

SUPREME COURT OF QUEENSLAND

CITATION: *ING Life Ltd & Anor v Commissioner of State Revenue*
[2008] QSC 248

PARTIES: **ING LIFE LIMITED**
(first appellant)
and
ANZ LIFE ASSURANCE COMPANY LIMITED
(second appellant)
v
COMMISSIONER OF STATE REVENUE
(respondent)

FILE NO: S549 of 2008

DIVISION: Trial Division

PROCEEDING: Appeal

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 22 October 2008

DELIVERED AT: Brisbane

HEARING DATE: 11 September 2008 to 12 September 2008

JUDGE: McMurdo J

ORDER: **1. Appeal dismissed.**
2. The appellants are to pay the respondent's costs of the appeal.

CATCHWORDS: TAXES AND DUTIES – STAMP DUTIES – EXEMPTIONS – QUEENSLAND – Exemptions under s 406 of the *Duties Act* 2001 (Qld) - Where a business reconstruction results in transfer of a business from one entity to another – where both entities are ultimately controlled by the same parent – Definition of “own” and “owned” in s 401 and 402 of the *Duties Act* 2001 (Qld) – Whether a beneficiary “owns” the property of a trust where the units are held by different entities in the same corporate group

CORPORATIONS – CORPORATE CHARACTER – HOLDING, SUBSIDIARY AND ASSOCIATED COMPANIES – HOLDING AND SUBSIDIARY COMPANIES – Meaning of “subsidiary”

CPT Custodians Pty Ltd v Commissioner of State Revenue for the State of Victoria (2005) 224 CLR 98

Halloran v Minister Administering National Parks and

Wildlife Act 1974 (2006) 229 CLR 545

Kent v SS "Maria Luisa" (No 2) (2003) FCR 12

KLDE Pty Ltd (in voluntary liquidation) v Commissioner of Stamp Duties for the State of Queensland (1984) 155 CLR 288

Saunders v Vautier (1841) 4 Beav 115, 49 ER 282

Duties Act 2001 (Qld) s 406, s 398, s 399, s 400, s 401, s 402

Corporations Act 2001 (Cth) s 46

COUNSEL: Mr PG Bickford for the appellants

Mr DW Marks for the respondents

SOLICITORS: HWL Ebsworth Lawyers for the appellants

Crown Law for the respondents

- [1] The second appellant, which I will call ANZ Life, transferred its life insurance business to the first appellant, which I will call ING Life, on 30 June 2005. The entirety of the assets of the business was transferred in consideration for the assumption by ING Life of its liabilities. As I will discuss, the appellants were companies ultimately controlled by the same entity. The purpose of the transfer was to consolidate the life insurance businesses of the appellants within one company without adverse effect upon policy holders. It was expected that this would result in operating efficiencies and the avoidance of duplication of expenses.
- [2] The respondent assessed the Queensland component of this transaction to duty of \$578,475. The appellants paid the duty and lodged an objection. This is an appeal against the respondent's disallowance of that objection.
- [3] The appellants say that no duty was payable because this was a transfer of dutiable property carried out for a corporate reconstruction, and as the conditions specified in s 406(2) of the *Duties Act 2001* (Qld) have been satisfied, the transfer is exempt by s 406(1).
- [4] The issue is whether the appellants were "group companies" as defined for s 406.
- [5] Section 406 provides as follows:

"Exemption – intra-group transfer of property

- (1) Transfer duty or vehicle registration duty is not imposed on a transfer, or agreement for the transfer, of dutiable property carried out for a corporate reconstruction if the conditions in subsection (2) are complied with.

- (2) For subsection (1), the condition are as follows –
- (a) the transferor did not hold, and the transferee will not hold, the property as trustee;
 - (b) the transferor and transferee of the property are group companies;
 - (c) the dutiable transaction has not been made under an arrangement under which –
 - (i) part or all of the consideration for the dutiable transaction has or is to be provided or received, directly or indirectly by a person other than a group company; or
 - (ii) a group company is to be enabled to provide any of the consideration by a person other than as mentioned in subsection (3); or
 - (iii) a group company is to dispose of any of the consideration through a payment or other disposition –
 - (A) to a person other than a group company; or
 - (B) to a person other than by way of loan on ordinary commercial terms;
 - (d) the property transferred is, at the time of the transfer, group property under section 407.
- (3) For subsection (2)(c)(ii), consideration may be provided –
- (a) by a financial institution by way of loan on ordinary commercial terms; or
 - (b) by a group company; or
 - (c) under an offer and sale of shares to the public in the circumstances mentioned in section 412(4)(b).”

[6] Section 398 defines a “corporate reconstruction” as follows:

“What is a *corporate reconstruction*

- (1) A *corporate reconstruction* happens if –

- (a) through a transaction or series of transactions, property is transferred, or agreed to be transferred, for the purpose of changing a corporate structure to make internal adjustments to corporate arrangements; and
- (b) the transaction or each transaction is necessary to give effect to the purpose and is not undertaken for any other purpose; and
- (c) the transfer, or agreement for the transfer, of the property is not part of an arrangement under which any company involved with any of the transactions ceases to belong to the same corporate group other than in the circumstances mentioned in section 412(4).

- (2) For subsection (1)(b), a transaction that is 1 in a series of transactions is taken to be necessary to give effect to the purpose if it is necessary for an exemption to apply to the transaction.”

[7] The Commissioner accepts that this transfer was carried out for a corporate reconstruction. He also accepts that each of the conditions for exemption under s 406 is satisfied, save that he disputes that the appellants are group companies. That question involves the application of s 399 to s 402 which are as follows:

“399 What is a *company*

A *company* is a body corporate other than a corporation sole.

400 What are *group companies*, a *group company* and a *corporate group*

- (1) If a company is the subsidiary of another company, the companies are *group companies*.
- (2) Also, if 2 or more companies are the subsidiary of another company, all the companies are *group companies*.
- (3) Each of the group companies is a *group company*.
- (4) All companies that are group companies form a *corporate group*.

401 What is a *parent company*

A company is the *parent company* of another company if –

- (a) it directly owns, other than as trustee, at least 90% of the issued shares in the other company; and

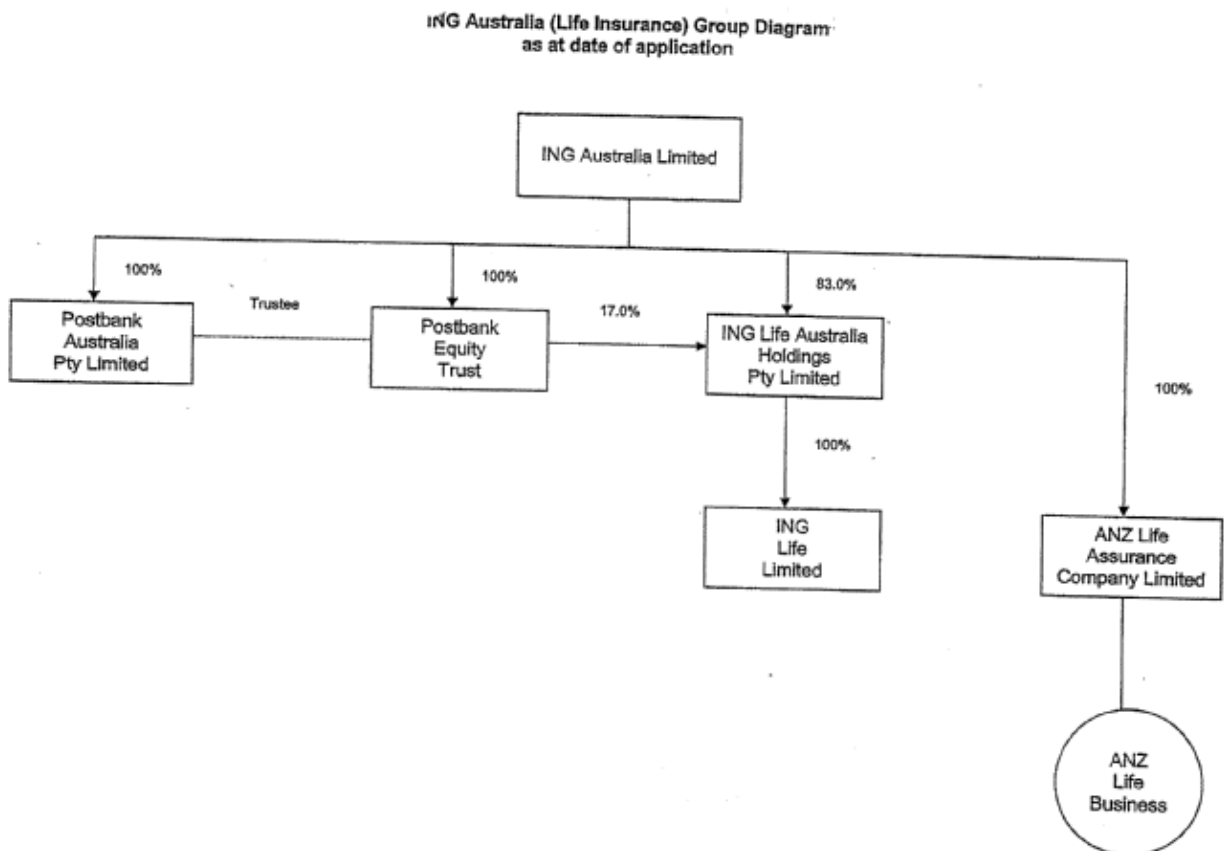
(b) has voting control over the other company.

402 What is a *subsidiary*

A company (the *first company*) is a *subsidiary* of another company if at least 90% of the issued shares in the first company are owned, other than as trustee, and voting control of the first company is held, by 1 or more of the following companies –

- (a) the other company;
- (b) 1 or more other subsidiaries of the other company;
- (c) the other company and 1 or more other subsidiaries of the other company.”

- [8] The question here is what is meant by “own” and “owned” in s 401 and s 402. Before going to that question it is necessary to set out the facts, which are undisputed, as to the connection between the appellants. The connection is represented in this diagram:



- [9] ANZ Life was a wholly owned subsidiary of ING Australia Ltd and they were group companies. The appellant ING Life was a wholly owned subsidiary of ING Life Australia Holding Pty Ltd and they were group companies.

- [10] The appellants say that ING Life Australia Holdings was a subsidiary of ING Australia Ltd. If that is correct, then ING Life was also a subsidiary of ING Australia Ltd (by s 402(b)) and the appellants, as subsidiaries of ING Australia Ltd, were group companies (s 400(2)).
- [11] Of the issued shares in ING Life Australia Holdings Pty Ltd, 83 per cent were held, and undoubtedly “owned”, by ING Australia Ltd. The remaining 17 per cent were held by Postbank Australia Pty Ltd. It was a wholly owned subsidiary of ING Australia Ltd but it held that 17 per cent as a trustee. But for that trusteeship, clearly it would follow from s 402(c) that ING Life Australia Holdings was a subsidiary of ING Australia Ltd.
- [12] The appellants’ case nevertheless is that the 17 per cent held by Postbank were shares “owned” by ING Australia Ltd. That is said to follow from that company’s ownership of all of the units in the unit trust¹ under which Postbank as trustee held that 17 per cent. What must be considered then is the nature of the interest of ING Australia Ltd under that unit trust and whether that constitutes ownership upon the proper interpretation of s 401 and s 402.
- [13] The trust was established by a unit trust deed dated 24 September 1993, which with some amendments which need not be discussed, contained the terms of the trust at the time of the subject transaction. The deed defined the “Trust Fund” as follows:

“‘Trust Fund’ means the amount referred to in Recital B and all moneys paid to the Trustee for the issue of any Units pursuant to the provisions of this Deed and all moneys and investments paid or transferred to and accepted or acquired by the Trustee or held on its behalf, in any such case to be held upon the Trusts hereby constituted, and the investments from time to time representing the same, including the ING Share Deed, together with all additions or accretions thereto and includes any part or parts thereof.”

Clauses 3.1 and 3.2 were as follows:

- “3.1 The beneficial interest in the Trust fund is to be divided into Units. Each Unit is to be either an Income Unit or a Capital Unit. Each Unit of a Class of Units confers on its Holder an interest in the Trust Fund equal to that conferred on Unit-holders by each other Unit of the Class of Units in accordance with the provisions of this Deed.
- 3.2 A unit confers upon a Unit Holder a beneficial interest in the Trust Fund but such interest does not entitle the Unit Holder other than as provided in this Deed or the Unit Subscription Agreement to:

¹ The so-called Postbank Equity Trust.

- (a) interfere with the rights or powers of the Trustee in its dealings with the Trust Fund;
- (b) an interest in any particular part of the Trust Fund or any asset forming part of the Trust Fund;
- (c) require the transfer to the Unit Holder of any part of the Trust Fund or any asset;
- (d) attend meetings whether shareholders or otherwise or take part in or consent to any actions concerning the Company; or
- (e) exercise any rights, powers or privileges in respect of the Company Shares.”

[14] By other terms the trustee was able to alter the number of units by, subject to certain conditions, issuing new units or, again subject to conditions, redeeming units. With the consent of the trustee, units were transferable.

[15] The deed provided that at the time of issue of a unit, the trustee was to designate that unit as a “Capital Unit”, or as an “Income Unit”. The holders of Income Units, if any, were “presently and absolutely entitled at the end of each Accounting Period to the Net Income of the Trust for that Accounting Period in the proportions in which they respectively held those units.”² If there were no Income Units held at the end of an Accounting Period, then the holders of Capital Units were presently and absolutely entitled to the Net Income in the proportions in which they held their units.³ As it happened, both Capital and Income Units were issued, but in 1997, all of the Income Units were redeemed. Since then all of the units have been Capital Units and all of them have been held by ING Australia Ltd.

[16] The trustee was given power to manage the Trust Fund upon certain conditions. In particular it was not, without the approval of all unit-holders, to invest any part of the fund in anything except what were called “Company Shares”, what were defined as “Depositary Receipts”, shares of any other corporation as approved by all unit-holders or the temporary lodgement of funds on bank deposit.⁴ Clause 13.3 provided that the Trustee was to exercise the voting rights attributable to the Company Shares in such manner as the Capital Unit holder should from time to time direct. The term “Company Shares” meant ordinary A class shares in ING Life.⁵ Initially, Postbank held 17 per cent of the shares in ING Life, and ING Australia Ltd held the balance. In 2001 the structure was changed to interpose ING Life Australia Holdings Ltd between ING Life and its then shareholders. However, there was no amendment to the definition of “Company Shares”.

² Clause 9.2.

³ Clause 9.5.

⁴ Clause 10.2.

⁵ Then called Mercantile Mutual Life Insurance Company Limited.

- [17] By clause 10.3 the trustee was not without the consent of all unit-holders to sell or otherwise dispose of any shares held by the trustee, except to realise funds for the redemption of income units or following the termination of the trust.
- [18] By clause 14 the trustee was entitled to be reimbursed for liabilities, costs and expenses as follows:

“REIMBURSEMENT

The Trustee is entitled to be reimbursed for all liabilities, costs and expenses for business transacted, time expended and acts done by it (or by other persons on its behalf) in connection with the trusts hereof and the Trustee is entitled to be indemnified out of the investments and property for the time being forming part of the Trust Fund against liabilities incurred by it in the execution or attempted execution of or as a consequence of the failure to exercise any of the trusts authorities powers and discretions hereof or by virtue of being the Trustee hereunder except in the case of any liability costs and expenses caused by or attributable to the fraud or wilful breach by the Trustees of its fiduciary obligations.”

- [19] Clause 15.2, importantly for present purposes, provided as follows:

“Subject to the Unit-Holders’ rights created by this Deed, the Unit Subscription Agreement or by law, a Unit Holder is not entitled to require the transfer to him of any of the property comprised in the trust fund nor is he entitled to interfere with or question the exercise of non-exercise by the Trustee of any of the trusts powers authorities or discretions conferred upon it by this Deed or in respect of such property.”

- [20] Clause 16.1 provided that the trust was to terminate on the Closing Date, which was defined to mean the earliest to occur of the following dates:
- (a) the date on which the unit-holders unanimously agreed in writing; or
 - (b) the eightieth anniversary of the date of the Deed; or
 - (c) the date of termination of the trust specified in a notice given by the Capital Unit-holders to the trustee following the redemption of all of the Income Units.⁶

- [21] Clause 16.2 provided for the termination of the trust as follows:

“Upon the termination of the Trust the following provisions shall have effect:

⁶ As defined in clause 1.2.

- (a) the Termination of the Trust shall not affect the Trustee's obligation to redeem the Income Units in accordance with clause 7.1, and clauses 16.2(d) to (h) inclusive do not apply until the Trustee has satisfied its obligations under clause 7.1.
- (b) The Trustee shall as soon as practicable after the termination of the Trust give to each Unit Holder notice of the termination of the Trust and of its intention to distribute the Trust Fund.
- (c) Subject to clauses 16.2(a), (d) and (e) the Trustee shall as soon as practicable sell call in and convert the Trust Fund into money and the Trustee shall after payment or satisfaction of the Redemption Price for the Income Units, distribute the balance of the net proceeds of such sale calling in and conversion to the Capital Unit holders. The Income Unit Holders shall have no entitlement to participate in the surplus upon the winding up of the Trust after receipt of the Redemption Price for the Income Units.
- (d) The Trustee may postpone the sale calling in and conversion of any part of the property of the Trust Fund for such time as it thinks it desirable so to do in the interests of the Unit Holders and shall not be responsible for any loss attributable to such postponement.
- (e) The Trustee may in lieu of realising the whole of the property of the Trust Fund, distribute any property forming part of the Trust fund pro rata to the Unit Holders in full or partial satisfaction of the Trustee's obligation to make a cash distribution to such Unit Holders.
- (f) the Trustee may if it thinks fit transfer any property of the Trust Fund to the trustee of any other trust (whether or not the Trustee is in any way associated with such other trust) on receiving cash equivalent to the market value of such property at the date of transfer.
- (g) The Trustee may retain in its hands or under its control for as long as it thinks fit such part of the Trust Fund as in its opinion may be required to meet any outgoings or liabilities (actual or contingent) in respect of the Trust Fund or any of the investments thereof PROVIDED THAT any investments or money so retained to the extent that they are ultimately found not to be so required shall remain subject to the trust for conversion and distribution contained in clause 16.2(c).

- (h) The Trustee's decision as to the amount available to be distributed to Unit Holders under the provisions of this clause shall be final and binding upon all Unit Holders."

[22] Clause 18.1 provided for an indemnity to the trustee as follows:

"The Trustee shall be indemnified from the Trust Fund against any claims and costs in relation to or arising in connection with the Trust Fund or any part thereof including any liability in relation to Taxes, except in the case of any claims and costs caused by or attributable to the fraud or wilful breach by the Trustee of its fiduciary obligations."

[23] In practice, Postbank was not an active trustee and after the Income Units were redeemed, the 17 per cent holding in ING Life, and subsequently ING Life Australia Holdings, was effectively managed by ING Australia Ltd. It is undisputed that at all times it had the voting control of those companies.

[24] It is also undisputed that at the time of the subject transfer, Postbank had no debts, so that it then had no entitlement to be paid any particular amount from the Trust Fund, pursuant to clauses 14 or 18 or otherwise.

[25] Importantly then, although a unit conferred a beneficial interest in the Trust Fund as a whole, the unit holder was not entitled to any interest in any particular part of the Trust Fund or any asset forming part of the Trust Fund, or entitled to require the transfer of any part of the Trust Fund or any asset to the unit holder (clauses 3.2 and 15.2). With the unanimous agreement of the unit-holders, the trust was to be terminated: but in that event the Trustee was to convert the Trust Fund into money and distribute the net proceeds, subject to the Trustee's discretion to distribute property forming part of the Trust Fund pro rata to the unit holders (clause 16.2)(c), (e)). The Trustee was to exercise the voting rights attributable to "the Company" (ING Life) as "the Capital Unit Holder(s)" should direct⁷, but otherwise the interest of a unit holder did not entitle it to "exercise any rights, powers or privileges in respect of the Company Shares."

[26] The appellants argue that at the date of the transfer of the business, ING Australia was the beneficial owner, and thereby the owner or an owner of the 17 per cent shareholding in the required sense. This is because, they contend, it had "an absolute, vested and indefeasible interest" in the Trust Fund, and was thereby entitled, pursuant to the rule in *Saunders v Vautier*⁸, to require the transfer of the Trust Fund to it. They then argue that such an interest was sufficient to constitute ownership in the sense of s 402 of the *Duties Act*. Alternatively they argue that ING Australia Ltd had the "dominance, ultimate control and ultimate title against the world" with respect to all of the shares in ING Life Australia Holdings, so as to make it the owner of the shares in the relevant sense.

⁷ Clause 13.3.

⁸ (1841) 4 Beav 115, 49 ER 282.

- [27] The submission that ING Australia Ltd was the beneficial owner of these shares must be considered by reference to *CPT Custodians Pty Ltd v Commissioner of State Revenue for the State of Victoria*.⁹ The question there was whether the holder of all of the issued units in a unit trust was the “owner” of land which was part of that trust fund, for the purposes of the *Land Tax Act 1958* (Vic). Under that Act, the term “owner” was defined to include “every person entitled to any land for any estate of freehold in possession”. The Act provided for the liability and assessment of “the owner of any equitable estate or interest in land” as if that estate or interest was legal, and for a deduction for the amount of tax paid by the legal owner. The High Court held that the appellant, even as the holder of all units in the trust, was not an owner of the trust property, having regard to the terms of that trust. The Court emphasised that it was necessary to look at the terms of the trust in question, and to assess what interest, if any, those terms gave to unit-holders, rather than reasoning according to some general notion or understanding of the rights and interests of beneficiaries under any unit trust. So whilst, in general, unit-holders may have rights protected by a court of equity, it did not follow in every case that they would be beneficial owners of the trust property.¹⁰
- [28] Amongst the significant terms of that trust were the entitlements of the Trustee and of a manager to substantial fees to be paid out of the trust fund, and to reimbursement for costs, charges and expenses. As in the present case, there was an express provision that no unit conferred “any interests in any particular part of the Trust Fund for any investment”. Again, as in the present case, there was an express provision that unit-holders were not entitled to require the transfer of any property comprised in the fund although, by agreement with the Manager, distributions *in specie* might be made upon determination of the Fund. There was a further term that a unit holder was not entitled to lodge a caveat claiming an estate or interest in any investment being realty. But again, as in the present case, the trust deed provided for the realisation of the fund upon its determination and the distribution of the proceeds among unit-holders.¹¹
- [29] There are, in particular, three respects in which the reasoning of the Court¹² is relevant to the present arguments. The first is from the Court’s reference to what was said by Griffith CJ in *Glenn v Federal Commissioner of Land Tax*:¹³

“[The Commissioner’s argument is] based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable.”

⁹ (2005) 224 CLR 98.

¹⁰ (2005) 224 CLR 98 at 109-110.

¹¹ (2005) 224 CLR 98 at 111.

¹² The joint judgment of Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ.

¹³ (1915) 20 CLR 490 at 497, set out in (2005) 224 CLR 98 at 112.

Of that passage, the Court in *CPT Custodians* said:¹⁴

“That statement was a prescient rejection of a ‘dogma’ that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.”

- [30] Secondly, the Court rejected the reasoning in the Victorian Court of Appeal that although the holding of some of the units in a unit trust did not confer upon the holder an equitable interest in any trust assets, nevertheless the holding by one entity of all of the units made a difference, and did entitle the unit holder to an interest, vested in possession, in all the trust assets. The High Court held that the holder of all issued units could not have something “more than the accumulation of the rights attaching to each of the units considered severally”. Referring to the terms of the trusts in that case, the Court said:¹⁵

“The trusts ... recognised ... that all issued units might be in the one beneficial ownership, but the trusts were drawn in terms conferring individual rights attached to each unit. They were not drawn to provide a single right of a cumulative nature so that the whole differed from the sum of the parts. There could be no such single right unless held jointly or in common, but the Deed was not cast in such terms.”

- [31] Thirdly, as to the rule in *Saunders v Vautier*, *CPT Custodians* is relevant here in two respects. One is that upon the facts in *CPT Custodians*, it was held that it could not be said that the unit holder alone had the requisite interest in the capital and income of the trust property to be able to require the transfer of the property according to the rule. In *CPT Custodians*, the provisions of the trust deed, which entitled the trustee and the manager to fees and to reimbursement for expenses, made them persons who were interested in the due administration of the trust, so that “the unit-holders were not the persons in whose favour alone the trust property might be applied by the trustee of the Deed.”¹⁶ And the unsatisfied trustee’s right of indemnity in that case had been expressed as an actual liability in the accounts of the trust, so that “until satisfaction of rights of reimbursement and exoneration, it was impossible to say what the trust fund in question was”.¹⁷ Consequently until then, the rule in *Saunders v Vautier* could not apply.

- [32] The other point about the rule in *Saunders v Vautier* was that it is one thing to say that a beneficiary or beneficiaries acting together, having an absolute, vested and indefeasible interest in the capital and income of the property might require the transfer to him (or them) of the trust property,¹⁸ but it is another to say that before

¹⁴ (2005) 224 CLR 98 at 112.

¹⁵ (2005) 224 CLR 98 at 119.

¹⁶ (2005) 224 CLR 98 at 120.

¹⁷ (2005) 224 CLR 98 at 121.

¹⁸ As the rule in *Saunders v Vautier* was expressed by the Court, according to its “modern formulation” in *Thomas on Powers* (1998) at 176, cited in (2005) 224 CLR 98 at 119.

the beneficiaries have required the trust property to be transferred, that they should be regarded as having the proprietary interest which they would have upon making that requirement. Referring to what Tamberlin and Hely JJ said in *Kent v SS Maria Luisa (No 2)*¹⁹, the Court said that²⁰:

“Equity often regards as done that which ought to be done, but not necessarily that which merely could be done.”

- [33] In *Kent v SS “Maria Luisa”*, the question was whether the sole unit holder of a unit trust, the property of which was a boat against which the appellant sought to recover damages, was “the owner” of the boat within s 19 of the *Admiralty Act 1988* (Cth). Tamberlin and Hely JJ accepted that “from a practical and commercial point of view”, the unit holder was “in a position to take steps, which if taken prior to the relevant date, would have resulted in [it] becoming the owner of the ship at the relevant date”. But as no step had been taken to terminate the trust as at the relevant date, the unit holder had not become the owner of the boat. Their Honours likened the position to that of a sole shareholder in a company.²¹

“A sole shareholder in a company has the ability to become the owner of the company’s assets (subject to the position of creditors) by liquidating the company, and distributing its assets *in specie*. But the company’s property has never been regarded as the property of its members, or even of its sole member, by reason only of the existence of the practical power which the member has in that respect. AFE had the practical ability to collapse the trust as at the relevant date, and had it done so, AFE and not [the Trustee] would have been the owner of the ship at the relevant date.”

- [34] The same view was expressed as to the rights of a sole unit holder under a trust deed which (again) provided that every unit conferred an interest in the Trust Fund but not an interest in any particular part of it or any investment, in *Halloran v Minister Administering National Parks and Wildlife Act 1974*.²²
- [35] The appellants seek to distinguish their case on the factual basis that, as at the date of the subject transfer, there was no amount to which the trustee or any other person was entitled to be paid from the Trust Fund. I accept the unchallenged evidence to that effect. I accept therefore the argument that pursuant to the rule in *Saunders v Vautier*, ING Australia Ltd was then entitled to require the transfer to it of the trustee’s 17 per cent shareholding.
- [36] However there remain two propositions from *CPT Custodians* which the appellants’ case fails to meet. The first is that under a trust deed in these terms, and in particular clause 3.2 of the present deed, no unit holder has the beneficial ownership of any asset forming part of the trust fund, and the position is no different for the fact that all of the units have come to be held by the one entity. Secondly, that

¹⁹ (2003) 130 FCR 12 at 35-36.

²⁰ (2005) 224 CLR 98 at 121.

²¹ (2003) 130 FCR 12 at 35.

²² (2006) 229 CLR 545 at 570.

remains the position unless and until the trust is determined and the unit holder requires the trust property to be transferred to it. In the present case there had been no requirement of the trustee for the transfer of the trust property by the date of the subject transaction. In my conclusion, ING Australia Ltd was not the beneficial owner at the relevant date.

- [37] Accordingly, if ownership under s 401 and s 402 includes beneficial ownership, as the appellants argue in reliance upon *KLDE Pty Ltd (in voluntary liquidation) v Commissioner of Stamp Duties for the State of Queensland*,²³ nevertheless the 17 per cent holding was not owned in that sense.
- [38] There is then the appellants' alternative argument that ING Australia Ltd owned the shares on the broad basis that it had the "dominance, ultimate control and ultimate title as against the world". Undoubtedly all of the shares in ING Life Australia Holdings Pty Ltd were, in a practical sense, under the effective control of ING Australia Ltd, just as much as if it had held the shares. However the exemption from duty for transactions in a "corporate reconstruction" is according to a definition of "subsidiary" which uses, not only a criterion of voting control, but also one of ownership. In this way, the parliament has seen fit to define a "subsidiary", for the purposes of this exemption, in terms which are quite different from the definition of a subsidiary in the *Corporations Act 2001 (Cth)*.²⁴ I am unable to accept that ownership in this context should be interpreted as the equivalent of effective control, rather than as the holding of a proprietary interest. This alternative submission must be rejected.
- [39] It follows that for the purposes of s 406 of the *Duties Act*, the appellants were not "group companies" and that their transaction was not entitled to the exemption. The appeal must be dismissed, and subject to any further submission, the appellants must pay the respondent's costs.

²³ (1984) 155 CLR 288, a case involving the different terms of the then s 49C of the *Stamp Act 1894-1982 (Qld)*.

²⁴ Section 46 of the *Corporations Act* provides:

What is a subsidiary

A body corporate (in this section called the *first body*) is a subsidiary of another body corporate if, and only if,

- (a) the other body:
 - (i) controls the composition of the first body's board; or
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or
 - (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
- (b) the first body is a subsidiary of the other body.