To be vested or not to be vested … that is the declaration

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Abstract: A recent stamp duty decision by the New South Wales Court of Appeal will have considerable impact on people dealing with dutiable property in NSW. The case, Chief Commissioner of State Revenue v Platinum Investment Management Ltd, was concerned with the scope of declarations of trust in the context of the NSW stamp duties regime, and the availability of the apparent purchaser nominal duty concession.

The court decided that there can be a declaration of trust over future identifiable property, but that the apparent purchaser concession did not apply to the declaration in this case. The court also considered the "dutiable value" of a declaration of trust.

The decision is likely to impact on the execution of common transaction documents dealing with NSW dutiable property, such as superannuation gearing transactions pursuant to ss 67A and 67B of the Superannuation Industry (Supervision) Act 1993 (Cth), which will need to be reconsidered as a result of the decision.

Introduction

On 10 March 2011, the New South Wales Court of Appeal handed down its decision in *Chief Commissioner of State Revenue v Platinum Investment Management Ltd*,[1] which was concerned with the scope of declarations of trust in the context of the NSW stamp duties regime, and the availability of the apparent purchaser nominal duty concession.

The decision impacts on advisers (and clients) that deal with NSW dutiable property. Indeed, the execution of common transaction documents dealing with NSW dutiable property, such as superannuation gearing transactions pursuant to ss 67A and 67B of the *Superannuation Industry (Supervision) Act 1993* (Cth), will need to be reconsidered as a result of the decision in *Platinum Investment*.

Background

On 4 April 2007, by deed (the deed), Mr and Mrs Clifford and other shareholders in McRae Pty Ltd (McRae) sold their shares in McRae (the sale shares) to Queens Hill Pty Ltd (Queens Hill). As consideration for the disposal of the sale shares, the deed provided that new shares in Queens Hill (the consideration shares) would be allotted to Mr and Mrs Clifford. However, the deed provided that the consideration shares were not to be held by Mr and Mrs Clifford, but by Platinum Investment Management Ltd (on behalf of Mr and Mrs Clifford), which was described as a "nominee".

Clause cl 2.2 of the deed provided that:

> "(a) Unless otherwise agreed between the Buyer and the Sellers, all Consideration Shares will be issued to and registered in the name of the Nominee, which shall hold the Consideration Shares on behalf of the Sellers (who shall be absolutely entitled to their respective Consideration Shares as against the Nominee).
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> (b) The Nominee shall also retain custody of the share certificates in respect of the Consideration Shares unless otherwise instructed by the Seller on whose behalf it holds an individual parcel of Consideration Shares."

That is, cl 2.2 of the deed provided that the consideration shares would be issued to, and held by, the nominee as trustee for Mr and Mrs Clifford. Further, cl 3.3 of the deed provided that:

> "As soon as practicable after Completion the Buyer must:
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> (a) issue the Consideration Shares to the Nominee to be held by the Nominee for the benefit of the Sellers;
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> (b) register the Nominee as the holder of the Consideration Shares;
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> (c) deliver the share certificates in respect of the Consideration Shares to the Nominee; and
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> (d) deliver or cause to be delivered to the Shareholder 1 signed copy of the Acknowledgement of Trust executed by the Nominee."

As both McRae and Queens Hill were companies registered in the state of New South Wales, both the consideration shares and the sale shares were "dutiable property" as defined in s 11 of the *Duties Act 1997* (NSW) (Duties Act).

As at the date of the deed (4 April 2007), the consideration shares were not issued (ie they were not in existence). Rather, the consideration shares were issued on 6 April 2007 (ie two days after the deed was executed).

While completion of the agreement took place on 4 April 2007, it was not until 6 April 2007 that the consideration shares were actually issued to Mr and Mrs Clifford, and held by Platinum Investment (as the nominee of Mr and Mrs Clifford). It was on 4 April 2007, when the deed was executed, that the parties to the deed became contractually bound to the terms of the deed, with the result that (among other things) Mr and Mrs Clifford could compel the allotment of the consideration shares via a specific performance action.

The Chief Commissioner of State Revenue (NSW) (the Chief Commissioner) assessed the deed on the basis of it evidencing both a transfer of the sale shares, as well as a declaration of trust with respect to the consideration shares. That is, the deed was subject to ad valorem duty twice.

The taxpayer objected to the assessment and obtained a favourable judgment by Gzell J on 2 February 2010. Broadly speaking, Gzell J held that there could not be a dutiable declaration of trust in the deed with respect to the consideration shares. Gzell J found that ad valorem duty was not chargeable on the declaration over

the consideration shares because those shares were not allotted and did not exist when the deed was first executed and that, as a result, there was no "dutiable property" in existence when the declaration was made.

Issues considered

The issues considered by the NSW Court of Appeal in *Platinum Investment* include, in the context of the NSW duties regime:

- whether a dutiable declaration of trust can be made with respect to property not in existence at the time that the declaration is made;
- what the "dutiable value" of a declaration of trust over future property is; and
- whether the apparent purchaser concession contained in s 55 of the Duties Act can apply if there is a declaration of trust over future property.

Whether there could be a declaration of trust over future identifiable property

An issue that the court considered is whether cl 2.2 of the deed, which provided that the consideration shares would be held by a nominee of the sellers of the sale shares, was a "declaration of trust" (and therefore subject to ad valorem duty), notwithstanding that, when the "declaration" was made (on 4 April 2007), the consideration shares were not in existence (ie they were actually allotted on 6 April 2007).

Section 8(1)(b)(ii) of the Duties Act provides that "This Chapter charges duty on … the following transactions … a declaration of trust over dutiable property". The term "declaration of trust" is in turn defined in s 8(3) of the Duties Act as being "… any declaration (other than by a will or testamentary instrument) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or person, or the purpose or purposes, mentioned in the declaration …". Further, s 9 of the Duties Act charges duty on (among other things) declarations of trust with respect to "the property vested or to be vested in the declarant".

The majority of the NSW Court of Appeal (Handley AJA and Campbell JA, with Macfarlan JA dissenting) held that there could be a declaration of trust over future property. In particular, the majority considered that the words of terms such as "to be vested" and "to be held in trust" imported an element of futurity with respect to declarations of trust. As a result, a declaration of trust could occur with respect to property not in existence at the time of the declaration. It was further held that the term "identifiable property", for the purposes of the declaration head of duty, does not require that property to be in existence at the time of the declaration, but that the property is "identifiable" at the time of the declaration.

Campbell JA considered that, because the words "vested or to be vested" are contained in the definition of "declaration of trust" in s 8(3) of the Duties Act, "the definition could be satisfied if the property in relation to which the trust is declared is not then vested in the person making the declaration, provided that the property in question is to be vested, at some stage in the future, in the person making the declaration".[2] Further, because the definition of declaration of trust in s 8(3) includes the words "is or is to be held in trust", "it is not necessary for a declaration to be to the effect that at the time the declaration is made the property of the subject of it is held in trust". Indeed, Campbell JA concluded that, in order to have a declaration of trust, "it suffices if the declaration is that the property is, at some stage in the future, to be held in trust".

Campbell JA observed that, unlike in the definition of declaration of trust, there are no analogous words of futurity in the identification of property. Rather, the "property must be 'identified property' at the time of first execution of the first declaration of trust, and it does not suffice that the property referred to in the declaration might become 'identified property' at some later time".

After analysing the relevant provisions of the Duties Act, Handley AJA observed that:[3]

> "The Act brings to charge declarations of trust relating to property not yet vested which is to be vested in the declarant provided it is identified. The identified property must exist before it can be vested in the declarant. The question is whether it must also exist when the declaration is made."

Handley AJA differentiated the requirements for the two limbs contained in the declaration head of duty in s 8(3) of the Duties Act:[4]

> "The first limb of the definition ('vested … in the person making the declaration') can only apply to property in existence when the instrument is first executed. The second limb ('to be vested') can only apply to property in existence when vesting occurs."

However, it was observed that, in relation to the second limb, "the property to be vested must be identified when the instrument is first executed, but there is no requirement in terms that it then be in existence".

Campbell JA considered that future tense terms contained in the Duties Act, including "to be vested" and "to be held in trust", do not "necessitate a conclusion that the property the subject of the declaration could be property not in existence at the time of the declaration", but that the "presence of these forward-looking words … are consistent with 'identified property' possibly extending to property not in existence at the time of the declaration". Similarly, Handley AJA observed that the "Consideration Shares were identified property 'to be vested' in the taxpayer when issued 'to be held in trust' for the Cliffords".[5] Further, it was held that the deed "did not purport, in terms, to do the impossible by declaring trusts to take effect in the future in respect of property which would then not exist".

Handley AJA further observed that there would be a large gap in the scheme of taxation if declarations of trust in respect of property not in existence at the time of declaration fell outside the scope of the regime.[6] It was observed that dutiable property that could come into existence after "the first execution of trust could include interests in land carved out of fee simple such as leases, mortgages, undivided interests, and interests under contracts of sale" and that it "could also include shares, interests in shares, debentures, units in unit trusts, and options over dutiable property".

Campbell JA considered that, because future property could be assigned, so too can such property be subject to a declaration. It was observed that there can be an effective assignment of future property by using words that describe the future property in a general way. Such an assignment will be effective if, when the property actually does come into existence, it is then identifiable. An effective assignment of future property does not require that the property be identifiable at the time of the assignment. Campbell JA observed that:[7]

> "In the law of assignment of future property, there can be an effective assignment of property by using words that describe the property in quite a general way. The assignment is effective if that one can tell, once a particular item of property comes into existence, whether it meets the description. Thus,

> there can be an effective equitable assignment of 'any real estate my father might leave me in his will', at a time when the assignor's father is still alive. That is because, once the father has died, and the terms of his will are known, one can tell whether any particular item of real estate meets the description. The property is identifiable, once the occasion has come for deciding whether it is caught by the assignment. However, it is not possible, at the time of the assignment, to list the items of property that will fall within the assignment. It would be out of keeping with ordinary use of language to say, at the time of the assignment, that any particular item of real estate is 'identified property' that is the subject of the assignment."

As a result, Campbell JA held that, notwithstanding that the consideration shares were not in existence when the declaration in the deed was made, the consideration shares were "identified property", and therefore subject to the declaration head of duty.

Minority decision with respect to the future property issue

Macfarlan JA (who dissented on the future property issue) considered that the term "to be vested" does not extend to future property. Macfarlan JA queried whether the term "to be vested" as used in ss 8 and 9 of the Duties Act compels the conclusion that the term "property" (as used in those sections) is used other than with its ordinary meaning. Rather, Macfarlan JA considered that the element of futurity imported by the term "to be vested" relates to the vesting, and not to the property, by observing that the "words 'to be vested' certainly contain an element of futurity but that is as to vesting and not as to the existence of future property".

Macfarlan J suggested that:[8]

> "However, in my view those words do not indicate that a declaration of trust is dutiable even if it relates only to future property. They indicate that the property need not be vested in the declarant at the time of the declaration, but that is different from an indication that the property need not be in existence at that time. The words have a sensible meaning if (as their express terms suggest should occur) they are read as being concerned with the vesting of property and as saying nothing about whether the property need be existing. That latter topic is dealt with by the legislature's use of the word 'property' in the Act's description of the transactions that are dutiable. As a consequence, a declaration of trust is dutiable if it relates to existing property that is 'to be vested' in the declarant, but not if it relates to the future vesting in the declarant of the property that is not in existence at the time of the declaration."

Macfarlan JA considered that the term "to be vested" should be given its literal meaning and, in particular, that the term does not extend 'identifiable property' to future property. Macfarlan JA considered that the literal meaning was not nonsensical, and that there were no contextual reasons to depart from the literal meaning. Further, as a matter of statutory interpretation, taxing provisions should be clear in their meaning. The intention to impose tax should not be inferred from ambiguous words.

Macfarlan JA considered that the term "property" should take its ordinary meaning, particularly as the relevant legislation did not seek to bear any meaning other than its ordinary meaning. After referring to decisions such as *Perpetual Executors and Trustees Association of Australia Ltd v FCT*[9] and *Hepples v FCT*,[10] Macfarlan observed that a mere expectancy of "future" property is not property as ordinarily understood.

Further, after observing that s 21 of the *Interpretation Act 1987* (NSW) defines the term "property" as "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description, including money, and includes things in action", Macfarlan J observed that *The Bell Group Ltd (in liq) v Westpac Banking Corporation*[11] is authority for the proposition that the terms "present or future" in a similar definition as that contained in s 21 of the *Interpretation Act 1987* qualify the words "estate or interest", and not the term "property".

Determining the "dutiable value" of the declaration over the consideration shares

On the basis that the declaration of trust over the consideration shares was subject to ad valorem duty, the court considered what the "dutiable value" of the declaration was. It was noted that s 21(1) of the Duties Act provides that the dutiable value is the higher of the consideration and the unencumbered value.

Whether the consideration shares could be valued as at 4 April 2007

Both the taxpayer and the Commissioner led evidence relating to the value of the consideration as at 4 April 2007. The valuation obtained by the taxpayer valued the consideration shares at nil, whereas the Commissioner's valuer ascribed a value of $193,969,750.

The court observed that there is little differentiation between an estimation and a valuation. *FCT v St Helen's Farm (ACT) Pty Ltd*[12] was cited and, in particular, the observation that "valuation is not an exact science, but an exercise in estimation". Handley AJA rejected the proposition that future property cannot be valued:[13]

> "… I would not wish to give support to the proposition that future property cannot be valued. Although the Consideration Shares did not exist on 4 April 2007 the Cliffords had more than a mere expectancy. They had an enforceable right to have the shares issued to the taxpayer as their nominee, and it was practically certain that they would come into existence within a few days."

While Handley AJA did observe that future property may be subject to contingencies, it was also observed that:[14]

> "Future interests which presently exist, but which are not vested in possession, can be, and are valued. Examples include interests in remainder or reversion subject to life or other interests, leases with an option of renewal, and freehold reversions. These interests have a present value but normally become more valuable when they vest in possession."

What was the consideration for the declaration of trust over future property

Notwithstanding the observations relating to the ability to value the unissued consideration shares (as at 4 April 2007), Handley AJA considered that the higher "dutiable value" amount (pursuant to s 21 of the Duties Act) would be the "consideration".

Handley AJA observed that the consideration for the transfer of the sale shares was the allotment of the consideration shares:[15]

> "The Cliffords directed the declaration of trust by the taxpayer when they executed and exchanged the Deed. Consideration for the declaration could be provided by them as directing parties or as beneficiaries. The only consideration could be the transfer of Sale Shares to the Buyer. This was the consideration which 'moved' the Buyer's allotment of shares to the taxpayer."

The court then had to consider what the "consideration" was for the declaration of trust. Handley AJA held that "where the party directing the declaration of trust

is the only beneficiary and value is not transferred to anyone else, receipt of the beneficial interest is consideration which moves the declaration of trust". As a result, it was concluded that:[16]

> "In my judgment therefore the Sale Shares provided consideration for the declaration of trust of the Custodian Shares. The value of the Consideration Shares has not been determined, but the highest value supported by the evidence … was less than the value of the consideration. Accordingly duty was properly calculated on the consideration."

Whether the "apparent purchaser" duty concession applied

In the event that the declaration within the deed was subject to duty, the next issue to be considered was whether the declaration was subject to nominal duty pursuant to the apparent/real purchaser concession contained in s 55 of the Duties Act. Relevantly, s 55(1)(a) of the Duties Act provides that:

> "(1) Duty of $10 is chargeable in respect of:
>
> (a) a declaration of trust made by an apparent purchaser in respect of identified dutiable property:
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> (i) vested in the apparent purchaser upon trust for the real purchaser who provided the money for the purchase of the dutiable property, or
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> (ii) to be vested in the apparent purchaser upon trust for the real purchaser, if the Chief Commissioner is satisfied that the money for the purchaser of the dutiable property has been or will be provided by the real purchaser."

Both Campbell and Macfarlan JJA agreed with the views of Handley AJA on this point, that is, the apparent purchaser concession within s 55 of the Duties Act did not apply. In coming to that view, Handley AJA applied the High Court's decision in *Commissioner of Stamp Duties (NSW) v Pendal Nominees Pty Ltd*[17] (Pendal Nominees). In particular, his Honour accepted the reasoning in Pendal Nominees that, if a declaration is made before there is an "apparent purchaser", the concession cannot apply. Handley AJA held that:[18]

> "The Deed described the Cliffords as the Sellers, Queens Hill Pty Ltd as the Buyer, and the taxpayer as the Nominee, and is relevantly indistinguishable from the deed in Pendal. In these circumstances the taxpayer was not the apparent purchaser and it is not necessary to consider whether the exemption applies to an exchange where 'money for the purchase' does not change hands."

However, it should be noted that the apparent purchaser concession, as contained in s 55 of the Duties Act relevant for the purposes of *Platinum Investment*, differs from the concession that was contained in the former para (1) of the item of Declaration of Trust in the Second Schedule of the *Stamp Duty Act 1920* (NSW) (Stamp Duty Act) which was considered in *Pendal Nominees*.

The apparent purchaser concession under the former Stamp Duty Act provided that "Any instrument declaring that a person in whom property is vested as the apparent purchaser thereof holds the same in trust for the person or persons who have actually paid the purchase money thereof"'. That is, the former concession as contained in the Stamp Duty Act is similar to that contained in s 55(1)(a)(i) of the Duties Act, that is, in order for the concession to apply, there needs to be identified dutiable property that "is vested" (ie presently vested), and that the real purchaser has (ie past tense) "provided the money for the purchase of dutiable property".

However, since the High Court's decision in *Pendal Nominees*, the apparent purchaser concession has been expanded by s 55(1)(a)(ii) of the Duties Act which (relevantly) provided that "Duty of $10 is chargeable in respect of … a declaration of trust made by an apparent purchaser in respect of identified dutiable property … to be vested in the apparent purchaser upon trust for the real purchaser, if the Chief Commissioner is satisfied that the money for the purchase of the dutiable property has or will be provided by the real purchaser". That is, unlike the concession in existence during *Pendal Nominees*, the concession applies if identified dutiable property is "to be vested" (ie future tense) and if the money for the purchase of the dutiable property "will be provided by the real purchaser".

It is submitted that the issue in *Pendal Nominees* was the disjoint in the Stamp Duty Act when comparing the declaration head of duty (ie which charged duty on property "vested" or "to be vested") with the apparent purchaser concession (which only applied to property that "is vested" in an apparent purchaser). Section 55(1)(a)(ii) of the Duties Act uses future tense terms, such as "to be vested" and "will be provided", as does the declaration head of duty. However, the former apparent purchaser concession only uses the past tense, such as "is vested" and "who have actually paid".

It is respectfully submitted that, for the same reasons that the majority of the Court of Appeal in *Platinum Investment* held that the term "to be vested" in the declaration head of duty allows future property to be subject to duty, then too should the term "… to be vested …" should allow a "future" apparent purchaser (and "future" real purchaser) to avail themselves of the concession within section 55 of the Duties Act.

Recent change to the Duties Act to catch future property

It should be noted that the Duties Act was amended by the *State Revenue Legislation Amendment Act 2010* (NSW) by inserting subsection 12(3) into the Act:

> "A liability for duty in respect of a dutiable transaction that is charged with duty as if it were a transfer of dutiable property arises *even if the dutiable property is not in existence* at the time that the transfer is taken to have occurred, or the instrument effecting the transfer is first executed, as the case requires." (emphasis added)

That is, since the introduction of subsection 12(3) of the Duties Act, future dutiable property has been specifically brought within the scope of the NSW duties regime.

Comment

Since the introduction of subsection 12(3) of the Duties Act, which makes it clear that "future" identifiable "dutiable property" may be subject to NSW duty, the decision in *Platinum Investment* will only have precedent value with respect to the "dutiable value" of a declaration of trust, and the application of the apparent purchaser concession.

The practical implication of the decision in the context of the apparent purchaser concession is that a declaration of trust relating to dutiable property that is *to be vested* in a "'future" apparent purchaser will be subject to duty (as a declaration) with no ability to obtain the apparent purchaser concession.

As an example, if X wishes to acquire real property in NSW (and will provide all of the purchase price for the acquisition of the property), with the registered proprietor of the property to be Y (ie the property is to be held on trust by Y for X), then a declaration made by Y will be subject to duty as a declaration of trust (with no relief

under the apparent purchaser concession) if the declaration is made *before* exchange on the contract to purchase the property. That is, in such a situation, NSW duty will be charged twice — once on the transfer of the property to X (to be held by Y), and a second time on the declaration of trust by Y over the property made before the exchange of contract for the property. However, if X declares that it holds the item of real property on trust for Y *after* exchange (and if Y provides all of the purchase price for the purchase of the property), the declaration should be subject to concessional duty pursuant to s 55 of the Duties Act.

In the author's experience, the NSW Office of State Revenue has in the past accepted that the apparent purchaser concession applies if a declaration of trust is executed before property is vested in an apparent purchaser (eg before a contract for the purchase of property is exchanged in the name of an apparent purchaser), provided it has been shown that the purchase price has been, or will be, provided by the real purchaser.

One would expect a change in the practice of the NSW Office of State Revenue following the decision in *Platinum Investment*. Indeed, it is submitted that the decision will have great impact on those involved in commercial and property transactions concerning NSW dutiable property. Some circumstances which may cause the principles relating to the apparent purchaser concession as enunciated in *Platinum Investment* to give rise to hazards for advisers and their clients include:

- arrangements, such as that illustrated in *Platinum Investment*, whereby NSW dutiable property is to be held by a custodian or a nominee;
- an acknowledgement/declaration by an adviser (usually a solicitor) given to a client that a contract to acquire a property entered into if the adviser successfully bids at an auction for a property will be for the benefit of the client; and
- declarations of trust over NSW dutiable property which may be entered into for the purposes of acquiring an asset by a trustee of a superannuation fund pursuant to ss 67A and 67B of the *Superannuation Industry (Supervision) Act 1993* (Cth).

That is, careful consideration will need to be given to the timing of declarations of trust.

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References

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4 *Platinum Investment* at [86].
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6 *Platinum Investment* at [89].
7 *Platinum Investment* at [14].
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9 [1948] HCA 24.
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11 (1995) 22 ACSR 337 at 343.
12 [1981] HCA 4.
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14 *Platinum Investment* at [98].
15 *Platinum Investment* at [109].
16 *Platinum Investment* at [111].
17 [1989] HCA 19.
18 *Platinum Investment* at [119].