ESTATE DUTY ON PROPERTY COMPRISED IN A SURRENDERED LIFE ESTATE

DEPUTY COMMISSIONER OF TAXATION (S.A.) v. SIMPSON

In *Simpson's Case*[1] Kitto, J.[2] and the Full High Court[3] on an appeal from his decision discussed at some length s.8 (4) of the Estate Duty Assessment Act 1914-1957 (Commonwealth) and in particular paragraph (c) of s.8 (4), which provides:

> For the purposes of this Act the estate of a deceased person comprises —
> (4) property —
> (c) comprised in a settlement made by the deceased person under which he had any interest of any kind for his life whether or not that interest was surrendered by him before his decease, unless it was so surrendered more than three years before his decease.

The Full Court decided that the factor which brings property into charge under s.8(4)(c) of the Act is the making of a settlement by the deceased person under which he has a life interest, and not the surrender of that life interest within three years of his decease. Kitto, J. and the Full Court considered whether "settlement" and "surrender" in s.8(4) should be interpreted as applying only to voluntary dispositions. The case in its result is an illustration of how estate planning can misfire and involve liability to heavier duties than if no estate planning at all had been attempted.

The facts of the case can be summarised as follows. In 1936 a Mrs. Simpson executed a settlement of shares. The trustees under the settlement were directed to pay the income from the shares to the settlor and her husband in equal shares during their joint lives, and on the death of one to the survivor. On the death of the survivor half the corpus was to be held in trust for each of the two sons of the settlor, Derek and Donald, contingently on his attaining twenty-five. In 1948, less than three years before her death, Mrs. Simpson executed an indenture to which the two sons and the trustees under the settlement were parties as well as herself. By the indenture Mrs. Simpson surrendered the income thereafter to arise to which she would have been entitled under the settlement.

The surrender was stated to be in consideration of the sum of £39,393 agreed to be paid by Donald and Derek Simpson to Mrs. Simpson. Each son was to pay £19,696.10.0 to Mrs. Simpson on her giving three months' notice to pay the amount. The amount of the consideration was based on an actuarial calculation of the value of the settlor's life interest. It was not disputed that £39,393 was a full, and indeed a more than adequate, consideration for the surrender.

In December 1948, March 1949, and September 1950, cheque transactions took place whereby in each instance the settlor gave each son a cheque for £5,000 and each son gave the settlor a cheque for £5,000. As neither the settlor's nor either of the son's accounts was sufficient to meet a cheque for that amount, special arrangements were made with the bank to have the cheques lodged and cleared simultaneously. A letter written by another son to both Derek and Donald shortly before the first exchange of cheques indicated what the parties conceived to be the legal effect of the transactions. Each transaction in their interpretation consisted of gifts by the settlor to her sons, each son immediately

---

[1] *Deputy Commissioner of Taxation (S.A.)* v. *Simpson* (1960) 32 A.L.J.R. 506.
[2] (1958) 32 A.L.J.R. 292.
[3] (1960) 33 A.L.J.R. 506.

paying back the amount of the gift in partial discharge of his debt under the indenture. Consistently with this interpretation returns were made under the Gift Duty Assessment Act 1941-1947 (Cwlth.) in respect of the £30,000 and the executor of the settlor included the balance of the debts (£4,696.10.0 in each case) in his return under the Estate Duty Assessment Act as debts due to the estate. The Commissioner included both the £30,000 and the property comprised in the settlement in his return assessment. A notice of objection was lodged by the executor but in all material respects was disallowed by the Commissioner. The executor thereupon requested that the objection be treated as an appeal and the appeal came on for hearing before Kitto, J.

On the appeal the executors submitted that the gifts of £30,000 were not caught by s.8(4)(a) because, having been used by Derek and Donald to pay off part of their debts to Mrs. Simpson, neither the money nor any property into which it could be traced existed in the hands of the donees at Mrs. Simpson's death. *Simpson's Case* was decided before *Gale's Case*[4] and while *Teare's Case*[5] and *Moss's Case*[6] were thought to state the law correctly. *Simpson's Case* was however decided after the decision of Fullagar, J. in *Higgins' Case*[7] and after the decision of the House of Lords in *Sneddon's Case*.[8] Kitto, J. thought that he should follow his brother Fullagar in *Higgins' Case* and hold that money which passed from the deceased by way of gift less than three years before her decease should be included in the dutiable estate by virtue of s.8(4)(a) though the money had been applied by the donees in discharge of debts. Hence, in his Honour's opinion, the £30,000 was rightly included in the dutiable estate.

Kitto, J. then considered the question whether the shares comprised in the settlement were brought into charge by s.8(4)(c). His Honour in interpreting s.8(4)(c) relied firstly on a conception of the general policy of estate duty acts and secondly on the legislative history of s.8(4) of the Commonwealth Act. In the first place his Honour asserted that as a general principle it is foreign to the character of estate duty that property which the deceased has disposed of in his lifetime by sale (provided the sale is real and not merely colourable) should be included as part of his estate. An interpretation of an estate duty act which would require the inclusion of such property should be avoided if the words to be interpreted admit of any other interpretation. His Honour then proceeded to examine paragraphs (a), (b) and (c) of s.8(4) of the Estate Duty Assessment Act in the light of this principle and reached the conclusion that the three paragraphs formed a coherent set of provisions designed to protect the Revenue against voluntary dispositions.

A novel line of reasoning was employed by Kitto, J. to reach the conclusion that s.8(4)(a) only brings settled property into charge, if the settlement was voluntary. Section 8(4)(a) applies to "gifts *inter vivos*" and "settlements". "Gift" is defined by s.3 so as to exclude dispositions in favour of a *bona fide* purchaser or encumbrancer for valuable consideration. "Settlement" is also defined in s.3, but settlements for value are not expressly excluded. However, in his Honour's opinion, it follows from the definition of settlement that settled property will only be caught by s.8(4)(a) if it has passed from the deceased person by a settlement made by him. His Honour then drew a distinction between voluntary settlements and settlements for value. If a settlement is voluntary it is clearly made by the person from whom the property passes, the "conveyor", and he is properly described as the "settlor". But if the settlement is for

[4] *Gale* v. *Fed. Commr. of Taxn.* (1959) 102 C.L.R. 1.
[5] *Trustees Executors and Agency Co. Ltd.* v. *Fed. Commr. of Taxn.* (1941) 65 C.L.R. 134.
[6] *Moss and anor.* v. *Fed. Commr. of Taxn.* (1947) 77 C.L.R. 184.
[7] *Elder's Trustee and Executor Co. Ltd.* v. *Fed. Commr. of Taxn.* (1953) 88 C.L.R. 200.
[8] *Sneddon* v. *The Lord Advocate* (1954) A.C. 257.

value, if, for example, A in consideration of a price paid by B conveys property to trustees on trust for persons in succession, it is, according to Kitto, J. an inapt use of language to describe A, the person who is in effect selling the land, as the settlor; it is B, the person who provides the consideration, who is properly described as the settlor. It follows that if A died within three years of the settlement, the settled property would not be included in his dutiable estate, because the settlement was not made by him.

The same argument, his Honour thought, is applicable to the word "settlement" in paragraph (b). Paragraph (b) is a necessary complement to paragraph (a) because paragraph (a) refers to the disposition or transfer of interests and does not apply to surrendered interests, because a surrender operates to extinguish, and not to transfer, an interest. It would be, in Kitto, J.'s opinion, to create an incongruity in the Act to construe paragraph (b) as applying to surrenders for value. On the ground that paragraphs (a) and (b) are confined to voluntary disposition and on the ground that paragraphs (a), (b) and (c) are a coherent set of provisions which should be read together, Kitto, J. decided that s.8(4)(c) is restricted to voluntary dispositions and that "surrender" in s.8(4)(c) must mean "voluntary surrender".

Kitto, J. also found justification for his view that "surrender" in s.8(4)(c) means "voluntary surrender" in the legislative history of the paragraph. In s.5 of the 1928 Act there appeared for the first time the three separate paragraphs (a), (b) and (c). The time before death was one year in (a) and (b), but unlimited in (c). This anomaly remained even after the period for paragraphs (a) and (b) was extended to three years by s.4(a) of the Act No. 18 of 1942. In 1947 the words "at any time before his decease" in paragraph (c) were replaced by "before his decease unless it was so surrendered more than three years before his decease." The language in Kitto, J.'s opinion was copied from s.11 of the Finance Act 1900 (Imp.) and the exclusion from the Australian section of the words "whether for value or not", which appear in the English Act, seemed to his Honour to be clearly deliberate.

Kitto, J. then was satisfied that s.8(4)(c) applies only to voluntary surrenders. If Mrs. Simpson's surrender of her life interest was for value, it would follow that the Commissioner had been in error in including the settled shares in her estate. Counsel for the Commissioner submitted at one stage in the hearing that the provisions as to consideration in the deed of surrender were a sham and could be disregarded, and that the surrender was voluntary. However, Kitto, J. held that the issue of the unreality of the consideration for the surrender had not been specifically raised and that on the material before him he would not be justified in holding that the provisions as to consideration in the deed were merely a sham. Hence his Honour ordered that the value of the settled property should be excluded from the estate. Kitto, J.'s reasoning, and in particular his interpretation of s.8(4)(a) may have implications for estate planning. If, for example, a husband settles property on trusts stipulated by his wife and consideration passes from the wife, then the settlement would not be a "settlement made by the husband" and even though he died within three years of the settlement would not be included in his dutiable estate. Of course Kitto, J. took care to point out that if the consideration is a sham, the settlement will be treated as a settlement by way of gift; it will be regarded as a settlement made by the husband and the settled property will be included in his estate by virtue of s.8(4)(a) if he died within three years of the settlement.

It is submitted, however, that Kitto, J.'s reasoning is open to serious objection. His Honour asserts that "settlement" in s.8(4)(a) means "voluntary settlement" and bases his assertion on the definition of settlement in s.3. It is equally possible to resort to the definition to explain "settlement" in paragraphs (b) and (c) and in fact his Honour indicates that his reasoning is equally

applicable to "settlement" in paragraph (b). However, to read "settlement" as meaning "voluntary settlement" wherever it occurs in paragraphs (a), (b) and (c) leads to results which conflict with Kitto, J.'s own conception of the policy of the Act. If "settlement" is read as "voluntary settlement" in paragraph (b), settled property would be brought into charge only if the original settlement was voluntary, but surely a life interest voluntarily surrendered within three years of death should not escape duty merely because the original settlement was for value. In paragraph (c) the consequence would be that while a voluntary surrender more than three years before death will take property out of charge, a surrender for value, no matter when it occurs, never will. Kitto, J. appears not to have seen these consequences of his thesis. His Honour, after restricting "settlement" in s.8(4)(a) to "voluntary settlement" to justify his thesis that s.8(4) is concerned only with voluntary dispositions, passes to a consideration of "surrender" in s.8(4)(c), neglecting the meaning he has assigned to "settlement".

An issue raised, but not resolved, by Kitto, J. was the efficacy of the cheque transactions. As was indicated above, at no time were there sufficient funds in Mrs. Simpson's account to meet her cheques or in either of the son's accounts to meet his cheques. Each cheque was drawn in the expectation on the part of the drawer that the payee would draw his or her cheque for the like amount. Money was never in fact available for the payment of any cheque. Kitto, J. thought it was a possible view that the cheque transactions were ineffective to alter the legal relations of Mrs. Simpson and her sons. His Honour said: "It may be thought a possible view that what took place with respect to the cheques resulted in nothing but the making by the bank of counter-balancing book entries and left the legal relations of Mrs. Simpson and her sons unaltered."[9] If there had been no effective gifts by Mrs. Simpson it would follow that the £30,000 should not have been included in the estate under the heading of gifts. But the total dutiable value of the estate would not have been diminished, for in the absence of effective gifts the debts owing by Derek and Donald to Mrs. Simpson under the surrender would have been included as debts owing to the estate at their original, and not at their reduced values.

The Commissioner appealed to the Full Court against Kitto, J.'s order that the values of the settled property should be excluded from the dutiable estate. There was no appeal by the executor from the decision that the £30,000 was rightly included in the notional estate. The Full Court did refer briefly to the gifts by Mrs. Simpson. The Court was prepared to recognise the cheque transactions as having the effect the parties conceived them to have — "there was no apparent reason for taking any other view". The Court remarked that the instant case was indistinguishable from *Higgins' Case*, without expressing an opinion as to the correctness of *Higgins' Case*. Now that *Gale's Case* has been decided, it is clear that the respective decisions of Fullagar, J. and Kitto, J. are correct.

The Full Court also commented on a point not raised before Kitto, J. The indenture of surrender provided that each son was to pay £19,696.10.0 to Mrs. Simpson on her giving three months' notice to pay the amount. The Court was tentatively of the opinion that the provisions created a debt *in praesenti*. However, the Court conceded that it might be maintained that no present debt was created by the indenture, and that the debt would only arise when Mrs. Simpson gave notice. On this latter interpretation the amount of £9,393 would not be a debt owing to the estate, because Mrs. Simpson had given no notice in respect of it. Moreover, if Mrs. Simpson had died without ever giving any notice, no indebtedness at all would have arisen and no part of the £39,393 could have been included in the dutiable estate. It is arguable, too, that Stamp Duty at Schedule VI rates would not have been incurred, because a full consideration would have been provided for in the deed.

[9] (1958) 32 A.L.J.R. 292 at 293.

It is noteworthy that the Commissioner did not, as Kitto, J. suggested he might do, take up the issue of the reality of the consideration for the surrender of the shares. The reason is probably that if it had been established that the consideration provided for in the indenture of surrender was a sham and that therefore the surrender was voluntary, the sons would never have owed Mrs. Simpson £39,393 and although the £30,000 paid out by Mrs. Simpson would be gifts within s.8(4)(a), there would be no debt of £9,393 owing to the estate.

The Full Court, having commented briefly on the inclusion of the £30,000 in the estate, then proceeded to determine the Commissioner's appeal. The Court did not have to decide whether "settlement" in s.8(4)(c) is restricted to "voluntary settlement" because the original settlement was voluntary. The Court did not comment on Kitto, J.'s distinction between settlements which can be said to have been made by the deceased, that is, voluntary settlements, and those which cannot be said to have been so made, that is, settlements for value. The Court did, however, state that it is not really correct to say that s.8(4)(a) is concerned only with voluntary dispositions. It is true that s.8(4)(a) refers (in part) to "gifts" and gifts are defined so as to exclude dispositions in favour of a *bona fide* purchaser. However, excluded from this exception are dispositions in favour of a relative and s.8(4)(a) contains a provision prescribing the amount on which duty is to be charged in the case of such dispositions for value in favour of a relative.

As regards the word "surrender" in s.8(4)(c) the Full Court did not express a definite opinion one way or the other whether "surrender" should be read as confined to "voluntary surrender". It is quite consistent with the alleged policy of the Act, the Court argued, that the estate should include property transferred for less than a *bona fide* adequate consideration. In *Simpson's Case*, of course, the consideration was adequate, but on Kitto, J.'s reasoning property would be excluded from the estate, even if the consideration was inadequate or nominal.

> Property of a value of £100,000 comprised in a voluntary settlement under which the settlor had a life interest, would escape charge under s.8(4)(c) if the settlor on the day before his death surrendered his life interest in consideration of a payment of £100.[10]

On the other hand, the Court found some evidence for the conclusion that "surrender" means "voluntary surrender" in the history of the paragraph. From 1928 to 1947 paragraph (c) did not include the reference to surrenders made less than three years before death. These words may have been added in 1947 because the draftsmen thought that the effect of such a surrender was to make a gift to the remainderman, and that therefore paragraph (c) should be assimilated to paragraph (a). This consideration, the Full Court said, tends to support the view that surrender in s.8(4)(c) means "voluntary surrender".

In any event the Court did not have to decide the question whether "surrender" in s.8(4)(c) is confined to voluntary surrenders. In the opinion of the Full Court, Kitto, J.'s argument was based on a false premise, that it is the surrender of the life interest by the settlor which brings property into charge under s.8(4)(c). However, it is not the surrender but the making of the settlement which brings property into charge. The surrender of the life interest by the deceased more than three years before his death takes property out of charge. Therefore even if "surrender" was read as "voluntary surrender", the shares comprised in the settlement would not escape inclusion in the dutiable estate unless the surrender occurred more than three years before the settlor's death. Mrs. Simpson had died within three years of the surrender of her life interest. It followed that the settled property should be included in her estate. The Full Court pointed out that as a surrender operates to take property out of charge, to interpret "surrender" as "voluntary" surrender would be less, not

[10] (1960) 33 A.L.J.R. 506 at 509.

more, favourable to settlors, and would be contrary to Kitto, J.'s own conception of the policy of the Act, for if a voluntary surrender takes property out of charge, surely a surrender for value should.

As was indicated above, the Full Court did not reach a decision whether "surrender" in s.8(4)(c) could mean a surrender for value, and actually conceded that it might follow from the legislative history of the paragraph that Kitto, J. was right in restricting the word to voluntary surrenders. It can be argued that even if "surrender" is so restricted, the value of a life interest in settled property, surrendered for value, will not be included in the dutiable estate. The argument would run as follows. "Settlement" is defined (so far as is relevant) as meaning "a conveyance . . . or other non-testamentary disposition of property . . . containing trusts or dispositions to take effect after the death of the settlor or any other person dying after the commencement of this Act."[12] If the life tenant surrenders his interest, the remainder takes effect immediately, and it cannot be said that there are trusts or dispositions to take effect after a death. It was to guard against the possibility that a surrender by the life tenant would take property out of charge because it could no longer be said that there was a "settlement" within the definition, that the words "whether or not that interest was surrendered by him before his decease," otherwise redundant, were added to s.8(4)(c). Now, if "surrender" means "voluntary surrender", "surrendered" must have a corresponding meaning "voluntarily surrendered". If the life interest is surrendered for value, so that the remainder takes effect, the conveyance will not be within the definition of "settlement" in s.3, nor will it be deemed to be a settlement by virtue of the words "whether or not that interest was surrendered by him before his decease," because they only refer to voluntary surrenders. The difficulty with this argument is that it would lead to a result different from that which the Full Court reached. If "surrender" means "voluntary surrender", Mrs. Simpson's surrender for value of her life interest would cause the indenture of 1936 to cease to be a "settlement" and the shares would escape inclusion in her estate. This possibility does not seem to have occurred to the High Court when it conceded that "surrender" might mean "voluntary surrender" and yet ordered that the settled shares be included in the dutiable estate.

B. M. JAMES, Case Editor — Third Year Student.

PROPERTY ACQUIRED UNDER ILLEGAL CONTRACT

SINGH v. *ALI*

The decision of the Privy Council in *Singh* v. *Ali*[1] is important because it illustrates the English courts' application of the oft-quoted decision in *Bowmakers Ltd.* v. *Barnett Instruments Ltd.*[2] in a manner different from that in which the New South Wales courts have applied the decision. *Singh* v. *Ali* concerns the rights of the parties to an illegal contract where such a contract is executed and in the course of this Note it will be necessary to discuss the meaning of the word "executed".

Regulations made by the Commissioner of Motor Transport of Malaya under powers conferred upon him by proclamation provided that all vehicles should be registered with the Registrar of Motor Vehicles and that no person was allowed to "sell, exchange, part with possession . . . of any motor vehicle without a permit in writing from the Registrar." The regulations further pro-

[11] Estate Duty Assessment Act 1914-1957 (Cwlth.), s.3.
[1] (1960) 2 W.L.R. 180.
[2] (1945) K.B. 65.