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Catching changes in “beneficial ownership”

Trust Company of Australia Ltd (as trustee for the Clayton 3 Trust) v Commissioner of State Revenue [2007] VSC 451.

On 20 November 2007, Justice Mandie of the Commercial and Equity Division of the Supreme Court of Victoria (“the Court”) handed down the decision in *Trust Company of Australia Ltd (as trustee for the Clayton 3 Trust) v Commissioner of State Revenue* [2007] VSC 451.

The case was an appeal by Trust Company of Australia Ltd (“TCL”) against a decision by the Victorian Commissioner of State Revenue (“the Commissioner”) with respect to an objection made by TCL to an assessment under the *Duties Act* 2000 (Vic) (“the Duties Act”), as well as the imposition of penalty tax under the *Taxation Administration Act 1997* (Vic).

The decision is an example of the application of the High Court’s decisions in *CPT Custodian Pty Ltd v Commissioner of State Revenue of the State of Victoria* (2005) 224 CLR 98 (“*CPT Custodian*”) and *Halloran v Minister of National Parks* (2006) 224 ALR 79 (“*Halloran*”). Notwithstanding that the decisions in both *CPT Custodian* and *Halloran* reconfirmed the proper application of the law relating to a beneficiary’s interest in assets held subject to a trust, the decisions had overturned long held presuppositions.

1. BACKGROUND FACTS

The decision considered the Duties Act implications of the following transaction (“the Transaction”):

- Clayton Business Park Pty Ltd (“CBP”) was, and remained at all relevant times, the registered proprietor of land at 1486 – 1550 Centre Road, Clayton South in the State of Victoria (“the Land”).

- CBP was the trustee of the Clayton Business Park Trust (“the Park Trust”), which was a discretionary trust.
- CBP initially held the Land, and intended to sell the Land in its capacity as trustee of the Park Trust.
- Trust Company of Australia (“TCL”) was the trustee of the Clayton 3 Trust (“Clayton Trust”), which was a unit trust.
- On 13 December 2002, CBP and TCL entered into a contract for the sale of the Land (“the Contract”). Under the terms of the Contract, CBP would sell the Land to TCL for more than \$74 million.
- The Contract provided that:
 - (1) “[u]pon payment of all purchase and other moneys payable by the purchaser under the contract the vendor shall deliver to the purchaser such registerable instrument ... or transfer of the land sold as will enable the purchaser to become registered as proprietor of the land sold and shall deliver to the purchaser the Certificate of Title...”.
 - (2) The instrument of transfer of the land to TCL should be prepared by, or on behalf of, TCL.
 - (3) TCL was to provide the instrument of transfer to CBP prior to settlement.
- However, TCL did not provide an instrument of transfer of the Land and when the purchase money was paid, CBP did not deliver to TCL the transfer (or any registerable transfer) of the land sold. Nor did CBP deliver to TCL the Certificate of Title.

- At a later stage, CBP resigned as the trustee of the Park Trust, and the shares in CBP were sold for a nominal amount to TCL. At that time, the records (which included the Certificate of Title of the Land) of CBP were handed over to TCL. The result was that:

“... although no registerable transfer was ever executed or made and although the “vendor” (CBP) remained the registered proprietor of the land, the complete and effective control of the land came into the hands of the interest associated with the purchaser ...”

The Commissioner assessed the Transaction as a “dutiable transaction” under s 7 of the Duties Act, as either:

- (1) “a transfer of dutiable property” under para 7(1)(a) of the Duties Act; or
- (2) a transaction that results in a change in beneficial ownership of dutiable property under para 7(1)(b)(vi) of the Duties Act.

The Court considered whether either para 7(1)(a) or 7(1)(b)(vi) of the Duties Act applied.

2. THE RELEVANT PROVISIONS

Paragraph 7(1)(a) of the Duties Act provided that duty was charged on “... a transfer of dutiable property ...”.¹ Paragraph 7(1)(b)(vi) of the Duties Act provided that duty was charged on a transaction “...that results in a change of beneficial ownership of dutiable property (other than a change in beneficial ownership of dutiable property as a result of the issue, transfer, redemption or cancellation of units in a unit trust scheme)”. Subsection 7(2) of the Duties Act provided that transfers under para 7(1)(a) of the Duties Act,² or transactions under para 7(1)(b)(vi) of the Duties Act were “dutiable transactions”. Subsection 8(1) of the Duties Act provided that the “... duty charged by this Chapter on a dutiable transaction referred to in

section 7(1)(b) ... [such as a transaction under para 7(1)(b)(vi) of the Duties Act] ... is to be charged as if each such dutiable transaction were a transfer of dutiable property”.

Further, the final item in the Table contained in subs 8(2) of the Duties Act provided that in the case of a transaction resulting in a change of beneficial ownership of dutiable property, the property treated as transferred is the property the beneficial ownership of which has changed (but only to the extent of the change), and the transferee is treated as being “... the person who obtains the beneficial ownership or whose beneficial ownership is increased ...”. The transfer is taken to have occurred when the beneficial ownership changes.

Finally, para 10(1)(a)(i) of the Duties Act defines the term “dutiable property” to be (amongst other things): “... each of the following estates in land in Victoria ... an estate in fee simple ...”.³ The Land satisfied this description.

3. WHETHER THERE WAS A “TRANSFER” OF DUTIABLE PROPERTY

As para 7(1)(a) of the Duties Act charged duty on “... a transfer of dutiable property...”, the first issue that the Court considered was whether there was a “transfer” of the legal and / or equitable estate in fee simple.

(i) What is a “transfer” for the purposes of paragraph 7(1)(a) of the Duties Act?

The Court at para 19 observed that there was no “transfer” of an “estate in fee simple” in the Land “...because a contract of sale is not itself a transfer of such estate ...”. Further, “... there was no instrument or transfer and the registered proprietor never changed.” The Court cited the decision of Ormiston JA in *Coles Myer Ltd v Commissioner of State Revenue* [1998] 4 VR 728 in discussing the elements of a “transfer”, in which it was held that there “... are two parties to every transfer, the transferor who disposes of all rights in the transferred property and the transferee who receives or acquires them so as thereafter to have the power to exercise effectively the same rights in the future.” Further, for an “... instrument to be properly characterised as a ‘transfer’ one

must be able to find that the property has passed from transferor to transferee so that the property is vested in the transferee who for all practical purposes is then capable of exercising the same rights as were capable of being exercised by the transferor before the transfer was executed.”

The Court at para 20 considered whether the Transaction gave rise to a “transfer”:

“... to constitute a transfer, there had to be a transfer of something (in this case an estate in fee simple) from A to B. In the present case ... CBP owned the legal estate in fee simple both at the commencement of the transaction and at the conclusion of the transaction, so that there was no transfer of the legal estate in fee simple in the land. Further, insofar as s 10(1)(a)(i) of the Act covered an equitable estate in fee simple as well as a legal estate in fee simple, CBP never held an equitable estate in fee simple (as it was a trustee) and it is not possible to identify the transfer of an equitable estate in fee simple from, or to, any identifiable entity or entities.

The Court observed that a “transfer” is essential for the passing of rights from the transferor, such that the rights are vested in the transferee. The Court at para 25 held that a “transfer” is “... not a mere disposition, a ridding oneself of the right or interest, it is the vesting in the transferee of that right or interest, precisely or substantially, which is necessary to effect a transfer, as ordinarily understood in the law.”

(ii) An agreement for sale is not a “transfer”

The Court considered whether an agreement for sale could constitute a “transfer”. The decision in *Commissioner of Inland Revenue v Angus & Co.* (1889) 23 QBD 579, which was concerned with liability to stamp duty upon a “conveyance or transfer on sale of property” in relation to an agreement for the sale of goodwill of a business was discussed at para 27. The Divisional Court in *Angus* held that an agreement for sale does “... not operate as a transfer, either legally or equitably, of the property comprised therein, although no doubt it would have conferred upon the purchaser a right legally and equitably to have such a conveyance made in the event of all the conditions precedent being fulfilled at settlement.” The Court of Appeal in *Angus* upheld the decision of the Divisional Court, and in doing so, Lord Esher MP observed that “...an

agreement for the sale of legal property, in respect of which equity would grant specific performance, did not constitute a conveyance of legal property (nor was there any equitable property to convey)”.

The Court cited the decision of Smithers J in *Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd* (1984) 6 FCR 277, in which it was held that an agreement to purchase assets does not result in a “transfer”, but rather a “creation” of an equitable interest in the asset subject to the agreement, enforceable as against the transferee – being the recipient of the valuable consideration. In citing the decision of Smithers J in *Acorn*, the Court at para 28 observed that after “... value ... [has] ... been given, an equitable interest in the subject thereof arises in the party giving it. In such a case the equitable interest arises not by way of transfer but by activation in equity of the conscience of the receiver of the valuable consideration.” Rather, a “... trust is created; there is not a transfer or assignment; there is no transmission of an equitable interest ... where there is an enforceable contract to transfer property, the equitable interest arising in the proposed transferee is not the product of a transfer but an exercise in creation.” As a result, the Court at para 29 held that:

“... a contract of sale of legal property (here the legal estate in fee simple), capable of specific performance, does not transfer that legal property and that, insofar as such a contract results in the purchaser having equitable rights or interests, these rights or interests in equity are not transferred by the contract but are simply created thereby and arise in the purchaser.”

(iii) The effect of a contract for sale of land – creation of a trust relationship

The Court cited *Lysaght v Edwards* (1878) 2 Ch D 499 as authority for the proposition that a “... contract for sale does not transfer an estate in fee simple (legal or equitable)...” but rather, the “... vendor becomes a trustee for the purchaser of the legal estate”. In discussing the “settled doctrine” with respect to the effect of a contract for sale of land, Jessel MR in *Lysaght* observed that “... the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchase of the estate sole, and the beneficial ownership passes to the purchaser, the vendor having the right to

the purchase-money, a charge or lien on the estate for security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid ...”.

With respect to the rights of a vendor, Jessel MR held that “ ... the position of a vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, at equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz possession of the estate and a charge upon the estate for his purchase-money.” Further, with respect to the vendor, Kitto J in *Haque v Haque* [No. 2] (1965) 114 CLR 98 observed that by the “...operation of well-known equitable principles the making of the contract had to an extent transferred the beneficial ownership to the purchaser. The [vendor] was not a mere trustee of the purchaser, but his position was something between that of a mere trustee and a mortgagee...”. Kitto J therefore held that “ ... for some purposes ... [the vendor is] ... in the position of a trustee, though for some he was not ... The vendor is ‘in progress towards’ trusteeship; and the incidents of trusteeship exist only if and so far as a Court of Equity would in all the circumstances of the case grant specific performance of the contract.”

As a result, the Court at para 32 observed that “...the contract for sale does not transfer an estate in fee simple (legal or equitable) but the vendor becomes a trustee for the purchaser of the legal estate”.

The Court at para 34 referred to the decision of Connolly J in *Bunny Industries Limited v F.S.W. Enterprises Pty Ltd* [1982] Qd R 712 in summarising the principles relevant with respect to the effect of a contract for the sale of land (see Table below).

The Court at para 39 concluded that “... none of the above quoted passages support the proposition that, in the case of a contract for the sale of land, there is any transfer of an equitable fee simple in the land from the vendor to the purchaser ...”. Rather, the authorities “... are consistent with the proposition that, after the payment of purchase money, the purchaser has an equitable interest in the land which, even if it may be described as an equitable estate in fee simple, is one that has arisen as a result of the transaction but is not an estate or interest that is transferred by the vendor to the purchaser”.

As a result, the Court held that the Transaction did not result in a “transfer” of a legal or equitable estate in fee simple.

| Number | Proposition |
|--------|--|
| One | On the execution of the contract the vendor becomes a trustee for the purchaser. However, the vendor is not a bare trustee, as the vendor has a personal and substantial interest, to the extent of the unpaid purchase moneys. The vendor is “in progress towards” bare trusteeship, and becomes a bare trustee when all of the purchase moneys are paid, at which time the vendor is bound to convey the property subject to the contract. |
| Two | The purchaser does not merely have a right in contract. Rather, the purchaser may devise, alienate and charge its equitable interest. |
| Three | The extent of the purchaser’s equitable interest in the property is measured by the amount of the purchase moneys paid. Thus to the extent of the payments, the purchaser acquires a lien exactly as if the vendor had given a mortgage to secure them. |
| Four | Where there is a clear and undisputed contract, the Court will not permit the vendor to transfer the legal estate to a third person. This is because in equity the property is transferred to the purchaser. |
| Five | The incidents of trusteeship for the vendor exist only if and so far as a Court in Equity would in all the circumstances of the case grant specific performance of the contract. |

4. WHETHER THE TRANSACTION RESULTED IN A CHANGE IN BENEFICIAL OWNERSHIP OF THE LAND

As noted above, para 7(1)(b)(vi) subjects duty to a “... transaction that results in a change of beneficial ownership ...” of the Land, being “dutiabale property”. The Court at para 60 observed that in determining whether there was a change in beneficial ownership, the following needs to be determined:

- whether TCL may be regarded as the “beneficial owner” because the estate in fee simple, once the purchase money was paid, was held by CBP on a bare trust for TCL and hence “... beneficial ownership has passed to the purchaser...”; or
- whether TCL cannot be described as the beneficial owner of an estate in fee simple in the Land if regard is had to its status as trustee.

(i) No change in beneficial ownership

It was observed that unlike the current situation, the “... judicial statements speaking of the passing of beneficial ownership to a purchaser under a contract for sale of land were made in contexts in which the question of trustee capacity did not arise”. Indeed, in agreeing with TCL, the Court observed that there could not be a “change” of beneficial ownership, which is required in order to be subject to duty under para 7(1)(b)(vi) of the Duties Act when there are no beneficial owners of an estate in fee simple either at the commencement, or the conclusion of the Transaction. With respect to the beneficial ownership of the Land during the Transaction, the Court observed at para 41 that (see Table on following page).

It was TCL’s submission that if one cannot identify a beneficial owner of the Land either at the commencement or conclusion of the Transaction, then there cannot be a change of beneficial ownership in the Land for the purposes of para 7(1)(b)(vi) of the Duties Act. As further support of the submission:

| Time of the transaction | Proposition |
|-------------------------|--|
| Commencement | "... <i>CBP was a trustee for a discretionary trust and hence was not the beneficial owner of the estate in fee simple...</i> " |
| | "... <i>having regard to the terms of the ... [Park Trust] ... there were no persons that could be identified as beneficial owners of the trust assets, and hence of the estate in fee simple in the land</i> ". |
| Conclusion | "... <i>TCL was entitled to a transfer of the estate in its capacity as trustee of the unit trust ... [and TCL] ... was not the beneficial owner of the estate in fee simple...</i> " |
| | "... <i>having regard to the terms of the ... [Clayton Trust] ... there were no persons that could be identified as beneficial owners of the assets of the unit trust (let alone beneficial owners of an estate in fee simple in the land)...</i> ". |

"... the appellant pointed to the Table attached to s 8 ... [of the Duties Act which provides] ... that the person liable to pay the duty (the transferee) was 'the person who obtains the beneficial ownership or whose beneficial ownership is increased'. This confirmed, it was submitted, the contention that a change of beneficial ownership necessarily involved the identification of a beneficial owner or owners at the conclusion of the transaction".

(ii) What is meant by the term "beneficially entitled"?

The Court cited *Wilcox v Smith* (1857) 662 ER 16 in discussing the concept "beneficially entitled" to property, observed that "beneficially" means for a person's own benefit "... *in contradistinction to being entitled as trustee*".

(iii) What is meant by the term "beneficially owned"?

The Court cited the decision of *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592 in defining the term "beneficially owned":

The term "beneficial" is usually employed in trust law as a cognate of "beneficiary". That term identifies those persons for whose benefit the trustee of a private trust ... is bound to administer the trust property. Where A holds Blackacre on a bare trust for B, it may accurately be said that B is the beneficial owner.

Further:

But the use of the word "owner" does not entail enjoyment by B of all the rights which the law as a whole confers in relation to Blackacre ... although B may be entitled by equitable remedies to be put into possession, B cannot sue A in ejectment.

The Court also cited the decision of Lord Diplock in *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 in finding that the term "beneficial ownership" means a technical reference to an entitlement in equity:

... the concept of legal ownership of property which did not carry with it the right of the owner to enjoy the fruits of it or dispose of it for his own benefit, owed its origin to the Court of Chancery. The archetype is the trust. The "legal ownership" of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trust or beneficiaries. Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the "legal ownership" in the trustee, what came to be called the "beneficial ownership" in the cestui que trust. But it did not follow even in equity that a person could only be the legal owner without being at the same time the beneficial owner in cases where it was possible to identify some other person or persons in whom the beneficial ownership had become vested. Executorship of an estate in course of administration provides one example which does not owe its origin to statute. No one would suggest that an executor, who was not also a legatee, was beneficial owner as well as legal owner of any of the property which was in the full ownership of the deceased before his death. He could not enjoy the fruits of it himself or dispose of it for his own benefit. Yet because an estate while still in the course of administration was incapable of satisfying the technical requirement of a "trust" in equity that there had to be specific subjects identifiable as the trust fund, it was impossible to identify, at any rate in the case of residuary legatees, a person or persons in whom the beneficial ownership in any particular property forming part of the estate was vested ...

(iv) Application of the decision in *CPT Custodian*

The Court then referred to the High Court's decision in *CPT Custodian*. It was observed that one of the issues determined in *CPT Custodian* was whether companies, who held units in unit trusts, could be treated as the owners of the equitable estate of freehold in possession of the land held subject to the unit trusts. If the companies were the "owners", then the companies would be subject to land tax referable to the land held subject to the unit trusts. In determining that the companies were not the "owners" of the land:

The High Court ... said that a priori assumptions should not be made as to the nature of a "unit trust" (or a "discretionary trust"). It all depended on the terms of the particular trust. The trust deeds need to be analysed to see whether unit holders had any entitlement to any estate of freehold in possession and not simply to see whether a unit holder had under the trust deed a proprietary interest in the assets comprising the trust fund.

The High Court in *CPT Custodian* observed that it "... *was one thing to identify rights protected by a court of equity and another to identify an interest which had the necessary quality of definable extent ...*" being "ownership".

It was observed at para 47 that:

The High Court adopted the statements of Griffiths CJ in *Glenn v Federal Commissioner of Land Tax* questioning the assumption that whenever a 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. They referred to this statement as the "prescient rejection of a 'dogma' that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else".

The Court concluded at para 48 that *CPT Custodian* is authority for the proposition that "... *a unit trust of the kind existing in the present case does not give the unit holders the beneficial ownership of any land to which the unit trust is entitled*".

The Court then discussed the decision of *Lygon Nominees Pty Ltd v Commissioner of State Revenue (Vic)* (2007) ATC 4628. *Lygon Nominees* was concerned with a taxpayer, who as the trustee of 11 discretionary trusts and one unit trust, was assessed for land tax on the total value of all land held by the trustee of the 12 trusts. The taxpayer

argued it was the owner of different lands in severalty in trust for different beneficial owners. It was observed at para 49 that:

The Court of Appeal held that, whatever the equitable interests of the takers in default under the discretionary trust were, they were vested in interest and not vested in possession ... [It was further] ... held that the nature of the discretionary beneficiary interest was such that it did not confer the required proprietary interest in the land. ... **the case does support the contention that, subject always to the terms of the given trust deed, it is difficult to treat the beneficiaries of a discretionary trust as being the beneficial owners of land held by that trust.** [emphasis added]

(v) Application of the decision in *Halloran*

The Court distinguished the High Court's decision of *Halloran*. *Halloran* was concerned with compensation under NSW land acquisition legislation, and determining whether, for the purposes of the former Stamp Duties Act, there had been "... a transaction which ... causes or results in a change of beneficial ownership of an estate or interest in land". The relevant facts in *Halloran* were:

- Sealark Pty Ltd had an unregistered, and therefore equitable interest in the relevant land.
- The directors of Sealark Pty Ltd resolved to accept an offer by P, as trustee of a trust, to acquire the land in consideration for the allotment to Sealark of a number of units in the trust, with the units issued to Sealark.
- The High Court held that the transaction had caused or resulted in a relevant change in beneficial ownership of an estate or interest in the land.

The Court cited the majority decision in *Halloran* at para 51:

... when the units were issued to Sealark (if not earlier, when Sealark accepted P's offer) a change in the relationship between Sealark and P took place. The equitable interest in the land became vested in P as trustee of the trust. It might be convenient to describe Sealark in those circumstances as in the position of a trustee for P under a bare trust. Thus there had been a change in the "beneficial ownership."

Further, Hayson J considered that the change in beneficial ownership:

... occurred when a constructive trust arose as a result of Sealark's acceptance of P's offer – at that moment, the beneficial ownership of Sealark's equitable interest changed ... [Hayson J] ... said that the interest of P as purchaser was commensurate with its ability to protect that interest by obtaining specific performance

The High Court in *Halloran* also rejected the argument that because Sealark was the sole beneficiary of the trust of which P was the trustee, there was no change in the beneficial ownership of the land. In citing *CPT Custodian*, the High Court observed that "... having regard to the terms of the trust deed, Sealark did not have any interest in any particular part of the trust fund ...".

The Court agreed with TCL, in distinguishing *Halloran* from the present case, for at least two reasons:

- The first reason was that "... Sealark was the beneficial owner of an equitable interest in the land in question (whereas in this case CBP had not been the beneficial owner of any estate or interest in the land). Sealark therefore has the capacity to enter into a transaction that might cause or result in a change in that beneficial ownership."
- The second reason was that "... the statute there in question was concerned with a change in the beneficial ownership of any estate or interest in land, whereas para 7(1)(b)(vi) of the Duties Act was concerned only with changes of beneficial ownership of dutiable property (ie an estate in fee simple)." The Court therefore held that "... in the present case, there could have been no change in beneficial ownership of the estate in fee simple because there was no beneficial owner of that estate at any relevant time, either before during or after the transaction."

(vi) Relevance of the capacity of the purchaser and the vendor – both trustees of trusts

The Court discussed the capacities in which, in particular the purchaser, acted during the Transaction. It was recognised that "... CBP sold in its capacity as a trustee and was not therefore a beneficial owner of an estate in fee simple in the land..." and "... TCL purchased in its capacity as a trustee and did not therefore

become a beneficial owner of an estate in fee simple in the land ...". Further, "...if CBP had sold as beneficial owner (not being a trustee) and TCL had purchased as beneficial owner (not being a trustee), the transaction would have resulted in a change of beneficial ownership."

The Court further observed that:

...if CBP had sold in its capacity as trustee but TCL had purchased as beneficial owner (not being a trustee) that too would have resulted in a change of beneficial ownership of the estate in fee simple, because the beneficial ownership, although not transferred from one beneficial owner to another, had nevertheless changed – this analysis is supported by *Halloran*. So it would appear that the key factor in the appellant's argument is that TCL purchased the land in its capacity as trustee and not on its own behalf and therefore could not be regarded as the beneficial owner of an estate in fee simple in the land.

(vii) Intent of paragraph 7(1)(b)(vi) of the Duties Act

The Court recognised the "intent and purpose" of para 7(1)(b)(vi) of the Duties Act at para 59:

I think that the intent and purpose of s 7(1)(b)(vi) of the Act was to catch transactions in which, although there was no transfer of the estate in fee simple in land, there was a change in the underlying equitable interest so that, in substance, there was a change of "ownership".

However, it was observed by the Court that "... by using the term 'beneficial ownership' ..." para 7(1)(b)(vi) of the Duties Act "... arguably fails to catch transactions in relation to which no 'beneficial owner' can be identified ...". As a result, the provision "... arguably fails to catch changes in underlying equitable interests where the beneficiaries, say, of a discretionary trust or of a unit trust, cannot be characterised as beneficial owners of any interest in land held by the trust, or, at least, not as beneficial owners of an estate in fee simple in such land". Indeed, it was recognised that the legislation "... makes it clear that it is necessary to identify the person who 'obtains' the beneficial ownership of the estate in fee simple".

The Court at para 61 observed that:

While it may be convenient shorthand to say that, once the purchase money has been paid and the vendor holds as a bare trustee, beneficial ownership has passed, **I think that it is offensive to the concept of beneficial**

ownership to say, in the case of a trustee purchaser, that the trustee has “obtained the beneficial ownership” of an estate in fee simple in the land by paying the purchase money.

Rather, the Court observed that the “... trustee holds not for himself but for the benefit of others.” Further, “[n]ot without some doubt, I do not think that the language of the statute can be stretched to capture the transaction despite the evident policy underlying the relevant provision”.

COMMENT

The decision in *Trust Company of Australia Ltd (as trustee for the Clayton 3 Trust) v Commissioner of State Revenue* [2007] VSC 451 is an example of the restrictive view that the courts are taking regarding an interest that a beneficiary has in the

assets of a trust estate. Although the decisions in *CPT Custodian* and *Halloran* reconfirmed the proper application of the law relating to a beneficiary’s interest in assets held subject to a trust, this decision is an example of the application of *CPT Custodian* and *Halloran* overturning long held trust law presuppositions. Whilst it was conceded by the Court that the Transaction was one which was intended to be caught by the relevant provisions of Duties Act, such provisions (ie those dealing with “beneficial ownership”, “beneficial interest”, etc) will need to be reconsidered in light of the recent judicial restatements.

Further, although mentioned in passing by the Court, we await further clarification regarding the distinction (if any) as between “beneficial ownership” and “beneficial interest”.

The decision creates a hole in the Duties Act, and gives rise to tax planning possibilities. It is therefore expected that either the Commissioner will appeal the decision, or the relevant legislation will be amended so as to subject similar transactions to duty.

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Reference notes:

- 1 Similarly, in *New South Wales*, para 8(1)(a) of the *Duties Act 1997 (NSW)* “... charges duty on ... a transfer of dutiable property...”.
- 2 Similarly, in *New South Wales*, subs 8(2) of the *Duties Act 1997 (NSW)*.
- 3 Similarly, in *New South Wales*, para 10(1)(a) of the *Duties Act 1997 (NSW)*.