrangements of the type under consideration are categorised in Palmer on Bailment, 2nd edition (1991). Paton refers (at 470) to cases where the owner of a chattel such as a machine makes it available, with an operator, to a third party and observes that contracts of this kind are "normally designated leasing or hiring of machines". After reviewing many cases in which the legal nature of such transactions has been considered, he observes at 488:

> "It seems, then, that a contract for the supply of equipment and manpower of this variety will generally produce a bailment, regardless of the exclusive powers of operation and maintenance conferred on the supplier's operative, so long as the general course of work is to be directed by the person chartering the machine and the accident occurs during that time."

The Court was referred to a number of decisions in which consideration has been given to the question whether a customer gains the right to possession of a chattel supplied to him with an operator and whether, in such cases, the chattel is "used by" the customer.

Each case depended, of course, on its own facts, but in deference to counsel's careful argument I shall refer to some of them.

In *Acadia Road Contractors Limited v Canadian Surety Company* (1977) 81 DLR (3d) 169 and on appeal (1978) 27 NSR (2d) 605 the owners of two cranes supplied them to a contractor who was erecting a bridge. The cranes were operated and maintained by their owners, but the contractor directed their work. The cranes were damaged due to the contractor's negligence whilst the bridge was under construction. The contractor claimed indemnity from its insurer. The insurer refused to indemnify the contractor, relying upon a provision in the policy of insurance which excluded the right to indemnity in respect of "property owned, used or occupied by or leased to the Insured" and also in respect of "property in the care, custody or control of the Insured." It was held that the contractor was entitled to be indemnified. The decision of Cowan C.J.T.D. (which was affirmed on appeal) was based upon his Honour's conclusion that the cranes were never in the possession of the contractor. He was of the view that the cranes had not been leased to the contractor, the agreement being that the owners would supply two cranes, together with operators, to be used under the direction of the contractor. The question whether this was a hiring arrangement was not addressed. Nevertheless, it is plain that the view was taken, on the facts of that case, that the cranes were not used by the contractor within the meaning of the exclusion clause in the insurance policy.

Coast Crane Co. Ltd. v Dominion Bridge Co. Ltd. et al (1961) 28 D.L.R. (2d) 295 was another case in which a crane was hired with an operator. It was held there was no bailment of the crane to the hirer. But the hirer apparently hired the crane for use by himself and other contractors as well. In fact, the hirer used the crane for only two hours during the week after it was hired and before it was damaged. With respect, I would have thought the finding that there was no bailment in this case is doubtful in view of the contractual

arrangements for the hire of the crane. These obliged the hirer to take the operator supplied with the crane onto its payroll and to pay him his wages, to supply fuel and lubricants required for the operation of the crane, and to be responsible for its maintenance.

In another case in which the operator was taken onto the hirer's payroll there was found to be a bailment of the crane: see *Great Lakes Steel Products Ltd. v M.E. Doyle Ltd. et al* (1968) 1 D.L.R. (3d) 349.

Another Canadian case, *Allison Concrete Ltd v Canadian Pacific Ltd.* (1973) 40 D.L.R. (3d) 237 is on the other side of the line. On the facts of that case it was held that where a contract was made to hire a machine for work to be directed by the hirer, there was a bailment of the machine even though the machine was operated by the owner's employee.

Other cases in pari materia include *J.D. Irving Limited & Ors v Mojan Ltd & Ors* (1983) 52 NBR (2d) 361; *Kenting Drilling Ltd v The General Accident Assurance Company of Canada* (1979) 5 W.W.R. 68 and *D. Porter & Son Ltd. v Nova Scotia, Province of and Provincial Tax Commission* (1979) 37 N.S.R. (2d) 164 but I do not think they shed any further light on the present case.

Each case must depend on its own facts. It is indisputable in the present case that the person who is responsible for the safe working of a crane which has been wet hired is an employee of the appellant. Whilst the crane is actually working, he is the person who has control over the manner in which it is operated to ensure that it is used within its rated capacity and in accordance with safe and satisfactory work practices. But I do not think this necessarily means that the customer who has hired the crane is not in possession of it. It is the customer who determines what work the crane is to perform, where it is to work and the periods when it is to be operated.

If a customer, having hired a crane for a set period, finds that he has no work for the crane to do during the whole of that period, the crane remains under his control in the sense that he has the right to dictate what is to happen to it during the period when it is not in use. During the period he has hired a crane no other person can lawfully take possession of it against his will or take it out of his control. Certainly neither the crane operator nor the appellant has that authority.

In a real sense what the operator of a crane does when it is on wet hire to a customer is done at the direction of the customer and not of the appellant. The fact that the operator remains the employee of the appellant does not mean that he is not acting under the direction of and on behalf of the customer, nor does it alter the essential nature of the arrangement made between the appellant and the customer, which is an arrangement for the hire of the crane. It is not necessarily inconsistent with the bailment of a chattel that the bailor's employee should operate it whilst it is bailed.

The requirement that a customer accept an employee of the appellant as the operator of a crane on wet hire is but one of the conditions of hire and does not affect the nature of the transaction as a "hiring arrangement".

It is to be observed that, subject to certain exceptions not presently relevant, the terms and conditions of hire applicable to wet hires since 1987 oblige the hirer to indemnify the appellant for loss of or damage to a crane when it is on hire. It is difficult to understand why such an obligation was included in the terms unless the parties contemplated that whilst a crane was on hire to a customer it would be regarded as being in his possession. The parties can hardly have intended that the hirer would be liable to indemnify the owner for damage caused to the crane whilst it was not in his possession.

The terms of hire (clause 4) also provide that the appellant has the right to determine "the type of operation in which the PLANT may reasonably be employed." This clause appears to me to contemplate the plant will be employed by the customer in operations approved by the appellant, ie that the customer will be the user of the plant. It could hardly be said that a customer who "dry hires" one of the appellant's cranes and arranges for it to be operated by a person who is the servant of a third party does not use it if he instructs the operator what work the crane is to perform. So, in the case of a wet hire, the customer uses the crane he has hired by arranging for it to be operated by the appellant's employer and instructing him what work he is to carry out.

The above considerations lead me to conclude that the arrangements made by the appellant for wet hires of its cranes were "hiring arrangements" for the purpose of s4(1) of the Act.

Although I am of the opinion that the definition in s4(1) is not exclusive, I shall consider the appellant's argument that the meaning of "hiring arrangement" is to be determined by reference only to the words "an arrangement under which goods are or may be used at or during any time by a person other than the owner of those goods ...". It was central to this argument that although cranes which are wet hired are used for the purposes of the hirers, they cannot be said to be used by them. It was submitted that an essential feature of an arrangement under which goods "may be used ... by a person other than the owner of those goods" is that a person other than the owner has possession of the goods. Since, so it was submitted, the appellant's customers do not gain possession of cranes which are wet hired to them, the cranes are not used by them.

For the reasons I have already given, I am of the opinion that the fact that a crane is supplied with an operator does not have the consequence that the customer fails to gain possession of the crane.

Thus, even if one accepted the appellant's argument that the definition of "hiring arrangement" is exhaustive its wet hiring arrangements would be caught by the definition.

Further guidance on the question whether cranes hired with an operator are "used by" customers can be gained from *Commissioner of Taxation v Brambles Holdings Limited* (1991) 28 FCR 451. In that case Brambles had contracted with a municipal council to supply bins directly to occupiers of premises to facilitate refuse collection. The bins were hired by the Council from Brambles. They were delivered directly to occupiers who were required to keep them clean and in good condition and to otherwise deal with them as required by a by-law made by the Council. The question for decision was whether the bins were exempt from sales tax as goods for use by the Council. The Commissioner contended that the bins were not for use by the Council but were used by Brambles to discharge its contractual obligations to the Council. It was held that the bins were exempt from tax as being for use by the Council.

After referring to the fact that the bins were hired to the Council and that this gave it control over them because it could demand possession of them at any time, Sheppard J said (at 457) that, " ... as a matter of the ordinary use of language, it is apt ... to say that the Council used the bins which had been hired to it for the purposes of discharging its obligations under the *Health Act* ...". Similarly, in the present case, I think it is apt to say that the appellant's customers who hire cranes with an operator use the cranes for their own purposes, ie to carry out the building operations upon which they are engaged.

In *Otto Australia Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 477 the facts were much the same as in *Brambles' Case*, save for the important distinction that the refuse bins were not hired to the Council. The majority of the Court (Sheppard and Beaumont JJ) held that the bins were not used by the Council. It was central to

Sheppard J's decision that the bins were not hired by the Council and that it did not have the right to take possession of the bins. In the present case it was always open to customers to direct what work cranes were to perform and when they were to be used during the period of hire. If a dispute had arisen between a customer and a crane operator as to how a crane was to be operated the customer would have been entitled (during the period of hire) to take possession of the crane even if it could not have been operated until the dispute had been resolved.

Having regard to all the circumstances in which work performed by wet hired cranes was carried out I think they can fairly be described as "goods ... used... by a person other than the owner ...". I therefore cannot accept the appellant's argument that the cranes were used only for the benefit of customers, and were not used by them.

I therefore conclude that Thomas J did not err in finding that wet hires of the appellant's cranes fell within a "hiring arrangement" as defined in s4(1) of the Act.

Counsel for the appellant put an alternative argument that, even if the appellant's wet hiring arrangements were liable to duty the respondent wrongly exercised his discretion under s96(6) of the Taxation (Administration) Act when considering whether he should remit the penalty for which the appellant became liable by reason of its failure to furnish returns including appropriate particulars of wet hiring arrangements.

The assessments of duty made by the respondent were default assessments made under s94 of the Act. By virtue of s96(1) the appellant became liable to pay, by way of penalty, in addition to the amount of duty assessed, an amount equal to double the amount of that duty. Further, the appellant became liable to pay by way of penalty interest calculated at the rate of 1.5% per month upon the amount of

the unpaid duty. However, s96(6) provides that the respondent "may, in a particular case, for such reasons as in his discretion he thinks sufficient, remit the whole or part of an amount payable by way of penalty ...".

The respondent exercised his discretion by reducing the penalty to 40% of the duty assessed, but declined to reduce the amount of the penalty referable to interest calculated at 1.5% per month.

The appellant exercised its right under s100 of the Act to object to the assessments. One of the grounds of the objections was that in the exercise of his discretion the respondent should have reduced the additional penalty tax to nil. The Commissioner disallowed the objections, whereupon the appellant appealed to the Supreme Court. Upon such an appeal, grounds of appeal are confined to those stated in the objection: s101(2). There is no provision in the Act restricting the power of the Supreme Court to allow an appeal on the ground that the discretion to remit an amount payable by way of penalty has been wrongly exercised. Hence, so it was argued, the Court has power to set aside the respondent's decision qua penalty if it is satisfied that the discretion was, indeed, wrongly exercised.

It was submitted that the trial judge erred in not directing the respondent to further remit the penalties imposed under s96(6). It was asserted at the trial (and on appeal) that similar legislation in New South Wales had been construed by the review authorities in that State as not rendering wet hire arrangements liable to duty, that this fact had been publicised in circulars and rulings issued by it, and that this was a powerful circumstance that should have led the respondent to further remit the penalties.

Mr Hampson QC, senior counsel for the respondent, submitted that a sum added by way of penalty does not form part of the assessment and cannot be challenged on an appeal lodged under s101 of the Act. As I am of the opinion that no ground has been made out for

setting aside the respondent's decision on the question of penalty, I find it unnecessary to deal with this submission.

The trial judge's reasons for declining to give the respondent a direction to remit the penalties appear from the following passage in her reasons:

> "Whilst I concede the Appellant may have reason to take some encouragement from the position in N.S.W. the fact is that there is to be legislation in that state which will specifically preclude 'wet hire' from duty. There is no evidence that such legislation is pending in the Northern Territory and in the Northern Territory the Appellant is bound by the law as it is and on the findings of fact and law that I have made I do not consider it appropriate to give the Respondent a direction in respect of remitting penalty. My decision does not conflict with the advice in the circular (Exhibit 1)."

With respect, I do not think the fact that legislation specifically excluding wet hiring arrangements from duty was pending in New South Wales was a sufficient or satisfactory basis for rejection of the appellant's argument on this point. I therefore think it is necessary to consider all the matters relied upon by the appellant in support of the argument.

The relevant provisions in the Taxation (Administration) Act as to hiring arrangements were enacted in 1978. The equivalent New South Wales legislation became law in 1967. In a ruling given in June 1987 by the Chief Commissioner of Stamp Duties in New South Wales it was said that it was not possible to give a definitive ruling on the classification of arrangements of a particular class. The ruling continued:

> "However some guidelines are in use for the purpose of assisting an owner of goods to determine whether or not an arrangement or contract is a 'hiring arrangement' within the meaning of the Stamp Duties Act.
>
> The question at issue will be to what extent are the hired goods in the control of the hirer? If the operator performs the agreed task subject to direction by the

> hirer, then prima facie the arrangement is a hiring arrangement rather than a contract of service. Several aspects will be relevant including whether performance of the work depends upon the presence and/or supervision of the 'hirer' on site; the frequency and nature of adjustments in work procedures as a result of the requirements of the hirer; and the variety of tasks performed with the equipment for the one 'hirer'."

The appellant relies upon this ruling as confirming its belief that its wet hiring arrangements were not dutiable. However, since it was always an open question whether the cranes hired by the appellant were in the customers' control, I do not think the appellant was entitled to treat the ruling as necessarily confirming its view that its wet hiring arrangements were not dutiable.

The appellant also relies upon a ruling published by the respondent which was, in part, as follows:

> "Where hired plant is supplied with an operator or driver and the carrying out of the job is not the responsibility of the lender, the arrangement is liable for duty. In these sort of hiring arrangements the equipment and the operator is under the direction and control of the person paying the hiring charge. ...
>
> Where a contract is arranged between the customer and the lender for the completion of a job which is the responsibility of the lender and the customer merely requires the job to be done and does not direct or control the way in which it is done, the arrangement is not liable for duty. ..."

This ruling should not have given the appellant any confidence that its wet hiring arrangements were not dutiable. At the very least, it must have appeared an open question whether the appellant's arrangements involved it assuming responsibility for the completion of the job for which a crane was hired.

News releases issued in May and September 1991 by the New South Wales authorities, which were apparently regarded by the appellant as

reinforcing its view of the law, took the matter no further than the earlier rulings. Nor, in my opinion, did the views of the authors of texts on stamp duty legislation. Those views were not based upon the written arrangements entered into by the appellant with its customers or a consideration of the circumstances in which those customers made use of the appellant's cranes.

In these circumstances, I do not think it has been shown that the respondent wrongly exercised his discretion under s96(6) of the Act, or that the Court should itself fix penalty duty at amounts lower than those fixed in the assessments.

The Court was informed by counsel in the course of the hearing that the appellant wishes to consider whether it should press a ground of appeal (which was not argued) that the Taxation (Administration) Act imposes a duty of excise contrary to s90 of the Constitution of the Commonwealth. Accordingly, formal orders disposing of the appeal should not be made until that matter has been determined. If that ground of appeal is not pursued, the appeal should be dismissed with costs.