

CITATION: JANICE GRICE V COMMISSIONER OF TERRITORY REVENUE [2021]
NTLC009

PARTIES: JANICE GRICE

V

COMMISSIONER OF TERRITORY REVENUE

TITLE OF COURT: TAXATION AND ROYALTY APPEALS
TRIBUNAL

JURISDICTION: CIVIL

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Transfer *in specie*; Valuable Consideration

Stamp Duty Act 1978 Schedule 2 Item 6(b)

Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143

Commissioner of State Revenue v Lend Lease Development Pty Ltd (2014) 254 CLR 142

Hill, Graham, "The True Nature of a Member's Interest in a Superannuation Fund" [2002]
JIATax 1

REPRESENTATION:

Solicitors:

Appellant: Jacobs Krajsek Wauchope

Respondent: HWL Ebsworth Lawyers

Judgment category classification: C

Judgment ID number: 009

Number of paragraphs: 26

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2020-02722-LC

BETWEEN

JANICE GRICE

Appellant

AND

COMMISSIONER OF TERRITORY REVENUE

Respondent

REASONS FOR DECISION

(Delivered 26 March 2021)

JUDGE ARMITAGE

1. This is an appeal to the Taxation and Royalty Appeals Tribunal (the Tribunal) constituted by a Local Court Judge. The Tribunal must determine the appeal on the basis of the written material submitted by the parties unless satisfied that it is necessary to conduct a hearing in view of the nature and circumstances of the appeal. This appeal was conducted on the written materials submitted by the parties.

Background

2. The Appellant, Ms Janice Grice, is a director, member, and beneficiary of the Grice Family Superannuation Fund (the Trust) with the Fund trustee being Grice Investments NT Pty Limited (ACN 087 278 108) (the Trustee). At the relevant time, the Trustee and Trust members were governed by the "Variation Deed Grice Family Superannuation Fund" (and annexures) formed on 26 June 2017 (the Trust Deed), along with superannuation laws among other means of regulation.
3. The Trust Deed permitted the Trustee to have the assets of the Trust Fund valued whenever the Trustee considers it appropriate. On 12 June 2019, Colliers International provided a valuation report for Lot 5500 Francis Bay Drive, Darwin, Northern Territory (the Property). Colliers International assessed the property as having a market value of \$11,800,000.

4. The Trust Deed provided for benefits to be paid to beneficiaries with the maximum amount payable being the total of the balance in all that Beneficiary's Accumulation Accounts and Pension Accounts. Benefits could be cashed in in a number of ways including by one or more lump sums.
5. On 30 June 2019 the Appellant requested the Trustee to commute all but \$10,000 from her pension account into her accumulation account. The Appellant also requested that the Trustee pay her a lump sum payment from her accumulation account to the value of \$9,440,000. However, instead of receiving a monetary lump sum, the Appellant requested a proportionate interest in a property held by the Trust.
6. The ability to transfer the Property in partial satisfaction of Ms Grice's accrued benefits was permitted and effected pursuant to Clause 21 of the Trust Deed. Clause 21 of the Trust Deed provides as follows:

21. Transfer In Specie

21.1 The Trustee:

- (a) may, with the consent of a Member or the Dependents of a Member to whom a Benefit is payable; and*
- (b) must, if required by clause 22.7, transfer investments of the Fund of equivalent value instead of paying the whole or part of the amount otherwise payable.*

No Beneficial Interest

21.2 With the exception of the provisions of clause 7 and this clause 21, no Member or Beneficiary has or may acquire any beneficial or other interest in specific assets of the Fund.

7. On 30 June 2019 the Trustee completed the partial commutation of the pension account, and by a Resolution of Directors the Trustee agreed to transfer a proportion of the Property to Ms Grice, equal to the value and instead of the lump sum payment from Ms Grice's accumulation account. 80 per cent of the Property was transferred to Ms Grice and the Trustee retained a 20 per cent interest in the property, as tenants in common.
8. On 29 July 2019 the Appellant's solicitors lodged the Instrument of Transfer for stamping with the Respondent, with a request that the transfer be assessed as exempt from stamp duty applying Item 6 (b) of Schedule 2 of the *Stamp Duty Act 1978*.
9. By notice dated 24 September 2019 the Respondent assessed the transfer of the Property as dutiable, asserting that the transfer was made for valuable consideration.

10. By letter dated 11 November 2019 the Appellant objected to the assessment pursuant to Division 2 of Part 11 of the *Taxation Administration Act 2007 (NT)* (the Objection).
11. By notice of decision dated 5 June 2020 (Notice of Decision) the Respondent disallowed the Objection.

The Appeal

12. The Appellant now appeals that Notice of Decision.
13. Section 6 of the *Stamp Duty Act 1978* (the Act) provides for exemptions from stamp duty pursuant to section 8E and Schedule 2 of the Act.
14. As at 29 July 2019 Item 6 (b) of Schedule 2 of the Act provided that a conveyance was exempt from stamp duty if it was:
 - “(b) *made by a trustee of a non-discretionary trust to a beneficiary where:*
 - (i) *the conveyance is made in accordance with the terms of the trust (but not for valuable consideration); and*
 - (ii) *the property conveyed was acquired by the trustee by virtue of an instrument that was duly stamped, was exempt from duty under this Schedule (or a corresponding previous enactment) or was for some other reason not liable to duty;”*
15. The Commissioner of Territory Revenue (the Commissioner) accepted:
 - (i) that the Property conveyed to the Appellant was from a trustee of a non-discretionary trust to a beneficiary,
 - (ii) that the conveyance was in accordance with the terms of the trust, and
 - (iii) that the Property was acquired by the Trustee by an instrument described in Item 6(b)(ii).
16. However, the Commissioner found that the exemption created by Item 6 (b) of Schedule 2 of the Act did not apply to the conveyance in question because “valuable consideration” formed part of the transaction.¹
17. On appeal the only issue in dispute between the parties was whether the conveyance of the Property was for “valuable consideration”. If so, stamp duty was to be paid; if not, the conveyance was exempt from duty.

¹ Notice of Decision dated 5 June 2020 at pp 167-168 of the Appeal Book.

The Submissions of the Appellant

18. In support of her position that the transfer of the Property was not for valuable consideration, the Appellant made the following summarised submissions.

18.1 Distributions from a trustee to a beneficiary pursuant to the terms of a trust instrument have historically been exempt from duty: see s6(11) of the *Stamp Duty Act 1978* which provided:

(11) Stamp Duty is not imposed under this Ordinance on a conveyance -

(a)...;

(b)...; or

(c) made by a trustee to a beneficiary.

18.2 By the *Stamp Duty Act (No.2) 1979* (No. 73 of 1979) the exemption was moved from the body of the Act to the Schedules. It became Item 9A (c) of Schedule 2 which maintained an exemption from stamp duty for conveyances made by a trustee to a beneficiary.

18.3 Schedule 2 was amended by Act No. 66 of 1981 and Item 9A relevantly read as follows:

9A. *Conveyance -*

(b) made by a trustee to a beneficiary where -

(i) the conveyance is not made for valuable consideration;

(ii) the conveyance is in conformity with the trust contained in a duly stamped instrument of trust; and

(iii) the property the subject of the conveyance was acquired by the trustee by virtue of an instrument upon which ad valorem duty has been paid or which was duly stamped as exempted from duty under this Schedule, or by virtue of a testamentary disposition or intestacy.

18.4 In the second reading speech of 25 August 1981 the Treasurer said:

“Mr Speaker, the opportunity has also been taken to amend the legislation to prevent two recently detected and serious avoidance practices. Both schemes involve Item 9A of the Second Schedule which is now to be repealed. Item 9A (c) had exempted from stamp duty conveyances made by a trustee to a beneficiary. This exemption is so broad in character as to allow abuse. The proposed replacement Item removes the possibility of such avoidance by more

clearly defining the categories of exemption for conveyances of property from a trustee to a beneficiary. The proposed amendment will make the Territory legislation in this area similar to that in the states."

18.5 As at 15 November 1995, the exemption was condensed but otherwise not substantially changed and relevantly read as follows:

9A. Conveyance -

(b) Made by a trustee to a beneficiary, where the conveyance is not made for valuable consideration and the conveyance is in conformity with the trust contained in a validly constituted trust and the property the subject of the conveyance was acquired by the trustee by virtue of an instrument which was duly stamped or has been exempted from duty under this Schedule or was not otherwise subject to duty; or

18.6 On 1 July 2001 the exemption was changed and relevantly read as follows:

9A. Conveyance-

(b) Subject to paragraph(ba), made by a trustee to a beneficiary, where the conveyance is not made for valuable consideration in the conveyance is in conformity with the trust contained in a validly constituted trust and the property the subject of the conveyance was acquired by the trustee by virtue of an instrument which was duly stamped or has been exempted from duty under this Schedule or was not otherwise subject to duty;

(ba) made by a trustee of a discretionary trust to a beneficiary where -

(i) the beneficiary is a natural person and, as a result of the transfer, the beneficiary holds both the legal and equitable interests in the property the subject of the conveyance;

(ii) the conveyance is not made for valuable consideration, which includes money or money's worth, the forgiveness of all release from a debt, gift or legal obligation (including the trustee's right of indemnity and exoneration against a beneficiary) and whether the valuable consideration is paid, payable, made over to, given or granted by or to the trustee, a beneficiary or a person acting for, in concert with or

under an arrangement or understanding (which may be formal or informal or express or implied) with the trustee or a beneficiary; and

- (iii) the conveyance is in conformity with the trust contained in a validly constituted trust in the property the subject of the conveyance was acquired by the trustee by virtue of an instrument which was duly stamped or has been exempted from duty under this Schedule or was not otherwise subject to duty; or*

18.7 The July 2001 amendment introduced a distinction between discretionary trusts and other trusts. The extensive additional wording used in paragraph (ba) ensured that “valuable consideration” was to be construed broadly in the case of discretionary trusts, but not in paragraph (b) in relation to non-discretionary trusts.

18.8 The *Stamp Duty Act* was entirely rewritten on 1 January 2008, with the exemption from stamp duty for transfers from trustees to beneficiaries of non-discretionary trusts appearing as Item 6(b) of Schedule 2 as follows:

- (b) made by a trustee of a non-discretionary trust to a beneficiary in accordance with the terms of the trust if the property conveyed was acquired by the trustee by virtue of an instrument that was duly stamped, was exempt from duty under this Schedule (or a corresponding previous enactment) or was for some other reason not liable to duty.*

18.9 The second reading speech of 23 August 2007 did not include any relevant commentary. Curiously, the requirement that the conveyance not be for valuable consideration was omitted. This omission was rectified in 2008 by the *Revenue Law Reform (Budget Initiatives) Act 2008*, resulting in the current exemption as follows:

- (b) made by a trustee of a non-discretionary trust to a beneficiary where:
 - (i) the conveyance is made in accordance with the terms of the trust (but not for valuable consideration); and*
 - (ii) the property conveyed was acquired by the trustee by virtue of an instrument that was duly stamped, was exempt from duty under this Schedule (or a corresponding previous enactment) or was for some other reason not liable to duty;**

18.10 In the second reading speech of 7 May 2008 the Treasurer said:

“The last of these measures ensures that conveyance stamp duty is payable when a person acquires property from a non-discretionary

trust as a purchaser rather than in their capacity as a beneficiary of the trust. This corrects an oversight when new taxation administration arrangements were introduced from 1 January 2008. As such, it is appropriate for the proposed amendment to take effect from that date.”

- 18.11 The second reading speech clearly and succinctly articulated the policy underlying the exemption. The fundamental reason for the proviso in relation to valuable consideration is that the exemption is not available where the person acquires property as a purchaser rather than in their capacity as a beneficiary of the trust. Conversely, the exemption is meant to apply when the beneficiary receives the property as a benefit and not as a purchaser.
- 18.12 It is not difficult to envisage circumstances where a beneficiary might receive property as both a beneficiary and as a purchaser. For example, a trust deed might contain an express provision authorising the sale of trust assets to beneficiaries of the trust provided that the beneficiary pays market value as determined by an independent qualified valuer. In such a case, where a beneficiary purchases trust property by paying money to the trustee in return for the transfer, this would be a transfer from a trustee to a beneficiary made in accordance with the terms of the trust deed, but it would be made for valuable consideration, and accordingly the exemption would not apply.
- 18.13 The evolution of the exemption, so as to distinguish between discretionary trusts (Item 6 (c)) and non-discretionary trusts (Item 6 (b)) reflects the introduction of anti-avoidance measures that are designed to prevent misuse by parties seeking to acquire an interest in trust property that is not reflective of their existing beneficial interest in the trust fund. Valuable consideration is a constraint upon the operation of the Item 6 (b) exemption. The exemption does not apply to conveyances where there is not the requisite correlation between the beneficial interest in the trust fund and the property to be conveyed.
- 18.14 When the *Stamp Duties Act* is viewed objectively, the statutory purpose of the anti-avoidance measures is not intended to preclude a distribution to a beneficiary of a non-discretionary trust that is reflective of the beneficiary's pre-existing interest in the trust fund. If the concept of valuable consideration for the purposes of Item 6 (b) is read so broadly as to include the reduction in the superannuation fund member's account balance corresponding to the payment of a member benefit, the logical outcome would be that the exemption would rarely, if ever, be available. Such an interpretation would defeat the purpose of the exemption. A construction which renders the exemption ineffective cannot be correct.

- 18.15 In the present case, the transfer of property made to Ms Grice was in her capacity as a beneficiary of the trust. The fundamental nature of the transaction involved a withdrawal of a trust fund benefit and not a purchase of property. It makes no difference whether the lump sum is withdrawn in the form of money or other property. The Accumulation Account balance was reduced to reflect the withdrawal of the benefit.
- 18.16 A superannuation fund is a trust where the respective entitlements of the beneficiaries in respect of the Fund are determined by their account balances. The reduction in the Accumulation Account reflects that property of the Trust has been paid to the benefit of the member in question. This entry ensures that the interests of other members are not prejudiced. This does not mean the Trustee has received something of value in return for the transfer. It means that its duty to the beneficiary has been performed in accordance with the Trust Deed and without prejudice to the other beneficiaries.
- 18.17 Clause 21 of the Trust Deed permitted a lump sum benefit to be paid in the form of transfer of Property instead of in the form of money. The fact that the beneficiary must consent to the lump sum benefit being paid by way of transfer of property *in specie* does not convert the reduction in the Accumulation Account balance to “valuable consideration”. Nothing of value passed to the Trustee when it made payment of the lump sum in the form of transfer of property *in specie* instead of money.
- 18.18 The Trust establishes an equitable obligation on the part of the Trustee with respect to the beneficiaries. The obligation is expressed in clause 18.10 of the Trust Deed which provides that when a Beneficiary calls on the Trustee to Pay a Benefit, the Trustee must pay the Benefit, subject to the terms of the Trust Deed and the Relevant Requirements. Within the procedures established by the Trust Deed there are matters to be agreed between the Trustee and the beneficiaries in relation to the manner of discharge of the Trustee’s duties. Clause 21 restrains the Trustee from paying a benefit by way of assets instead of money without the consent of the person to whom the benefit is payable. A “meeting of the minds” as to how the benefit was to be paid was required by the Trust Deed and was not contractual in character.
- 18.19 The nature of the rights and obligations of trustees and beneficiaries is governed by the law of trusts², not the law of contract. The liability of the Trustee to the Appellant arose from its fiduciary obligations. Even if there are some co-existing contractual elements between a trustee and a beneficiary, those elements do not establish that the reduction in the

² Hill, Graham, “The True Nature of a Member’s Interest in a Superannuation Fund” [2002] JIATax 1 at 34

Appellant's Accumulation Account balance was "valuable consideration" for the transfer of the Property. Rather, the reduction in the Accumulation Account is a recognition of the performance by the Trustee of an obligation under the Trust.

- 18.20 The Stamp Duty Lodgement Guide published by the Commissioner makes it clear that in the case of unit trusts (which are a form of non-discretionary trust potentially subject to the exemption in Item 6 (b)), the Commissioner expects to see "evidence to show that the transfer has the effect of reducing the rights of the holder of units in respect of the property held by the unit trustee to the extent of the property, or the value of the property conveyed or transferred (for example, cancellation, redemption of units, etc)". In other words, the Commissioner expects there to be a reduction of the rights of the holder of units in respect of the property held by the unit trustee to the value of the property transferred if the exemption is to apply. The Guide is a publicly expressed view of the Commissioner, that for unit trusts, the reduction in the value of the rights of unit holders resulting from a transfer from trustee to beneficiary does not constitute valuable consideration within the meaning of Item 6 (b). The position adopted by the Commissioner with respect to unit trusts as expressed in the Stamp Duty Lodgement Guide cannot be reconciled with the submissions made by the Respondent in this case. While the Stamp Duty Lodgement Guide is not authority for the interpretation of Item 6 (b), the position of the Respondent as expressed in the Stamp Duty Lodgement Guide is consistent with the Appellant's submissions in this case.

The Submissions of the Respondent

19. In support of its position that the valuable consideration formed part of the transaction the crux of the Respondent's submissions are summarised.
- 19.1 Ms Grice did not have a prior interest in the Property and under the Trust there was no guarantee or certainty that the Property would be transferred to her. Clause 21 of the Trust Deed required that there be an agreement between Ms Grice and the Trustee before any part of the Property could be transferred to her. In the absence of mutual agreement that had a contractual character, the *in specie* distribution could not occur. The transfer of the Property to Ms Grice could not properly be described as a mere performance of the Trust by way of a withdrawal of a benefit from the Trust as the agreement for an *in specie* distribution was outside the "normal scheme".

- 19.2 The Respondent relied on *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 (*Archibald Howie*), in which the High Court considered the dutiability of an *in specie* distribution of assets from a company to a shareholder via a share buyback. On the question of whether there was consideration for the transfer the High Court held [at 152] that:
- “... the word “consideration” should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts. The difference is perhaps not very material because the consideration must be in money or money’s worth. But in the law of simple contracts it is involved with offer and acceptance: indeed properly understood it is perhaps merely a consequence or aspect of offer and acceptance. Under section 66 the consideration is rather the money or value passing which moves the conveyance or transfer.”*
- 19.3 The Respondent submitted that consideration is “...what was received by the Vendor so as to move the transfers to the Purchaser as stipulated in the Agreement”: *Commissioner of State Revenue v Lend Lease Development Pty Ltd* (2014) 254 CLR 142 (*Lend Lease*), at 49.
- 19.4 The agreement reached between Ms Grice and the Trustee resulted in Ms Grice “surrendering, exchanging or converting” her entitlement to a lump sum from her Accumulated Account, in exchange for an 80 per cent interest in the Property. Concomitantly, the Trustee gave up its 80 per cent of its interest in the Property, in exchange for no longer being exposed to the liability of Ms Grice’s accumulated benefits.
- 19.5 Upon transfer of the Property to the Appellant, Ms Grice’s Accumulation Account was debited in the amount of \$9,440,000, being the full market value (valuable consideration) for the Property transferred.
- 19.6 The agreement to exchange one type of valuable property (a lump sum monetary payment from her Accumulation Account) for another type of valuable property (real property) constitutes valuable consideration (notwithstanding that the value of the items exchanged are equal).
- 19.7 In addition, the Respondent submitted that the decision to distribute the Property instead of a lump sum to Ms Grice resulted in the other beneficiaries being denied the opportunity to receive that portion of the Property. This was a material change to the Fund’s portfolio and affected the future entitlements of other Fund Members. However, how this consequence advances the Respondent’s argument is not entirely clear.

Appellant's Reply to the cited High Court Decisions

20. In response to the cited authorities the Appellant submitted, inter alia, as follows.

20.1 The decision in *Archibald Howie* is, on its facts, distinguishable from the present case. *Archibald Howie* was decided in the context of a reduction of share capital in a proprietary limited company in which the High Court held that: the rights of the shareholders arose out of the contract *inter socios*; and the reduction involving the payment of part of the paid-up share capital must be considered an effectuation of the contract of membership. However, in this case the trustee holds property not in its own right with a contractual obligation to make payments to members in accordance with the rules of the fund, but as trustee for the members as beneficiaries, with duties as trustee to deal with the property in accordance with the provisions of the trust deed. The circumstances of the exemption in Item 6 (b) are fundamentally different from those under consideration by the High Court in *Archibald Howie*, and hence, that decision does not assist in the interpretation of Item 6 (b). However, relevantly the High Court in *Archibald Howie* found that consideration is something which moves the conveyance and is not something which is the ordinary result of the conveyance.

20.2 In addition, in *Lend Lease* the High Court held at [50]:

"In these cases, the consideration which moved the transfer by VicUrban to Lend Lease of each Stage was the full performance, by Lend Lease, the several promises recorded in the 2001 DA (or the agreement as later varied and supplemented), in consequence of which VicUrban would receive the total of the several amounts set out in the applicable agreement. It was only in return for the promised payment of that total sum, by the various steps recorded in the applicable agreement, that VicUrban and was willing to transfer to Lend Lease the Land comprising the relevant Stage."

20.3 *Archibald Howie* and *Lend Lease* are authorities for the proposition that consideration "for" a transfer, or which "moves" a transfer, is the payment or performance by the transferee, the promise of which by the transferee was necessary, before the transferor would be willing to make the transfer. However, in the present case, the Trustee did not make a transfer of property because the Appellant agreed to a reduction in her Accumulation Account balance. The Trustee transferred the property because: the Appellant was entitled as a beneficiary to a lump sum payment; payment of the lump sum benefit in the form of property instead of money was permitted by the Trust Deed; and the Appellant accepted payment in that form. The reduction of the Accumulation Account balance was not a

matter of “valuable consideration” in the decision to transfer the Property rather it was the natural consequence following the distribution of a benefit. The reduction in the Accumulation Account balance cannot be said to have “moved” the conveyance.

Decision

21. I did not find the reasoning of the Respondent to be persuasive. I preferred and accepted the submissions of the Appellant and found their legislative analysis particularly helpful. I note that the Respondent did not offer any convincing alternative to this analysis.
22. I was satisfied that the transaction was a mere performance of the Trust by way of a withdrawal of a lump sum benefit from the Trust. Members were entitled to transfer amounts from their Pension Account to their Accumulation Account. Members were entitled to request and receive Benefits up to the value of the total of their Accounts in the Fund. If a member requested a Benefit be paid from their Accumulation Account, the Trustee was required to make good that claim through either monetary payment or by the transfer of investments of the Fund of equivalent value, with the Member’s consent. This was the scheme of the Trust. No contractual arrangement was necessary to give effect to this scheme and no contract arose.
23. The reduction in the Accumulation Account balance was the ordinary, and under the Trust terms necessary, accounting result reflecting the withdrawal of a Benefit. The adjustment in the Accumulation Account balance was a consequence of the payment of a Benefit. It was not payment (valuable consideration) for the Property, and it was not an offer that moved the transfer, as submitted by the Respondent.
24. The exemption from stamp duty created by Item 6 (b) of Schedule 2 of the Act applied to this performance of the Trust.
25. The Objection is allowed and the assessment is overturned.
26. I will hear the parties as to costs and any ancillary orders.

Dated this 26th day of March 2021

JUDGE ARMITAGE

LOCAL COURT JUDGE