26, 1970

IN THE PRIVY COUNCIL No. 18 of 1970

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

DOLORES HAY McCLELLAND Appellant

- and -

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal by special leave from a decision of the Full Court of the High Court of Australia (Kitto, Menzies and Owen J.J., Barwick C.J. dissenting) delivered on 28th February, 1969 allowing by majority an appeal against the judgment and order of Windeyer J. pronounced on 8th November, 1967 whereby he allowed with costs an appeal by the present Appellant against an assessment of income tax and social services contribution (herein called "income tax") issued by the Respondent in respect of the year of income ended 30th June, 1963. pp. 53-67; pp.36-49; p.50; p. 71

2. The only item in dispute in the assessment was an amount of £56,951 ($113,902) which the Respondent asserts and the Appellant denies forms part of her assessable income pursuant to the Income Tax and Social Services Contribution Assessment Act, 1936-1963 (herein called "the Act"). Sections 25 (1) and 26 (a) of the Act provide as follows :-

"25.- (1) The assessable income of a taxpayer shall include -

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(a) Where the taxpayer is a resident - the gross income derived directly or indirectly from all sources whether in or out of Australia; and

(b) where the taxpayer is a non-resident - the gross income derived directly or indirectly from all sources in Australia,

which is not exempt income."

"26. The assessable income of a taxpayer shall include -

(a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme;"

In s. 6 (1) of the Act "income from personal exertion" and "income from property" are defined as follows :-

"income from personal exertion" or "income derived from personal exertion" means income consisting of earnings, salaries, wages, commissions, fees, bonuses, pensions, superannuation allowances, retiring allowances and retiring gratuities, allowances and gratuities received in the capacity of employee or in relation to any services rendered, the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person, any amount received as a bounty or subsidy in carrying on a business, the income from any property where that income forms part of the emoluments of any office or employment of profit held by the taxpayer, and any profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale or from the carrying on or carrying out of any profit-making undertaking or scheme, but does not include -

(a) interest, unless the taxpayer's

principal business consists of the lending of money, or unless the interest is received in respect of a debt due to the taxpayer for goods supplied or services rendered by him in the course of his business; or

(b) rents or dividends;

"income from property" or "income derived from property" means all income not being income from personal exertion;

3. The circumstances leading up to the particular events in which the profit was derived were as follows :-

(a) The Appellant's uncle, Henry John Spaven (herein called "the deceased") died on 27th September, 1958 leaving a large estate.

(b) The estate included 3,600 acres of land at Rockingham south of Fremantle in Western Australia and it was apparent shortly after the deceased's death that this land would increase in value in the future.

(c) By his Will the deceased bequeathed certain pecuniary legacies and then he devised and bequeathed the residue of his estate upon trust for sale and conversion with power to postpone the same and to hold the proceeds of such conversion upon trust to set aside two sums of £15,000 and £10,000 to pay the income therefrom to two beneficiaries for life and subject thereto to hold the capital and income of his estate upon trust for the appellant and her brother as tenants-in-common in equal shares.

(d) The executors of the deceased's estate were two Perth solicitors.

(e) By May 1962 the estate of the deceased had been so far administered that debts, duties, funeral and testamentary expenses

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and legacies had been paid. Some investments had been set aside to provide the sums of £15,000 and £10,000, but the executors desired further liquid funds for this purpose.

(f) It was known by this time that residue would comprise the bulk of the Rockingham land

(g) The Appellant had from soon after the testator's death been well aware of the value of this land and of the prospect that it would increase in value. She wanted to retain it. She thought in time it could become very valuable and that it could then be subdivided and sold. It was near the beach and she thought that beach house cottages could be built on it. During 1961 the Appellant made enquiries from a town planner and the Shire Clerk of the area as to the value and potential of the land.

(h) At a meeting between the Appellant, her brother and the executors in May 1962, the Appellant's brother made it clear to the Appellant that he wanted his share of the estate in money and that he did not want to wait for it. He informed her that he had a buyer who was prepared to pay him £40,000 for his interest in the land. He told the taxpayer that this buyer would be willing to buy her share also for the same sum. The Appellant told her brother that she did not want to sell her share. As a result of the enquiries which she had made, she had high hopes that in time she might get much more from her share than that. She asked him if she could have a first refusal of his share and he agreed to this. The Appellant did not then have £40,000 to pay him for his share but she thought she could get it from the estate.

(i) The Appellant's brother would not agree to a partition, and the trustees of the estate were not prepared to transmit the land to

the Appellant and her brother until they received additional funds to secure the sums of £15,000 and £10,000 referred to.

4. In these circumstances the Appellant embarked on a course of action which Windeyer J. described as follows :-

"The taxpayer undoubtedly had a programme or "plan of action. She can certainly be said "to have engaged in an undertaking or scheme "designed by her to enable her to turn to the "best advantage for herself what she had got "from her uncle". p.42 l.16

His Honour also found that her main purpose throughout was to keep the land for subdivision later.

5. The course of action on which the Appellant embarked is to be found in a consideration of the events which took place in the months following the meeting of May 1962. These events can be summarized as follows :-

(a) Following upon the meeting of May 1962, the Appellant considered how she could raise the amount of £40,000 and buy her brother's share herself. She was averse to finding herself tenant in common with a stranger. However, she did not have the money to buy her brother's interest. She conceived the idea that she might obtain all the money she needed by selling in advance part of the land. Prior to 26th July, 1962, she had discussions with the executor regarding the land. She also had discussions with a town planner regarding the land to see how some of it could be sold, how what she thought was more valuable could be retained for sale and subdivision later and how she would be able to pay her brother the money. The land she wanted to keep was the land facing the beach.

(b) The town planner then prepared a plan of the land which subdivided it into 3 blocks 2 of which (comprising about 525 acres)

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faced the beach and contained the more valuable land and which could be retained for subdivision and sale later and 1 of which (comprising about 3,073 acres and hereinafter called "Lot 5") could be sold immediately. The town planner informed her that in order to get a purchaser to pay a good price, it would be necessary to sell part of the more valuable land and the plan of subdivision was made up on this basis.

(c) In June 1962 the Appellant had discussions with a potential purchaser and indicated that an area of approximately 3,000 acres was for sale and suggested a price of £40 per acre.

p. 83 (d) On 26th July, 1962, after receiving the plan from the town planner, she obtained an option from her brother to purchase his half share in the land for £40,000 exercisable in writing on 15th September, 1962.

(e) After obtaining the option the Appellant approached the Town Planning Board with regard to the subdivision of the land. Following this an application for subdivision of the land was lodged and was finally approved.

(f) It was first proposed that the land would be sold by the executors. However, difficulties arose as to this and finally it was agreed that the executors would transfer to her the legal estate so that she could sell off Lot 5 and pay her brother off out of the proceeds. However, the executors indicated that they were not prepared to give her a transfer unless she and her brother each lodged £10,000 with them to ensure that they could set aside the two funds referred to in the deceased's Will. The executors had made a tentative appropriation to satisfy these two annuity funds using some assets in a company which they did not regard as satisfactory to answer the annuity and they required both the Appellant and her brother

to each lodge £10,000 deposit. This being so, it was necessary for the Appellant to have £50,000 in order to take a transfer of the land.

(g) After obtaining the option but prior to exercising it, the Appellant also offered Lot 5 to several people for £50 per acre. During August the Appellant received an offer of £40 per acre from one potential purchaser. Prior to 10th September, 1962 two development companies offered to purchase Lot 5 at a figure in the vicinity of £45 per acre. Subsequently, but prior to the 10th September, an increased offer of approximately £50 per acre was made by these companies. Although this offer was acceptable to the Appellant, the executors indicated that they would not allow it to be sold because they were proposing to sell on the basis of subdivision and no subdivision had been approved by the Town Planning Board, the executors being of the opinion that it was illegal to sell without the consent of the Town Planning Board.

(h) As at 10th September, 1962, the Appellant knew that she could sell Lot 5 for at least £45 per acre and she was in no doubt that it was to her benefit to exercise the option. On that date she exercised the option and then paid a deposit of £4,000 to her brother. p. 83

(i) After exercising the option, the Appellant agreed to sell Lot 5 for £153,632 and on 5th October, 1962, she entered into a contract of sale on terms providing for the immediate payment of a deposit of £50,000. Receiving £50,000 as a deposit under the contract, she paid the balance of £36,000 due to her brother, lodged £10,000 with the executors and received from them a transfer of the fee simple in the whole of the Rockingham land. p. 89

(j) By the end of the year of income, the sale of the land was completed and she received

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the balance of the purchase money amounting to £103,632.

6. The Appellant had thus carried into effect the plan she had formed. She was the owner of a considerable part of the land which she could hold with a view to selling it in the future and she had done very well by her sale of Lot 5.

7. Kitto J. in delivering the judgment of the majority described the Appellant's conduct in the following terms which description the Respondent respectfully adopts :- 10

p.62 l.13 "In the present case, what the respondent bought was her brother's half interest in the Rockingham lands, and her purpose was to enable herself to sell the fee simple in those lands that is to say to sell part of them immediately and the rest at a future time. She had no other purpose than that of selling the entirety, and of doing so in such a way as would bring in the best price. This 20 means that the plan she finally worked out and adopted was a plan for the making of profit by selling part of the lands immediately and the rest at a future time, at prices which would show her a profit over what she had laid out."

8. The Appellant did not dispose of any other part of the land during the year of income.

9. On the 5th day of August, 1966, the Commissioner issued to the Appellant the notice 30 of assessment which is in dispute in this appeal.
p. 71 The assessment included in the Appellant's assessable income an amount of £56,951 ($113,902)
p. 72 described in an adjustment sheet accompanying the assessment as "Profit arising from the sale of
p. 73 Rockingham land". The Appellant objected to the
p. 74 assessment, and on disallowance of the objection she appealed to the High Court.

10. Before Windeyer J. and the Full Court the Appellant contended that the amount in question 40 was not a taxable profit. In relation to s.26 (a) of the Act her contentions may be summarized as follows :-

(a) The first "limb" of the section was not attracted because she did not acquire the property which she sold. What she acquired was her interest under the Will but this was not the property which was sold. Further it was submitted that what was acquired was not acquired for re-sale at a profit.

(b) Therefore there had been no "sale of property acquired ... for the purposes of profit-making by sale" within the section.

(c) The second "limb" did not apply because there was no "profit-making" scheme. The Appellant was merely realising a capital asset.

11. The Respondent contended before Windeyer J. and the Full Court that both "limbs" of s.26 (a) applied.

12. The Respondent submits that in the circumstances of this case which have been substantially outlined above the judgments and decision of the majority of the High Court upholding the Respondent's assessment are correct. The Respondent supports this submission on the following grounds :-

(a) that the amount represented a profit arising from the sale by the Appellant of property acquired by her for profit making by sale and is therefore assessable under the first limb of s.26 (a). The Respondent submits that what was acquired by the Appellant was the Rockingham land and that in the events which happened this was clearly acquired for profit making by sale, the amount in question representing a profit arising from the sale of part of that land.

(b) that the amount represented a profit arising from the carrying out of a profit-making undertaking or scheme and was therefore assessable under the second limb of s.26 (a). Windeyer J. and all the Justices who sat on the Full High Court

were satisfied that the Appellant's conduct during the relevant period which led to the derivation of the sum in question constituted an undertaking or scheme and the Respondent submits that it is properly characterised as a "profit-making" undertaking or scheme within the meaning of s.26 (a).

(c) that the amount was income according to ordinary concepts as the net proceeds of an adventure in the nature of a trade and therefore was assessable under s.25 (1) of the Act

13. Before outlining the argument in support of these grounds, it is pertinent to make the following general observations and submissions:-

(a) The Appellant has asserted that the sale from which the alleged profit arose was a mere realisation of a capital asset, namely, her inheritance. Clearly enough, this cannot be an accurate summary of what took place. As at May 1962 what she had was an interest jointly with her brother in relation to the residuary estate of her uncle. For reasons which will subsequently be advanced, it is submitted that her interest was no more than a chose in action against the executors or an interest in the nature of personalty. However, whether her interest was personalty or whether it was an equitable interest as tenant in common with her brother in the Rockingham land, what she ultimately acquired from the executors was something quite different from what she inherited. She acquired the fee simple in the land. It was the fee simple in part of the land of which she disposed. Therefore to succeed by this line of argument, it is submitted the Appellant must show that the fee simple in the land was a capital asset. It is not sufficient to show that her inheritance was a capital asset.

(b) The majority Justices, Barwick C.J. and

Windeyer J. were all in agreement that the Appellant's conduct during the relevant period constituted the adoption and carrying out of a plan, undertaking or scheme. These findings were plainly correct but in any event it is submitted that they would not be reviewed by your Lordships' Board. The real issue in this appeal is not whether the Appellant adopted and carried out a plan or scheme but whether her conduct in so doing gave rise to a taxable profit.

(c) The Full High Court in determining the appeal from the decision of Windeyer J. was in the ordinary position of an appellate Court sitting on appeal from a judge without a jury, namely, it could make up its own mind on the facts and draw its own inferences from the facts proved or admitted but not disregarding the judgment appealed from and giving due weight to that judgment in cases where the credibility of witnesses was involved. Thus the Full High Court in a taxation appeal can make its own findings of fact and draw its own inferences from facts notwithstanding that there is some evidence upon which the Judge at first instance could have formed his view of facts and inferences of facts. In this respect the position is different to that of a Court in the United Kingdom sitting on appeal from a decision of the Commissioners of Inland Revenue. The present case is not a case where the credibility of witnesses was in issue. (See generally Paterson v. Paterson 89 C.L.R. 212; Benmax v. Austin Motor Co. Limited 1955 A.C. 370; Judiciary Act 1903-1969 ss. 34 and 37.)

(d) In approaching questions of fact in this appeal, it must constantly be borne in mind that because this involves an appeal from the disallowance of an objection to an assessment of Commonwealth income tax, the burden is on the Appellant, as taxpayer, to prove that the assessment is excessive (s. 190 (b) of the Act).

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14. The Respondent makes the following general observations and submissions in relation to s.26 (a) -

(a) S.26(a) first found its appearance in Commonwealth income tax law in 1930 when it was inserted (following the decision in Jones v. Leeming (1930) A.C. 415) in the definition of "income" in s.4 of the Income Tax Assessment Act 1922. The amendment was made retrospective to 1922.

(b) In Premier Automatic Ticket Issuers Limited v. Federal Commissioner of Taxation 50 C.L.R. 268, Dixon J. (as he then was) said (at page 298):-

> "The criterion, which the Legislature has now adopted and established, was formulated by the Courts in the absence of any statutory direction upon the way in which capital profits may be distinguished from income profits. So far as it lacks precision or is uncertain in its application, the cause is to be found in the powerlessness of the Courts to do more than state a wide general proposition and to apply it as each case arose. The statement of the proposition was not a definition, but rather an explanation of principle. No doubt, as the language of the statute it must receive a more literal application. It is not easy to say whether the expression 'profit-making by sale' refers to a sole purpose, or a dominant or main purpose, or includes any one of a number of purposes. The alternative 'carrying on or carrying out' appears to cover, on the one hand, the habitual pursuit of a course of conduct, and, on the other, the carrying into execution of a plan or venture which does not involve repetition or system."

(c) Although it has been argued that s.26 (a) was not intended to cover cases where the profit was not income according to ordinary

concepts, this, it is submitted, is not correct. Both the history and the form of the section are against this argument. As Dixon J. (as he then was), in the passage quoted, emphasized - "as the language of a statute it must receive a more literal application". In the first limb the language is apt to cover an isolated transaction the profit from which might not according to ordinary concepts have been income and fixes upon the purpose of the acquisition as the criterion upon which assessability is determined. In relation to the second limb, it is to be noted that in some of the earlier cases the test had been formulated in the form of a question -

> "Is it a gain made in an operation of business in carrying out a scheme of profit-making?"

(e.g. California Copper Syndicate 5 Tax Cas. 159; Ruhamah Property Co. v. Commissioner of Taxation 41 C.L.R. 148 at pages 151, 152). In the second limb the referencd to "an operation of business" is omitted. This, it is submitted, is significant. A submission was made on behalf of the Appellant, on the hearing of the application for special leave in this appeal, that s.26 (a) is the section corresponding to the English provisions dealing with an adventure in the nature of trade, but this is clearly not so. Although its terms may be wide enough to include operations of this nature, it is submitted that the section does not require the proof of an operation in the nature of business before a profit can be caught by it. It is sufficient if it can be described as a profit arising from the carrying out of a profit-making undertaking or scheme. This, it is submitted, is what Dixon J. meant when he referred, in the passage quoted above, to "the carrying into execution of a plan or venture which does not involve

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repetition or system".

(d) It is therefore submitted that s.26 (a) should not be read down, should be applied according to its ordinary and natural meaning and should not be regarded as referring only to profits which would be income according to ordinary concepts.

15. It is submitted that the profit was assessable as a profit arising from the sale of property acquired by her for the purpose of sale at a profit, for the following (amongst others) reasons :-

(a) The word "purpose" in s. 26(a) means the purpose actuating the acquisition of the property - the use to which the property is to be put. (Pascoe v. Federal Commissioner of Taxation (1956) 11 A.T.D. 108 per Fullagar J. at p. 112). "Purpose" as so used must not be confused with "motive". If land is acquired with the intention that it be sold at a profit the resultant profit will be assessable notwithstanding that in entering into the transaction the taxpayer was really motivated, for example, by a compelling desire to prevent some other person from acquiring it. In each case the "purpose" is to be determined not merely by a consideration of subjective factors but of the conduct of the taxpayer in relation to the transaction.

(b) In this case the Appellant acquired the fee simple in the land. It is not a full description of what took place to say that what she acquired was her brother's interest in the land. When she exercised the option it was the Appellant's clear intention to acquire the fee simple from the executors. To achieve this two conditions had to be satisfied. First she had to acquire her brother's interest and second she had to lodge £10,000 with the executors. When, but only when, she fulfilled these conditions, the executors transferred to

her the fee simple.

(c) In the High Court the Respondent submitted that the Appellant had no equitable interest in the land but only an equitable chose in action because the executorial duties had not been completed. The correctness of this submission depends on whether by reason of the need to provide adequately for the two sums of £10,000 and £15,000 the administration of the deceased's estate was still incomplete. If this be so, then the Appellant's interest in the estate was an equitable chose in action. (See Commissioner of Stamp Duties (Qld.) v. Livingstone (1965) A.C. 694).

(d) If, on the other hand, the administration of the estate had advanced to the stage where the residuary beneficiaries were entitled to equitable proprietary interests, nevertheless the Appellant's equitable interest was personalty because the land was held by the trustees upon an imperative trust for sale and conversion. A beneficiary absolutely entitled to an undivided share in the proceeds of the sale of land held upon trust for conversion :-

(i) cannot demand an immediate sale of the land, In re Horsnaill (1909) 1 Ch. 631, In re Kipping (1914) 1 Ch. 62 (C.A.);

(ii) cannot call for the transfer of his undivided share in the land, supra, Holloway v. Radcliffe (1857) 23 Beavan 163 at 172 (53 E.R. 64 at 67-68), In re Marshall (1914) 1 Ch. 192 at 199; and

(iii) cannot obtain an order for partition of the property. Biggs v. Peacock (1882) 22 Ch. D. 284 (C.A.), and Dodd v. Cattell (1914) 2 Ch. 1 at 11.

These principles apply in Australia. See

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Wilson v. Wilson 51 S.R. (N.S.W.) 91 and Manfred v. Maddrell 51 S.R. (N.S.W.) 95.

(e) The success of the Respondent's argument in relation to the first limb of s.26 (a) is not dependent on establishing the assertions in the two preceding paragraphs (c) and (d). However, if, as is submitted, the Appellant's interest as residuary beneficiary was an equitable chose in action or otherwise in the nature of personalty, it serves to emphasize the basic proposition contained in paragraph (b) above that what was acquired by her was the fee simple in the land

(f) Not only did the Appellant acquire the fee simple in the land, but she did so for the purpose of profit-making by sale. At the time she exercised the option, she knew that she could sell the land at a price in excess of what it was costing her and she knew the approximate price at which she could sell Lot 5. At this time and subsequently, it was her intention to sell part of the land immediately and retain the balance for subdivision and sale at a later date. In these circumstances her intention was to sell the fee simple for more than it cost her. What it cost her consisted of her half interest she became entitled to under the Will plus £40,000 plus (it could be said) the deposit of £10,000 with the executors. In other words, her purpose in acquiring the land or the use to which she intended to put it was to sell it at a profit. This submission is further assisted by the fact that the Appellant does not appear to have had any other intention in mind than sale as to the use to which she would put the land.

(g) Windeyer J. held :-

p.44 l.30 "I am satisfied that her dominant purpose throughout was to ensure as far as she could that the land would not be sold until some time in the

future and that she would be in control of it."

It is submitted that this finding relates not to the "purpose" but to the "motive" of the Appellant in acquiring the land. For the reasons given in paragraph (a) above, it would be erroneous in law to treat "motive" as equivalent to "purpose". The Appellant's purpose is found in considering the use to which she intended to put the land when she acquired it and for the reasons already given this, it is submitted, was profit-making by sale.

(h) The burden is on the Appellant of showing that the land was not acquired for profit making by sale and it is submitted that in the circumstances she has not discharged this burden.

16. The Respondent also submits that the profit was assessable as a profit arising from the carrying out of a profit-making undertaking or scheme for the following (amongst other) reasons :-

(a) The word "scheme" in s.26 (a) points to some coherent programme or plan of action. As pointed out in paragraph 13 (d) above, all the Justices agreed that the Appellant's conduct constituted the adoption and carrying out of a plan, undertaking or scheme. The real question here is, was it a profit-making undertaking or scheme?

(b) A profit-making undertaking or scheme is one whose purpose is profit making. To ascertain this profit-making purpose, it is necessary to look at the scheme itself and ascertain what is its effect or what it does irrespective of the taxpayer's motives.

(c) Kitto J. described the profit-making nature of the undertaking or scheme in this case in terms which the Respondent respectfully adopts. His Honour's description is set

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out in paragraph 7 above and also in the following passage :-

p.62 l.25

"The learned Judge rightly held that her purpose was not one of profit making by sale of the brother's half interest either in Lot 5 or in the whole of the Rockingham land; but the point to which I respectfully think that His Honour did not give due weight is that the purpose was one of profit-making by a process which involved bringing both that half interest and her own to an end by uniting them in her own hands and then selling the resulting entirety in subdivision, over a period, for more than the entirety had cost her. What it had cost her consisted of the half interest she had become entitled to under the Will plus £40,000. The excess arising from the carrying out of the scheme would plainly be profit which would answer the description in the second limb of s.26 (a)."

(d) The profit-making purpose of the scheme, which the Appellant adopted, is clearly established by her conduct, detailed earlier in this case, from the time she conceived the idea of acquiring her brother's interest until she exercised the option. Throughout this period she was seeking to find a purchaser for the less valuable portion of the land at a price well in excess of what she would have to pay her brother for his half interest in the whole of the land. Her enquiries in 1961 confirmed her earlier view that the land was best kept for subdivision later, as she expected it would increase greatly in value. Her activity between the meeting with her brother and the exercise of the option further confirmed this belief. Furthermore, this activity was designed to ascertain how best to deal with the land in order to produce the greatest profit having in mind the immediate desire to sell portion in order to buy her brother's interest in relation to it and the desire

to retain the most valuable portion for subdivision later. At no stage does the Appellant appear to have given any thought to using the land for any purpose other than the immediate sale of portion and the ultimate sale of the balance at a profit. When she exercised the option and was thereby able to carry out the plan she had conceived and adopted, she knew that she could sell Lot 5 for at least £45 per acre and, as she must have known, this would be extremely profitable to her. As it was the least valuable portion of the land, she must have expected that she would earn even greater profits when the balance was sold.

(e) In calculating the profit which the Appellant made it was proper to bring to account the value of her interest under her uncle's Will. By her conduct she adopted an undertaking or scheme which involved her in committing to it the interest which her uncle left her. In the circumstances, this was the only capital asset she had. She chose not to realize it but to commit it to the scheme of profit-making which she adopted. Having committed it to the scheme, it is proper to treat its value as part of the cost to her in calculating the profit which flowed from the scheme.

(f) Her position in this respect can be contrasted with that of her brother. He chose to realize his capital asset whereas she chose to commit hers to the scheme. It is for this reason that when she sold part of the fee simple she was not realizing a capital asset, she was taking the first step of profit-making in the scheme she had adopted.

(g) In his judgment Barwick C.J. said :-

"I am unable to conceive of a profit in the relevant sense in circumstances such as those with which we are here dealing which does not represent a

p.56 l.40

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surplus over cost. The respondent had not acquired her inheritance nor could it be said to have cost her any sum of money. I am quite unable to accept the Commissioner's submission that a cost of the land sold can be worked out by valuation of the interests in the land or of the land itself."

It is true that her interest under the Will cost her nothing. However, it is respectfully submitted that in this passage His Honour has overlooked the crucial fact, namely, that the Appellant committed her interest to the scheme. When she did this it did cost her something, namely the value of her interest at that time.

(h) It is not a sufficient description of the scheme to describe it, as Windeyer J. did, as one of retaining her interest under her uncle's Will as far as possible in the form of land. This may describe her motive. The Appellant cannot, however, escape the true nature of the undertaking or scheme which she adopted by reason of the motive which actuated her. If, as was the case, her intention was to make a profit by the steps which she took, the undertaking or scheme is accurately described as a profit-making undertaking or scheme. This was recognized by Barwick C.J. when he said :-

p.57 1.40 "I should observe that the purpose of the respondent in formulating and carrying through her plan does not in my opinion control the result of this case ..... If in truth the facts of the case had established that she had engaged in a business or the existence of a profit-making scheme within s.26 (a), the tenure of the stated purpose would not have prevented the taxation of the income of the business or the profits arising from carrying out the scheme ...."

(i) The conclusions of the minority Judges ultimately depended on their findings that

the Appellant was only realising a capital asset to best advantage. Any gain from the scheme was therefore a capital gain or capital profit which was not taxable under s.26(a) of the Act. Even if one accepts the proposition that the mere realisation of a capital asset to best advantage does not produce a taxable profit under the Act, this principle has no application to the facts of the present case. The Appellant's argument involves a fundamental inconsistency. She asserts that the first "limb" of s.26(a) does not apply because she did not sell the property that she acquired from her brother, but sold something quite different. Yet in relation to the second "limb" she assets that all she was doing was realising a capital asset to the best advantage. The Respondent submits that the Rockingham land cannot be regarded as a capital asset of the Appellant for the purposes of the second "limb" of s.26(a). She did not own the land before she embarked upon the scheme. She only acquired it as a result of the scheme and in the course of carrying it out. A taxpayer who conceives and executes a scheme which involves the acquisition of an asset, and its realisation to the best advantage, cannot be said to be doing no more than realising a capital asset. He is realising to best advantage an asset which he acquired in pursuance of an undertaking or scheme and if this is done with a view to profit and profit results, then such profit will be taxable under the section.

(j) The Appellant cannot be said to have done no more than realise a pre-existing capital asset to best advantage. The entirety of the land was never a pre-existing capital asset of hers. Windeyer J. recognized that the asset she sold was fundamentally different from her pre-existing capital asset when he accepted the Appellant's arguments on the first limb of the section.

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p.42 l.48

He said, referring to the first limb:-

"But, as I read it, it does not apply when what is sold is essentially different in kind from the thing acquired"

This conclusion, while in favour of the Appellant on the first limb, is, however, fatal to her argument on the second. The asset which the Appellant realised under her scheme was not a pre-existing capital asset and in the absence of such an asset, there is no reason for denying the profit-making character of her "money-making" scheme. Accordingly, the case is seen to fall within the second limb of s.26 (a).

(k) The Respondent's submissions on the second limb of s.26(a) are strongly supported by the decision of the Full High Court in Official Receiver v. Federal Commissioner of Taxation (Fox's Case) (1956) 96 C.L.R. 370 and the Respondent submits that the present case is indistinguishable in principle from that case.

(l) In that case the joint judgment of Dixon C.J., Williams, Webb, Fullagar and Kitto JJ. includes the following passage at pp. 387-8:-

"There is no reported case quite like this one. Moreover, although s.26(a) is founded on language which was used in judicial decisions (see Premier Automatic Ticket Issuers Ltd. v. Federal Commissioners of Taxation) yet it provides a statutory criterion which must be applied directly and cannot be treated as going no further and producing no different result than would a criterion expressed as "exercising trade" or "carrying on a business". English cases applying those tests cannot govern the application of s.26(a), although no doubt they may give some assistance. Of course in the end the question whether a case falls under the operation of s.26 (a) must be determined as a matter of fact. It may be added that this is even more true of the essential question

whether a profit was produced by the carrying on or carrying out of the undertaking or scheme."

The majority of the Justices in the present case have found in relation to this question of fact that the Appellant did engage in a profit-making undertaking or scheme and it is respectfully submitted that the Board ought not to disturb this finding of fact.

(m) As stated by their Honours in Fox's Case in the passage quoted, English cases relating to the test of "exercising trade" or "carrying on a business" cannot govern the application of s.26 (a). This is further confirmation that in applying s.26 (a) it should be applied according to its ordinary and natural meaning.

(n) The result of the Respondent's submission is that any increase in the value of the entirety after its acquisition by the Appellant will when realised result in an increase in the income profit made by her profit-making scheme. It is submitted there is no injustice to the Appellant in being taxed on such additional profits, because she could never have gained those profits without the scheme. She was not free, if she so wished, to retain her half interest in the land and to benefit from its anticipated future increase in value.

(o) It is submitted that the second limb of s.26(a) can apply even though the first limb does not apply to a given set of facts. It is also submitted that the second limb can apply even though the taxpayer is not engaged in a business.

(p) It is submitted that the findings of the majority of the Justices of the High Court in this case are fully consistent in law with the prior decisions of the High Court dealing with the second limb

of s. 26 (a), and the reasons given by them are correct.

(q) The Appellant has not discharged the onus of showing that the second limb of s.26(a) does not apply.

18. In his reasons for judgment Kitto J. said that the profit in question was income according to ordinary concepts since it would be the net proceeds of an adventure in the nature of trade. Barwick C.J. also dealt with this question but expressed a contrary view. It is submitted that the view of Kitto J. on this matter is correct. The Respondent supports this submission by reference to the analysis of the Appellant's conduct set out earlier in this case in relation to the application of s.26 (a). This submission is supported by the decision of your Lordships in Iswera v. Commissioner of Inland Revenue (1965) 1 W.L.R. 663 and by earlier English decisions. It is not necessary that there be a series of operations in order for such an adventure to exist. It is significant in this case that there was not only selling but also buying involved in the Appellant's conduct. This is an indication of trading and combined with the other conduct of the Appellant in negotiating with purchasers of the land is, it is submitted, sufficient to establish that the profit in question was derived from activity in the nature of trade.

19. It is the fact that no submission to the effect contained in paragraph 18 was put by the Respondent to the Full High Court. However, having in mind that all the facts relevant to it are before your Lordships, that the Full High Court itself dealt with it and that it is only an alternative way of presenting the Respondent's case under s.26(a), it is respectfully submitted that your Lordships should entertain the submission.

20. Finally, the Respondent submits that the amount of the profit for which the Appellant has been assessed is correct. In cases of this type, the Commissioner must necessarily proceed on valuations and estimates, and make

apportionments. Iswera v. Inland Revenue Commissioner (1965) 1 W.L.R. 663 (P.C.) and Chapman v. Federal Commissioner of Taxation (1968) 117 C.L.R. 167 (Menzies J.). No question of principle arises in relation to the details of the assessment. In these circumstances it is submitted that the Board will not review the details of the assessment. The position would of course be otherwise if the assessment were shown to be erroneous in principle. Cf. Vander Poorten v. Vander Poorten (1963) 1 W.L.R. 945 (P.C.) and Aik Hoe & Co. Ltd. v. Superintendent of lands and Surveys First Division (1969) 1 A.C. 1 (P.C.).

21. In any event, under the Act the taxpayer has the onus of establishing that the assessment is excessive (s.190(b)), and in the present case it is submitted that if the Appellant fails on the questions of principle dealt with in this case, she cannot establish that the assessment is excessive.

22. The Respondent therefore submits that the appeal should be dismissed for the following (amongst other)

R E A S O N S

1. The majority of the Full Court of the High Court of Australia were correct for the reasons given by them, in holding that the Appellant had embarked upon a profit-making undertaking or scheme with regard to the Rockingham land, so that the case falls within the second limb of s.26(a) of the Act.

2. The Appellant was not merely realising a pre-existing capital asset.

3. The assessment does not tax the Appellant on any capital gains made by her by committing her pre-existing capital asset to the scheme.

4. The Appellant did "acquire" the freehold of the Rockingham land, and since she did so for the purpose of profit-making

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by sale, the case falls within the first limb of s.26(a) as well.

5. The profit assessed was income according to ordinary concepts because the Appellant was engaged in an adventure in the nature of trade.

6. The Appellant has not discharged the onus of showing that the assessment is excessive.

7. If the Respondent succeeds in supporting the assessment in principle, your Lordships should not embark upon a review of the details of the assessment. 10

R. ELLICOTT

No.18 of 1970

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

DOLORES HAY McCLELLAND

- v -

THE COMMISSIONER OF
TAXATION OF THE COMMONWEALTH
OF AUSTRALIA

CASE FOR THE RESPONDENT

COWARD, CHANCE & CO.
St. Swithin's House,
London E.C. 4.