SUPREME COURT OF QUEENSLAND

CITATION:	*Pryke & Ors v Commissioner of State Revenue* [2007] QCA 121
PARTIES:	**DARYL JOHN PRYKE, CAROLE ROSE PRYKE, JOAN CAROL PRYKE AND ROBERT LINDSAY PRYKE** (appellants/respondents) v **COMMISSIONER OF STATE REVENUE** (respondent/appellant)
FILE NO:	Appeal No 7814 of 2006 SC No 4759 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 April 2007
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2007
JUDGES:	Williams and Holmes JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1 Appeal dismissed.** **2 Order the appellant to pay respondents' costs of and incidental to the appeal.**
CATCHWORDS:	TAX AND DUTIES –STAMP DUTIES- GENERAL EXEMPTIONS - QUEENSLAND - whether the transfer contained an error for the purposes of s152 *Duties Act 2001* (Qld) in failing to record all the partners' names as transferees - whether the transfer contained an error in failing to record the defendant's taking of the land on behalf of or as trustee for the partnership *Duties Act 2001*(Qld), s 152, s 549(4) *Commissioner of State Revenue v Viewbank Properties Pty Ltd* (2004) 55 ATR 501, considered *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329, cited *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, cited *Oates Properties Pty Ltd v Commissioner of State Revenue* (2003) 53 ATR 308, cited

Winks v WH Heck & Sons Pty Ltd [1986] 1 Qd R 226, cited

COUNSEL: R W Gotterson QC, with C J Conway, for the appellant
P J Lyons QC, with D W Marks, for the respondents

SOLICITORS: C W Lohe, Crown Solicitor for the appellant
Short Punch & Greatorix for the respondents

[1] **WILLIAMS JA**: I have had the advantage of reading the reasons for judgment of Douglas J wherein the background to this appeal is set out.

[2] The primary judge faced a difficult task in making relevant findings of fact because the significant events occurred some 30 years prior to the hearing. Robert Pryke had retained solicitors to act in the transaction, and those solicitors signed the Form W transfer as correct for registration. But in the ordinary course of business the conveyancing file had been destroyed many years prior to the hearing, and so there was no written record of any instructions given by Robert Pryke. In essence the primary judge was left with oral evidence of recollections of intention some 30 years prior to the giving of that evidence.

[3] In those circumstances the primary judge made findings about Robert Pryke's intention with respect to the transfer and those findings were not challenged on the hearing of the appeal. I am satisfied that there was evidence to support the findings made.

[4] Once those findings of fact were made the task of the appellant in contending that s 152 of the *Duties Act 2001* (Qld) did not apply was rendered much more difficult.

[5] I have ultimately concluded that the reasoning of Douglas J is correct and that, given the primary findings, an exemption from payment of duty based on s 152 was established.

[6] For the reasons given by Douglas J the appeal should be dismissed with costs.

[7] **HOLMES JA**: I agree with the reasons of Douglas J and the order he proposes.

[8] **DOUGLAS J**: In 1972 the respondents, Robert Pryke, his wife Joan Pryke, his brother Daryl Pryke and Daryl's wife Carole Pryke, were members of a partnership proposing to operate a caravan park at Palm Beach. The land for the caravan park was transferred to Robert Pryke alone pursuant to an option agreement dated 21 May 1973 in favour of him "or …. such person you may care to nominate". The transfer, dated 10 August 1973, was made in consideration of the payment of $300,000. Stamp duty of $3,737.50 was paid on it on 11 October 1973.

[9] The question that arises here is whether that transfer contained an error in failing to record all the partners' names as transferees or, alternatively, in failing to record the fact that Robert Pryke took the land on behalf of or as trustee for the partnership. The learned primary judge took the view that there was such an error, so that no duty was payable on a transfer 30 years later from Robert Pryke to all four partners. The Commissioner of State Revenue has brought this appeal against that decision.

Background

[10] The original owners of the caravan park were Mr and Mrs Fiebig. The 1973 transfer to Robert Pryke was executed by them, not by Robert Pryke, but reflected the option agreement they had entered into with him to the extent that it was a transfer to him. The option anticipated that it would be accepted in writing and that the acceptance may also be made by any nominee of Robert Pryke, nominated by him in the letter of acceptance. There was no such nomination made that Robert Pryke could recall in his oral evidence. His solicitor's evidence was that he was "never instructed by Mr Pryke of his nomination of his partners as transferees", although one infers that may have been a conclusion he drew from the form of drafting of the transfer he prepared.

[11] His Honour's unchallenged findings about Robert Pryke's intention in respect of the transfer were as follows:[1]

> "[38] Looking at the transaction in context, it is plain that Mr Robert Pryke's intention was to convey Lots 1 and 2 to the partnership. He did not, I expect, think about how that was to be done, or appreciate that a transfer to one partner only did not truly reflect what he, or his partners, intended. I expect this was the result of inadvertence. I believe he did not turn his mind to the question of the identity of the transferees. I do not consider that he actually intended the transfer to be to him on the basis that he would hold the land on trust for the partnership, which is what happened."

[12] Those findings were based on evidence that, in 1972, Robert Pryke had just sold his printing business and had decided to move from Sydney to Queensland to set up business running a caravan park with his brother and their wives. Robert Pryke arrived in Queensland first and was delegated to make enquiries and to buy a suitable property. After the purchase of the land in Robert Pryke's name, the caravan park was operated by the partnership and appeared in its books as an asset. Other adjoining land was bought in all partners' names in 1979 and the money was borrowed in their names from time to time to make improvements to the caravan park. Daryl Pryke had realised at a very early stage that the land was only in his brother's name, that the transfer in that form to Robert Pryke alone was mistaken and he was disappointed that that had occurred. Nothing was done by the partners at that time, however, probably, as his Honour found, because of the costs of effecting another transfer. The relations between the partners were also harmonious and it was clear in their minds that Robert Pryke held the land on behalf of all of them.

[13] His Honour found that these were the facts despite the lapse of time between the original transfer and the rectification of it by the 2003 transfer. He relied, in particular, on Daryl Pryke's evidence to reach that conclusion.

[14] The possibility of redevelopment of the land in recent years and the advancing age of the parties, encouraged them to look at transferring the land into all four names, as the other adjoining blocks were held. They were then advised that the passage of

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1 [2006] QSC 226 at [38].

s 152 of the *Duties Act* 2001 (Qld) may assist such a transfer by negating the imposition of transfer duty. That section provided:

> "**152 Exemption—to correct error in previous dutiable transaction**
>
> Transfer duty is not imposed on a dutiable transaction to correct an error in a previous dutiable transaction about the same property if—
>
> (a) no additional consideration is paid or payable; and
>
> (b) the beneficial interests in the property change only to the extent necessary to correct the error."

[15] The section has been amended since the decision appealed from but it was not submitted to us that the form of the amendment should be taken into account in assisting the interpretation of the section that applied to this transaction.

[16] Section 152 should also be read with s 549(4) which provided:

> "(4) A reference in this Act to a dutiable transaction or relevant acquisition is, if the context permits, taken to be a reference to an instrument chargeable with or exempt from stamp duty under the repealed Act that gives effect to or evidences an equivalent transaction or acquisition."

[17] Accordingly, on 24 November 2003, Robert Pryke executed a transfer of the land described as Lot 1 on RP119605 County of Ward, Parish of Tallebudgera and Lot 2 on RP126274 in that County and Parish to all four partners for a consideration described as: "Nil. Correction of Transfer previously recorded."

[18] The Commissioner did not accept the accuracy of the consideration set out in the transfer and called for a valuation of the land. That came in at $10,740,000. The value of the three-quarter interest transferred was $8,055,000 on which duty was assessed at $299,287.50, ironically almost precisely the amount paid for the land alone slightly more than 30 years earlier.

"Error in a previous dutiable transaction"

[19] The focus of the arguments was the meaning of the words "error in a … transaction" in s 152. The learned trial judge resolved that issue of construction by deciding that the words "in a … transaction" immediately after the word "error" meant "in connection with" or "concerning" the transaction.[2] He accepted that the connection between the error and the transaction should be relatively close.[3] In applying that analysis, his Honour then made the factual findings which I have already set out.[4] Those findings appear to be to the effect that Robert Pryke erred in not appreciating that a transfer to him alone did not reflect what he or his partners intended. As his Honour went on to say:[5]

> "The error was in thinking that a conveyance to Mr Robert Pryke would be a conveyance to the partnership; or in not thinking about how to effect a transfer to the partnership. It was, I think, an error in opinion or the result of holding a mistaken belief. It was certainly something done through ignorance or inadvertence. The evidence

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2 [2006] QSC 226 at [33].
3 [2006] QSC 226 at [33].
4 [2006] QSC 226 at [38].
5 [2006] QSC 226 at [39].

> establishes that it was a mistake. The ordinary definition of 'error' is satisfied."

The submissions

[20] The appellant's submissions attack that conclusion. The first argument of Mr Gotterson QC for the Commissioner was that the preposition "in" required that the error be located within the previous dutiable transaction. This was said to be consistent with the corresponding exception under the heading "Conveyance or Transfer" in the first schedule to the *Stamp Act* 1894 (Qld), subpara. (4)(vii) of which read:

> "correcting an error in a previous conveyance or transfer of the same property …"

[21] In arguing against adopting what he submitted was the imprecise test that the error be in connection with or concerning the transaction, he said that the qualification that the connection be relatively close provoked questions for which the section provided no answers. In that context, he submitted that the error should be one made in the *recording* of the previous transaction and be one made on the part of a party to the transaction, there relying on an analogy with the law of rectification.[6] The party should be, he submitted, one who had executed the instrument.

[22] He also submitted that the effect of s 549(4) was to make it clear that the previous dutiable transaction was an instrument, namely the 1973 transfer, consistently with the focus of the 1894 Act in imposing duty on instruments rather than the transaction documented by an instrument. In that context, he submitted there was no error in the 1973 transfer. He made that submission because it reflected in part the terms of the option agreement, because there was no evidence of a nomination having been made by Robert Pryke of other transferees and because of the common understanding of all the partners of the fact that Robert Pryke actually held the land on their behalf.

[23] That argument, however, meets an immediate hurdle in his Honour's factual findings that were not challenged. He sought to counter that conclusion by the submission that the error identified by his Honour was not one *in* the 1973 transfer but, at most, an error as to the consequences of registration of the transfer.

[24] Mr Lyons QC for the respondents pointed, initially, to the recognition in s 152(b) of the possibility that beneficial interests could change to the extent necessary to correct an error as arguing against any proposition that the relevant error should be limited to a clerical error. In my view there is substance in that submission. Otherwise he submitted that the word "in", appearing here in remedial and facultative legislation, should be read broadly and beneficially to include the meaning "with respect to".

[25] He pointed out also that, although Robert Pryke's evidence was not particularly clear, it was consistent with an intention that the land be transferred to the partnership. It was also possible that the transfer itself may not have come to his

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[6] See *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329, 345; *Oates Properties Pty Ltd v Commissioner of State Revenue* (2003) 53 ATR 308; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, 350 and *Winks v W H Heck & Sons Pty Ltd* [1986] 1 Qd R 226, 237, 243.

attention. It was signed by the Fiebigs and by his own solicitor as correct for registration but not by Robert Pryke himself. He also submitted that the relevant error consisted in the transfer showing Robert Pryke as the transferee when he and the other partners intended that the transfer should be to all four of them.

[26] In respect of the proper construction of the word "error" he relied particularly on one of the meanings attributed to that word in the *Oxford English Dictionary (2nd ed.)*: "something incorrectly done through ignorance or inadvertence; a mistake, e.g. in calculation, judgement, speech, writing, action, etc."

[27] In this instrument of transfer, he submitted that one could find the error in the imperfect identification of the transferee, where Robert Pryke was the person able to identify the transferee as himself or his nominee and the Fiebigs were indifferent as to whether the transfer would be to him or his nominee. He submitted that the transfer was effected mistakenly because of Robert Pryke's ignorance or inadvertence in failing to nominate all the partners and also because of his partners' ignorance, thus amounting to an error in the transaction. There was a lack of correspondence between Robert Pryke's intention as to the identity of the transferees and the transferee named, where he had the power to nominate who the transferees should be and erred in failing to nominate the correct people.

Discussion

[28] A recent useful summary of the proper approach to the construction of an exception to dutiability such as s 152 is to be found in *Commissioner of State Revenue v Viewbank Properties Pty Ltd* (2004) 55 ATR 501; [2004] VSC 127 at 513, [38] where Nettle J said:

> "Despite developments in the law relating to the construction of taxing statutes — so that by and large one is now to approach their construction in the same way as any other statute — the starting point remains the plain natural and ordinary meaning of the words of the legislation and the discernment of the legislative intention from the terms of the legislation viewed as a whole. Within the limits which they impose it is appropriate to construe exemption and exception provisions like s 67A(3)(a)(i) in favour of those who claim that they come within the exception. But where the words of such a provision are clear, the mere fact that a liberal construction of the provision more closely accords with subjective perceptions of what is "equitable" will rarely if ever be sufficient basis to depart from the plain and ordinary meaning of the language that has been employed. Absent a drafting mistake of the kind which underscored the decision in Cooper Brookes or absurd irrational or capricious results or the use of language which as a matter of natural and ordinary meaning permits of a multiplicity of possibilities, or perhaps extrinsic materials which make plain that the language employed simply fails to achieve the result which was intended, it is not permissible to depart from the plain and ordinary meaning of the words."

[29] When one adopts such an approach and characterises the error in the transaction relied on by reference to his Honour's factual findings as the imperfect identification of the transferee, it seems to me that the error is "in the transaction" in

the sense that it is reflected in the mistaken description of the transferee in the memorandum of transfer.

[30] In partial answer to that approach his Honour's factual findings in para. [38] extracted above, were said to be unclear, particularly in the last two sentences where he said: "I believe he did not turn his mind to the question of the identity of the transferees. I do not consider that he actually intended the transfer to be to him on the basis that he would hold the land on trust for the partnership, which is what happened."

[31] In context, however, it seems clear to me that his Honour's meaning was that Robert Pryke did not intend the transfer to be to him alone as trustee but that it should have been a transfer to the four partners. That is what he said in effect in the first sentence of para. [38], that it was plain that Robert Pryke's intention was to convey the lots to the partnership. That the transfer did not reflect that intention seems to me to amount to an error in the transaction on the normal reading of those words in s 152. Such an approach avoids the possible imprecision associated with the test that the error be in connection with or concerning the transaction, so long as the connection was relatively close.

[32] The submissions for the Commissioner arguing that the error should be made in the recording of the previous transaction on the part of a party to the transaction who actually executed it, seem to me to be too restrictive and not a necessary consequence of the use of the statutory language.

[33] Another possible approach to the problem is to take the view that an "error in a previous dutiable transaction" is one where the mistake is one affecting all the parties to that transaction. That is not the case here. Nobody suggests that the Fiebigs were parties to any variation to the transaction to identify the potential nominees of Robert Pryke and mistakenly failed to implement it. To require the error to be mutual or common to the parties does not seem to me, however, to be a natural or necessary interpretation of the section.

[34] Mistakes may be unilateral, mutual or common but this statutory language does not prevent unilateral mistakes from creating an error in a transaction. Although the transaction was one between the Fiebigs and Robert Pryke it was also one meant, from the respondents' point of view, to show a nomination by Robert Pryke of his partners as transferees. His failure to do that created the error in the transaction as to the identity of the persons to whom the land should have been transferred.

Conclusion

[35] In other words, it is my view that an error in the description of the transferee in a memorandum of transfer where the transferee had the power to nominate who could take the transfer and inadvertently failed to ensure that his proposed nomination took effect, has created a situation which in the plain and ordinary meaning of the language amounts to an error in that transaction.

[36] Accordingly, I would dismiss the appeal and order the appellant to pay the respondents' costs of and incidental to the appeal.