SUPREME COURT OF QUEENSLAND

CITATION:	*McGowan & Anor v Commissioner of Stamp Duties* [2001] QCA 236
PARTIES:	**TIMOTHY WILLIAM McGOWAN** (appellant) **STEPHEN FRANCIS ROCHE** (appellant) v **COMMISSIONER OF STAMP DUTIES** (respondent)
FILE NO/S:	Appeal No 5631 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Case Stated
DELIVERED ON:	22 June 2001
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2001
JUDGES:	McPherson JA, Williams JA, Helman J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**Appeal dismissed. Questions answered as follows:** **Question (a): Yes.** **Question (b): The heading *Conveyance or Transfer* in Schedule 1 to the Stamp Act 1894.** **Question (c): Yes.** **Question (d) to (h): Unnecessary to answer** **Question (e):The costs of and incidental to stating this case and of the appeal should be borne and paid by the appellants**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – APPEAL, CASE STATED, ETC – QUEENSLAND – whether the Commissioner was correct in including as part of the unencumbered value of a partnership interest transferred on which duty was assessed two items described as "work in progress" TAXES AND DUTIES – STAMP DUTIES – WHAT TRANSACTIONS OR INSTRUMENTS ARE LIABLE – CONVEYANCE OR TRANSFER ON SALE – QUEENSLAND CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER

MATTERS – whether the rectification of the deed on 21 July 1999 had the result that two provisions of the same contract were irreconcilably inconsistent

Partnership Act 1891 (Qld), s 23(1)
Stamp Act 1894 (Qld), s 2A(5), s 2A(8), s 4(1), s 24, s 54(1), s 54(2), s 80(3), s 81, Schedule 1

Brice v Bannister (1878) 3 QBD 569, considered
Cachia v Isaacs (1985) 3 NSWLR 366, considered
Chia v Ireland [2000] SASC 47, considered
Coughlan v Federal Commissioner of Taxation (1991) 91 ATC 4505, considered
Don King Productions Inc v Warren [1999] 3 WLR 276, applied
Federal Commissioner of Taxation v Everett (1980) 143 CLR 440, considered
Hawley Partners Pty Ltd v Commissioner of Stamp Duties (Qld) (1996) 96 ATC 4847, considered
Healthcorp Ltd v Commissioner of Stamp Duties [1992] 1 Qd R 610, considered
Henderson v Federal Commissioner of Taxation (1970) 119 CLR 612, distinguished
S J Mackie v Dalziell Medical Practice Pty Ltd [1989] 2 Qd R 87, considered
Sobell v Boston (1975) 1 WLR 1587, considered
Underwood, Son & Piper v Lewis [1894] 2 QB 306, considered

COUNSEL: J A Logan SC for the appellants
K Dorney QC with D Marks for the respondent

SOLICITORS: McCullough Robertson for the appellants
Crown Solicitor for the respondent

[1] **McPHERSON JA**: This is an appeal by way of case stated under s 24 of the *Stamp Act 1894* against an assessment by the Commissioner of Stamp Duties of duty on an instrument described as a Deed of Assignment dated 8 July 1998 to which the appellants are parties. The circumstances in which the Deed came to be executed are as follows. Before 30 June 1998, the appellants Messrs Roche and McGowan carried on in partnership with Mr K G Shine the practice of solicitors in Toowoomba. On or about that date Mr Shine decided to retire from the partnership. On 8 July 1998, he executed the Deed of Assignment in which he is designated the Owner and Messrs McGowan and Roche are the Assignees.

[2] In its original form, the Deed recited (A) that the partnership and the capital assets of the partnership were vested in the partners in shares of one third each; and (B) that the Owner had, for the consideration expressed in the Deed, agreed to assign to the Assignees all his right, title and interest in and to his one third interest in the capital assets and future profits of the partnership. Clause 2.1 of the Deed then provided that, for the consideration and subject to the terms of the Deed, the Owner:

> "… transfers to the Assignees on and from the date of Assignment his one third interest in the partnership including:
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> (a) the capital and assets of the partnership, including
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> (i) the business carried on by the partners; and
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> (ii) all contracts entered into by the partners in the course of the business of the partnership; and
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> (b) the future profits of the partnership … for the financial year ended 30 June 1998 …".

By cl 3 of the Deed, the consideration or purchase price was defined as follows:

> "3.1 The consideration or purchase price for the assignment is a sum determined as follows:
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> (a) for the Owner's interest in the debtors unbilled disbursements and goodwill of the partnership – the sum of $1.00.
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> 3.2 In addition the Assignees acknowledge that the Owner has, and will have as at 30 June 1998, an entitlement to a one third share in the work in progress of the partnership as at that date. The Owner has agreed with the Assignees that the value of that entitlement will be $1 million and that that sum will be payable to the Owner by 120 equal monthly instalments, the first of such instalments to be paid on 31 July 1998 and thereafter at the end of each month."

The Deed also contained provisions concerning Mr Shine's undrawn profits, indemnities, bank accounts, and other matters, and in cl 14.1 a covenant in restraint of trade.

[3] The Commissioner assessed the Deed to stamp duty under cl (4)(a) or alternatively (4)(b) of the heading **Conveyance or Transfer** in Schedule 1 of the Act, read with s 54(1) and s 2A(5) of the *Stamp Act*. By force of s 4(1) of the Act, ad valorem duty is charged at the rates specified in the Schedule on a conveyance or transfer:

> "(4) Of any property … (a) upon a sale for a consideration in money or money's worth of not less than the full unencumbered value of the property."

Section 54(1) is the familiar provision that imposes duty, chargeable as if it were an instrument of conveyance of the property, on any contract or agreement for sale of any property or "any contract or agreement whereby a person becomes entitled or may … become entitled to the conveyance or transfer of any property". In applying the provision in cl (4)(a) of the heading **Conveyance or Transfer** in Schedule 1, s 2A(5) of the Act ascribes a meaning to the expression "full unencumbered value" in a case where the relevant "property" represents an interest in a partnership held by or acquired by a person. Without descending to all of its detail, s 2A(5) provides that the full unencumbered value of a partnership interest is to be "the greatest" of three specified amounts, of which (c) is "the total capital amount represented by the partnership interest". Section 2A(8) then adds that, for the purposes of the definition of "full unencumbered value" in s 2A(5)(c), the total capital amount represented by the partnership interest shall include:

> "… all proprietorship of property and assets, by whatever name called, attaching to the partnership interest …".

[4] In assessing the Deed of Assignment to duty under these provisions, the Commissioner adopted the certified balance sheet of the partnership for the year ended 30 June 1998, which he was entitled to do: *Healthcorp Ltd v Commissioner of Stamp*

Duties [1992] 1 Qd R 610, 624. In that balance sheet, the total partnership funds are shown as $2,782,269.78, represented by the addition of debtors of $455,321.21, unbilled disbursements of $734,597.62, work in progress of $20,914 "SM" (which refers to an earlier partnership of Shine Murdoch), and other work in progress of $3 million, less current liabilities of $2,782,269.78. The Commissioner's assessment aggregated those items to $4,210,833.70 and arrived at a figure of $1,403,611.23 as representing the full unencumbered value at its "greatest" amount of Mr Shine's one third share of the partnership interest which was being transferred by the Deed from him to the Assignees: see para 10(g) of the Case Stated. The associated Form S(a) submitted by the appellant was amended by the Commissioner to incorporate those values. It is not disputed that ad valorem duty calculated by reference to that amount is $49,863.75.

[5] The point at issue on this appeal is the Commissioner's action in including as part of the unencumbered value of the partnership interest transferred on which duty was assessed the two items described in the balance sheet as representing "work in progress". The appellant taxpayers, for whom Mr Logan SC appeared, submitted that "work in progress" was purely an accountant's conception adopted for balance sheet purposes; and that it was not recognised in law as "property" within the meaning of the provisions of the *Stamp Act* and, in particular, of the reference in s 2A(8) to "partnership interest" as including "all proprietorship of property and assets, by whatever named called, attaching to the partnership interest".

[6] My immediate impression is that the appellants' submission is directly contradicted by the provisions of cl 2.1(a)(ii) of their own Deed of Assignment, which, as we have seen, transfers to the Assignees the one third interest of Mr Shine in the partnership including "the capital and assets of the partnership", which are in turn specifically defined to include under (iii) "all contracts entered into by the partners in the course of the business of the partnership". Since "work in progress" is work being carried out under contracts entered into by partners with clients of the firm in the course of the solicitors' practice, it appears that the Deed itself acknowledges Mr Shine's share of that work in progress to be part of the assets assigned or transferred to the appellant taxpayers as Assignees under the Deed. On behalf of the appellants, Mr Logan nevertheless submitted that to approach those contracts or "work in progress" in that way is inconsistent with the reasoning in *Henderson v Federal Commissioner of Taxation* (1970) 119 CLR 612. The decision in that case was concerned with the question of when the income of a partnership of accountants was "derived" for the purpose of assessment to tax under the *Income Tax Assessment Act* 1936-1966. The Full High Court, affirming the decision of Windeyer J, held it was derived, and so became assessable, when the right to payment for work done was earned, and not when the payment due in respect of that indebtedness was in fact received. In arriving at this conclusion Windeyer J referred (119 CLR 612, 635) to the decision in *Duple Motor Bodies Ltd v Inland Revenue Commissioners* [1961] 1 WLR 739, in which the House of Lords held that an increase from one year to the next in the stock-in-trade and work in progress of a manufacturer was to be regarded for income tax purposes as a "receipt"; or, as Lord Reid expressed it:

> … sums which would have gone to swell the year's profits are represented at the end of the year by tangible assets, the extra stock-in-trade which they have been spent to buy. So to omit stock-in-trade would give a false result."

[7] Having referred to those and other observations in the speeches in that case, Windeyer J went on to confine them to work in progress consisting of "tangible things, goods in the process of manufacture from raw materials, things which when completed will become stock in trade". In discussing the reason for so restricting it, his Honour explained (119 CLR 612, 635-637):

> "But 'work' in that sense does not connote abstract activity, work done and labour expended. It denotes concrete tangible things, work on hand. But the ambiguity of the word 'work' and the attraction for accountants of the phrase 'work in progress' can I think mislead. In my opinion it is a mistake to suppose that the notion of the value of work in progress, in the sense of things uncompleted by a manufacturer or craftsman, can be simply transferred to uncompleted services by a tradesman or the practitioner of some profession, and to assume that it can then be applied in the calculation for income tax purposes, of income derived …. A lawyer retained to write an opinion or draw a deed cannot ordinarily say that he has earned any income by his work until he has produced the result of it … A half-written legal opinion, a deed drawn in part only, plans unfinished and still on the drawing board, an incomplete balance sheet, are not like goods in the course of manufacture. When completed they are not valuable because of their physical properties, but for the information they convey or the legal effect they produce."

The question discussed in *Henderson's* case and, since it was decided, in some other matters by courts and boards of review or their equivalent in Australia was, however, different from that under consideration in the present case. There it was whether profits had been derived during a particular taxation year of trading, and so amounted to "income" liable to taxation in that year. For that purpose, the High Court in *Henderson's* case regarded stock-in-trade that was the tangible product of activity during the year of income as an item properly brought to account on the revenue side of the profit and loss account of a manufacturing business. Here the question is not whether "work in progress" is to be included in arriving at the taxable profit of a solicitors' partnership as representing income "earned" or "derived" in a particular year before completion of the work; but whether it correctly finds a place as an asset in a balance sheet, whose function it is to ascertain the net worth or value of an enterprise at a particular date, which is not always, or necessarily, selected by reference to the last day of a particular financial year or any other period of trading or business activity.

[8] Since the function of a balance sheet is to show the value of the business at the date selected by deducting current and contingent liabilities from current and contingent assets, it would be surprising if, in the case of a solicitor's practice, anticipated future receipts based on work in progress under existing contracts were to be excluded from consideration as being no part of the "property" of that business. It would certainly be potentially productive of legal liability if accountants followed a practice of recording, as assets in balance sheets prepared for professional practitioners, items which had no existence or justification in law. In the case of a solicitor's practice, the assets often consist of little else but work in progress, as indeed is illustrated in the case of Shine Roche McGowan where, "work in progress" appears in the balance sheet as by far the most valuable single item ($3,000,000) in the aggregate assets ($4,210,833) of the partnership at 30 June 1998.

[9] It is helpful to test the appellants' submission by reference to the simple example of a solicitor practising as a sole practitioner. Apart from items such as unpaid fees for work done for which clients have already been billed (represented in the partnership balance sheet as "debtors"), the remaining assets of a practitioner are likely to consist primarily of the two items of: (1) disbursements made on behalf of clients, for which payment has yet to be claimed ("unbilled disbursements"); and (2) the value of work done but not yet completed and charged for by the solicitor ("work in progress"). As to the latter, a solicitor has, as a matter of law, generally no right to payment for work done on a particular client "file" until it is completed. That is so because an agreement for work and labour in the form of legal services is in law regarded as prima facie an entire contract under which payment does not become due until completion of the work. See *Underwood, Son & Piper v Lewis* [1894] 2 QB 306; *Cachia v Isaacs* (1985) 3 NSWLR 366, 377. That, at least, is the approach adopted at common law, although it was, for the reasons given by Jessel MR in *Re Hall v Barker* (1878) 9 Ch D 538, 543-544, not the rule in equity before the Judicature Act. No doubt because it is the general rule, most solicitors in practice adopt the precaution of requiring some payment in advance to cover disbursements and work in progress in the expectation of ultimate settlement of an action or its determination by judgment. Money paid in that fashion would, however, ordinarily be held by the solicitor in trust and so would not appear in a balance sheet as assets of the solicitor concerned.

[10] Subject to any special agreements or arrangements, relations between solicitor and client are, as regards payments for work done as well as other matters, governed by the general law of contract. See *Cachia v Isaacs* (1985) 3 NSWLR 366, 377. As such, the prima facie rule that the right to payment is dependent on complete performance is subject to the qualification that the solicitor may, for good cause and on giving reasonable notice, decline to act further in the action and thereupon sue the client for costs in respect of the prior conduct of the matter (3 NSWLR 366, 377). Whether there is in law a further qualification that a solicitor may, on reasonable notice at any time and without good cause, terminate the retainer appears doubtful, or at least uncertain (*ibid*). The decision in *Underwood v Lewis* [1894] 2 QB 306 continues to stand as general authority that, in the absence of agreement to the contrary, the solicitor is in such circumstances not entitled to a quantum meruit for work done. On the other hand, as was said by A L Smith LJ in that case ([1894] 2 QB 306, 314):

> "… the client may put the solicitor in such a position as to entitle him to decline to proceed; for instance, if the solicitor asks for necessary funds for disbursements and such funds are refused by the client, the solicitor is not bound to go on; and, speaking for myself, I may say that the solicitor is not bound to go on acting for the client if the client insists on some step being taken which the solicitor knows to be dishonourable, and many other cases may be supposed in which the solicitor may be entitled to refuse to act for the client any further."

And, as his Lordship concluded, in any case in which the client has hindered and prevented the solicitor from continuing to act as a solicitor should act, "then upon notice he may decline to act further; and in such case the solicitor would be entitled to sue for the costs already incurred".

[11] Examples of that kind are simply applications of the general principle exemplified in *Planché v Colburn* (1831) 8 Bing 14 that, if a party to a contract for services wrongly repudiates it before the work is completed, the party doing the work

is entitled to a quantum meruit for services performed, even if, as it was in the case mentioned, the incomplete work is, objectively speaking, of little or no value to the client or anyone else. It is, in any event, not often that steps taken in the course of instituting an action and bringing it to trial are of no value at all to the client who gave instructions for them. The half-written opinion or half drafted deed mentioned by Windeyer J may be examples; but issuing proceedings, delivering pleadings and particulars, arranging for discovery, answering interrogatories and generally attending to and prosecuting an action towards its conclusion are all activities requiring professional skill and time, which confer on the solicitor who performs them a lien over documents and funds held on behalf of the client. In most cases, it is the existence of that lien, or its assertion, that effectively precludes the client from seeking legal advice or assistance elsewhere without first paying for services performed by his previous solicitor. In this, as in most other matters, accounting practice which treats "work in progress" as an asset of a solicitor's practice is no more than a reflection of the underlying legal principles and conceptions involved.

[12] There must inevitably be some actions and matters in a solicitor's practice that, through default on the part of the client, are not brought to a conclusion after professional work has been done on them, and so give rise to an enforceable claim, for what it is worth, for payment for the services rendered. No doubt there are also many more that reach a conclusion that results in a right to recover professional costs. At any time in a professional practice, there must be even more that are still at an incomplete stage of proceeding, but about which it can fairly be predicted that a right to payment will or may arise in due course. Those falling within the first two categories are choses in action and so are plainly "property" within any accepted meaning of that expression. Even if the contingent rights to payment which occupy the third category are more open to debate, it is difficult to deny them the character of "property" according to ordinary conceptions.

[13] If, as is sometimes suggested, assignability is a test of the proprietary character of a thing, the decision in *Brice v Bannister* (1878) 3 QBD 569 shows that a right or expectation to future payment under a contract not yet performed or completed is capable of assignment in equity. See the discussion in *Durham Bros v Robertson* [1898] 1 QB 765, 768. Under the principle in *Tailby v Official Receiver* (1888) 13 App Cas 523, 543, future property, possibilities and expectancies are assignable in equity by agreement for value which takes effect as a present assignment when the debt or other subject-matter comes into existence. See *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 450. In equity book debts are assignable even if their existence is contingent on completion of the contract under which they may arise in the future: *Contemporary Cottages (NZ) Ltd v Margin Traders Ltd* [1981] NZLR 114. To the objection that in such a case no conveyance or transfer takes place until the indebtedness arises, the short answer is that those two conceptions are deliberately extended by s 54(1) of the *Stamp Act* to any contract or agreement "whereby a person *may* become entitled to a conveyance or transfer of property". It accurately describes the operation of cl 2(a)(ii) of the Deed in this case in its application to uncompleted partnership contracts for professional services considered as "work in progress".

[14] A contract is not assignable if it is one into which a substantial element of personal skill and confidence enters. Of that, a contract for professional services by a solicitor is a traditional example. It does not follow that a non-assignable contract for

personal service is not "property": see *O'Brien v Benson's Hosiery (Holdings) Ltd* [1980] AC 562. In the context of partnership, the question was recently considered by the Court of Appeal in *Don King Productions Inc. v Warren* [1999] 3 WLR 276, 314, where contracts for the promotion and management of boxers that were non-assignable, some expressly so, were nevertheless held to be partnership "property" or assets within the meaning of the Partnership Act 1890 (UK). The Court decided ([1999] 3 WLR 276, 301) that those contracts, although vested solely in particular partners personally, were, on the authority of *Chan v Zacharia* (1984) 154 CLR 178, 198-199, held by each partner on trust for the members of a dissolved partnership that was in the process of being wound up; that the fact that the contracts were personal and not assignable did not prevent the benefit or "fruits" of the contracts from being assigned as between the partners; and that a provision for assigning such a non-assignable contract is ordinarily to be construed as an assignment of the benefit of the contract, with the consequence that that benefit must be held in trust for the assignee. Although the burden of a contract with a retiring solicitor is not assignable without the assent of the client, yet, practically speaking, as Heerey J said in *Coughlan v FCT* (1991) 91 ATC 4505, 4507, there must be a substantial degree of probability that the client will allow his work to be completed by the new firm and will pay the bill for work which has been done. As suggested earlier, the existence of a lien in favour of a solicitor probably has a significant impact in producing that result.

[15] These considerations apply to the partnership in the present instance. When Mr Shine retired on 30 June 1998, the intention was that the surviving partners Messrs McGowan and Roche would succeed to the practice. By reason of that change in the firm, it necessarily became in law a different firm or partnership: *S J Mackie v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87, 91-92. On dissolution, s 42 of the *Partnership Act 1891* requires the property of a partnership to be applied in payment of the debts and liabilities of the firm, with any surplus of realisable assets being distributed in accordance with the rights of the partners. But, subject always to paying or providing for the creditors, it is open to the partners to arrive at some other arrangement for disposing of partnership assets, and, in this instance as in many others, that was what was done on dissolution. Although a partner has no title to specific property owned by the partnership, "he has a beneficial interest in the partnership assets, indeed in each and every asset of the partnership": see *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 446. On dissolution each partner retains that interest: *Hendry v Perpetual Executors & Trustees Association* (1961) 106 CLR 256, 266; which has been authoritatively described as "a right to a proportion of the surplus after realisation of the assets and payment of the debts and liabilities of the partnership": *FCT v Everett* (1980) 143 CLR 440, 446.

[16] Here it was agreed to transfer that interest for a price from Mr Shine to the members of the new firm of Roche and McGowan. To accomplish it, the parties chose the avenue of an assignment as provided in cl 2 of the Deed. Their purpose might equally well have been achieved if Mr Shine had executed an instrument releasing his interest to the other partners, in which event the instrument would still have been dutiable as a conveyance or transfer under the Act: *Garnett v Commissioner of Inland Revenue* (1899) 81 LT 633. The interest of a partner in the partnership assets is equitable and, as *FCT v Everett* shows assignable, and an equitable assignment is, under s 54 of the Act, liable to stamp duty as a conveyance or transfer. So is an agreement taking effect as a declaration of trust in favour of an intended transferee. See *Chesterfield Brewery Company v Commissioner of Inland Revenue* [1899] 2 QB

7, where Wills J considered (at 12) that equity would have produced that result even if an express declaration of trust had not been included in the instrument in question. Both he and Bruce J also considered it amounted to a "conveyance on sale" in the character of a contract for the sale of an equitable interest in property falling within s 59 of the Stamp Act 1891 (UK). That section was originally reproduced verbatim in s 54 of the Queensland *Stamp Act of* 1894; but the specific reference to sale of an equitable interest has now been subsumed under the general terms of s 54(1) read with the definition of "property" in s 36 of the *Acts Interpretation Act 1954*. That it continues to extend to a contract for the sale of an equitable interest in property is evident not only from the language of s 54(1) itself, but also from the explicit reference in s 54(2) to a contract for the sale of an equitable interest in any property.

[17] The question in the present case is, however, not whether the Deed of Assignment transferred to the partners of the new firm an equitable interest in property in the form of Mr Shine's share or interest as partner in the assets of the old firm, but whether, as cl 2(a)(ii) of the Deed itself asserted, those assets included all contracts for professional services entered into by the partners in the course of the previous partnership business. By s 23(1) of the *Partnership Act 1891* all property, rights and interests originally brought into the partnership stock (such as the work in progress designated "SM" generated by the earlier partnership of Shine Murdoch), or acquired in the course of the partnership business, are partnership property. If direct authority were needed for saying that such property includes the benefit or "fruits" of current contracts with clients of the firm for the performance of professional work not yet completed, it is supplied by the decision in *Don King Productions Inc v Warren* [1999] 3 WLR 276. In the case of the partnership of Shine Roche and McGowan, the benefit of those contracts is the "work in progress" to which the balance sheet of the firm referred. It was, in my opinion, rightly treated by the Commissioner as a component of the partnership property assigned, and so conveyed or transferred, in assessing the stamp duty payable on the Deed of Assignment.

[18] I have so far been considering the Deed dated 8 July 1998 in the original form in which it was assessed to duty under the *Stamp Act* on 17 February 1999. On 21 July 1999 the parties to the Deed obtained from Douglas J in the Supreme Court an order that the Deed be rectified in certain respects, of which one was the insertion in cl 2.2 of a new sub-cl (c) as follows:

> "(c) The Owner's entitlement to a one third share in the work in progress."

Clause 2.2 is a provision that defines or describes the interest which is *not* being transferred to the Assignees. Set out in full in its form as rectified, it provides:

> "2.2 The interest being transferred to the Assignees does not include:
>
> (a) money standing to the credit of the Owner in a current account, advance account or otherwise in the books of account of the partnership; nor
>
> (b) profits accumulated in the books of account representing profits derived by the partnership, in the financial year in which this assignment is effected secured prior to the Date of Assignment and which have not been distributed.
>
> (c) *the Owner's entitlement to a one third share in the work in progress.*"

The provisions in paras (a) and (b) are what one would expect in such a case. The reference in the concluding words of cl 2.2 to the "financial year" suggests that it is

income derivation and tax with which cl 2.2 is principally concerned. Having regard to the appellants' primary submission that "work in progress" is simply an accounting device or expression, having in law no meaning or proprietary significance, it is passing strange that the parties should have gone to the trouble of having the Deed rectified in order to expressly insert cl 2.2(c).

[19] The question of the meaning, if any, of the Deed as rectified was not the subject of detailed submissions on the appeal. It may be that reliance could have been placed by the Commissioner on the provisions of s 81 of the *Stamp Act* as avoiding the effect, if any, of the inserted provision; but no attempt was made to invoke that section. Instead, the Commissioner, relying on s 80(3) of the Act, declined to amend the original assessment he had made. Having regard to the terms of that subsection, it is not altogether clear that he was bound to do so: see *Hawley Partners Pty Ltd v Commr of Stamp Duties (Qld)* (1996) 96 ATC 4847, 4853. The question is, however, whether the incorporation of the inserted cl 2.2(c) is now capable of being given effect according to its terms. The problem as it seems to me is that the provisions of cl 2.2(c) are irreconcilably inconsistent with those of cl 2.1(a)(ii) of the Deed. By cl 2.1(a)(ii), the Owner transfers to the Assignees his one third interest in the partnership including its capital and assets, which are to include (ii) "all contracts entered into by the partners in the course of the business of the partnership". It is perhaps conceivable that those responsible for the drafting of the Deed had in mind that this description would serve to include contracts for the hire of equipment, such as photocopiers, computers and the like. If so, it is extraordinary that they failed to appreciate that it also extended to the very sinews of the practice, in the form of current contracts by the firm with clients for the provision to them of legal services.

[20] There is nothing in cl 2.1 that is capable of limiting its comprehensive terms to equipment contracts and the like. It makes little or no sense to speak, as cl 2.2 now does, of "the Owner's entitlement to a one third share in the work in progress of the partnership … in the financial year in which this assignment is effected .. and which have not been distributed". It was plainly never the intention that any of the work in progress or uncompleted contacts with clients, or the Owner's entitlement to a one third interest in those contracts should be excluded from the transaction. The purpose of the Deed, which is plain enough, was that current work or contracts should, in return for a payment, be taken over by the members of the new partnership. That this is so clearly appears from cl 3.2, which contains an acknowledgment that the Owner has an entitlement to a third share in the work in progress of the partnership at 30 June 1998, and that

> "The Owner has agreed with the Assignee that the value of that entitlement will be $1 million and that that sum will be payable to the Owner by 120 equal instalments, the first of such instalments to be paid on 31 July 1998 and thereafter at the end of each month."

Clause 6 of the Deed contains an express indemnity by the Owner in favour of the Assignees against claims, demands, etc relating to the Owner's one third interest in the partnership "represented by the property being transferred to the Assignees in respect of the period up to and including 30 June 1998". The principal subject matter of that indemnity is, evidently enough, claims for professional negligence arising out of work in progress at and before that date. It is difficult to conceive of any need for an indemnity from the Owner in respect of anything except claims arising out of the work in progress or "property" that, in the language of cl 6, was "being transferred".

[21] The two provisions in cl 2.1(a)(ii) and cl 2.2(c) are mutually inconsistent. As Williams JA observed in argument, they have the absurd result that the sum of $1 million expressed to be payable under cl 3.2 as the value of Mr Shine's "one third share in the work in progress of the partnership" at 30 June 1998 is, if given effect, now payable to him for no consideration whatever. The only other consideration stated in cl 3 is a sum of $1.00, which is specifically identified in that clause as the consideration or purchase price for the assignment of the Owner's interest in unbilled disbursements and goodwill of the partnerships. The result is that, in this respect, the Deed as rectified makes no sense at all. Presumably, if literal effect were given to the inserted cl 2.2(c), the result would be that Mr Shine has succeeded in retaining the beneficial ownership of his interest in a one third share in the "work in progress" or benefit of all professional contracts entered into by the partnership before his retirement on 30 June 1998, and so is still entitled to claim a corresponding proportion of the total value of that work up to that date, while also receiving the sum of $1 million appropriated in cl 3.2 as representing its value. Such an outcome is so improbable as to raise a serious question whether it is or ever could have been the parties' true intention to produce that result.

[22] When two provisions of the same deed or contract are irreconcilably inconsistent and cannot stand together, it becomes the duty of a court in interpreting the contract to resolve the antinomy if necessary by rejecting the provision that is repugnant to the substance of the whole. It is a course which a court of construction does not lightly undertake, the more so perhaps where the parties have deliberately gone to effort and expense to rectify the contract by inserting the very provision that is the source of the problem. The old rule was that where an earlier clause of a deed is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails over the later: *Forbes v Git* [1922] 1 AC 256, 259. That kind of mechanical aid to interpretation is now so unfashionable that one hesitates to mention it; but it is relevant here that the Deed of Assignment made good sense until the parties applied to reform it in the afterlight (as one is bound to infer) of the adverse assessment from the Commissioner on 19 February 1999. The underlying motive for that action was plainly enough the view, which I consider to be erroneous, that work in progress is not in law an asset or "property" of the partnership comprehended by the description "all contracts entered into by the partners in the course of the business of the partnerships" in cl 2.1(a)(ii). In my opinion, the provision inserted as cl 2.2(c) is altogether inconsistent with cl 2.1(a)(ii) and also repugnant to the Deed as a whole; as such, it ought as a matter of interpretation to be rejected. For duty purposes, the Deed, whether in its original or rectified form, must be interpreted so as to ignore cl 2.2(c) altogether.

[23] It follows that the Deed of Assignment was properly assessed to ad valorem duty as a **Conveyance or Transfer** under cl 4(a) of that heading in Schedule 1 to the *Stamp Act 1894*, and that, in so assessing it to duty, the Commissioner rightly took account of "work in progress" as "property" that was transferred by the Deed. In consequence, a number of other questions raised by the stated case do not fall for consideration. The parties incorporated in the case stated a combination of interrogatories for the edification of the Court, but which it is not necessary to answer in that degree of detail or at all. I would dismiss the appeal against the assessment, and in doing so answer the questions in the stated case as follows:

Question (a): Yes.

Question (b):	The heading **Conveyance or Transfer** in Schedule 1 to the Stamp Act 1894.
Question (c):	Yes.
Question (d) to (h):	Unnecessary to answer
Question (e):	The costs of and incidental to stating this case and of the appeal should be borne and paid by the appellants.

[24] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA and can state my reasons for agreeing with his conclusion briefly.

[25] The Deed of Assignment as originally drafted provided for the transfer to the appellants by the retiring partner of his one-third interest in the capital and assets of the partnership and what was described as "the future profits of the Partnership . . . for the financial year ended 30 June 1998". The capital and assets of the partnership were then defined as including:

> "(i) the business carried on by the partners; and
> (ii) all contracts entered into by the partners in the course of the business of the Partnership".

The partnership carried on the practice and profession of law in Queensland as solicitors. In those circumstances it is clear that contracts (retainers) with clients would constitute a valuable asset; that would particularly be so where the retainer was with a plaintiff in a personal injury action. In the circumstances "all contracts entered into by the partners in the course of the business of the Partnership" must include all contracts (retainers) entered into with clients.

[26] I agree with the reasoning of McPherson JA in concluding that such contracts were assignable. Most clients would have regarded the firm as being the solicitors handling the matter and would not be perturbed by the departure of Mr Shine. For present purposes the reality is that all clients would allow the subject matter of the retainer to be completed by the continuing firm (cf. per Heerey J in *Coughlan v FCT* (1991) 91 ATC 4505 at 4507). Generally the fees would be payable on the completion of the work; at that stage the income would be received and the asset realised.

[27] The consideration or purchase price for the transfer was said to be $1 for the retiring partner's "interest in the debtors unbilled disbursements and goodwill of the Partnership", and:

> "In addition the Assignees acknowledge that the Owner has, and will have as at 30 June 1998, an entitlement to a one-third share in the work in progress of the Partnership as at that date. The Owner has agreed with the Assignees that the value of that entitlement will be $1 million and that that sum will be payable to the Owner by 120 equal monthly instalments, the first of such instalments to be paid on 31 July 1998 and thereafter at the end of each month."

It is obvious that the work in progress relates, inter alia, to work undertaken pursuant to contracts with clients; presumably there were many personal injury actions at varying stages of progress from initial instruction to final determination. It is work undertaken pursuant to contracts with clients that generates the principal income of the practice. That can be seen from the Balance Sheet for the year ended 30 June 1998 which shows the value of work in progress at $3M out of total assets of $4.21M.

[28] Counsel for the respondent Commissioner conceded in his written outline of argument that the rectification of the Deed perfected by the order of the Supreme Court of 21 July 1999 effected the amendment as from the date of execution of the Deed and may have the effect of depriving the Crown of stamp duty. The order of the court inserted into Cl 2.2 - the clause defining the interests not included in the transfer - the "Owner's entitlement to a one-third share in the work in progress of the Partnership".

[29] The first comment to be made is that the provision inserted by way of rectification appears to be inconsistent with the essential terms of the Deed. As already noted the substantial consideration is payable with respect to the retiring partner's interest in "work in progress" transferred as part of the assets of the partnership. Clauses 2.1(a)(ii) and 3.2 can only have the consequence that the retiring partner is foregoing his interest in the work in progress in return for the receipt of $1M. Clearly it could not be the intention of the parties that he receive $1M and still retain an "entitlement to a one-third share in the work in progress of the Partnership" as at 30 June 1998. Further, he cannot merely forego his interest in that work in progress leaving it in a state of suspension. The only rational consequence is that the continuing partnership acquired the interest in that work in progress by assignment from the retiring partner. It is therefore nonsensical for the Deed to provide that the interest being transferred does not include the retiring partner's entitlement to a share in the work in progress. I agree with McPherson JA that the clause inserted by way of rectification must be rejected as repugnant to the substance of the Deed as a whole.

[30] In practical terms Mr Shine elected to retire as a partner and the appellants agreed to the continuation of the partnership, such partnership being comprised of the remaining two partners. The retirement of Mr Shine brought about what has been described by some writers as a "technical dissolution" or "notional dissolution". In strict terms the situation here is analogous to that considered by the courts in cases such as *Sobell v Boston* (1975) 1 WLR 1587 and *Chia v Ireland* [2000] SASC 47. Even though notional or technical, the dissolution was real in the sense that Mr Shine's interest in the partnership was converted by that dissolution into a debt in his favour arising under s 46 of the *Partnership Act* 1891. Mr Shine's interest, being a debt, was a chose in action which was assignable. The value of that debt, and therefore the value of the chose in action, was to be determined by valuing his one-third interest in the partnership. In the absence of other evidence the most recent balance sheet could be used to calculate that value: *Healthcorp Ltd v Commissioner of Stamp Duties* [1992] 1 Qd R 610.

[31] Looked at in that light the interest in the partnership of the assignor, including the work in progress, constituted property and was capable of being assigned. Such an interest is clearly capable of being assigned: *Commissioner of Taxation v Everett* (1980) 143 CLR 440.

[32] The primary contention of the appellants was that "work in progress" was not properly capable of being transferred or assigned. That argument was based on statements in *Henderson v Federal Commissioner of Taxation* (1970) 119 CLR 612, particularly the judgment of Windeyer J at first instance. In my view *Henderson's* case is distinguishable. The court was there concerned with what constituted income derived in a particular taxation year. As the reasoning therein demonstrates the concept of "work in progress" can pose some difficulties in that situation; but the case was not concerned with whether or not "work in progress" constituted property or an asset of a

partnership having a value and capable of being transferred or assigned. McPherson JA has amply demonstrated that "work in progress" constituted property which could be assigned for value thereby attracting provisions of the *Stamp Act* 1894.

[33] I agree that the appeal should be dismissed and the questions answered as proposed by McPherson JA.

[34] **HELMAN J:** I agree with the reasons of McPherson JA and those of Williams JA and with the order and answers proposed by McPherson JA.