SUPREME COURT OF QUEENSLAND

CITATION:	*Tighe v Commissioner of State Revenue* [2008] QSC 30
PARTIES:	**HEATHER LENISE TIGHE** (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	BS 7554 of 2005 BS 5612 of 2007
DIVISION:	Trial Division
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	27 February 2008
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2008
JUDGE:	de Jersey CJ
ORDER:	**1. Each appeal is dismissed** **2. No order as to costs**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – GENERAL MATTERS – ASSESSMENT OF DUTY ON LAND TRANSFER – whether transfer gave effect to separation agreement – whether separation agreement was a "recognised separation agreement" – whether defect in witnessing of execution remedied by subsequent execution of counterpart – availability of duty exemption TAXES AND DUTIES – STAMP DUTIES – GENERAL MATTERS – ASSESSMENT OF DUTY ON LAND TRANSFER – whether Commissioner should have assessed agreement rather than the transfer – whether Commissioner was obliged to re-assess duty in light of duly executed counterpart *Duties Act* 2001 (Qld) s 9(1)(a), s 9(1)(b), s 16, s 21, s 22(2), s 266, s 420, s 422, s 424, s 425, s 499 *Property Law Act* 1974 (Qld) s 264(1)(a)(i), s 265, s 266, s 274, s 277 *Taxation Administration Act* 2001 (Qld), s 69(1) *Uniform Civil Procedure Rules* 1999 (Qld) r 784(3)
COUNSEL:	K Hoare for the appellant

D W Marks for the respondent

SOLICITORS: Merthyr Law for the appellant
Crown Law for the respondent

[1] **de Jersey CJ**: These appeals are brought, under s 69(1) of the *Taxation Administration Act 2001*, against the respondent Commissioner's decisions on the appellant's objections.

[2] The evidence before me comprised an agreed statement of facts filed in appeal 7554/2005, some limited affidavit material, two documentary exhibits, some short oral evidence from the appellant, and the documents sent to the Registrar by the Crown Solicitor under Rule 784(3) of the Uniform Civil Procedure Rules. The parties agreed all that evidence should be put before me.

[3] The appeals were heard together, with evidence in the one being admitted in the other.

[4] Appeal 7554 concerns the Commissioner's assessment to duty, under the *Duties Act 2001*, of a transfer to the appellant of an interest in residential property, from the appellant's former de facto partner Mr Todhunter. The transfer was signed by Mr Todhunter, the transferor, on 17 February 2005. The transfer recites the consideration as "pursuant to separation agreement dated 21 February 2005". Clause 8.2 of that separation agreement provided for the transfer of the property, and obliged the appellant to pay any applicable stamp duty. In the separation agreement, the parties recited their agreement that it be a "recognized separation agreement" for the purposes of ss 265 and 266 of the *Property Law Act 1974*.

[5] Section 266 of the *Property Law Act* defines "recognized agreement" of de facto partners. Among other things, such an agreement must be signed by the de facto partners and witnessed by a justice of the peace (qualified) or solicitor. It must also contain "a statement of all significant property, financial resources and liabilities of each de facto partner when the de facto partner signs the agreement".

[6] Unfortunately, the appellant's signature on the agreement was witnessed, in Victoria, not by a justice of the peace (qualified) or solicitor, but by a pharmacist. That technical deficiency meant, as was common ground, that the agreement did not qualify as a "recognized agreement".

[7] On 28 February 2005, the Commissioner advised the appellant's solicitors of his view that the separation agreement did not, because inadequately witnessed, constitute a "recognized agreement". On 3 March 2005, the appellant's solicitors forwarded to the Commissioner a counterpart of the separation agreement signed by the appellant and properly witnessed by a justice of the peace. Clause 11 provided

for counterparts, and their being taken together to "constitute one and the same instrument".

[8] If the agreement had been a "recognized agreement", it would have been a "de facto relationship instrument" under s 422 of the *Duties Act*; and because of s 424, a transfer giving effect to it would not have been dutiable.

[9] In his letter of 28 February 2005, the Commissioner advised his intention to levy duty on the transfer, and invited the submission of evidence of the value of the interest being transferred. That duty amounted to $5,600. The Commissioner disallowed the appellant's objection, and appeal 7554 is brought against that disallowance.

[10] The appellant's solicitors objected to the Commissioner's decision by fax dated 9 March 2005. On 21 April 2005 they wrote again to the Commissioner, referring to the objection and setting out comprehensively their supporting submissions.

[11] In that letter, the solicitors also sought a reassessment under "s 424" of the *Duties Act*. The reassessment provision is actually s 425. On 8 July 2005, the Commissioner refused the objection and the application for reassessment. But the Commissioner failed to advise the appellant then of her right of objection in relation to the refusal to reassess. The Crown Solicitor wrote on 15 March 2007 proposing a course to facilitate an appeal in that respect, and the appellant followed that course.

[12] Accordingly, an objection was lodged on 11 April 2007. The Commissioner determined that objection against the appellant in his letter of 1 May 2007. The appellant then appealed against that decision, by appeal number 5612/2007.

Appeal 7554/2005

[13] Under s 9(1)(a) of the *Duties Act*, the transfer was a "dutiable transaction". So was the separation agreement executed on 21 February 2005 (s 9(1)(b)). The Commissioner chose to levy duty on the transfer, not upon the agreement. He was entitled to do that.

[14] Mr Hoare, who appeared for the appellant, relied on s 21 of the *Duties Act*. That concerns, however, a transaction – in the singular – which may throw up more than one head of duty. Here there was the agreement, and the transfer pursuant to the agreement. If duty were paid on the agreement, none could be levied on a subsequent transfer (s 22(2)). But the Commissioner levied the transfer first, and not the agreement. That was an appropriate course.

[15] Because of s 16 and schedule 2, liability for duty on the transfer arose when the transferor Mr Todhunter signed the transfer (17 February 2005), or at the latest, when the appellant signed it as correct for registration (21 February 2005). Duty was paid on or about 10 March 2005.

[16] Mr Hoare emphasized the plain intention of the parties that the separation agreement they executed in February 2005 was to amount to a "recognized agreement".

[17] A recognized agreement becomes definitive of such parties' subsequent entitlements (s 274 *Property Law Act*), whereas a separation agreement which is not a recognized agreement is not definitive of those matters (s 277). This may be part of the explanation why the formal requirements to be satisfied to constitute a recognized agreement are spelt out, as they are, in s 266.

[18] Mr Hoare submitted that the Commissioner should have assessed duty on the agreement "perfected by the counterpart" in March. To get to that point, he sought to rely on s 499 of the *Duties Act*, which is headed "reassessment of duty in particular circumstances". But as Mr Marks, who appeared for the Commissioner, pointed out, reliance on s 499 predicates the lodgement of an application for reassessment "in the approved form" within a specified period. That did not occur.

[19] Mr Hoare also submitted that there was "substantial compliance" with s 266 of the *Property Law Act*. For that contention he relied on the parties' having received independent legal advice, the appellant's subsequent execution of the counterpart, that the parties supported the subsistence of the agreement, and an intention, discernible, he submitted, from s 425 of the *Duties Act*, "that the legislature did not wish for the duty exemption to be ignored for technicalities or for timing reasons".

[20] He referred, as supporting his approach, to *Black v Black* (2006) 36 Fam LR 680.

[21] The requirements under s 266 are plainly prescribed and easily met. I have suggested a reason why the legislature expected full compliance, in order to constitute a particular agreement as "recognized". *Black* is distinguishable. In *Black*, the Judge found that the requirements of the legislation were in fact satisfied (para 115): here they were not.

[22] I refer to s 425 in my subsequent treatment of appeal 5612/2007. In respect of appeal 7554/2005, it suffices to observe that s 425 does not support the liberal approach to construction for which Mr Hoare contended.

[23] Mr Marks sought to establish a further deficiency in the separation agreement, on the basis it omitted "significant…financial…liabilities of each de facto partner" (s 266(1)(c) *Property Law Act*). He relied principally on the evidence of the appellant. I accepted that evidence. The appellant gave evidence of various financial liabilities. The only one which should arguably have been included in the separation agreement, in the context of the statutory requirement, was a credit card liability, primarily of Mr Todhunter, of "up to $10,000". See para 7 of his affidavit, and the appellant's oral evidence. Because the appellant's position with her bank, at the time of the agreement, was rather parlous, it may be arguable that a $10,000 debt was "significant", even though the property available for distribution between

the parties was much more substantial. But it is not necessary for me to express a final view on this, because of my other conclusions, which I summarize as follows.

[24] The originally executed separation agreement was not a "de facto relationship instrument" under s 422 of the *Duties Act*. That is because it was not a "recognized agreement" under s 266 of the *Property Law Act*, because of the deficiency in execution. The transfer which the Commissioner assessed to duty was made under that separation agreement. The Commissioner was entitled to make the assessment because the transfer was a "dutiable transaction" under s 9 of the *Duties Act*. If in March the subsequently duly executed counterpart did convert the original February agreement into a "recognized agreement", the fact remains that the assessed transfer was not made "under" that March agreement. It was made "under" the February agreement. The transfer gave effect to the separation agreement executed in February. Accordingly, the exemption under s 424 of the *Duties Act* did not apply.

[25] The Commissioner's decision was correct and the appeal must be dismissed.

Appeal 5612/2007

[26] The appeal against the Commissioner's refusal to make a reassessment under s 425 of the *Duties Act* focuses on the so-called "perfecting" of the February separation agreement by the due attestation of the properly executed counterpart at the beginning of March. The amount of the duty was paid to the Commissioner about a week later.

[27] Section 425 relevantly provides as follows:

> "425 Reassessment on application
>
> (1) This section applies if—
>
> (a) duty has been paid on a transaction to the extent that it gives effect to an instrument for the transfer, or
>
> agreement for the transfer, of—
>
> (i) matrimonial property from 1 party to a marriage to the other party; or
>
> (ii) de facto relationship property from 1 de facto partner to the other; and
>
> (b) duty was paid on the basis that the instrument was not a matrimonial instrument or de facto relationship instrument; and
>
> (c) either of the following apply—
>
> (i) when the duty was paid, the instrument was a matrimonial instrument or de facto relationship instrument for the property;
>
> (ii) after the duty was paid, the instrument becomes a matrimonial instrument or de facto relationship instrument for the property.
>
> (2) On application made by a party to the marriage or 1 of the de facto partners, the commissioner must make a

> reassessment of duty for the transfer as if it were exempt from duty under section 424…."

[28] Section 424 provides:

> "424 Exemption—matrimonial and de facto relationship Instruments
> Duty is not imposed on a transaction to the extent that it gives effect to a matrimonial instrument or de facto relationship instrument."

[29] Mr Marks accepted that sub-s (1)(a) of s 425 applied. He also accepted that para (b) applied because the basis on which the appellant paid the duty was that the s 424 exemption did not arise because the transfer was not a "de facto relationship instrument". Sub-section (1)(c)(i) did not apply because when the duty was paid, the transfer (the "instrument") was not a "de facto relationship instrument" under s 422. That was because it was not made (s 422(c)) "under" a "recognized agreement": it was made "under" the February separation agreement. Sub-section (1)(c)(ii) also did not apply, because nothing relevant occurred "after the duty was paid".

[30] On the other hand, Mr Hoare submitted that s 425(1)(c) should be liberally construed, and that if it is not seen to embrace this situation, it is difficult to see how it could ever have any operation. I do not accept that submission. There is no reason to depart from a literal construction, and that allows adequate scope for the practical application of the provision.

[31] The provision in para (c)(i) is apparently intended to cover a situation where the parties mistakenly fail to claim an exemption to which they are entitled. Such a failure may arise from a range of matters, including ignorance or inadvertence. It is a beneficial provision.

[32] As to para (c)(ii), Mr Marks provided two examples of its potentially beneficial operation, each tenable.

[33] The first concerns an agreement entered into after the commencement of matrimonial proceedings, providing for the distribution of property on dissolution, which becomes a matrimonial instrument upon dissolution. See s 420. The agreement would have been dutiable on execution.

[34] The second is a cohabitation agreement entered into before, and in contemplation of, the commencement of a de facto relationship, under s 264(1)(a)(i) of the *Property Law Act*. The agreement would be dutiable upon execution. With the commencement of the relationship, it could become a "recognized agreement" under s 266, and qualify for exemption under s 424 of the *Duties Act*.

[35] In short, an ordinary construction of the provision allows it ample scope for practical operation.

[36] The Commissioner was correct in refusing the application for reassessment and in dismissing the appellant's objection.

Orders

[37] Each appeal is dismissed.