NICHOLAS PASPALEY PROPERTIES PTY LTD v COMMISSIONER OF TAXES

Supreme Court of the Northern Territory of Australia

Angel J.

18, 19, 26 February and 1 March 1991

STAMP DUTIES - Appeal - opinion of Commissioner - nature of appeal - Stamp Duty Act NT 1978 s.101

STAMP DUTIES - Agreement - conveyance - whether stamped instrument constitutes an agreement or conveyance - memorandum of agreement not sufficient - Stamp Duty Act s.3, 8(1), Taxation (Administration) Act s.4(1)

STAMP DUTIES - Sale of land and business - different purchasers - whether conveyances constitutes or constitute one transaction - whether land and business "complicated" - Stamp Duty Act s.8(1)

Statutes referred to:

Stamp Duty Act NT 1978 ss.3, 8(1), 101
Taxation (Administration) Act 1978 NT s.4(1)

Cases referred to:
Avon Downs Pty Ltd v FCT (1949) 78 C.L.R. 353
Allen v Carbone (1975) 132 C.L.R. 528
Brien v Dwyer (1978) 141 C.L.R. 378
Builders Licensing Board v Sperway Constructions (Syd.) Pty Ltd (1976) 135 C.L.R. 616
FCT v Brian Hatch Timber Co. (Sales) Pty Ltd (1971-72) 128 C.L.R. 28
Jeffrey v Commissioner of Stamps (1980) 23 S.A.S.R. 398
Old Reynella Village Pty Ltd v Commissioner of Stamps (1989) 51 S.A.S.R. 378
Outer Suburban Property Ltd v Clarke [1933] S.A.S.R. 221
Sindel v Georgio (1984) 154 C.L.R. 661
Sportsman's Hotel Pty Ltd & Anor v Commissioner of Stamp Duties (Tas.) (1990) 21 A.T.R. 291

Cases followed:
Carlill v The Carbolic Smoke Ball Company [1892] 2 K.B. 484
Grimwade v FCT (1949) C.L.R. 199
Groves v Groves [1944] S.A.S.R. 187
Holliday v Lockwood [1917] 2 Ch. 47

Cases not followed:
Fleetwood-Heskett v Commissioners of Inland Revenue [1936] 1 K.B. 351

Counsel for the Appellant:	D. Mildren QC/C. Ford
Solicitor for the Appellant:	Ward Keller
Counsel for the Respondent:	G. Nicholson/R. Silva
Solicitor for the Respondent:	Solicitor for the NT

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No.468 of 1989

IN THE MATTER of an appeal under the Taxation (Administration) Act

BETWEEN:

NICHOLAS PASPALEY PROPERTIES PTY LTD
Appellant

AND

COMMISSIONER OF TAXES
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT
(Delivered the 1st day of March 1991)

This is an appeal pursuant to s.101 of the Taxation (Administration) Act 1978 NT challenging a stamp duty assessment of $200,000.

On 5 December 1988, the appellant became the registered proprietor of waterfront land in Darwin known as the Francis Bay Slipway. Prior to becoming so registered it had on that day agreed to purchase the land from

John Holland Pty Ltd for a total consideration of $3,339,709.

On the same day, Yeodine Pty Ltd agreed to purchase the business conducted on the land from Francis Bay Slipway Pty Ltd for the sum of $1,660,291. That business comprised certain items of plant and equipment, certain chattels, work in progress and the goodwill of the business.

The agreement in respect of the purchase of the land was entered into on 5 December 1988 when the vendor and the appellant exchanged the executed part and counterpart of a document headed "AGREEMENT FOR SALE AND PURCHASE OF LAND". The agreement in respect of the sale of the business was entered into on the same occasion when an executed part and counterpart of a document headed "CONTRACT FOR SALE OF A BUSINESS" was exchanged between Francis Bay Slipway Pty Ltd as vendor and Yeodine Pty Ltd as purchaser. Settlement of the agreements took place on the same occasion. The executed transfer of the land was delivered by the vendor to the appellant, and registration thereof followed shortly thereafter.

On 2 December 1988, the respondent assessed stamp duty in the sum of $200,000 payable on the part agreement for sale and purchase of land executed by the vendor. The counterpart executed by the purchaser (the appellant) was

assessed for nominal duty. The stamp duty was said to be payable ad valorem on the total consideration of both the land transaction and the business transaction, that is on the total consideration of $5m. The justification for the assessment was said to lie in s.8(1) of the Stamp Duty Act. That section provides:

> "Subject to subsection (2), where a conveyance is executed in pursuance of an agreement or a number of agreements which, in the opinion of the Commissioner, constitutes or constitute one transaction, the value of or consideration paid for (whichever is the greater) -
>
> (a) any chattels; or
>
> (b) any enhancement of the land or interest conveyed, by virtue of the position of, or any transferable licence, right or privilege (however described) associated with, the land,
>
> included in the transaction, shall be included in the amount upon which duty is assessed."

Section 8(2) is irrelevant for present purposes.

Counsel before me were agreed as to the nature of this appeal. Having regard to the reference to "the opinion of the Commissioner" in s.8(1) and Avon Downs Pty Ltd v FCT (1949) 78 C.L.R. 353 at 360, FCT v Brian Hatch Timber Co (Sales) Pty Ltd (1971-72) 128 C.L.R. 28 at 45, 56-58, 59 and Builders Licensing Board v Sperway Constructions (Syd.) Pty Ltd (1976) 135 C.L.R. 616 it is, as a first

step, incumbent on the appellant to show that the Commissioner erred in some way in reaching his opinion on the material before him; and on error being shown, the appeal is thereafter to proceed de novo on the materials before the court.

The first question is whether the assessed instrument is a conveyance for the purposes of s.8(1) of the Stamp Duty Act.

Section 3 of the Stamp Duty Act provides that the Stamp Duty Act is incorporated and shall be read as one with the Taxation (Administration) Act. Section 4(1) of the Taxation (Administration) Act relevantly provides "'conveyance' includes - (a) ... (b) a transfer, or an agreement for a transfer, of an estate or interest in land in the Territory ...".

Counsel for the Commissioner submitted the assessed instrument was "an agreement for a transfer of an estate or interest in land in the Territory". I do not accept this submission. The instrument is dated 2 December 1988. It is executed by the vendor only. It was a part that on 5 December 1988 was exchanged for a counterpart, executed by the appellant. No binding agreement was reached between the vendor and the appellant until 5 December 1988. Neither at the time of the assessment (2 December 1988) nor

subsequently did the instrument constitute an agreement. The distinction between a "contract in writing" and "contract evidenced by" writing is well known, Outer Suburban Property Ltd v Clarke [1933] S.A.S.R. 221 at 226. The instrument evidences the terms of an agreement entered into on 5 December 1988. Until the exchange of part and counterpart the appellant was not bound to purchase the land. The parties contracted in a familiar way, see Allen v Carbone (1975) 132 C.L.R. 528, Brien v Dwyer (1978) 141 C.L.R. 378, Sindel v Georgio (1984) 154 C.L.R. 661. There being no agreement prior to 5 December 1988, the instrument cannot be a conveyance for the purposes of s.8(1) of the Stamp Duty Act. As Hawkins J said in Carlill v The Carbolic Smoke Ball Company [1892] 2 Q.B. 484 at 490:

> "Whether a written or printed document falls within this requirement [ie an agreement or memorandum of agreement for the purposes of the Stamp Act 1891 U.K.] depends upon its character at the time it was committed to writing, or print, and issued. If at the time no concluded contract had been arrived at by the contracting parties, it certainly could not in any sense be treated as an agreement, nor could it be treated as a memorandum of an agreement, for there could be no memorandum of an agreement which had no existence. No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement; but, if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement,

unless, indeed, after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered."

Section 8(1) of the Stamp Duty Act speaks of agreements; it makes no mention of memoranda of agreement. Counsel for the respondent relied upon the reasons for judgment of Lord Hanworth MR and Romer LJ in Fleetwood-Hesketh v Commissioners of Inland Revenue [1936] 1 K.B. 351 at 359, 363-4. Their reasoning is to be contrasted with the more careful, if I may say so with respect, reasoning of Maugham LJ. If the reasoning of Lord Hanworth MR and Romer LJ leads to a different conclusion from my view that the instrument is not an agreement and thus not a conveyance as defined for the purposes of s.8(1) of the Stamp Duty Act, then I, with respect, disagree with that reasoning and decline to follow it.

It follows that the Commissioner erred and that the appeal must be allowed. However, counsel for the parties have requested that in remitting the matter to the Commissioner for reassessment, I express my views as to whether the Real Property Act transfer should bear ad valorem duty on the basis of an aggregated consideration pursuant to s.8(1) of the Stamp Duty Act. There is no

appeal from the assessment of nominal stamp duty on the transfer, so strictly speaking the matter is not before me. However, it is a convenient course and may well avoid future litigation. It is open to the Commissioner to reassess the stamp duty payable on the transfer: s.97(1) Taxation (Administration) Act.

The transfer is a conveyance as defined. Was it "executed in pursuance of an agreement or a number of agreements which ... constitutes or constitute one transaction" which included chattels? The appellant argued that the contract for sale of land was separate from the contract for sale of the business. The contract for sale of land was expressed to be conditional upon the sale of the business but the mere fact one contract is conditional upon another contract does not ipso facto render it one transaction. As counsel for the appellant said, the fact that a contract to purchase land is subject to obtaining finance does not render the contract to purchase and the obtaining of finance one transaction.

Counsel for the appellant stressed that there was no term in the contract to purchase the business pursuant to which the land was transferred. By way of contrast, the contract for the purchase of land expressly so provided. Counsel for the appellant submitted that a contract constituting "one transaction" does not mean a contract

constituting "one of a series of transactions" or a contract constituting "part of a larger transaction". There was nothing in the agreements themselves which indicated that one agreement was entered into in consideration of the other. Neither could it be said, it was submitted, that the agreements stood or fell together. The agreement to purchase the business "stood alone": in certain events contemplated by the agreement for sale and purchase of the land, that agreement might be terminated by the appellant without reference to the agreement to purchase the business. Section 8(1) of the Stamp Duty Act uses the words "constitutes or constitute one transaction" and may be contrasted with legislation that speaks of contracts being aggregated for stamp duty purposes if they "together form, or arise from substantially one transaction or one series of transactions", such as s.66 a b(1) of the South Australian Stamp Duties Act 1923; see Jeffrey v Commissioner of Stamps (1980) 23 S.A.S.R. 398 and Old Reynella Village Pty Ltd v Commissioner of Stamps (1989) 51 S.A.S.R. 378. Nor, it was said, could the Commissioner go behind the legal entities, that is, the two purchasers. Each was to be treated as a separate company, true though it may be that each was a wholly owned subsidiary of a third company and had common directors. Related companies are grouped for the purposes of payroll tax, see division 8A of the Taxation (Administration) Act. They are not so grouped for the purposes of stamp duty.

In ordinary parlance the word 'transaction' is wider than the word 'contract', see per Rich J in Grimwade v FCT (1949) 78 C.L.R. 199 at 222. However, s.8(1) by its use of the words "constitutes or constitute" equates "an agreement or a number of agreements" with "one transaction". The section is thus narrower than, for example, the South Australian legislation. Counsel for the appellant also submitted that agreements which form one transaction are not caught by s.8(1) unless the conveyance is made pursuant to each agreement comprising the one transaction and not merely one of the agreements. I do not accept this submission. It seems to me that if a number of agreements constitute one transaction and the only one of those agreements expressly provides for the conveyance, the conveyance can nevertheless be said to be in pursuance of all the agreements comprising the transaction. I, with respect, agree with Mayo J in Groves v Groves [1944] S.A.S.R. 187 at 189, 190. The words "in pursuance of" may mean under or according to the terms of an agreement but may have a wider meaning, that is, in intended performance or furtherance of an agreement. The words may describe objectively the character of the act or may link up the reason for what is done, or both. The fact that a conveyance is executed under or according to an express term of one of a number of agreements does not thereby prevent it also being executed pursuant to one wider transaction constituted by all the agreements.

In the circumstances of this case I have reached the view that the transfer was a conveyance executed in pursuance of an agreement which constituted one transaction. That transaction included chattels. The agreement was between the respective purchasers, on the appellant's part to acquire the land and to give Yeodine Pty Ltd possession and use thereof, and on the part of Yeodine Pty Ltd to acquire the business and to take possession of the land and conduct the business thereon. In furtherance of that agreement - to which neither vendor was a party - the land and business were respectively acquired; in pursuance of that agreement the transfer was executed. The existence of such an agreement is to be inferred from the facts.

It seems to me that it matters not that there were different vendors of the land and of the business. Of more importance are other features of the transaction that lead to my conclusion. The two purchaser companies were related, albeit separate legal entities. They were owned by the same holding company, Nicholas Paspaley Investments Pty Ltd. They had common directors. The subject matter of the contract for the sale of the business included fixtures and site improvements which were considered part of the land. What is described as a "Synchro-lift", which may be loosely described as the slipway apparatus, ie, rails, and lifting mechanism to remove ships from the sea to dry land,

was referred to in both the contract to purchase land and the contract to purchase the business. The sale of the business included sale of the goodwill, work in progress and permanent fixtures, eg the retaining sea wall. By its nature, the business could not be conducted independently of the land. The land and business assets necessarily had to be used conjunctively; they were, in the word used in the authorities, "complicated": Holliday v Lockwood [1917] 2 Ch. 47 at 56.

The purchasers here were not commercial strangers to each other. In the absence of evidence to the contrary, it is an irresistible inference that the appellant's dealings which led to the conveyance included an agreement with Yeodine for that company to purchase the business; the appellant and Yeodine Pty Ltd acted conjunctively: compare Sportsman's Hotel Pty Ltd & Anor. v Commissioner of Stamp Duties (Tas) (1990) 21 A.T.R. 291. It follows, I think, that the transfer is assessable with ad valorem duty calculated by reference to s.8(1) of the Stamp Duty Act and the agreement to purchase the business. The consideration for the purchase of the business not wholly relating to the purchase of chattels, it is inappropriate that I express any view as to how much stamp duty should be assessed on the transfer.

The appeal will be allowed. I shall hear counsel as to the appropriate orders.