

*Privy Council Appeal No. 20 of 1972*

**The Commissioner of Stamp Duties**     -     -     -     -     *Appellant*

v.

**Alan Cavaye Atwill and others**     -     -     -     -     -     *Respondents*

FROM

**THE HIGH COURT OF AUSTRALIA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER 1972

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*Present at the Hearing :*

LORD REID

LORD MORRIS OF BORTH-Y-GEST

VISCOUNT DILHORNE

LORD SIMON OF GLAISDALE

SIR RICHARD WILD

[*Delivered by* VISCOUNT DILHORNE]

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Milton Spencer Atwill, who died on 24th November 1965, on 27th November 1953 created a trust fund for the benefit of his wife and family. After the death of the survivor of himself, his wife and his sons the trust fund was to be divided. It is not disputed that the trust deed contained a trust to take effect after his death and so was caught by s. 102 (2) (a) of the Stamp Duties Act 1920 of New South Wales.

The trust fund in 1953 consisted of £200 provided by Mr. Atwill. That sum was invested by the trustees in the purchase of 20 shares in Langton Pty. Limited, a company incorporated in New South Wales, and those shares continued to be held by the trust and were held by the trust at Mr. Atwill's death. Their value then was \$276,458.

The Commissioner of Stamp Duties in assessing the death duty payable in respect of Mr. Atwill's estate claimed that the 20 shares were to be included in his dutiable estate and on that basis assessed the duty payable at \$124,938·06. If the shares are not to be so included that sum will be reduced by \$77,926·04 so that the duty will be \$47,012·02.

The respondents required the Commissioner to state a case and on 27th November 1970 the Court of Appeal of the Supreme Court of New South Wales (Asprey J.A., Mason J.A., and Moffitt J.A.) dismissed their appeal holding that the duty payable was \$124,938·06.

The respondents then appealed to the High Court of Australia and by a majority their appeal was allowed (Barwick C.J., Windeyer and Owen Jj.; Menzies and Walsh Jj. dissenting).

The Commissioner now appeals with special leave. At the time leave was granted an appeal from the Court of Appeal of the Supreme Court of New South Wales was pending which raised precisely the same question. Counsel for the appellants in that case (*Falkiner and Perpetual Trustee Company Limited v. The Commissioner of Stamp Duties*) was heard in the course of the argument in this case.

The question to be determined is the proper interpretation to be placed on the relevant parts of s.102 of the Stamp Duties Act of New South Wales. They read as follows:

“ 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property—

. . . .

(2) (a) All property which the deceased has disposed of . . . by a settlement containing any trust in respect of that property to take effect after his death. . . .

Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.”

The respondents in this case and the appellants in the *Falkiner* case contend that section 102(2)(a) only operates to bring into account as part of the dutiable estate so much of the actual property made subject to a settlement containing a trust to take effect after the settlor's death as was in existence and subject to the settlement at the date of the death. The respondents therefore say that at most only £200 could have been included, and that as that sum was not at the date of death subject to the trust, nothing should be included.

The appellant on the other hand contends that the value of the 20 shares at the date of death must be included in the dutiable estate.

Barwick C.J. said that he agreed with the conclusions of Owen J. and with his reasons. He held that it was an inadmissible method of construction of the Statute to read the words of the proviso as if they were a substantive provision; that the proviso ought not to be read and construed apart from the terms of the section; that the governing words of the whole provision were the opening words of s.102(2)(a) “all property which the deceased has disposed of . . . by a settlement . . .” and that the reference to property in the proviso was to that property. In his opinion the proviso ensured that only the property made subject to the settlement which is at the date of the death still subject to the settlement is brought into the valuation.

Owen J. said that it appeared to him odd that what on its face appears in the form of a proviso should be regarded as adding to and not merely qualifying what went before. “If it is itself a substantive enactment then the legislature has, in the form of a proviso, added to s.102(2) a new category of ‘notional estate’ consisting of property over which the deceased never had any power of disposition.” He thought the second part of s.102(2)(a) was a true proviso limiting the operation of the first part and operating only upon so much of the property disposed of by the deceased as remains subject to the trusts of the settlement.

Windeyer J. agreed with the judgment of Barwick C.J. and Owen J. In his view the shares not being property the deceased disposed of were not by virtue of section 102(2)(a) to be included in his dutiable estate. In his view the property subjected to duty was the property that the deceased had disposed of by the settlement, or so much of it as was still subject to the trust when he died.

The decision of the majority of the High Court was thus based on the view that the proviso was a true proviso limiting or qualifying what preceded it.

Their Lordships are not able to agree with this conclusion. While in many cases that is the function of a proviso, it is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and not merely limit or qualify that which precedes it. In *Jennings v. Kelly* [1940] A.C. 206 Viscount Maugham at p. 217 said:

“The learned Lord Chief Justice was influenced in coming to his conclusion by his view that the first part of the section was the operative portion of it, and that the proviso could not properly be used to explain the words as to increase of population in the operative part. He therefore relied on the principle of construction to be found in the case of *West Derby Union v. Metropolitan Life Assurance Society* [1897] A.C. 647. The principle is thus stated by Lord Watson. ‘I am perfectly clear’ he said, ‘that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive those provisions by implication from a proviso.’ I am sure that none of your Lordships would desire to depart from this principle where it is applicable, namely, where the enacting part of the section is unambiguous and complete and is followed by a true proviso, that is, a qualification or an exception out of it.

In my view that is not the case here, and as Lord Herschell pointed out in the same case: ‘Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment and show when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it.’ My Lords, that is precisely the method of construction which in my view is applicable in the present case. I will add that the words beginning ‘Provided that’ are, in my opinion, additional and explanatory words necessary for the purpose of giving a more definite meaning to the preceding words, that is of removing doubt as to its scope, and they might easily have been incorporated in the earlier part of the section at the risk of making it rather more cumbersome than it is. We are not dealing here with a true proviso, or at any rate not with such a proviso as this House was considering in the case cited. It cannot, I think, be disputed that in construing a section of an Act of Parliament, it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. . . . This principle is equally applicable in the case of different parts of a single section, and none the less that the latter part is introduced by the words ‘provided that’ or like words. There can, I think, be no doubt that the view expressed in Kent’s Commentaries on American Law (cited with approval in Maxwell, p. 140) is correct: ‘The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together, is to prevail.’”

In the same case Lord Wright said at p. 229:

“It is said that where there is a proviso, the former part, which is described as the enacting part, must be construed without reference to the proviso. No doubt there may be cases in which the first part is so clear and unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the section;

the proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part. But in the present case, not only is the first part of the section deficient in express definition, but the second part is complementary and necessary in order to ascertain the full intention of the Legislature. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest. I do not think that there is any other rule even in the case of a proviso in the strictest or narrowest sense. Still less, where, as here, the introduction of the second part by the word 'provided' is in a strict sense inapt."

In a strict sense the use of the words "Provided that" in section 102 (a) may also be disregarded as inapt. The meaning of that provision and the proviso would be the same if instead of the words "Provided that" there had appeared the word "and" or the words "in which case" and to ascertain the true effect of the provision the second part, that is to say, the proviso, is complementary and necessary in order to ascertain the full intention of the Legislature. In *Rhondda Urban District Council v. Taff Vale Railway Company* [1909] A.C. 253 the House of Lords had to consider the effect of a section which was framed as a proviso upon preceding sections. In that case Lord Loreburn L.C. at p.258 said:

"But it is also true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before."

Other examples of such provisos are to be found in the Stamp Act itself in the first proviso to s.102(2)(ba) where the Commissioner is given power to reduce the value of any property in certain circumstances; in the first proviso to s. 102 (2) (d) and to s. 102 (2B) where the Commissioner is given a similar power. In each of these instances the proviso contained what is called a substantive enactment (see also the Wheat Marketing Act of 1920, s. 11 (1), and the Workmen's Compensation (Amendment) Act 1920 of New South Wales, s. 4).

Examples of such a use of a proviso can also be found in conveyancing precedents (see Hallett's Conveyancing Precedents (1965) p. 846, 3 (b), the Encyclopaedia of Forms and Precedents, Fourth Ed. Vol. 20, p.617 Form 1:H:24, p.627 Form 1:H:41 and p.640 Form 1:L:6). The words of the proviso to s.102(2)(a) are in their Lordships' opinion clear and unambiguous. They must be construed with the words which precede them and their effect would not be different if instead of the words "Provided that", the section, as has been said, had read "and" or "in which case". To come within s. 102 (2) (a) there must have been property disposed of by the deceased by a will or settlement containing a trust in respect of that property to take effect after death. If that is so, then the property which at the time of the death is subject to such trust is to be deemed to be included in the deceased's estate.

The word "property" is used four times in s.102(2)(a). In each case the subsection makes clear beyond doubt what is the property referred to. On the first two occasions on which it is used it is property which the deceased had disposed of. On the third occasion it is property "deemed to be included in the estate" and on the fourth "property which at the time of his death is subject to such trust".

The scope of that description of property is not in their Lordships' view in any way restricted by the fact that it is contained in a proviso and there is no valid ground for implying that it should be read as "property which at the time of his death is subject to such trust and which was disposed of by the deceased".

In *Watt's case* (1925) S.R. (N.S.W.) 467 Ferguson J. expressed the opinion that the intention of the legislature was that if there was existing some property which the deceased had disposed of but which at his death was still subject to a trust to take effect after a death the effect of the proviso was to secure that that was treated as part of his dutiable estate. On appeal Higgins J. agreed with this (38 C.L.R. 36). That was a case where a trust to take effect on death was extinguished and the Commissioner's contention was that once property had been disposed of by a will or settlement on a trust to take effect after death that property was stamped irrevocably with liability to death duty. That contention was rejected. The Court in that case did not have to consider the problem raised in this case and while what Ferguson J. said was clearly right, their Lordships do not consider that the effect of the proviso is limited to such a case.

If in this case the decision of the High Court is right, then it means that a very large gate is open for the avoidance of duty. Directly the disposition of property is made by a settlement on a trust to take effect on the settlor's death the trustees of the settlement, by changing the form of the property held, *e.g.*, by selling the shares transferred by the settlor and buying further shares with the money realised, can free the trust fund from all liability to estate duty. It cannot have been the intention of the Legislature so to provide.

In the Stamp Duties Act of 1898, s. 58, it was provided that within six months of the death of any person who had executed a settlement containing a trust to take effect after his death, notice of the settlement had to be lodged "together with a declaration specifying the property thereby settled and the value thereof" and duty was payable on that value. Section 58 (2) gave the Supreme Court power to order a sufficient part of "the property included in such settlement" to be sold to pay the duty.

When the Stamp Act 1920, an Act to amend and to consolidate, was prepared, it may have been appreciated that the language of s. 58 which was replaced by s. 102 (2) (a) left it open to argument whether the property thereby settled was to be interpreted as the property disposed of and whether duty was or was not payable on the value of the property included in the settlement at the time of death. It may well have been in order to clarify the position that the proviso to s. 102 (2) (a) was inserted.

For the reasons stated their Lordships are of the opinion that the views expressed by Menzies J. and Walsh J. were correct and they will humbly advise Her Majesty that this appeal should be allowed, the Order of the High Court set aside and the Order of the Court of Appeal restored. The respondents must pay the costs of the appeal to the High Court and of this appeal.

In the Privy Council

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**THE COMMISSIONER OF STAMP  
DUTIES**

v.

**ALAN CAVAYE ATWILL AND  
OTHERS**

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DELIVERED BY  
VISCOUNT DILHORNE