FEDERAL COURT OF AUSTRALIA

Kafataris and Another v Deputy Commissioner of Taxation

[2015] FCA 874

Davies J

30 July, 20 August 2015

Taxation — Capital gains tax — Transfer of property by creation of trust in favour of wholly owned company — Whether taxpayers entitled to CGT roll-over relief — Whether trust created by operation of law or by declaration or settlement — Whether CGT event A1 or E1 most specific to circumstances — Income Tax Assessment Act 1997 (Cth), ss 102-25, 104-10, 104-55, 122-15, 122-125 — Conveyancing Act 1919 (NSW), s 23C.

The applicant taxpayers were the registered owners of a property and the sole directors and shareholders of a company, Thorium. By written offer, Thorium offered to acquire the equitable estate in the property from the taxpayers, and to issue to the taxpayers 9 million ordinary class shares in Thorium by way of consideration. The offer provided that upon acceptance of the offer, the taxpayers would be bound to hold the property on trust for Thorium. This offer was accepted by the taxpayers signing the letter of offer and applying for the shares to be allotted to them.

The taxpayers claimed to be entitled to roll-over relief in respect of the capital gains tax which would otherwise be payable following the transfer of the property by reason of ss 122-15 and/or 122-125 of the *Income Tax Assessment Act 1997* (Cth). These provisions made roll-over relief available to a taxpayer who transferred property to a wholly owned company in circumstances including those giving rise to CGT event A1 (a change of ownership because of some act or event or by operation of law). The taxpayers claimed that upon acceptance of the offer, CGT event A1 had occurred in relation to the property because a constructive trust was imposed by operation of law in favour of Thorium.

The respondent Commissioner argued that in fact CGT event E1 had occurred in relation to the property, because the taxpayers had created a trust over the property in favour of Thorium by declaration or settlement. In these circumstances, no roll-over relief was available.

Held: (1) A trust is created by "declaration" when it is created by the holder of the undivided legal interest in property using words or actions which sufficiently evidence an intention to create a trust over the property. [26]

Korda v Australian Executor Trustees (SA) Ltd (2015) 255 CLR 62, applied.

Halloran v Minister Administering National Parks and Wildlife Act 1974 (2006) 229 CLR 545; *Permanent Trustee Company v Scales* (1930) 30 SR (NSW) 391, distinguished.

Zobory v Federal Commissioner of Taxation (1995) 64 FCR 86, considered.

(2) A trust is created by "settlement" by vesting property subject to a trust for the benefit of others. [31]

Taras Nominees Pty Ltd v Federal Commissioner of Taxation (2015) 228 FCR 418, applied.

(3) The taxpayers, as absolute owners in fee simple of the property, were able to create an equitable interest in Thorium in the property by the express terms upon which they accepted Thorium's written offer, and accordingly an express, not a constructive, trust arose, by declaration and/or by settlement. [22]-[25], [31]-[32], [35]

Cases Cited

Baloglow v Konstantinidis (2001) 11 BPR 20,721.

Buzza v Comptroller of Stamps (Vic) (1951) 83 CLR 286.

Byrnes v Kendle (2011) 243 CLR 253.

Davidson v Chirnside (1908) 7 CLR 324.

Halloran v Minister Administering National Parks and Wildlife Act 1974 (2006) 229 CLR 545.

Herdegen v Federal Commissioner of Taxation (1988) 20 ATR 24.

Korda v Australian Executor Trustees (SA) Ltd (2015) 255 CLR 62.

Massereene v Commissioner of Inland Revenue [1900] 2 IR 138.

Neville v Wilson [1997] Ch 144.

Oswal v Federal Commissioner of Taxation (2013) 233 FCR 110.

Oughtred v Inland Revenue Commissioners [1960] AC 206.

Permanent Trustee Company v Scales (1930) 30 SR (NSW) 391.

Rawluk v Rawluk [1990] 1 SCR 70.

Stamp Duties (Qld), Commissioner of v Chaille (1924) 35 CLR 166.

Stamp Duties (Qld), Commissioner of v Hopkins (1945) 71 CLR 351.

Taras Nominees Pty Ltd v Federal Commissioner of Taxation (2015) 228 FCR 418.

Zobory v Federal Commissioner of Taxation (1995) 64 FCR 86.

Application

I Young, for the applicants.

M O'Meara, for the respondent.

20 August 2015

Davies J.

Introduction

1 The applicants ("the taxpayers") have appealed the decision of the respondent ("the Commissioner") to disallow their objection against the inclusion of a net capital gain of $1,134,894 in each of their taxable incomes for the income year ended 30 June 2008. The taxpayers do not dispute that they derived the net capital gain in the amount assessed. The gain was made on the creation of a trust over property owned by them to a company called Thorium Pty Ltd ("Thorium"), of which they were the sole directors and shareholders. However,

they claim to be entitled to roll-over relief under s 122-15 or s 122-125 of the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act") on the basis that CGT event A1 applies to the creation of the trust.

2 The issue is whether the creation of the trust occurred by operation of law (CGT event A1), as the taxpayers contended, or whether the taxpayers created a trust over the land in favour of Thorium by declaration or settlement (CGT event E1), as the Commissioner contended. If CGT event A1 happened, roll-over relief is available to the taxpayers pursuant to s 122-15 and/or s 122-125 of 1997 Act. The taxpayers further contended that even if CGT event E1 happened, CGT event A1 is more specific to the taxpayers' situation and, accordingly, roll-over relief is still available. Roll-over relief is not available if CGT event E1 applies.

The statutory context

3 Section 104-10 provides for when CGT event A1 happens. The section (as it was at the time) provided:

> 1. *CGT event A1* happens if you *dispose of a *CGT asset.
> 2. You *dispose of* a *CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur:
> (a) if you stop being the legal owner of the asset but continue to be its beneficial owner; or
> (b) merely because of a change of trustee.

4 Section 104-55 provides for when CGT event E1 happens. The section (as it was at the time) provided:

> 1. *CGT event E1* happens if you create a trust over a *CGT asset by declaration or settlement.
> 2. The time of the event is when the trust over the asset is created.

5 Section 102-25 provides for the order of application of CGT events if more than one CGT event happens. Relevantly, s 102-25(1) provides that:

> (1) Work out if a *CGT event (except *CGT events D1 and H2) happens to your situation. If more than one event can happen, the one you use is the one that is the most specific to your situation.

6 Sections 122-15 (individuals) and 122-125 (partnerships) provide for roll-over relief in relation to the disposal of assets to a wholly owned company. For the purposes of ss 122-15 and 122-125, relevant CGT trigger events include CGT event A1 but not CGT event E1.

Facts

7 The facts were not in dispute and can be summarised as follows.

8 On or about 19 April 1988, the taxpayers jointly acquired the property at 43-49 Goulburn Street, Sydney ("the property") for a purchase price of $4,030,000.

9 From 16 January 1991 until July 2007, the taxpayers returned rental income from the property.

10 On 2 July 2007, the taxpayers, in their capacity as the directors of Thorium, resolved that Thorium should make a written offer to acquire the equitable estate in the property for a consideration of $9 million. The minutes of meeting record as follows:

> Produced at the meeting was a draft letter of offer to be made by Thorium Pty Limited to Peter Kafataris and Helen Kafataris, the owners of [the property].
>
> The letter stated that Thorium Pty Limited wished to acquire an equitable estate in [the property] and that the consideration for the acquisition of that interest would be the payment of $9,000,000 to Peter Kafataris and Helen Kafataris.
>
> It was noted that acceptance would be constituted by dealing with the promissory note and delivering the title deeds to Con Kafataris of Lot 9, 122-130 Clareville Avenue, Sans Souci as custodian. When this occurred Peter Kafataris and Helen Kafataris would hold the land on trust for Thorium Pty Limited.
>
> RESOLVED that Thorium Pty Limited should make the offer contained in the tabled draft letter. Accordingly, the Chairman was authorised to execute the letter of offer and to deliver it to Peter Kafataris and Helen Kafataris together with a promissory note in the sum of $9,000,000 made payable to Peter Kafataris and Helen Kafataris.

11 By letter dated 2 July 2007, Thorium made an offer to acquire the equitable estate in the property. The letter stated that Thorium:

> … offers to acquire from Peter Kafataris and Helen Kafataris an equitable estate in [the property].
>
> Pursuant to this offer Thorium Pty Limited hereby tenders to Peter Kafataris and Helen Kafataris ~~a promissory note in the sum of $9,000,000~~ an application for shares in the company.
>
> Peter Kafataris and Helen Kafataris may accept the offer contained in this letter by signing the application ~~dealing with the promissory note~~ and delivering the title deeds to the property to Con Kafataris of Lot 9, 122-130 Clareville Avenue, Sans Souci in the State of New South Wales as Custodian.
>
> Once this offer has been accepted, Peter Kafataris and Helen Kafataris shall be bound to hold the property on trust for Thorium Pty Limited.

The letter was signed by Peter Kafataris.

12 For present purposes, nothing turns on the changed consideration. On the same day, the taxpayers both signed an application for the allotment of 9,000,000 ordinary class shares in Thorium. The signed application for allotment of shares states:

> To: The Directors
>
> Thorium Pty Limited
>
> PETER AND HELEN KAFATARIS
>
> APPLY for the allotment of shares in the share capital of Thorium Pty Limited (ACN 126 167 155) full particulars of which are set out in the Schedule;
>
> AGREE to be bound by the Constitution of the Company;
>
> AGREE to accept the number of shares specified in the Schedule or any lesser number of shares allotted to me;
>
> AUTHORISE you to complete the Company's register of Members in respect of the shares allotted to Peter and Helen Kafataris;
>
> WAIVE any right to receive notice of the allotment of shares.

13 The minutes of a second meeting of the directors of Thorium also held on 2 July 2007 record that:

> Produced to the Company was an application for the allotment of 9,000,000 Ordinary Class Shares in Thorium Pty Limited by Peter Kafataris and Helen Kafataris at a price of One Dollar per share.

> RESOLVED that the directors of Thorium Pty Limited should allot 9,000,000 Ordinary Class Shares in Thorium Pty Limited to Peter Kafataris and Helen Kafataris at a price of One Dollar per share.

14 On 2 July 2007, Thorium issued a share certificate to the taxpayers that they are the registered holders of 9,000,000 Ordinary Class Shares in the Company. The requisite Form 484, notifying the allotment of an additional 9,000,000 ordinary class shares in Thorium was lodged and registered with ASIC on 28 September 2007.

Did CGT event E1 happen in relation to the property?

15 The taxpayers contended that CGT event A1 occurred in relation to the property because the change in beneficial ownership of the property occurred pursuant to a constructive trust imposed over the property in favour of Thorium. The constructive trust was said to have arisen immediately upon, and in consequence of, the taxpayers accepting Thorium's written offer. The taxpayers relied for this contention upon *Zobory v Federal Commissioner of Taxation* (1995) 64 FCR 86 (*Zobory*) and *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545 (*Halloran*). The corollary of that contention was that CGT event E1 did not happen because the trust over the property was created by operation of law and not by declaration or settlement within the terms of s 104-55(1) of the 1997 Act.

16 The starting point for the taxpayers' contention was the uncontroversial proposition that a constructive trust arises as soon as the conduct which has given rise to its imposition occurs. As Burchett J stated in *Zobory* at 91:

> So clear is this proposition that it was possible for A J Oakley in his learned article "The Precise Effect of the Imposition of a Constructive Trust", published in *Equity and Contemporary Legal Developments* 427, to state (at 433) that "it seems to be universally accepted that the general rule is that a constructive trust takes effect from the moment at which the conduct which has given rise to its imposition occurs". For this rule, he cites the decision of the Supreme Court of Canada in *Rawluk v Rawluk* (1990) 65 DLR (4th) 161, where Cory J, with the concurrence of Dickson CJC, Wilson and L'Heureux-Dube JJ, expressed (at 176) his complete agreement with the view of Professor Scott that "(t)he beneficial interest in the property is from the beginning in the person who has been wronged".

It is trite law that a constructive trust arises by operation of law without reference to the intentions of the parties concerned and without any need for a curial declaration: Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) at [1301].

17 The taxpayers' contention that the change in beneficial ownership was the consequence of the imposition of a constructive trust over the property in favour of Thorium was said to be supported by the decision in *Halloran*. In *Halloran*, the appellant argued that a change of the beneficial ownership of an interest in land occurred when the following steps, described as the "first event", were carried out:

(a) the directors of P, as trustee for the P Trust, would resolve to make a written offer to buy the land in consideration of the allotment to S of 79,000 $1 A class units in the P Trust;

(b) the written offer executed by H, one of the directors of P, would be delivered to S;

(c) the directors of S would resolve to accept the offer and authorise H to inform a meeting of the trustee of the P Trust of his acceptance;

(d) the directors of P would resolve to allot 79,000 $1 A class units in the P Trust to S and issue a Unit Certificate; and

(e) the Unit Certificate would be issued.

18 Those steps were designed on the express assumption, which turned out to be erroneous, that the subject of the sale to P was ownership of the land when in fact S was not the owner but, rather, held an unregistered equitable interest in the land. The High Court held that by these steps a change in the "ownership" of S's equitable interest in the land to P was effected.

19 The plurality (Gleeson CJ, Gummow, Kirby and Hayne JJ) held that the change in beneficial ownership was brought about by, and was the consequence of, the fact that consideration was provided by P to S. The plurality's view was that the change in beneficial ownership occurred when the consideration moved to S upon the allotment of the units, "if not earlier upon acceptance by [S] of the written offer". Their Honours stated at 569:

> In the eye of equity, which provided the critical conspectus because the subject matter was purely equitable, nothing remained to be done in order to define the respective rights of [S] and [P] with respect to that equitable interest; a court of equity might be asked to protect rights completely defined in this way.
>
> …
>
> It may be convenient to describe [S] in these circumstances as in the position of a trustee for [P] under a bare trust involving no duties. But there would be much to be said for the view that the intrusion of the notion of a trust at that stage would be superfluous, were it not for s 23C of the *Conveyancing Act*.

The plurality went on to state that the absence of a disposition in writing signed by S to comply with s 23C(1)(c) of the *Conveyancing Act 1919* (NSW) would be met by reliance on s 23C(2) and a constructive trust binding on S in favour of P or, alternatively, any assertion of a lack of efficacy for want of compliance with s 23C(1)(c) would be to use the statute as an instrument of fraud. The plurality concluded at 571 that:

> The change was brought about and was the consequence of the fact that the consideration (no matter what form that consideration took) was provided by [P] to [S]. The change was thus the consequence of the operation of the doctrines of constructive trusts or the use of statutes as instruments of fraud or both.

20 Heydon J agreed with the plurality except in one respect. His Honour was of the view that a constructive trust arose on, and as the consequence of, the acceptance of the offer, citing in support *Oughtred v Inland Revenue Commissioners* [1960] AC 206 (*Oughtred*); *Neville v Wilson* [1997] Ch 144 (*Neville*); *Baloglow v Konstantinidis* (2001) 11 BPR 20,721 (*Baloglow*). Heydon J held that the change in beneficial ownership occurred at that moment when the constructive trust arose.

21 The taxpayers argued that the steps involved in the "first event" were relevantly indistinguishable from the steps carried out in the present case and, on the authority of *Halloran*, that a constructive trust arose upon the mutual exchange of promises. It was argued that CGT event A1 therefore happened as the change of ownership of the property was the consequence of the imposition of a constructive trust over the property by operation of law.

22 The premise of the argument was that a constructive trust arose over the property because of the mutual exchange of promises. However, *Halloran*, *Oughtred*, *Neville* and *Baloglow* were all cases where equity was called in aid in

identifying the "interest" of a purchaser in the circumstance of an incomplete contract. Those cases are distinguishable and *Halloran* does not provide support for the taxpayers' contention.

23 First, the facts are quite different. In *Halloran*, the parties mistakenly thought that S was the absolute owner in fee simple of the property that S contracted to sell to P in consideration for units in the P trust. In fact, S was not the registered proprietor and its interest in the land was an equitable interest. As the interest was of that nature P, in consequence, could only acquire or derive an equitable interest from the interest of S. In the present case, unlike in *Halloran*, the taxpayers were the absolute owners in fee simple of the property with all the rights and incidents attaching to that estate and, thus, as the owners of the property, able to create an equitable interest in Thorium in the property by the express terms upon which the taxpayers accepted the offer from Thorium.

24 Secondly, unlike in *Halloran*, the parties' clear and express intention was to create a trust over the property in favour of Thorium. It was an express term of the contractual dealings that upon acceptance of the offer, the taxpayers "should be bound to hold the property on the trust for Thorium". In *Halloran*, the intention was to transfer ownership of the property from S to P.

25 Thirdly, there is no question in this case, as there was in *Halloran*, of a failure to comply with the statutory formalities contained in s 23C of the *Conveyancing Act*. For the reasons that follow, I accept the Commissioner's submission that a trust was declared and that the declaration of trust is "manifested and proved by some writing" as required by s 23C.

26 The 1997 Act does not contain any definition of "declaration". Thus the word "declaration" in s 104-55(1) of the 1997 Act must take its ordinary meaning: *Oswal v Federal Commissioner of Taxation* (2013) 233 FCR 110 at [40]-[41] (*Oswal*). As a matter of ordinary language, a trust is created by "declaration" when it is created by the holder of the undivided legal interest in property using words or actions which sufficiently evidence an intention to create a trust over that property: *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 (*Korda*).

27 In *Korda*, French CJ stated at [3] and [5]:

> The question whether an express trust exists must always be answered by reference to intention. An express trust cannot be created unless the person or persons creating it can be taken to have intended to do so. Absent, as in this case, an explicit declaration of such an intention, the court must determine whether intention is to be imputed. It does so by reference to the language of the documents or oral dealings having regard to the nature of the transactions and the circumstances attending the relationship between the parties.
>
> …
>
> … The seventh edition of *Jacobs' Law of Trusts in Australia* offers the usefully succinct observation that the creator of an express or declared trust will have used language which expresses an intention to create a trust:
>
> > The author of the trust has meant to create a trust, and has used language which explicitly or impliedly expresses that intention, either orally or in writing. The fact that a trust was intended may even be deduced from the conduct of the parties concerned but if there is any uncertainty as to intention, there will be no trust.

(Citations omitted.)

Relevantly, Gageler J said at [109]:

> Where there is no reason to consider that parties entering into a contract have not said what they meant or meant what they said, an express term in the contract that one party is to hold property on "trust" for another party, or for a third party, will be recognised and enforced in equity as a trust.

See also *Oswal*. In that case, Mr Oswal, as trustee of a trust, resolved to exercise a power of appointment so that a part of the corpus of the trust "shall be held on separate trust and for the absolute benefit of the named beneficiaries in their own individual capacities". Edmonds J found that even though the resolution did not use the word "to declare" it was a "declaration of trust within the ordinary perception of a declaration of trust".

28 In the present case, the contractual arrangements used the express language of trust. The offer was to acquire "an equitable interest" in the property. The terms of the offer expressly provided that once the offer had been accepted, the taxpayers "shall be bound to hold the property in trust for Thorium". There was no equivocal indication of contractual intention. The letter of offer provided that the taxpayers may accept the offer contained in the letter by signing the application for shares in the company and the taxpayers did so. It is manifest that the parties intended by the terms of the offer and the acceptance of those terms to constitute a trust of the property in favour of Thorium.

29 *Permanent Trustee Company v Scales* (1930) 30 SR (NSW) 391 on which the taxpayers also relied does not assist them. In that case Harvey CJ in Eq found that a trust had not been declared. The facts of this case were that Mrs Scales had been "minded to buy a house" for her mother to live in for the remainder of her life on certain terms and conditions. The property was to belong to Mrs Scales, and her mother was to have a limited right of life occupation in the house. This intention was expressed in writing and subsequently the property was purchased and the mother took up occupancy. His Honour stated at 393:

> I think it is clear on principle that a person cannot declare himself a trustee of property which he has not yet acquired, even though he expresses the intention to acquire the property, and subsequently carries out that intention. The requisites are, firstly, that the declarer of the trust should own certain property; secondly that he should declare a trust, and, thirdly, that there should then come into existence a document under the hand of the declarant showing that a trust has been declared …

That case is distinguishable in that Mrs Scales had not owned the property at the time she declared her intention. In the present case, the taxpayers were the absolute owners in fee simple of the property and entirely capable of declaring a trust over that property and to impress on their legal interest an equitable estate in favour of Thorium.

30 Section 23C(1)(b) of the *Conveyancing Act* requires that a declaration of trust respecting any land or interest "must be manifested and proved by some writing some person who is able to declare such trust". Those words do not require that the trust be created by writing: *Byrnes v Kendle* (2011) 243 CLR 253 at [48]. Nor is it necessary that the writing be made at the time that the trust is declared: Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis, 2006) at [708]. In the present case, in any event, the writing requirement is sufficiently manifested and proved by the written letter of offer and the share application which both taxpayers signed.

31 I find also that the trust over the property was created "by settlement". Like the word "declaration" the word "settlement" in s 104-55(1) in the 1997 Act is

not defined and must take its ordinary meaning. In *Taras Nominees Pty Ltd v Federal Commissioner of Taxation* (2015) 228 FCR 418 (*Taras Nominees*), the Full Federal Court recently considered the legal concept of a "settlement". The Court stated at 421:

> The application of CGT event E1 relevantly depended upon whether Taras created a trust over its land by "settlement" upon the transfer of its land to Victoria Gardens. The word "settlement" is not defined for the purposes of the 1997 Act but has been the subject of judicial consideration in other contexts. The legal concept of a settlement has been said to be difficult to define but involves the creation of equitable interests over property. In *Buzza v Comptroller of Stamps (Vic)* (1951) 83 CLR 286 Dixon J said at 300:
>
> > The creation of new trusts, the inclusion of trusts to persons in succession and the restriction involved in all the trusts upon the enjoyment which would arise from full ownership mark the instrument out as a settlement. Even the trust to appropriate and to distribute involves a departure from the rights of enjoyment which full and immediate ownership would give the children. It is notoriously difficult to define a settlement, but that does not mean that it is difficult to recognise one. This instrument appears to me to be well within the conception, even if the limitation of interest in succession were an indispensable attribute, which it is not.
>
> Williams J said at 310:
>
> > It would be unwise to attempt to define what instruments are settlements and what are not. But at least it can be said that when a person or persons who own property at law or in equity solely or collectively dispose of that property by vesting it in a trustee on beneficial trusts for the benefit of themselves and others, such persons settle that property. And it is immaterial that the property is already vested in the trustee when the trusts are created (as in the present case) or that the trusts are created before the property is vested in the trustee and await the vesting for their operation. In *Commissioner of Stamp Duties (Q.) v. Hopkins* Dixon J. said: "An instrument is a settlement because it creates trusts and contains limitations which restrict or affect alienation and transmission, according to the course provided by law for estates in fee simple or a full ownership."
> >
> > In *Masserene v. Commissioners of Inland Revenue* Palles C.B. said, in a passage which exactly fits the present case: "It is essential to such an instrument that there shall be — 1, such free property, by which I mean property which then is not, according to our jurisprudence, subject to the trusts in question; 2, a settlor, who either is, or appears on the face of this instrument to be, competent to subject that free property to trusts which, until the execution of the instrument, did not bind it; and 3, an imposition by the instrument of such trusts upon such property." The present case is in essence indistinguishable from *Commissioner of Stamp Duties (Q.) v. Chaille*. It is a stronger case than *Davidson v. Chirnside*, for there the trusts of the indenture corresponded with the trusts of the will, whereas in the present case they are different.
>
> [Footnotes omitted.]
>
> Fullagar J said at 312:
>
> > It has been said again and again that liability to duty under statutes framed as are the *Stamps Acts 1946-1949* (Vict.) depends on the nature of the instrument in question, and not on the nature of any transaction which the instrument may be intended to effectuate or in which it may play a part. Looking at the nature of the instrument in question in the present case, I do not find it possible to say that "property" is not "settled" by it, and I think

> that the "property settled" is the whole of the property with which the instrument deals. It is true that it does not create successive interests in respect of the whole of the property with which it deals, but only in respect of part of that property. But it is not essential to the conception of a settlement that successive interests should be created in property. It is enough, in my opinion, if, as here, new equitable interests are created and the trust is more than a "bare" trust. The "property settled" is not merely the property in which successive interests are created. The whole of residue is "settled" by the instrument.

> A key indicator of a settlement, therefore, is the vesting of property in a trustee for the benefit of others. In *Buzza* it was found, in the words of Williams J at 310, that there had been a settlement by the collective disposal of property by persons to a trustee on beneficial trusts "for the benefit of themselves and others".

The cases referred to in *Taras Nominees* make it plain that a trust is created by "settlement" by vesting property subject to a trust for the benefit of others.

32 In the present case, the taxpayers, as the absolute owners in fee simple of the property, were competent to subject that property to a trust. By the steps taken on 2 July 2007, they imposed a trust on their legal interest in the property in favour of Thorium. Thus a trust was created by "settlement".

33 *Davidson v Chirnside* (1908) 7 CLR 324 does not advance the taxpayers' contention that there was no "settlement". The taxpayers relied on a passage from the judgment of Griffiths CJ where his Honour stated that "any instrument, which on its face purports to be the charter of future rights and obligations with respect to the property comprised in it, and which contains such limitations as are ordinarily contained in settlements, is a settlement" (at 340-341). It was contended that here there is no such document and therefore, the argument went, no settlement. The question for determination in that case, however, was whether an indenture arising out of a will was a deed of settlement within the *Stamps Act 1982* (Vic) and therefore dutiable. Griffiths CJ found that it was, holding that the authority conferred on the trustees of the will to settle the fund in the hands of a new trustee was a limited power to re-settle because the indenture created new rights. His Honour's statement must be read and considered by reference to the issue in dispute — that is whether there was a change of beneficial ownership for stamp duty purposes. It is undisputed in the present case that a trust was impressed on the property in favour of Thorium.

34 Finally, the taxpayers also sought to rely on a statement by Fullagar J in *Buzza v Comptroller of Stamps (Vic)* (1951) 83 CLR 286 that it is sufficient to constitute a "settlement" that new equitable interests are created *and* the trust is more than a "bare" trust (at 312). It was argued that the trust here created was a "classic bare trust". Therefore, it was submitted, there was no settlement. That proposition cannot be accepted. The usually accepted meaning of "bare" trust is a trust under which the trustee holds property without any interest other than that existing by reason of the office and the legal title as trustee, and without any duty or further duty to perform, except to convey the property upon demand to the beneficiary or as directed by them: *Herdegen v Federal Commissioner of Taxation* (1988) 20 ATR 24 at 32-33. The submission that the trust here is a "bare trust" is unsupportable having regard to the uncontroversial fact that the property was, at the time of the creation of the trust, subject to lease. There is some evidence to indicate that the property continues to be leased. At the least,

the taxpayers, on whom the burden of proof falls, led no evidence to the contrary. In those circumstances it cannot be said that the taxpayers have no active duties to perform in relation to the property.

35 Accordingly, CGT event E1 happened because a trust was created over the property by declaration or settlement.

Was CGT event E1 the most specific to the taxpayers' situation?

36 Finally, it is necessary to deal with the taxpayers' contention that s 104-55(1) was not engaged because, the argument went, the taxpayers did not create the trust. This argument was predicated upon the language of s 104-55(1) that CGT event E1 happens if "you" create a trust. It was submitted that the relevant minutes and letter of offer were actions and documents of the company, not the taxpayers personally and, therefore, the argument went, the taxpayers in their personal capacity did not create the trust. The submission has no substance and is rejected. The taxpayers were the absolute owners in fee simple of the property with all the rights and incidents attaching to that estate and, thus, as the owners of the property, able to create and did create, an equitable interest in Thorium in the property by impressing a trust over the property in favour of Thorium.

37 Having found that an express trust was created by declaration or settlement, CGT event E1 is more specific to the case and the CGT event to be used: *Taras Nominees*.

Conclusion

38 The application should be dismissed.

Orders accordingly

Solicitors for the applicants: *Dormer Stanhope*.

Solicitors for the respondent: *Gadens*.

FIONA CAMERON