IN THE COURT OF APPEAL [1998] QCA 234

SUPREME COURT OF QUEENSLAND

Appeal No. 9179 of 1997.
Appeal No. 9180 of 1997.

Brisbane

[Thakral Fidelity P/L v. CSD]

BETWEEN:

THAKRAL FIDELITY PTY LTD
A.C.N. 062 622 600
(Applicant) Appellant

AND:

THE COMMISSIONER OF STAMP DUTIES
(Respondent) Respondent

McPherson J.A.
Pincus J.A.
White J.

Judgment delivered 21 August 1998

Separate reasons for judgment of each member of the Court; McPherson JA and White J concurring as to the orders made; Pincus JA dissenting in part.

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1. IN APPEAL NO. 9179 OF 1997:

(A) APPEAL ALLOWED;

(B) ORDER THE RESPONDENT TO PAY TO THE APPELLANT:

(I) THE SUM OF THE ASSESSMENT PAID BY THE APPELLANT TO THE RESPONDENT ON 1 FEBRUARY 1996 NAMELY $3,154,264.25;

(II) INTEREST ON THE SAID SUM CALCULATED PURSUANT TO S. 24(4A) OF THE *STAMP ACT* AT 5.5% PER ANNUM;

(III) THE COSTS OF THE PROCEEDINGS (INCLUDING THE COST OF THE APPEAL AND ANY RESERVED COSTS) TO BE TAXED.

2. IN APPEAL NO. 9180 OF 1997:

(A) APPEAL ALLOWED WITH COSTS, INCLUDING COSTS OF THE APPLICATION BELOW NO. 2515 OF 1996;

(B) THE COMMISSIONER'S ASSESSMENT UNDER S. 56C IS SET ASIDE;

(C) THE MATTER OF THAT ASSESSMENT IS REMITTED TO THE COMMISSIONER FOR DUTY (IF ANY) PAYABLE UNDER THE *STAMP ACT* 1894 TO BE RE-ASSESSED ACCORDING TO LAW.

CATCHWORDS: **STAMP DUTY - judicial review of stamp duty assessments - issue and redemption of units in a property trust - whether the unit trust scheme was a "public unit trust scheme" - whether commissioner can express satisfaction in accordance with s. 56B(1A) before approval of the deed - transfer of shares in a company which was the legal owner of the trust property - whether value of trust property should be considered on an encumbered or an unencumbered basis - whether the application of a s. 56C is excluded by subs. 56C(16) - whether the definition of "full unencumbered value" in subs. 2A(2) applies - whether reference in subs. 56C(8) to "free of encumbrances" applies - whether liabilities of the trustee are encumbrances on the trust property.**

***Stamp Act* 1894, 22. 2A, 56B, 56C**
Kemtron Industries Pty Ltd v. Commissioner of Stamp Duties [1984] 1 Qd. R. 576
Chief Commissioner of Stamp Duties v. Buckle (1998) 72 A.L.J.R. 243.

Counsel: Mr D F Jackson Q.C. with him Mr D Savage for the appellant.
Mr B Gotterson Q.C. with him Mr J Logan for the respondent.

Solicitors: Phillips Fox for the appellant.
Crown Law for the respondent.

Hearing date: 13 May 1998.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 9179 of 1997
Appeal No. 9180 of 1997

Brisbane

Before McPherson J.A.
Pincus J.A.
White J.

[Thakral Fidelity P/L. v. C.S.D.]

BETWEEN:

THAKRAL FIDELITY PTY. LTD
A.C.N. 062 622 600
(Applicant) Appellant

AND:

THE COMMISSIONER OF STAMP DUTIES
(Respondent) Respondent

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 21 August 1998

These are appeals (no. 9179 of 1997 and no. 9180 of 1997) from a decision in the Supreme Court to which applications (no. 549 of 1996 and no. 2515 of 1996) were brought under the *Judicial Review Act 1991* to review decisions of the Commissioner of Stamp Duties assessing duty under the *Stamp Act 1894*. The first of those decisions related to an assessment dated 21 December 1995 under s.56B, and the other to an assessment dated 23 February 1996 under s.56C of that Act. Details of the facts, the assessments, and the relevant provisions of the Act appear in the reasons for judgment of Pincus J.A. on these appeals. It is not necessary to repeat them here further than is needed to explain what follows.

1. The assessment under s.56B

The assessment involved in the first of these appeals was made on 21 December 1995 and arises out of the redemption of units and the issuing of other units in a unit trust. Section 56B lays down a system for imposing stamp duty on dispositions in relation to unit trust schemes. In this context "disposition" is defined in s.56B(1) to include:

> "(b) the allotment or issue of a unit; and
>
> (c) the redemption, surrender or cancellation of the unit".

Consistently with the traditional character of stamp duty as a tax on instruments, the disponor and disponee of such a unit are required by s.56B(2A) to prepare and execute an instrument effecting or evidencing the disposition. The taxing system adopted is, by s.56B(4), then to make the instrument, which effects or evidences the disposition in relation to a unit, chargeable with duty as if it were a conveyance of an undivided share, in proportion to the total issued units under the scheme, in the property held by the trustee of the unit trust scheme.

The expression **unit trust scheme** is defined in s.56B(1) to mean a unit trust scheme, where any property that is the subject of the scheme is located in Queensland, or any business of the scheme is carried on there. The definition excludes or, more accurately, "does not include" a unit trust scheme: "(a) which is a public unit trust scheme ...". The expression **public unit trust scheme** is also defined in s.56B(1). It means a unit trust scheme of which the units are listed on a stock exchange, or a unit trust scheme in respect of which there is an approved deed for the purposes of what is now Part 7.12 of the Corporations Law. In practical terms, the result therefore is that the prime targets of the duty imposed by s.56B are what may be described as private unit trust schemes or, at any rate, not public unit trust schemes as defined. No doubt the reason for the exception in favour of public unit trust

schemes is to ensure that the tax imposed by the Act does not discourage the use of public unit trust schemes as a means of carrying on business in Queensland, and conversely promotes rather than stultifies business activity in this State. As a form of taxation, stamp duty is largely parasitic on such activity, and it is a prudent parasite that stops short of destroying its host entirely.

Whatever the reason, the definition of **unit trust scheme** is expressed not to include a "public unit trust scheme" as defined in s.56B(1). The definition of **public unit trust scheme** does, however, incorporate exceptions of its own. It is expressed *not* to include a unit trust scheme "in respect of which there is such an approved deed but under which -

> "(a) no units have been issued to the public; or
>
> (b) fewer than 50 persons are beneficially entitled to units under the scheme or 20 or fewer persons are beneficially entitled to 75% or more of the total issued units under the scheme..."

In submissions before us, para. (b) was conveniently designated the "spread" provision. It is not necessary here to set it out in full because it has no immediate relevance to the dutiability of the instrument or instruments under consideration.

Before finally arriving at the question for decision on appeal, it is necessary to refer also to s.56B(1A), which is as follows:

> "**(1A)** For the purposes of subsection (1), definition "public unit trust scheme", paragraph (a), where the commissioner is satisfied that, within 12 months of the date of the approval of a deed, units will be issued to the public to an extent and with such entitlements as are within the scope of that definition, the unit trust scheme shall be deemed to be a public unit trust scheme for the purposes of that definition."

A provisional first impression gained from reading s.56B(1A) is that it operates as an enlargement or extension of the definition in para. (a) of s.56B(1). A unit trust scheme, as defined in s.56B(1), does *not* include a **public unit trust scheme** as there defined, which is a

unit trust scheme of which the units are publicly listed or "in respect of which there is an approved deed" for the purposes of the Corporations Law. However, despite the terms of the definition and in particular the qualifications or exceptions introduced by para. (a) of it (if "no units have been issued to the public"), it is deemed to be a public unit trust scheme for the purposes of that definition in s.56B(1) if it satisfies s.56B(1A). The substantial requirement of s.56B(1A), briefly stated, is that the Commissioner of Stamp Duties is satisfied that, within 12 months of the date of approval of a deed, units "will be issued to the public to an extent and with such entitlements as are within the scope of that definition" in s.56B(1), which plainly refers to the "spread" provision in para. (b).

It is possible now to turn to the facts giving rise to this aspect of the appeal. They are that, by a trust deed dated 9 September 1987, a unit trust scheme Broadbeach International Property Trust (BIPT) was constituted, having as trustee Goldsea Pty. Ltd., in which all the issued units were held by Hesse Pty. Ltd. as trustee under a further unit trust scheme Broadbeach International Holding Trust (BIHT). All the units in BIHT were, immediately before the relevant events, held by Ormiston Pty. Ltd. and Pranbrooke Pty. Ltd., which between them also held all the issued shares in the primary trustee Goldsea Pty. Ltd. The taxpayer is one of two investment companies named Thakral, which in 1993 proposed to those then controlling the unit trust that units in BIPT be floated publicly on the stock exchange. Steps taken to do so included the issue to the appellant Thakral of 100,000 voting units in BIPT and the redemption by it of all units (numbering 212, 455, 672) previously held in BIPT by Hesse Pty. Ltd.

The redemption of those units involved a "disposition" as defined in s.56B(1) and liable as such to attract duty under s.56B(4) unless otherwise exempted as a "public unit trust scheme" under s.56B. The purpose or effect of the public flotation would, if the requirements

of s.56B were satisfied, be to transform the unit trust into a "public unit trust scheme" within the meaning of that section, with the incidental consequence of escaping liability for stamp duty imposed by the provisions of that section chargeable on the contemplated disposition of trust property.

With this in view, solicitors for the taxpayer applied to the respondent Commissioner to express herself as "satisfied" in terms of s.56B(1A) that, within 12 months of approval of a deed, units would be issued to the public so as to satisfy the spread provision. The solicitors' letter dated 31 March 1994 explained the proposal and forwarded deeds and other documents needed to enable an opinion to be formed. The application was successful and, after some further communications had passed, an officer on the staff of the Office of State Revenue provided a letter dated 19 April 1994 advising that the unit trust scheme would "be considered to be a 'public unit trust scheme' for the purpose of Section 56B of the [*Stamp Act 1894*]", provided (the letter went on) that:

> "1. the amended Trust Deed receives approval from the Australian Securities Commission and
>
> 2. units are issued to the public in satisfaction of Section 56B(1A) within 12 months of the date of approval of the Deed."

Thereafter, on 4 May 1994, the Australian Securities Commission duly approved the trust deed under Part 7.12 of the Corporations Law. On 11 June 1994, some 300,000 or more units were issued to some 4,000 or more members of the public, and, on 17 June 1994, units in the scheme were listed on the Australian Stock Exchange.

What has led to these proceedings, however, is that the Office of State Revenue later reconsidered the matter, and, on 21 December 1995, the respondent Commissioner issued the assessment now under review. That decision was taken because, despite the opinion expressed in the letter dated 19 April 1994, the Commissioner had concluded that s.56B(1A)

did not authorise the formation of the state of satisfaction required under that provision unless, at the time it was formed (and presumably also communicated), there was already in existence a trust deed which had been approved under Part 7.12 of the Corporations Law. At that date, no such deed existed because the Commissioner's opinion was formed at latest when it was communicated by the letter of 19 April, and it was not until 4 May 1994 that the trust deed was approved by the Australian Securities Commission. In the court below, the learned primary judge accepted the Commissioner's submission to that effect. This appeal no. 9179 of 1997 is against that decision.

In essence the Commissioner's submission in support of the decision below is that, in referring, whether directly or indirectly to the deed or its approval, the language throughout the definitions in s.56B(1) consistently uses the present tense. For example, the definition of unit trust scheme in s.56B(1) speaks, in para. (a) of a public unit trust scheme in respect of which "there *is* a deed"; and, in para. (b), of a fund "of which the trustee *is* an approved trustee". What is more important, the definition in s.56B(1) of "public unit trust scheme" is also expressed in the present tense. It refers to a unit trust scheme "of which there *is* an approved deed" for the purposes of the Corporations Law; and, in specifically excepting a unit trust scheme where either of para. (a) or (b) applies, it again speaks of a scheme as to which "there *is* such an approved deed". Accordingly it is said, for the purpose of the definition of **public unit trust scheme** in s.56B(1) there must be a deed that has already received approval under the Corporations Law.

The next step in the submission is that the extension, as I have described it, under s.56B(1A) does not operate to alter or affect this requirement that the deed be one which has already been approved under the Corporations Law. The language of s.56B(1A) and the ambit of its operation is limited by the introductory words of that subsection, which are "For

the purposes of subsection (1), definition 'public unit trust scheme', para. (a) ...". This, so it is submitted, has the consequence of strictly confining its operation or effect to the contents of para. (a), which is: "(a) no units have been issued to the public". Hence, or so the argument runs, it is only in connection with, or for the purposes of, that particular provision in para. (a) that the Commissioner is invested by s.56B(1A) with a power to be satisfied that "within 12 months of the date of the approval of a deed, units will be issued to the public ...". What subsection (1A) does not do is to confer on the Commissioner a power to be satisfied that a deed will be approved in the future if the fact is that it has not already been approved at the time that state of satisfaction is formed or communicated.

Such an interpretation of s.56A(1B) involves giving to the introductory expression "for the purposes of" in that subsection a thoroughly restrictive effect. The expression itself is commonly used in legislative and legal drafting, although it has not been the subject of judicial consideration in any comparable context. There are nevertheless reported decisions in which those words have been given a broad rather than a narrow or literal effect (see for example, *Rowden v. Kaine* (1973) 5 S.A.S.R. 434), to the point on some occasions of being ignored altogether, as in *Charles Calthrop Pty. Ltd. v. Commissioner of Stamp Duties* [1983] 2 QdR 662, 679. On any view, it appears to mean no more than, "for the purposes of applying" the relevant provision (which in this case is stated to be para. (a) of the definition in s.56B(1) of "public unit trust scheme"), a further or extended effect is to be ascribed to that provision. In the present case, the content of that paragraph is "no units have been issued to the public".

It is, however, impossible to apply the enlarging provisions of s.56B(1A) so as to limit them to those particular words in the relevant definition by reading them in isolation from the remainder of the definition in s.56B(1). A factor that tells against doing so is that s.56B(1A)

itself incorporates a provision ("units will be issued to the public to an extent and with such entitlements as are within the scope of that definition..."), which can only refer to para. (b) of the definition in s.56B(1). To read it in the manner proposed by the respondent Commissioner would produce a result that would be meaningless. The only way in which effect can be given to s.56B(1A) is to read it in conjunction with other parts of the definition of **public unit trust scheme**. That is the natural way to read a provision like para. (a) of that definition. Although for facility of comprehension it has been reproduced as a distinct provision, it is nevertheless an integral part of a single subsection, or, in this case, definition, as a whole. To adopt the latter approach is, as Mr Jackson Q.C. for the appellant pointed out, also consistent with the concluding words of s.56B(1A), which deem a unit trust scheme to be a public unit trust scheme "for the purposes of that definition".

Approached in that way, the function of s.56B(1A) becomes apparent. In applying that part of the definition of **public unit trust scheme** contained in para. (a) in the context of that definition as a whole, the Commissioner is entitled to be satisfied that, although no units have been issued to the public, units nevertheless will, within 12 months of approval of the deed, be issued ... etc. Section 56B(1A) is expressed not in the present but the future tense ("within 12 months ... units will be issued"). Once the Commissioner begins to consider future events in deciding whether or not the requisite state of satisfaction ought to exist, there is no obvious reason why consideration of that question should be restricted to the issuing of units in the future under an existing approved deed, rather than extended to issuing units in the future under a deed yet to be approved. Indeed, there is, as was emphasised more than once in the appellant's submissions, no reason why the expression "within 12 months of the date of approval of a deed, units will be issued" should not be read as referring to units being issued within 12 months of the date of approval of the deed whenever that event may take

place. Under s.56B(1A) the period of 12 months falls to be measured from the date of the approval, and not from the date of the Commissioner's satisfaction. Stated in another way, in arriving at a state of satisfaction about the matter in question, there is no compelling reason why the use of the present tense in the primary definition of **public unit trust scheme** in s.56B(1) ("there *is* an approved deed") should be carried across to and applied under s.56B(1A), when its concern is with future events ("within 12 months of the date of the approval of the deed, units *will* be issued"). To do so would be to deprive s.56B(1A) of much of its enlarging operation or effect.

Commercial convenience, which it has already been suggested is the underlying motivation for s.56B(1A), may be thought to favour the appellant's submission. Time and certainty count for much in affairs of business. A promoter who delays may miss the critical moment in the ebb and flow of the market and consequently strand his enterprise in the shallows of the commercial tide. In that connection, it is, as Mr Jackson Q.C. observed, not a difficult matter under s.1065 of the Corporations Law to gain approval from the Australian Securities Commission for a deed of the kind contemplated in this instance. By the terms of s.1067(2), the Commission is affirmatively required to grant its approval to a deed unless of opinion that it does not comply with the specifications of the relevant Division of the Act and of the regulations. Section 1069(1) prescribes the covenants to be contained in the deed, which are to be "to the ... effect" of those listed in that section. See also regulation 7.12.15 of the Corporation Regulations. The prescription is lengthy; but there is no reason why a competent lawyer would find it difficult to comply with. In the present case, those requirements were satisfied on or before 4 May 1994, when the Australian Securities Commission's approval to the deed was obtained, and by 11 June 1994 (which was well within 12 months of the Commissioner's letter of 19 April 1994) the units had issued to the

public, thereby satisfying the terms of the proviso contained in that letter. As events turned out, the prediction or satisfaction of the respondent Commissioner is therefore seen to have been well founded. There is no reason to regard it as not being authorised under s.56B(1A), or as otherwise invalid. In the course of the appeal, reference was made to the state of affairs that might ensue if the public issue had, for some reason, not proceeded. But, whatever consequences might be entailed, it is not sufficient reason for rejecting the conclusion reached here about the effect of s.56B(1A). Similar questions would also arise if the proposed public issue of units never took place for reasons that were quite unconnected with approval of a deed, and even where the approval to an existing deed had in fact been obtained under the Corporations Law without having to apply to the Commissioner to make a forecast under s.56B(1A).

It follows that the assessment dated 21 December 1995 cannot be allowed to stand. It was an assessment of an instrument evidencing a disposition in terms of s.56B of a unit, but of a unit which, because it was in a "public unit trust scheme", as described in s.56B(1A), was excepted from liability for the duty imposed by s.56B. The appeal in no. 9179 should therefore be allowed.

2. The assessment under s.56C

The assessment under s.56C made on 23 February 1996 was in respect of instruments transferring the shares held in Goldsea Pty. Ltd. by Ormiston Pty. Ltd. and by Pranbrooke Pty. Ltd. to Trust Company of Australia Limited. Goldsea, it will be recalled, was the trustee of the Broadbeach International Property Trust (BIPT), which was being replaced as trustee by Trust Company of Australia Limited for the purpose of the public issue of units in the scheme.

Generally speaking, transfers of shares in companies (which are a form of "marketable security" as defined in s.2 of the Act) are made liable for duty under the Act by ss.31A to 31Y of the Act and, in particular, s.31H(2). However, the dutiability of a transfer of shares in what may be shortly described as trust companies is specifically regulated by s.56C. Section 56C(6) requires the disponor and disponee of a share in a company to which s.56C applies to execute a transfer effecting or evidencing the disposition. By subs.(2)(a) of s.56C, that section applies to a company "which is the trustee of a trust and in that capacity carries on business in Queensland or owns property located in Queensland". On 4 May 1994, Goldsea was registered proprietor of land in Queensland, which was the principal component of the property subject to the BIPT trust. Section 56C therefore applied to impose duty on the transfers to Trust Company of Australia of the shares held by Ormiston and Pranbrooke in Goldsea.

The only substantial question in relation to the Commissioner's power to assess under s.56C in this instance is whether the Commission ought under s.56C(16) to have been satisfied that:

> "... a disposition in respect of a share in a company to which this section applies was not made in the contemplation of a disponor disposing or the disponee acquiring, directly or indirectly, for himself, herself or any person any benefit in relation to property held in trust, the commissioner may determine duty not to apply under this section in respect of the disposition."

As to that, it is not in doubt that, when the shares in Goldsea Pty. Ltd. held by Ormiston Pty. Ltd. and Pranbrooke Pty. Ltd. were transferred to Trust Company of Australia, that company was intended to become trustee in place of Goldsea. The transfer was effected on 12 December 1994, which was the same day as the units held by Hesse Pty. Ltd. in BIPT were redeemed. Both of those steps were taken as part of the process of substituting Trust Company of Australia as trustee in control of the assets, including the land in Queensland the

subject of the unit trust. It was all part of a single transaction designed to facilitate flotation of the public unit trust. In these circumstances it seems to me to be impossible to sustain the appellant's argument that the disposition of the shares in the capital of Goldsea was "not made in contemplation of" Hesse Pty. Ltd. disposing of a benefit in relation to property in Queensland held in trust subject to the BIPT unit trust scheme. The Commissioner was therefore justified in not being satisfied, etc., in accordance with s.56C(16).

The remaining question on this appeal concerns the quantum of the assessment. Section 56C(8) renders the instrument effecting a disposition in relation to a share in a company chargeable with duty under the Act:

> "... calculated as if it were a conveyance free of encumbrances of a prescribed undivided share in all of the trust property held by the trustee of the trust ... of which the company is ... trustee."

The expression **prescribed undivided share** is defined in s.56C(8A)(a) in such a way as to ascribe to a single share a value proportionate to the value of the total issued capital of the company. That definition is primarily directed to a case where one or more of the shares in the trustee company are transferred. But it would apply equally to a case like this, where it was all of the shares in the share capital of Goldsea that were being transferred to Trust Company of Australia. The value for the purpose of conveyance or transfer duty of the share transfer or transfers in this instance falls to be calculated in accordance with s.56C(8) simply as if it were "a conveyance free of encumbrances ... of the trust property held by the trustee" company Goldsea.

If matters stood there, it would perhaps not be difficult to arrive at a value of the trust property for the purpose of calculating duty. Item (4) under the heading Conveyance or Transfer in Schedule 1 to the Act imposes duty at specified rates on a conveyance or transfer -

> "(4) Of any property (except stock or marketable security or right in respect of shares) -
>
> (a) upon a sale for a consideration in money or money's worth of not less than the full unencumbered value of the property -".

In determining whether this provision applies in the present case, the first question is whether the transfer of the shares in Goldsea falls within the parenthetical exception in Item (4)(a). The term "marketable security" is defined in s.2 of the Act, as meaning, among other things, a company share, which therefore brings it within that exception but outside Item (4)(a) in part of the Schedule. On that footing, the relevant provision governing the applicable rate of duty is not Item (4)(a) but Item (4)(b). It applies to a conveyance or transfer of any property "in any other case to which paragraphs (1) and (2) do not apply". By "paragraphs (1) and (2)" it was presumably intended to refer to Items (1) and (2) in the Schedule. Those two Items are concerned with transfers of mortgages and other forms of property. They do not apply here. Consequently, the transfers of Goldsea shares are "any other case" to which Item (4)(b) applies. It provides for duty to be "calculated on the full unencumbered value of the property at the rates specified" in Item (4)(a).

The expression **"full unencumbered value"** is defined in various ways in s.2A of the Act. Section 2A(1) first adopts a broad definition of the expression stating it to mean "the full value of the property without regard to any encumbrance to which the property is subject ...". That definition is followed by a series of more specific definitions, of which that in s.2A(2) is:

> "**(2)** Where property is held or to be held pursuant to a trust, other than a public unit trust scheme (in this section **'trust property'**) -
>
> **"full unencumbered value"** means the full unencumbered value of the trust property held or to be held by the trustee for the trust, without regard to the debts or liabilities of the trustee of the trust."

The expression "public unit trust scheme" in s.2A(2) is defined in s.2(1) to mean a public unit trust scheme as defined in s.56B of the Act.

It is not difficult to see why two separate definitions in ss.2A(1) and 2A(2) were considered to be necessary. The reason is that in *Kemtron Industries Pty. Ltd. v. Commissioner of Stamp Duties* [1984] 1 Qd.R. 576 it was held that the value of trust property for conveyance or transfer duty purposes was to be calculated after first deducting liabilities in respect of which the trustee had a right to be indemnified out of that property. The reasoning underlying that conclusion has recently been approved in *Chief Commissioner of Stamp Duties (NSW) v. Buckle* (1998) 192 CLR 226, 247-247. Because a trustee is personally responsible for liabilities incurred in the course of his duties as such, but with a right of indemnity out of the assets, it was evidently, and correctly, considered appropriate to incorporate in s.2A(2) a separate definition providing, in the case of trust property, that such liabilities were to be disregarded in arriving at the full unencumbered value of trust property for the purposes of calculating duty under Item (4)(b). The result, in a practical sense, was to reverse the particular decision in *Kemtron Industries Pty. Ltd. v. C.S.D.*, while continuing to recognise the underlying theory that trust debts and liabilities are attributable to the trustee rather than to the property itself.

Section 2A(2) is, however, expressed to exclude a public unit trust scheme from the ambit of its operation. According to its terms, it applies only where property is held, or is to be held, pursuant to a trust "other than a public unit trust scheme", which is in turn defined in s.2 to mean a public unit trust scheme as defined in s.56B. Taken with the definition of **"unit trust scheme"** in s.2, the scope of the exclusion is, as Pincus J.A. observes in his reasons, very wide. I agree with his Honour's conclusion, and with the reasons he gives for it, that the holding of the property by Goldsea Pty. Ltd. in trust was in the circumstances sufficient to

make it a "public unit trust scheme" within the meaning of those definitions. I also agree that it follows that, because of the exclusion in s.2A(2) in favour of a public unit trust scheme, the definition of "full unencumbered value" in s.2A(2) does not in this case apply to the calculation of duty under Item (4)(b) under the Conveyance or Transfer heading in Schedule 1. Where I respectfully differ from his Honour is in relation to the consequences that flow from that conclusion.

The immediate result is that neither of the definitions in s.2A(1) or s.2A(2) of the expression **"full unencumbered value"** has any application to the present case. The broader definition in s.2A(1) does not apply for either or both of two reasons. First, because the subject matter of assessment is "property held or to be held pursuant to a trust", which is a topic specifically covered by s.2A(2), to which s.2A(1) is expressly made subject by its introductory words; and, secondly, because the liabilities of the trustees do not amount to "any encumbrance to which the property is subject": see *Kemtron Industries Pty. Ltd. v. C.S.D.* [1984] 1 Qd.R. 576. The specific definition in s.2A(2) in the case of property held in trust is applicable; but its operation in this case is displaced by the exclusion in favour of property held pursuant to a trust "other than a public unit trust scheme".

The effect is to throw the matter back to Item (4)(b) in the relevant heading of the Schedule, which requires duty on the share transfer to be assessed at the rate specified in Item (4)(a) "on the full unencumbered value" of the property transferred which, in accordance with s.56C(8), is to be calculated "as if it were a conveyance free of encumbrances of ... all of the trust property held by the trustee of ... which the company ... is trustee". In this context, the meaning of the expression "free of encumbrances" falls to be determined without assistance from any statutory definitions or, in other words, according to its meaning under the general law. As to that, it seems to me that the matter is concluded by the decision of the

High Court in *C.C.S.D. v. Buckle* (1998) 192 CLR 226. In that case the question for decision was the meaning of the expression "unencumbered value" in a statutory provision (s.66(1) of the New South Wales *Stamp Duties Act* 1920) when applied to a deemed conveyance of property subject to a trust. In analysing that expression in the context of liabilities for which a trustee was entitled to be indemnified out of the trust property, their Honours said (192 CLR 226, at 247-247):

> "the term 'trust assets' may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not 'encumbered' by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment 'takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation'. A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the 'trust assets' which may be enforced in the same way as any other equitable charge. However, the enforcement of the charge is an exercise of the prior rights conferred upon the trustee as a necessary incident of the office of trustee. It is not a security interest or right which has been created, whether consensually or by operation of law, over the interests of the beneficiaries so as to encumber them in the sense required by s.66(1) of the Act. In valuing the interests of beneficiaries which are conveyed by an instrument, there is no encumbrance which the Act requires to be disregarded."

This accords with their Honours' earlier opinion 192 CLR 226, at 245) that the word "unencumbered" was used in s.66(1) "not in a loose sense but to refer to security interests in, or charges or other liabilities which attach to, the property in question".

The expression "free of encumbrances" in 56C(8) of the *Stamp Act 1894* (Qld.) is indistinguishable from the word "unencumbered" in s.66(1) of the New South Wales Act. Indeed, in the final sentence quoted above from the reasons of the Court in *C.C.S.D. v. Buckle* their Honours said that, in valuing the interests of the beneficiaries which are covered by an instrument, there is "no encumbrance which the Act requires to be disregarded". Their Honours were referring there to the equitable "charge" as it was described over trust assets in

favour of a trustee in respect of liabilities properly incurred in and about the trust, but which they held not to be an "encumbrance" within the meaning of s.66(1) of the *Stamp Act*. In the case of the present appeal, it is the amount of duty on the transfer of Goldsea shares that falls to be calculated; but, by virtue of s.56C(8), that process is to be carried out on the basis of the legal fiction that it is the trust property that is being transferred and valued for the purpose of calculating duty on the transfer.

On that basis, the liabilities of the trustee Goldsea for which it has (or had) a right to indemnity out of the property of the trust ought not to have been disregarded, but taken into account, in arriving at the value for duty purposes of the share transfers to Trust Company of Australia Ltd. Because that was, as I understand it, not the basis on which the Commissioner's assessment of duty made on 23 February 1996 proceeded, it follows in my opinion that this appeal should be allowed with costs, and the Commissioner's assessment under s.56C set aside.

I agree with the orders numbered 1 which are proposed by Pincus J.A. in Appeal no. 9179 of 1997, but not with the orders numbered 2 which he proposes in relation to Appeal no. 9180 of 1997. As to that appeal, I would make the following orders:

2. In Appeal no. 9180 of 1997:

(a) appeal allowed with costs, including costs of the application below no. 2515 of 1996;

(b) the Commissioner's assessment under s.56C is set aside;

(c) the matter of that assessment is remitted to the Commissioner for duty (if any) payable under the *Stamp Act 1894* to be re-assessed according to law.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 9179 of 1997.
Appeal No. 9180 of 1997.

Brisbane

Before McPherson J.A.
Pincus J.A.
White J.

[Thakral Fidelity P/L v. CSD]

BETWEEN:

THAKRAL FIDELITY PTY LTD
A.C.N. 062 622 600
(Applicant) Appellant

AND:

THE COMMISSIONER OF STAMP DUTIES
(Respondent) Respondent

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 21 August 1998

These are appeals from judgments of the Supreme Court on applications for judicial review of stamp duty assessments. The first assessment related to an issue and redemption of units in a property trust, and the second to the transfer of shares in a company which was at all material times the legal owner of the property the subject of the trust.

As to the first assessment, the fate of the appeal depends on whether the primary judge was right to hold, as he did, that s. 56B(1A) of the *Stamp Act* 1894 (the Act) did not operate on the facts to produce the consequence that there was a "public unit trust scheme" for the purposes of the definition of that expression in s. 56B(1). The issues raised with respect to

the second assessment are two; the principal one is whether the value of the trust property, on which the duty is to be assessed, should be considered on an encumbered or an unencumbered basis.

Before the transactions said to attract duty took place, Goldsea Pty Ltd held property as trustee of the Broadbeach International Property Trust, all the units in which were held by Hesse Pty Ltd. Ormiston Pty Ltd and Pranbrooke Pty Ltd held all the shares in Goldsea Pty Ltd. Transactions in 1994 left Goldsea Pty Ltd in place as holder of the legal estate, but replaced that company by Trustee Company of Australia Ltd as trustee of the Broadbeach International Property Trust. The units of the Broadbeach International Property Trust held by Hesse Pty Ltd were redeemed and two new issues of units were made. On 4 May 1994 one hundred thousand units were issued to the appellant, Thakral Fidelity Pty Ltd as trustee for Trustee Company of Australia Ltd and on 11 June 1994 some millions of units were issued to the public. On the same day as the Hesse Pty Ltd units were redeemed the shares in Goldsea Pty Ltd were agreed to be transferred to Trustee Company of Australia Ltd and those transfers were effected on 12 December 1994. The first assessment relates to the redemption of units in Broadbeach International Property Trust on 4 May 1994 and the issue of 100,000 units on the same date to the appellant. The second assessment relates to the share transfers I have mentioned. The first assessment relies on s. 56B of the Act and the second on s. 56C.

Section 56B

As I have explained, the only issue raised with respect to the s. 56B assessment is whether there was at relevant times a "public unit trust scheme" within the meaning of the statutory definition. Subsection (4) of s. 56B provides in effect, so far as relevant, that "an

instrument transferring a unit or effecting or evidencing a disposition in relation to a unit shall be chargeable with duty as if it were a conveyance free of encumbrances of [an interest in the trust property] without regard to the debts or liabilities of the unit trust scheme". The word "disposition" is defined in s. 56B(1) in such a way as to include both the issue and the redemption here in question. The question is whether these dispositions were "in relation to a unit"; the word "unit" is defined for the purpose of the section to mean, in short, any right or interest of a beneficiary "under a unit trust scheme" and the definition of "unit trust scheme" excludes, among other things, a public unit trust scheme.

So that the only question is whether the unit trust scheme here in question was a public unit trust scheme. The definition of "public unit trust scheme" is as follows:

> "**. . .** means a unit trust scheme the units of which are listed on a stock exchange or a unit trust scheme as defined in section 2 in respect of which there is an approved deed for the purposes of the Companies (Queensland) Code, part 4, division 6 or the corresponding provisions of the Companies Code or Companies Act of any other State or a Territory or a deed of a class approved by order in council, but does not include a unit trust scheme in respect of which there is such an approved deed but under which -
>
> (a) no units have been issued to the public; or
>
> (b) fewer than 50 persons are beneficially entitled to units under the scheme or 20 or fewer persons are beneficially entitled to 75% or more of the total issued units under the scheme before or after a disposition of a unit or a series of dispositions of units which are pursuant to one transaction or arrangement (or what is substantially one transaction or arrangement) or a series of transactions or arrangements having a mutuality of purpose, whether or not in the case of a series of dispositions they involve the same or different persons." (emphasis added)

The definition is supplemented by subs. (1A) -

> "For the purposes of subsection (1), definition 'public unit trust scheme', paragraph (a), where the commissioner is satisfied that, within 12 months of the date of the approval of a deed, units will be issued to the public to an extent and with such entitlements as are within the scope of that definition, the

> unit trust scheme shall be deemed to be a public unit trust scheme for the purposes of that definition."

There is a definition of "unit trust scheme" in s. 2 and it is common ground that the scheme here in question falls within its scope. It is also common ground that the Commissioner obtained and expressed satisfaction within the meaning of subs.(1A); but that was done before approval of the relevant deed.

I shall call a unit trust scheme, as defined, simply a "scheme" and one in respect of which there is an approved deed an "approved deed scheme". The definition of "public unit trust scheme" says in effect, so far as relevant, that it is an approved deed scheme but not one which fails to comply with para. (a) or para. (b). Then subs. (1A) has the effect that for the purpose of para. (a), where the Commissioner is satisfied that within 12 months of the date of approval of the deed units will be issued in such a way as not to conflict with the restraints defined by para. (a) and para. (b), the scheme shall be deemed a public scheme. Although subs. (1A) uses the expression "the unit trust scheme" it means "a unit trust scheme" - i.e. any scheme which falls to be considered under the subsection. There is not now any dispute that the Commissioner was satisfied of the matter just mentioned. The contention for the Commissioner, in this Court, was that the satisfaction in question cannot be valid if reached, as in the present case, before the deed is approved. The approval contemplated is one under the *Companies (Queensland) Code*, part 4, division 6 or corresponding provisions elsewhere.

Subsection (1A) says at the end: "**. . .** the unit trust scheme shall be deemed to be a public unit trust scheme for the purposes of that definition". Both "unit trust scheme" and "public unit trust scheme" are as I have said defined; the definition of the former does not require that there be an approved deed; the definition of "public unit trust scheme" does so

require. A natural inference is that the "unit trust scheme" referred to in subs. (1A) need not be an approved deed scheme; of course, the intention the Commissioner asserts to be either expressed or implicit could have been made clear by simply inserting the words "in respect of which there is an approved deed" after "unit trust scheme" in subs. (1A), as is done, twice, in the definition of "public unit trust scheme" in subs. (1) of s. 56B.

Although subs. (1A), in its opening words, suggests that it is only concerned with para. (a), it is in fact concerned with both para. (a) and para. (b); what the Commissioner must be satisfied of is that the scheme is one which will not fall within the description in either para. (a) or para. (b). So, joining the language of subs. (1A) to that of the definition of "public unit trust scheme" in subs. (1), the statute says, in effect, that the definition does not ordinarily include an approved deed scheme which is excluded by para. (a) or para. (b), but does include a scheme where the Commissioner is satisfied that there will be an issue, not falling within the exclusions in para. (a) and para. (b), within 12 months of the date of approval of the deed. One contrasts the exclusion, in the principal part of the definition, with the inclusion effected by subs. (1A). The inclusion and the exclusion cover the same field in that both relate to paras. (a) and (b), but they differ in that the exclusory words refer to an approved deed scheme but the inclusory words refer merely to a scheme. This difference supports the notion that the inclusory words, in subs. (1A), are intended to apply whether or not the scheme is an approved deed scheme at the time it comes to be considered.

Arguments of convenience are advanced for and against the primary judge's conclusion on this aspect of the case. His Honour referred in his reasons (p. 12) to two matters favouring the Commissioner: that on the appellant's argument "the temporal

operation of the exemption afforded by the subsection may be extended for an indeterminate period in excess of 12 months" and, secondly, that it is unlikely that it was intended to make the Commissioner determine whether a deed would become an approved one.

As to the former point, the judge noted that if the appellant's argument were accepted, the possibility that a scheme might achieve the status of "public unit trust scheme" even if there was never such an issue as the definition contemplated was enhanced. An answer to these contentions is that what the Commissioner must be satisfied about is not that units might or could be issued complying with paras. (a) and (b) within the requisite time, but that they will be. That may perhaps be construed as requiring a state of mind in the Commissioner short of absolute certainty, but any significant degree of uncertainty must surely preclude satisfaction. If the Commissioner had any reason whatever to doubt that the deed would be approved, he could hardly be satisfied that units would be issued complying with paras. (a) and (b) within 12 months of the date of its approval. The use of the strong expression "will be" must be intended to enable the Commissioner to decline to declare his or her satisfaction unless it is quite clear that the event contemplated by subs. (1A) will occur. It seems at first sight odd that the statute should invite the Commissioner to form an opinion as to the likelihood of a deed being approved by another authority, under provisions of the *Corporations Law* and *Corporations Regulations*; but that would not necessarily be any more difficult than deciding whether a planned issue of units would eventuate.

The arguments from convenience are rather finely balanced and I prefer to decide the matter on the basis of such indications as are to be found in the language used. Subsection (1A) does not expressly require that the Commissioner not be satisfied of the matter there

mentioned until a deed is approved and the contrast in wording discussed above is against the Commissioner's contention, which is that the subsection should be read as if it expressed such a requirement.

On the only issue raised, which is whether subs. (1A) of s. 56B should be so read as to require that the state of satisfaction mentioned in it be reached only in relation to a scheme for which a deed has been approved, my opinion is in favour of the appellant.

It is necessary to mention three other points, with respect to s. 56B. First, in the Commissioner's written reply, it is said that the intended effect of s. 56B(1A) is to cater for "interim circumstances where units are first issued to the public pursuant to an approved deed but before it satisfies the 'spread test' in paragraph (b) **...** ". This submission does not appear to me to have any substance. The construction contended for is said to flow from the fact that the opening words of subs. (1A) refer only to para. (a) of the definition of "public unit trust scheme". It was not explained how one can reason from that to conclude that subs. (1A) should be read as if it made the enlargement of the definition of "public unit trust scheme" effected by it applicable only during the period I have mentioned; in any event, subs. (1A) in truth concerns both of paras. (a) and (b). Secondly, the Commissioner's outline of argument suggests that in some respects deficiencies in the information supplied to the Commissioner by the appellant's solicitors might be relevant; however, we were informed by counsel that this aspect is not relied on. Thirdly, the arguments include some discussion of the possibility of revocation of what is described as a "decision under s. 56B(1A)". It is unnecessary to discuss whether that could be done or, more generally, to discuss whether the Commissioner has any remedy if satisfaction is attained on incomplete or misleading information, or if for

some reason the Commissioner, having become satisfied, ceases to be so. No such questions arise here.

The Commissioner's assessment based on s. 56B must be set aside.

Section 56C

Section 56C(8), the relevant part of which is set out below, applies, it is common ground, to the share transfers I have mentioned. One of the two arguments raised by the appellant relating to this assessment is based on s. 56C(16) which reads as follows:

> "Where the commissioner is satisfied that a disposition in respect of a share in a company to which this section applies was not made in the contemplation of the disponor disposing or the disponee acquiring, directly or indirectly, for himself, herself or any person any benefit in relation to property held in trust, the commissioner may determine duty not to apply under this section in respect of the disposition."

The other question, which I think to be a more difficult one, is whether the value of the property on which duty is chargeable is arrived at taking into account, or on the other hand ignoring, monies secured on that property. The precise amount secured does not clearly appear from the material, so far as I can discover, but is not I think of present consequence.

The Commissioner's assessment under s. 56C depends on bringing within the scope of s. 56C(8) the transfers of shares in Goldsea Pty Ltd, held by Ormiston Pty Ltd and Pranbrooke Pty Ltd, to Trustee Company of Australia Limited. Under that subsection, if it applies to a transfer, duty is chargeable as if the transfer were -

> "a conveyance free of encumbrances of a prescribed undivided share in all of the trust property held by the trustee of the trust which, as the case may be, is the trust of which the company **. . .** is trustee".

When the matter was before the primary judge, it was argued for the appellant that subs. (8) could not apply because Goldsea Pty Ltd was at relevant times a bare trustee or a trustee of a

constructive or resulting trust. This argument was abandoned before us. In lieu of that, an oral submission was made to us that Goldsea Pty Ltd was indeed a trustee within the meaning of subs. (8), but that s. 56C cannot apply because its application is excluded by s. 56C(16), set out above. The argument advanced was that the dispositions in question were the transfers of the shares I have mentioned and that the disponors did not dispose of, nor did the disponees acquire, "any benefit in relation to property held in trust".

It was said for the appellant that the subsection applies only where the acquisition of a benefit in relation to property held in trust occurs in consequence of a share transfer. As was conceded by counsel for the appellant, the interpretation of subs. (16) put forward is equivalent to reading the subsection as if it said, "was not one under which the disponor disposed of or the disponee acquired . . . any benefit in relation to property held in trust" (emphasis added). To read the provision in this way is to alter its meaning; the subsection does not speak of a disposition under or by virtue of which a benefit in relation to property held in trust is acquired, but of one made in contemplation of the acquisition of such a benefit. I see no reason why the suggested judicial emendation of the language of the section should be made and the argument, founded on the interpretation I have rejected, must share its fate.

No other argument - i.e. no argument not dependent on acceptance of the interpretation of subs. (16) just discussed - was advanced in favour of the proposition that s. 56C(16) has the effect of making the relevant duty inexigible. But an argument was advanced with respect to subs. (8) concerning the amount of duty. An instrument chargeable with duty under s. 56C is to be chargeable as if it were a "conveyance free of encumbrances"

of the underlying property. Under the relevant part of Schedule 1, namely cl. 4, under the heading "Conveyance or Transfer", duty is calculated in the way there stipulated. Clause 4 deals with a conveyance or transfer of "any property (except stock or marketable security or right in respect of shares)" and that applies because the deemed conveyance is one of such property.

Clause 4 deals with two situations. Clause 4(a) refers to a conveyance "upon a sale for a consideration in money or money's worth of not less than the full unencumbered value of the property", and cl. 4(b) deals with a conveyance "in any other case to which paragraphs (1) and (2) do not apply". It is unnecessary to use cl. 4(b) if the conveyance is caught by cl. 4(a). Here, the consideration was only $3.00 and the value of the property deemed to have been conveyed was greater than that sum. Therefore cl. 4(b) applies and duty must be calculated on "the full unencumbered value of the property".

The expression "full unencumbered value" is defined in s. 2A, but that definition may not be applicable because s. 56C(8) itself requires that the duty be calculated as if the deemed conveyance were one "free of encumbrances of a prescribed undivided share in all of the trust property". The expression "prescribed undivided share" is defined in subs. (8A)(a), so far as relevant for the purposes of the present case, as:

> "the proportion of the value of the total issued capital of the company which the commissioner determines is represented by the share".

This definition appears at first sight to be at odds with the scheme of subs. (8), which requires the transfer of the shares to be charged with duty to be calculated as if the transfer were a conveyance, not of part of the capital of the company, but of property held in trust. But the intention is that the fraction of the trust property deemed to be transferred is the same as the

fraction of the capital of the company represented by the shares transferred.

The Commissioner has to charge duty on the share transfer as if it were a conveyance free of encumbrances of the relevant property of the trust. Then, as I have pointed out, cl. 4(b) of that part of the Schedule which deals with conveyances requires that duty be charged on the "full unencumbered value of the property". The expression "full unencumbered value" is defined in s. 2A in such a way as arguably to exclude the subject transfer; but the expression "free of encumbrances" which is used in s. 56C(8) is undefined. Its ordinary meaning, however, must be free of mortgages or other securities; see Commissioner of State Revenue (Vic) v. Bradney Pty Ltd (1996) 96 A.T.C. 5130 at 5134.

It is convenient to approach the problem, in the first instance, on the assumption that it is the definition of "full unencumbered value" in s. 2A of the Act which governs this situation - i.e. to approach it unconstrained by the reference in s. 56C(8) to "free of encumbrances". Then one finds in s. 2A a definition of "full unencumbered value" which would require assessment of duty on "the full value" of the property "without regard to any encumbrance to which the property is subject". But that is expressly subject to subss. (2) to (10) and subs. (2) reads as follows -

> "Where property is held or is to be held pursuant to a trust, other than a public unit trust scheme (in this section **'trust property'**) -
> **'full unencumbered value'** means the full unencumbered value of the trust property held or to be held by the trustee for the trust, without regard to the debts or liabilities of the trustee of the trust".

Here, the property actually being transferred is shares but the deemed conveyance is one of the underlying property - i.e. the property the subject of the trust. The appellant argued

that that property is excluded from the definition in s. 2A(2) by the words "other than a public unit trust scheme". The expression "public unit trust scheme" is defined in s. 2 to mean "a public unit trust scheme as defined in section 56B". The definition, some discussion of which appears above, is to the effect that a public unit trust scheme is a certain sort of unit trust scheme and "unit trust scheme" is defined in s. 2 to mean, to express it rather shortly, "an arrangement made for the purpose, or having the effect of providing, [for certain persons], facilities for the participation by them . . . in any profits or income arising from [the trust property or trust business]". The Commissioner's argument is that the exclusion "other than under a public trust scheme" in s. 2A(2) does not apply, because the property in question is held and is to continue to be held by Goldsea Pty Ltd on a bare trust and, says the Commissioner, a bare trust cannot be a public unit trust scheme. (Ironically, this argument, that Goldsea Pty Ltd held on a bare trust, was put on the side of the appellant below.) The Commissioner's difficulty is that a public unit trust scheme is not a trust, if one follows the definitions through, but a certain sort of arrangement. Putting it accurately enough for present purposes, the kind of arrangement contemplated is one for the purpose, or having the effect, of enabling people to participate in profits from trust property or trust business.

So that although the expression in s. 2A(2), "pursuant to a trust, other than a public unit trust scheme", appears to imply that a public unit trust scheme is a kind of trust, it is not; it is an arrangement relating to a trust. Therefore the words "other than a public unit trust scheme" must be read as excluding from the definition in s. 2A(2) property held pursuant to such an arrangement. On the facts, it seems clear that the holding of the property by Goldsea Pty Ltd, in trust, was part of the arrangement, constituted by the various transactions summarised above; for there to be a public unit trust scheme, there had to be a holding of property in trust and it was that function which was to be and has been performed by Goldsea

Pty Ltd. The primary judge held that "**. . .** the matters which took place on 4 May 1994 were all interdependent parts of the one preconceived plan **. . .**".

It follows that the definition of "full unencumbered value" in s. 2A(2) does not apply in the instant case. The next problem is whether the exclusion of the trust here in question from the definition of "full unencumbered value" entitles one to treat the reference in the Schedule to "full unencumbered value" as devoid of all meaning. Perhaps the exclusion of property held pursuant to a public unit trust scheme was merely intended to make the statutory definition inapplicable and the ordinary meaning of "full unencumbered value" applicable. If the exclusion was, on the other hand, intended to imply that where property is held pursuant to a public unit trust scheme, the expression "full unencumbered value" is to mean "full encumbered value", one can only say that this intention has been clumsily expressed.

The conclusions I draw from the foregoing discussion are that the exclusion from s. 2A(2) of property held pursuant to a public unit trust scheme applies to the present case; and that such exclusion carries with it a possible implication that, in relation to the subject property, the expression in the Schedule "full unencumbered value" is to be read as "full encumbered value". To return now to the Schedule, and to s. 56C(8) with its reference to "free of encumbrances", there is seen to be a potential conflict between the indication in that subsection itself that, in calculating the duty, the trust property is to be treated as if it were encumbrance-free and the possible implication from the definition of "full unencumbered value", just analysed. That conflict should be resolved in favour of the plain statement in the statute and against the possible implication. It follows that the Commissioner succeeds on this point, in my opinion; duty on the share transfer is to be exacted without regard to encumbrances on the property held, subject to the trust, by Goldsea Pty Ltd.

Since writing the above, I have considered the decision of the High Court in Chief Commissioner of Stamp Duties (NSW) v. Buckle (1998) 192 CLR 226. I do not understand the appellant to contend that that decision alters the position for which it has argued. In Buckle's case it was pointed out that:

> "The entitlement of the beneficiaries in respect of the assets held by the trustee which constitutes the 'property' to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves." (252)

Here the question is not one of duty on beneficial interests, but one of duty on a deemed conveyance of the trustee's interest - the legal estate; what is deemed to have been conveyed under s. 56C(8) is a share (in this case a 100% share) "in all of the trust property held by the trustee". That property is encumbered, but the deemed conveyance is one "free of encumbrances".

What was held in Buckle does not determine the question whether the deemed conveyance of the property held by the trustee, in the present case, is to be treated as free of encumbrances, or not. The subsection provides the answer to that question; if the requirement in s. 56C(8) that the deemed conveyance be free of encumbrances does not apply here, it would appear never to apply.

Summary

1. The Commissioner's assessment under s. 56B is not justified by that provision and must be set aside.

2. The Commissioner's assessment under s. 56C must stand.

Orders:

1. In Appeal No. 9179 of 1997:

(a) appeal allowed;

(b) order the respondent to pay to the appellant:

(i) the sum of the assessment paid by the appellant to the respondent on 1 February 1996 namely $3,154,264.25;

(ii) interest on the said sum calculated pursuant to s. 24(4A) of the *Stamp Act* at 5.5% per annum;

(iii) the costs of the proceedings (including the cost of the appeal and any reserved costs) to be taxed.

2. In Appeal No. 9180 of 1997: appeal dismissed with costs.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 9179 of 1997.
Appeal No. 9180 of 1997.

Brisbane

Before McPherson J.A.
Pincus J.A.
White J.

[Thakral Fidelity P/L v CSD]

BETWEEN:

THAKRAL FIDELITY PTY LTD
A.C.N. 062 622 600
(Applicant) Appellant

AND:

THE COMMISSIONER OF STAMP DUTIES
(Respondent) Respondent

REASONS FOR JUDGMENT - WHITE J

Judgment delivered 21 August 1998

I have read the reasons for decision of McPherson JA in respect of both appeals and agree with the orders which his Honour proposes and the reasons which he has given.