SUPREME COURT OF QUEENSLAND

CITATION:	*Browne & Jeon v Commissioner of State Revenue* [2002] QCA 388
PARTIES:	**MARK DOUGLAS BROWNE** (first appellant) **PAUL EUNSEONG JEON** (second appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	Appeal No 2318 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Case Stated
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2002
JUDGES:	de Jersey CJ, McMurdo P and Jerrard JA Separate reasons for each member of the Court, each concurring as to the orders made.
ORDERS:	**The questions in the case stated are answered as follows:** **1. Yes.** **2. Yes.** **(i) Yes.** **(ii) Yes** **3. Yes** **4. Yes** **5. Not necessary to answer** **6. By the appellants**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – WHAT TRANSACTIONS OR INSTRUMENTS ARE LIABLE – CONVEYANCE OR TRANSFER ON SALE – QUEENSLAND – appeal by way of Case Stated against an assessment of stamp duty upon an agreement for the sale of two pharmacy businesses in Townsville with associated equipment – where the purchaser executed a deed of partnership contemporaneously with an agreement for sale, providing for their carrying on business together in respective percentage shares – whether the respondent erred in holding that the Agreement for Sale was a contract or Agreement within the meaning of s 54(1) of the *Stamp Act* 1894 (Qld), and, if so, whether the assessment notice was valid and the

duty assessed correct – where appellants contended that the legal effect of the agreement was to transfer only a certain percentage of that property, worth $1.3 million not the total purchase price of $3 million – where if one can lawfully transfer one's property to oneself and another, the Commissioner could correctly levy duty on the overall consideration

Property Law Act 1974 (Qld), s 14, s 35, s 50
Stamp Act 1894 (Qld) s, 22, s 23, s 24, s 54

Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143, referred to
Coles Myer Ltd v Commissioner of State Revenue [1998] 4 VR 728, referred to
Commissioner of Stamp Duties (Q) v Hopkins (1945) 71 CLR 351, approved
DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1981-2) 149 CLR 431, approved
Federal Commissioner of Taxation v Sealey 87 ATC 5076, considered
Glennon v Federal Commissioner of Taxation (1972) 127 CLR 503, approved
Mt Newman Mining Co Pty Ltd v Commissioner of State Taxation (1994) 11 WAR 413, approved
Re Broons [1989] 2 Qd R 315, approved
Rose v Federal Commissioner of Taxation (1951) 84 CLR 108, approved
Rye v Rye [1962] AC 496, approved
Stewart v Hawkins [1960] SR (NSW) 104, approved

COUNSEL: M Robertson for the appellants
K D Dorney QC, with D Marks, for the respondent

SOLICITORS: Roberts Nehmer McKee, for the appellants
Crown Solicitor, for the respondent

[1] **de JERSEY CJ:** This is a case stated by the Commissioner of State Revenue under s 24 of the *Stamp Act* 1894. The appellants are parties to an agreement dated 1 July 2000 for the sale of two pharmacy businesses in Townsville, the equipment used in connection with the businesses, and the business of Townsville Medical and Surgical and stock in trade. That is defined as the "Property Sold". The sale price under the agreement is $3 million. Clause 3.1 provides: "The vendors agree to sell the Property Sold to the Purchasers for the Sale Price."

[2] The agreement effected a redistribution of property rights. It designated the appellants, together with Mr J J Savina, as "Pharmacy Purchasers". Three others, J & P Savina Pty Ltd, Health Information Resources Pty Ltd and J Jeon, were designated as "Equipment Purchasers". Mr Savina was styled the "Pharmacy Vendor" and the company, J & P Savina Pty Ltd, as the "Equipment Vendor".

[3] Clause 3.1(b) purported to deal with the redistribution of interests in the following terms:

> "The parties acknowledge that John Joseph Albino Savina and J & P Savina Pty Ltd are named as Vendors and Purchasers with the intent that the interest transferred beneficially under this Agreement to Mark Douglas Browne and Paul Eunseong Jeon as Pharmacy Purchasers and Health Information Resources Pty Ltd and Jonghae Jeon as Equipment Purchasers is 43.333% in the Pharmacies and the Equipment respectively."

[4] At completion, which was 30 June 2000 unless otherwise agreed, the purchasers were to pay the vendors $1.3 million with the balance of $1.7 million constituting a debt owing by the purchasers to the vendors.

[5] The appellants and Mr Savina contemporaneously executed a deed of partnership dated 1 July 2000, as contemplated by the sale agreement, providing for their carrying on business together in partnership in the shares Mr Savina 56.67%, Mr Brown 33.33% and Mr Jeon 10%.

[6] The respondent, the Commissioner of State Revenue, assessed the agreement for sale under s 54(1) of the Act and para (4)(a) of the First Schedule heading, "Conveyance or Transfer" (para 9 case stated). The duty amounted to $109,725, on the agreed consideration of $3 million.

[7] The case stated asserts that in concluding that the agreement was chargeable as a "Conveyance or Transfer", the Commissioner took into account (para 11 case stated):

> "(a) that the Property Sold, as referred to in Clause 3.1(a) of the Agreement for Sale, was to become partnership property and not to remain the personal property of any vendor;
>
> (b) that each and every vendor was to convey or transfer his or its entire interest in each part of the Property Sold, such then becoming relevant Partnership Property;
>
> (c) that the Purchasers pursuant to the Agreement for Sale might, provided the terms and conditions thereof were met, become entitled to the conveyance or transfer of the Property Sold."

[8] The questions asked are:

> "(a) is the Agreement for Sale (Annexure "A" to the case stated) a contract or agreement within the meaning and terms of s.54(1) of the *Stamp Act* 1894?
>
> (b) if "yes" to (a), is the Commissioner's assessment to duty of that instrument, as contained in Assessment Notice issued 3 August, 2000 (Annexure "C" to the case stated), valid?
>
> (c) If "yes" to (b):
>
> (i) is the determination set forth in paragraph 11 of this Case Stated and is the associated opinion formed as set forth in paragraph 9 of this Case Stated correct?
>
> (ii) is the assessment of the Commissioner that the relevant consideration is $3m for the purposes of paragraph

(4)(a) of the First Schedule Heading to the *Stamp Act* 1894 "Conveyance or Transfer", correct?

(d) if "yes" to (c)(ii), is the assessment of the Commissioner of duty in the sum of $109,725.00 correct and, if not, what duty, if any, is payable?

(e) if "no" to (c)(i) or (c)(ii):

(i) what was the relevant property, agreed to be transferred under the Agreement for Sale, for the purposes of s 54(1) of the *Stamp Act* 1894?

(ii) what should be the amount of the considerations for the purposes of paragraph (4)(a)? and

(iii) what duty, if any, is thereby payable?

(f) how should the costs of and incidental to the stating of this case and of the appeal be borne and paid?"

[9] The principal contention for the appellants is that, with the agreement properly construed, its legal effect is to transfer, not all of the interest in the property defined as "Property Sold" – that is, the pharmacy businesses, equipment and the other business and stock in trade, but only 43.33% of that property, so that duty was chargeable on $1.3 million, not the $3 million consideration. The appellants point to clause 3.1(b), and the legal oddity of one's transferring a portion of one's own property to oneself (cf. *Rose v Federal Commissioner of Taxation* (1951) 84 CLR 108, 123-4; *Glennon v Federal Commissioner of Taxation* (1972) 127 CLR 503, 511. The appellants contend that the agreement amounts to no more than an agreement to vest in the appellants (together with Jonghae Jeon and Health Information Resources) a 43.33% interest in the property previously owned by Mr Savina and J & P Savina Pty Ltd: "an agreement to convert single ownership into joint ownership", so that the agreement should be stamped only with respect to the conveying of a 43.33% interest.

[10] If one may lawfully transfer one's property to oneself and another or others jointly, then that is what has effectually occurred here and the Commissioner was correct in levying duty on the overall consideration.

[11] At common law, one may not effectively contract with oneself (cf. *Rye v Rye* [1962] AC 496, 510). But s 50 of the *Property Law Act* 1974 as relevant here, ameliorates that position. Section 50 provides:

> "(1) Any covenant whether express or implied, or agreement entered into by a person with the person and 1 or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.
>
> (2) This section applies to covenants or agreements entered into before or after commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to the person and 1 or more other persons, but without prejudice to any order of the court made before such commencement."

Consistently, s 14 of that Act authorises transfers of property, by the owner, to the owner and another.

[12] Those provisions are to be seen as validating transactions of otherwise doubtful import, and not as converting them into something different from what their terms apparently accomplish: *Stewart v Hawkins* [1960] SR (NSW) 104, 106-8; re *Broons* [1989] 2 Qd R 315, 316-7. The point left open by Pincus JA in *Federal Commissioner of Taxation v Sealey* 87 ATC 5076, 5080, should in my view be determined consistently with *Stewart v Hawkins* – that is, in a remedial and facultative way. That is the obvious purpose of the provision, as confirmed in the Queensland Law Reform Commission's Working Paper on the Bill:

> "At common law a person cannot effectively contract with himself, and the same is true even if the agreement is entered into with himself and another or others: Halsbury's Laws of England (3ed.), vol. 8, p. 59. This is an inconvenient rule: it prevents for example an effective contract from being made between two partnerships having a member common to both: cf. Stewart v Hawkins [1960] S.R. (N.S.W.) 104; or by one member of an incorporated club [sic., unincorporated club] with other members: Middlemiss v Broderick [1964] S.R. (N.S.W.) 327, 335. The rule has, so far as concerns a contract made by a person with himself and another or others, been abrogated in England, New South Wales and Victoria, and this step seems to be a necessary corollary of permitting a person to convey or lease to himself and another or others, which is proposed by cl. 14. A consequence of the introduction of this provision is, as the above-mentioned cases show, to render possible contracts of the foregoing kind."

[13] The result of the appeal is to be determined by reference to the content of the agreement for sale (cf. *Commissioner of Stamp Duties (Q) v Hopkins* (1945) 71 CLR 351, 360; *Mt Newman Mining Co Pty Ltd v Commissioner of State Taxation* (1994) 11 WAR 413, 418; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1981-2) 149 CLR 431, 449). The agreement provided, in terms, for the outright sale of all the property for $3 million. The property purchased by the purchasers, in their respective capacities, became partnership property of the respective partnerships on transfer to the respective purchasers. As to the legal interest, the partners took as joint tenants (s 35(3) *Property Law Act* 1974). The agreement, otherwise insupportable at common law, was validated by s 50 of the *Property Law Act.* It is then to be construed literally for what it apparently provides, in this case thereby exposing its "legal effect". Insofar as the acknowledgement in cl 3.1(b) in inconsistent with the above analysis, it erroneously states the effect of the transaction and is therefore not determinative.

[14] This was not, as in *Coles Myer Ltd v Commissioner of State Revenue* [1998] 4 VR 728, a "transfer" which – having regard to its "real nature or substance" (p 747) – failed to vest any property, right or interest in the "transferee". Further, there is no reason to conclude the consideration on which duty falls to be calculated under para 4(a) of Schedule 1, "the money or value passing which moves the conveyance or transfer" (*Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143, 152), is other than the $3 million agreed upon by the contracting parties.

[15] I would answer the questions asked as follows:

(a.) Yes.

(b.) Yes.

(c.) (i) Yes.
(ii) Yes.
(d) Yes.
(e) Not necessary to answer.
(f) By the appellants.

[16] **McMURDO P:** The issues and essential facts in this case stated[1] are set out in the reasons of the Chief Justice with which I agree.

[17] Stamp duty is paid on the instrument conveying property.[2] Whether the duty is payable and the amount of the duty will be determined by the legal effect of the terms of the instrument of conveyance, here, the Agreement for Sale.

[18] The appellants contend that the legal effect of the Agreement for Sale is to transfer only 43.33 per cent of the property and that only that proportion of the $3 million consideration stated in the agreement ($1,300,000) was chargeable with stamp duty; the consideration on which duty is chargeable is not necessarily that stated in the agreement.

[19] In support of that proposition, the appellants refer to *Commissioner of Stamp Duties v Hopkins*[3] where Latham CJ stated that Griffith CJ's observations in *Davidson v Chirnside*,[4] that the question of the chargeability of an instrument must be determined by an examination of the instrument itself and not upon extrinsic evidence, is too widely stated; courts may hear extrinsic evidence in order to determine the real nature of the transaction to which the instrument relates and to ascertain the amount of duty payable. See also *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW).*[5] Indeed, s 22(1) and s 23 *Stamp Act* 1894 (Qld) allow the respondent to enquire and to receive evidence as to the true and full effect of instruments.

[20] Whether it is necessary to look beyond the agreement to determine the true consideration will depend on the facts of each case. The appellants urge the Court to consider two Form S(a) statements from the appellant Browne, prepared for the Office of State Revenue under the *Stamp Act* 1894 (Qld) after the Agreement for Sale was signed, in which he deposed that he acquired or agreed to acquire an interest in the pharmacy businesses for approximately $1,300,000.[6] These, they contend, and 3.1(b) Agreement for Sale, demonstrate that the true legal effect of the agreement is to transfer 43.33 per cent of the property from the pharmacy vendor to the appellants and the chargeable duty is only on $1,300,000 (43.33 per cent of the $3 million), not the full $3 million stated sale price.

[21] The appellant Browne's Form S(a) statements and s 3.1(b) of the Agreement for Sale do not detract from the clear terms of the Agreement for Sale, which was a sale of the pharmacy businesses and equipment from one entity to a partnership of that entity and others for a consideration of $3 million subject to the terms of the

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1 As to the principles regulating a case stated, see *R v Rigby* (1956) 100 CLR 146, 150-151 and *Brisbane City Council v Valuer-General for State of Queensland* (1978) 21 ALR 607, 621.
2 Section 4(1) and s 54(1) *Stamp Act* 1894 (Qld).
3 (1945) 71 CLR 351.
4 (1908) 7 CLR 324, 340.
5 (1981-1982) 149 CLR 431, 477.
6 See Case Stated 12.

agreement (definition Sale Price 1.1)[7], namely, $1,300,000 on completion (3.3)[8] and the balance of $1,700,000 being a debt owing by the purchasers to the vendors (3.4).[9] That conclusion is not inconsistent with the Form S(a) statements and is supported by 19.1 of the Agreement for Sale which provided that the Agreement for Sale, the Partnership Agreement and the Premises Leases contain the entire agreement between the parties.[10]

[22] Section 50 *Property Law Act* 1974 (Qld) is a validating provision allowing the enforcement of a sale from one entity to a partnership of that entity and others which would otherwise be unenforceable at common law; it validates agreements such as this Agreement for Sale, which may then be enforced according to their terms. See *Stewart v Hawkins*.[11] Under this agreement, the consideration was $3 million, not 43.33 per cent of $3 million. Stamp duty was therefore chargeable on $3 million.

[23] I agree that the questions submitted for the determination of the Court should be answered as proposed by the Chief Justice.

[24] **JERRARD JA:** I have read and agree with respect with the reasons for judgment of de Jersey CJ and McMurdo P, and with the proposed answers to the questions asked in the case stated.

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7 Case Stated 3(a)(ix).

8 Case Stated 3(h).

9 Case Stated 3(i).

10 See Case Stated 3(m).

11 (1958) 60 SR(NSW) 104, 107.