SUPREME COURT OF QUEENSLAND

CITATION:	*Pryke & Ors v Commissioner of State Revenue* [2006] QSC 226
PARTIES:	**DARYL JOHN PRYKE, CAROLE ROSE PRYKE and JOAN CAROL PRYKE AND ROBERT LINDSAY PRYKE** (appellants) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO:	BS 4759 of 2005
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	23 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2006
JUDGE:	Chesterman J
ORDER:	**1. The appeal be allowed.** **2. The respondent's disallowance of the objection of 18 April 2005 be set aside.** **3. The respondent pay to the appellants the amount of duty assessed by him, $299,287.50 together with interest pursuant to s 61(2) of the *Taxation Administration Act* 2001.** **4. The respondent pay the appellants' costs of the appeal.**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – EXEMPTIONS – QUEENSLAND – four appellants carry on business in a partnership – one appellant purchased land and paid duty on transfer of land to him in 1973 and later transferred the land to the four appellants for nil consideration – respondent assessed duty on later transfer – whether after initial transfer land held on trust for partnership – whether initial transfer to one appellant was 'an error in a previous dutiable transaction' under s 152 of the *Duties Act* 2001 exempting imposition of transfer duty on later transfer

Duties Act 2001 (Qld), s 152

COUNSEL: Mr D W Marks for the appellant
Ms C J Conway for the respondent

SOLICITORS: Short Punch & Greatorix for the appellants
Crown Law for the respondent

[1] By a memorandum of transfer dated 24 November 2003 the appellant Robert Pryke transferred to himself and the other appellants an interest in land described as Lot 1 on RP 119605 County of Ward, Parish of Tallebudgera and Lot 2 on RP 126274 in the same county and parish, for a consideration recorded as 'Nil. Correction of transfer previously recorded'. The transferees Daryl John Pryke and Carole Rose Pryke took a half interest in the said land as joint tenants *inter se* as did Robert Lindsay Pryke and Joan Carol Pryke but those two couples held their respective moieties in the land as tenants in common. Messrs Daryl and Robert Pryke are brothers. Their wives are joint owners with them in the land. They are all the appellants.

[2] The respondent did not accept the accuracy of the stated consideration and called for a valuation of the land which came in at $10,740,000. The value of the three quarter interest in the land conveyed by the transfer was calculated to be $8,055,000. On 28 October 2004 the respondent assessed duty on the transfer in the sum of $299,287.50, which the appellants have paid.

[3] Section 8 of the *Duties Act* 2001 ('the Act') imposes transfer duty on the dutiable value of a dutiable transaction. Section 9 defines a dutiable transaction to include a transfer of dutiable property. Land in Queensland is, by s 10, dutiable property. By s 11 the dutiable value of a transaction is the amount payable for it, or the unencumbered value of the property, if there is no consideration for the transaction.

[4] The appellants objected to the respondent's assessment of duty on the ground that the transfer was exempt from duty pursuant to s 152 of the Act. That provides:

> '**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.'

[5] On 18 April 2005 the respondent disallowed the objection and on 14 June 2005 the appellants filed an appeal pursuant to s 69 of the *Taxation Administration Act* 2001 against the respondent's decision. It provides that a taxpayer may appeal to the Supreme Court if dissatisfied with the respondent's decision on an objection. The right of appeal is conditional upon the taxpayer paying 'the whole of the amount of the tax … under the assessment …' before commencing an appeal. Section 70 requires a written notice of appeal to be filed within 60 days after receipt of the

notice of the rejection of the disallowance. The notice must 'state fully the grounds of the appeal and the facts relied on' which may not be amplified 'unless the court otherwise orders.' Sections 69 and 70 are silent as to the nature of the appeal. It is not said whether it is an appeal in the strict sense, on questions of law only, or is a rehearing on the materials before the respondent when determining the objection, or whether it is a new hearing on fresh materials.

[6] The parties expressly approached the appeal on the basis that it was of the third kind: a new hearing on materials not limited to those before the respondent. Some affidavits were filed and the two male appellants were cross-examined. I proceed on the basis that this procedure was appropriate without expressing any opinion as to what s 69 and s 70 mean by 'appeal'.

[7] The only point in the appeal is whether there was 'an error in a previous dutiable transaction', and the transfer in November 2003 had as its purpose the correction of the earlier error.

[8] The land in question was transferred to Mr Robert Pryke by Mr and Mrs Fiebig on 10 August 1973 for a consideration of $300,000. The transferors conducted the 'Queen Bee' Caravan Park on the land which is located at Palm Beach on the Gold Coast. The appellants still conduct a caravan park on the land although they have changed its name. The park has increased in size by the acquisition of adjoining parcels of land.

[9] In 1972 Mr Robert Pryke had just sold his printing business. He and his brother, and their respective wives, had decided to move from Sydney to Queensland to set up business. Mr Daryl Pryke had been involved in real estate development to the west of Sydney. Mr Robert Pryke had also been involved but to a lesser extent. He was able to make the move north before his brother and appears to have been delegated to make enquiries and a suitable acquisition.

[10] A partnership was formed, the members of which were the two brothers and their respective wives. All would share equally in profits and liabilities. They had also been equal shareholders in a company, Christchurch Pty Ltd, which later changed its name to Pryke Brothers & Associates Pty Ltd, and was later still wound up. It is not clear whether all four shareholders were directors or whether only the brothers held that position. In any event it seems to have been the vehicle by which family business activities were carried on. It had money or access to bank finance. It was the vehicle by which the appellants had conducted land development.

[11] On 21 May 1973 Mr and Mrs Fiebig signed a written option agreement addressed to 'Robert Lindsay Pryke, or to such person you may care to nominate' by which they offered to sell Lots 1 and 2, together with all improvements, to Mr Pryke for a price of $300,000. The option remained open until 19 August 1973. The consideration was $1,000 payable immediately and a further sum of $29,000 on written notification of acceptance of the offer which sums would go in diminution of the purchase price. It was a term of the option that it could be accepted by 'any nominee of [Mr Pryke's]' who should be 'duly nominated … in the letter of acceptance.'

[12] The offer was accepted and, as I have mentioned, the land was transferred by the memorandum of 10 August 1973. There was no intermediate contract of sale and purchase.

[13] The acquisition was paid for by a loan of $100,000 from the vendor and a further loan, secured by mortgage, of $220,000 from Westpac Banking Corporation (then the Bank of New South Wales Ltd).

[14] Many of the appellants' records have been lost or discarded in the ordinary course of business in the three decades since they bought the caravan park. It is nevertheless clear that the land was bought for the purpose of the appellants conducting a caravan park in partnership. This is what they have done, from that day to this. Initially the expenses incurred in the conduct of the business were met by Christchurch Pty Ltd but it made the payments on behalf of the partners and was reimbursed by the partnership. When the business became profitable expenses were met by the partnership from its own moneys and Christchurch Pty Ltd became unnecessary and disappeared from the accounts. The land has always appeared in the partnership books of account as an asset of the partnership which paid, by itself or by Christchurch Pty Ltd, all expenses connected with the ownership of the land including rates, outgoings and repayment of moneys borrowed to buy it.

[15] In about 1979, the appellants acquired three further parcels of land, Lot 13 on RP 64125, Lot 16 on RP 166207 and Lot 20 on RP 64125 to expand the caravan park. These parcels adjoin the original lots purchased in 1973. They were purchased by the four appellants, each husband and wife holding a moiety as tenants in common but as joint tenants *inter se*. On a number of occasions most notably in 1976 and 1977 the appellants, as partners, borrowed moneys from their bank to effect improvements to the caravan park. The moneys were borrowed jointly by the four appellants.

[16] The partnership books of accounts have always treated Lots 1 and 2 as a partnership asset. The income from it has been shared by the partners equally. There is no doubt that Mr Robert Pryke holds the land on trust for himself and his partners in equal shares though no written declaration of trust has been executed and no notification of trust appears on the land title register.

[17] The ownership of Lots 1 and 2 by Mr Robert Pryke is an anomaly. It is the only partnership asset not held in the names of the four appellants as partners.

[18] The explanation for the transfer of Lots 1 and 2 into Mr Robert Pryke's name lies, I think, in inadvertence and perhaps inexperience. As I mentioned Mr Robert Pryke carried on business as a printer in Sydney before moving to commence the partners' business activities in Queensland. I had the impression during the evidence that he lacked his brother's experience in dealing in real estate. The acquisition would mark the inception of the partnership business. The move to Queensland, the sale of houses and assets in New South Wales, and the commencement of a new family undertaking were novel to Mr Robert Pryke and created a degree of anxiety. I think this summary is a fair description which emerges from the male appellants' evidence.

[19] There was no reason why Lots 1 and 2 could not have been transferred to the four appellants. The option agreement allowed for the nomination of purchasers other than Mr Robert Pryke. He engaged Mr Punch, a solicitor, to act in the conveyance. It is likely, I think, that Mr Robert Pryke did not tell Mr Punch that he was buying the land as a partnership asset. Had he done so I think it is a fair inference from Mr Punch's affidavit that he would have advised a transfer which reflected the fact that

the land was to be beneficially enjoyed by all partners. I think it likely that Mr Robert Pryke, having become the optionee, simply asked Mr Punch to effect the conveyance. He did so with reference to the parties as they were identified in the option agreement.

[20] It is to be noted that the appellants have taken over 30 years to address what they say was Mr Robert Pryke's mistake in transferring Lots 1 and 2 to himself. Mr Daryl Pryke, whose evidence I accept completely, testified that he realised immediately that the transfer was a mistake and that it was a 'disappointment'. Nothing was done then because, I suspect, of the cost of effecting another transfer. The mistake had no practical consequences because of the harmonious relationship between the partners. With the passage of the Act in 2001 the appellants' accountant gave advice that it might be possible to rectify the mistake without cost. I presume the accountant had s 152 in mind when he gave that advice. Recent events have given impetus to the desire to address the mistake. The appellants wish to develop the caravan park, or part of it, into a residential unit building. This will necessitate the amalgamation of the various parcels of land which the partnership owns. The amalgamation cannot proceed if the registered owners of the parcels are not identical.

[21] There is another matter. Mr Robert Pryke is now in advanced years. There is a concern that should he die Lots 1 and 2, which will form part of his estate, might not pass to the surviving partners.

[22] The question on which the outcome of the appeal depends is whether there was an error in the transfer of Lots 1 and 2 to Mr Robert Pryke in August 1973 which the later transfer by him to the appellants as co-owners was intended to correct.

[23] Section 152 has not, so far as counsel could ascertain, been the subject of any judicial exposition. I was told that no similar provision appears in the revenue legislation of any other State or Territory.

[24] The appeal obviously turns upon what is meant by 'an error in a … transaction'.

[25] The appellants' counsel points to the meaning of 'error' in the Oxford English Dictionary:

> '3(a) the condition of erring in opinion … a mistaken notion or belief; …
>
> 4(a) something incorrectly done through ignorance or inadvertence; a mistake e.g. in … judgment … action
>
> 4(b) a mistake in the making of a thing; … a flaw …'

The submission continues that the failure to include the other partners as transferees in 1973 was an error which occurred through lack of legal advice and Mr Robert Pryke's failure to inform Mr Punch that the land was to be a partnership asset. It is further submitted that the transfer was incorrectly completed in ignorance of the proper or best way of reflecting the true ownership of Lots 1 and 2 so that the recording of his sole ownership was an error, or a 'mistake in the making' of the transfer which can be seen to be 'flawed'. Thus, within the ordinary meaning of the

word the transaction of transfer of Lots 1 and 2 to Mr Robert Pryke in 1973 was an error.

[26] The respondent's first answer is to contest, as a question of fact, the appellants' assertions concerning the acquisition of Lots 1 and 2. The passage of three decades before any action was taken to rectify what is said to be a mistake is pointed to as cogent evidence that the error has been recently propounded as a means of effecting a transfer free of duty to enable the appellants to further develop their land. In this context it is pointed out that the adjoining parcels were bought in about 1979 when, at the latest, the earlier alleged error would have been discovered. The submission is that the partners did not act earlier 'because all parties understood that the property was held by Robert Pryke on behalf of the partnership. There had been no error in the 1973 transaction. The parties were aware of how the property was held. It had been a deliberate decision to hold the property in that manner.' It is also pointed out that the option agreement conferred on Mr Robert Pryke a right to nominate other purchasers. He did not do so and his omission must be seen as a deliberate choice on his part.

[27] I agree that the lapse of time makes it important to scrutinise the evidence so as to be satisfied that the appellants are not seeking to utilise s 152 for an improper purpose. I am however persuaded by Mr Daryl Pryke's evidence in particular that the circumstances I have outlined are genuine. I was much impressed by Mr Daryl Pryke. I thought his brother's evidence should be discounted. He was clearly embarrassed by what happened all those years ago and his testimony had about it a degree of justification which affected its reliability. I do, however, accept that he was rather carried away by the responsibility of acquiring a property for what was then a substantial price and choosing a new business venture for his partners. I think it was the novelty of the venture and the anxiety of the move which led him not to inform Mr Punch of the purpose behind the purchase and to give the instruction merely to effect a conveyance of the land in accordance with the option agreement.

[28] The respondent then argues that s 152 should be construed similarly to Order 35 Rule 7(3) of the *Federal Court Rules* and *UCPR* 388. These are the 'slip' rules which allow the courts respectively to correct a 'clerical mistake in a judgment or order, or an error arising … from an accidental slip or omission'.

[29] It is seldom, if ever, helpful to construe a word or phrase appearing in one statute by reference to the same word or phrase which appears in a different statute unless the statutes are *in pari materia* i.e. when they deal with the same subject matter. 'It is not enough that they deal with a similar subject matter.' This, at least, is the opinion of the author of Maxwell on *The Interpretation of Statutes* (12th ed) at 66, citing *United Society v Eagle Bank* (1829) 7 Conn. 457 and Craies on *Statute Law* (6th ed) at 133-134. There is nothing in s 152 to suggest that it deals with the same subject matter as the 'slip' rules of court. The section does not speak of clerical mistakes in the record of a transaction nor of accidental errors or omissions. Section 152 should be construed according to its own terms and in its own context.

[30] The respondent then points to the 'Practice Direction Duties Act 55.1' promulgated by the respondent for the assistance of the public in understanding the effect of s 152. It is for the Court to construe the section, not the respondent who will be

bound by the Court's construction. Nevertheless the Practice Direction does not seem to take matters very far. It reads relevantly:

> 'For the exemption to apply, the following facts must be established:
>
> (a) There must be an error in a previous dutiable transaction ("the defective transaction"), that is, the transaction did not give effect to the intention of the parties …
>
> (b) The dutiable transaction being considered for the exemption … must be entered into to correct the error in the defective transaction.'

[31] Paragraph (a) puts a gloss on the section which does not refer to intention or the defective execution of an intention. It merely requires that there be an error in a transaction. It is, no doubt, right that the circumstances described in the practice direction would be such an error, but it is not right to restrict the operation of the section to that circumstance.

[32] The respondent's real submission is that 'the type of error contemplated by s 152 is that of a recording nature.' The error must be mechanical: there must be a discrepancy between what the parties to a transaction intended and what they effected by their transaction. This is said to follow from the preposition '"in". The error must be '**in'** the transaction. It can only be 'in' the transaction if the document effecting the transaction contains some mistake or misdescription of party or property.

[33] Again I see nothing in s 152 which would confine it in the manner contended for by the respondent. The section is remedial in nature and its words should be given their ordinary meaning. The operation of the section should not be restricted beyond what the ordinary meaning of the words requires. The words are quite general. The section speaks of an error in a transaction, not in the recording of the transaction. The error could as well be in the making of the transaction, as in the written record of it. I think 'in the transaction' means 'in connection with' or 'concerning' the transaction. I would accept that the connection between the error and the transaction should be relatively close.

[34] For the section to operate there must be something which answers the description of 'an error' and which can be seen to be 'in a transaction'. The section does not specify or limit the type or nature of the error. It must be 'in a transaction'.

[35] The respondent also argued that Mr Robert Pryke intended to take a transfer of the land. This is evidenced by his failure to nominate another purchaser or to seek legal advice about the identity of the transferee. It is said to follow that there was no 'error in the transaction' because the transfer was the very transaction which Mr Robert Pryke intended.

[36] Even if this was so I am not sure that the section could not apply. I do not see why the words of the section, which are quite wide in their import, could not apply to an intention, formed as a result of some erroneous belief, which resulted in a transaction. The transaction would have been intended, but would nevertheless be a mistake because of the erroneously formed intention.

[37] However I am not convinced that the respondent's analysis of the facts is correct. I do not think it right that Mr Robert Pryke's intention was that described by the respondent.

[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.

[39] I think that this amounts to an error in the transaction. The inadvertence infected the instructions given to Mr Punch. 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 establishes that it was a mistake. The ordinary definition of 'error' is satisfied.

[40] There is no doubt that the subsequent transfer of November 2003 was intended to correct the earlier error. The other conditions set out in s 152 are satisfied. The property is the same. No additional consideration was paid on that transfer, or in consequence of it, and there was no change in the beneficial interests in the property. Lots 1 and 2 had always been beneficially owned by the appellants equally.

[41] Accordingly I conclude that the respondent erred in disallowing the appellants' objection to the assessment of 28 October 2004.

[42] I order that the appeal be allowed and that the respondent's disallowance of the objection of 18 April 2005 be set aside. I order that the respondent pay to the appellants the amount of duty assessed by him, $299,287.50 together with interest pursuant to s 61(2) of the *Taxation Administration Act* 2001. The respondent should pay the appellants' costs of the appeal.

[43] The *Taxation Administration Act* does not comprehensively set out the powers of the Supreme Court when exercising the appellate jurisdiction given by s 69. Section 74 merely provides that the Supreme Court 'must allow the appeal completely or partly or disallow it.' The power to make the orders set out in the preceding paragraph is implicit in, or necessarily incidental to, the power contained in s 74. If other justification is needed for the order it may be found in s 8 of the *Supreme Court of Queensland Act* 1991.