CASE LAW

COMPENSATION RECEIPTS AS ASSESSABLE INCOME

LONDON & THAMES HAVEN OIL WHARVES LTD. v. *ATTWOOLL*

The principles enunciated by Buckley, J.[1] and the English Court of Appeal[2] in the *London & Thames Case* are neither novel nor illuminating. But the facts of the case sharply illustrate the difficulty of applying the law of compensation receipts, and perhaps the decision illustrates the incomprehensibility of the categories of law themselves.

The general principle as to assessability of compensation receipts may be stated as follows:

> A compensation receipt takes the capital or income character of that for which it is the compensation.[3]

Diplock, L.J., in the *London & Thames Case*,[4] said that there were two problems involved in applying this rule: first, the problem of identifying what the compensation was paid for, and secondly, the problem of determining whether that for which compensation was paid was or would have been itself of an income nature, if it had been received in the ordinary course of trade.

It seems to the present writer that the first of Diplock, L.J.'s two problems involves the characterisation of what the compensation was paid for (and I shall hereafter, for simplicity, refer to this object of compensation as "the

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[1] (1966) 3 W.L.R. 325; (1966) 3 All E.R. 145.

[2] (1967) 2 W.L.R. 743.

[3] Thus, in the *London & Thames Case, ibid.*, Willmer, L.J. in the Court of Appeal asked (at 746): "What does the sum . . . represent?" Diplock, L.J. at 755-56 proposed a different formulation: "Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received, instead of the compensation." It is submitted, with respect, that while Diplock, L.J.'s formulation was adequate on the facts before him, as a statement of the compensation principle it is deficient in three respects:

(a) the payment of compensation need not, at least in Australia, be pursuant to a legal right: *Carapark Holdings Ltd.* v. *Commissioner of Taxation of the Commonwealth* (1967) 40 A.L.J.R. 506, at 509.

(b) The compensation receipt may be assessable income, even though it is received for something other than the failure to receive money. (See *infra* Classes 1, 2 and 3.) It may be for the loss of trading stock, the loss of a "revenue asset", or the incurring by the taxpayer of a liability.

(c) His Honour's formulation does not supply any positive test for the corollary, as to when compensation receipts are not income.

In *Federal Commissioner of Taxation* v. *Wade* (1951) 84 C.L.R. 105, Dixon and Fullagar, JJ. at 112 said ". . . moneys recovered from any source representing items of a revenue account must be regarded as received by way of revenue". That formulation was adopted to cover a case of compensation for loss of trading stock. It seems less apt in the case of compensation for the incurring of a loss or outgoing.

[4] *Supra* n.2 at 756.

restituendum") under one of three broad categories. Those categories of *restituenda* appear to be:

1. Tangible Assets.
2. Intangible Assets, Prospective Profits and Receipts.
3. Losses and Outgoings.

The characterisation of the *restituendum* in accordance with these categories is important because different principles of assessability operate in each field (though there may be some overlapping). It is tentatively submitted that the three categories are assumed in a great many of the judgments on compensation receipts, and that to bear them in mind may help to avoid conceptual confusion. One may be guilty of failing to heed Harman, L.J.'s warning about the error of trying to classify the cases in this branch of the law,[5] but support for the present general method may be obtained from Diplock, L.J., who said: "I see nothing in experience as embalmed in the authorities to convince me that this question of law, even though it is fiscal law, cannot be solved by logic."[6] And it will later be submitted that counsel for the taxpayer in the *London & Thames Case* might have been able to put a more effective argument by appreciating the categories involved and consequently relevant taxation principles.

This note, therefore, proceeds by first setting out the categories of *restituenda* in turn, and by stating what principles of assessability are relevant to each. In the light of that analysis, the decision in the *London & Thames Case* is examined.

Class 1. Tangible Assets

Examples would be a building, cattle, a wharf or money. There will be an initial problem of identifying the asset as distinct from a mere part of it. If the wind blows the roof off the taxpayer's factory, has the taxpayer lost an asset, the roof, or merely suffered damage to his asset necessitating expenditure in repairing it?[7]

The compensation principle operates wherever there is a loss or sterilisation[8] of the tangible asset. As a matter of logic it would seem that once the asset has been identified, there cannot be a loss or sterilisation except of the whole asset, not merely part of it.

In this class, the taxation principles in Australia are relatively clear. A building is a capital asset unless the taxpayer is a speculator dealing in the buying and selling of buildings, and so compensation for its loss is normally a capital receipt. Cattle are trading stock of a primary producer, and therefore the compensation for them would be taken into account in calculating the taxpayer's assessable income from trading stock under Part III, Division 2, Subdivision B of the Income Tax Assessment Act, 1936-1967 (hereafter referred to as "the Act").[9] Money may be either capital or income, but is neutral of its nature. The assessability of money in the hands of the taxpayer depends on the circumstances of its receipt (for example, whether it was received as a reward for services, or in the form of a periodical receipt).

[5] *Id.* at 753.

[6] *Id.* at 755. Whether the taxation principles used by the courts to answer his Honour's second problem are logical, is another question.

[7] In the latter situation, the *restituendum* is the outgoing for repair, falling under Class 3 in the present analysis. Of course, the same problem arises in Australia in interpreting s.53 of the Income Tax Assessment Act, 1936-1967 (hereafter referred to as "the Act"). The test appears to be: was the money spent on restoration of a part of the asset, or reconstruction of the entirety? See *Lindsay* v. *Federal Commissioner of Taxation* (1961) 106 C.L.R. 377 at 383-84.

[8] The word "sterilisation" is used by Lord Buckmaster in *Glenboig Union Fireclay Co. Ltd.* v. *Commissioners of Inland Revenue* (1922) 12 T.C. 427, at 463.

[9] *Federal Commissioner of Taxation* v. *Wade, supra* n.3.

Class 2. Intangible Assets, Prospective Profits and Receipts

Examples would be patents, the congeries of rights contained in a contract of service or an agency contract, prospective profits which may flow from the exploitation of the agency contract, prospective receipts of salary for services performed under a contract of service.

Logically, there are at least two classes involved here: intangible assets and prospective profits/receipts. Readers may find it more helpful to make the strict, logical classification, but in the present analysis it is unnecessary to do so, because similar issues arise in applying the compensation principle in each of the logical classes. In particular, one must consider the "profit-making apparatus" test, referred to below, in any situation which falls under the present writer's Class 2.

Again, as in Class 1, there is an initial problem of determining what the *restituendum* is. The case of *Heavy Minerals Pty. Ltd.* v. *Federal Commissioner of Taxation*[10] may be seen as involving the question of whether the taxpayer's business enterprise was rutile mining, or mining in general.

The compensation principle will operate wherever there is a loss or sterilisation of the asset or a loss of the expected profit or receipt. Although the word "loss" is here used, many of the cases apply the compensation principle where the taxpayer has of his own volition given up the *restituendum* for some consideration. In such situations, the compensation principle may interact with principles regarding rewards for services, periodical receipts, mere gifts and receipts incidental to the carrying on of the taxpayer's business. Where, however, there is a lump sum[11] compensation payment, the only principle other than the compensation principle which would be relevant to the characterisation of the receipt (as distinct from the characterisation, under the compensation principle, of the *restituendum*) would be the principle that a receipt incidental to the carrying on of the taxpayer's business is income. The latter principle may have (on one view) brought about the decision in *H. R. Sinclair Pty. Ltd.* v. *The Commissioner of Taxation of the Commonwealth.*[12]

At least one of the principles which is relevant here but not relevant in Class 1 is that enunciated by Lord Macmillan in *Van Den Berghs Ltd.* v. *Clark.*[13] If the *restituendum* forms the "profit-making apparatus" of the taxpayer's business, it is of a capital nature. Cases on this principle are legion, and the principle poses the gravest difficulties of application.[14]

The cases talk of assets which have an income character. It is, of course, peculiar that one should use this terminology, because an asset, by definition, does not "come in" as a receipt.[15] What "comes in" in a compensation case is the compensation receipt. It is necessary to distinguish those assets, the compensation for which is income, from other assets. Perhaps the best phrase to use in referring to such assets is the one suggested by Professor R. W. Parsons,[16] namely "revenue assets". It is necessary, however, to remember

[10] (1966) 10 A.L.J.R. 140.

[11] If the compensation takes the form of periodical receipts, its form may render it assessable. See and contrast *Forsyth* v. *Thompson* (1940) 23 T.C. 374, 8 C.T.B.R. (N.S.) Case 114, 7 C.T.B.R. (N.S.) Case 70.

[12] (1966) 40 A.L.J.R. 111.

[13] (1935) A.C. 431 at 442-43.

[14] In *Moriarty (Inspector of Taxes)* v. *Evans Medical Supplies Ltd.* (1957) 3 All E.R. 718, the House of Lords appears to have concluded by a 3-2 majority that a sum received by the taxpayer under an agreement for the sale of "know-how" was income, though, by a 3-2 majority again, the consideration attributable to the taxpayer's divulging secret processes was capital.

[15] *Cf.* Findlay, J. in *Lambe* v. *Inland Revenue Commissioners* (1933) 18 T.C. 212: "Certainly one would, looking at the thing quite generally, suppose that income means what comes in. . . . "

[16] Professor of Law, University of Sydney, in notes of lectures published by the Law School.

that the phrase is no more than a shorthand expression for asserting the conclusion that where such an asset is the *restituendum*, compensation for it will enter the calculation of what is income.

Class 3. Losses and Outgoings

Examples would be medical expenses, repair costs, or outgoings incurred in giving effect to a moral obligation to members of an employee's family.

The compensation principle arises because the loss or outgoing has been or will be made or incurred by the taxpayer. This class is radically different from Classes 1 and 2, and it may be asked whether we can apply any compensation principle here at all. But it should be noted that if we cannot, unusual results may follow. For example, if a man is assaulted by another and thereby incurs medical expenses for treatment of his injury, those expenses would be deductible when paid, under s.82F of the Act. If he recovers a dissected[17] compensation payment covering the medical expenses in an action for damages, it may follow that such a receipt is nonetheless not assessable income as to any part. It is apparently not "an amount which the taxpayer or any other person is entitled to be paid in respect of those medical expenses by a government or public authority or by a society association or fund", under s.82F. The result may be that the taxpayer is not only restored to his former financial position, but is financially better off, to the extent of his tax saving, than he was before the assault. It is difficult to see what general principle of assessability would catch the receipt.[18] As Lord Reid might say, "one ought not to be surprised at anything that happens under the Income Tax Acts but nevertheless all this does seem a little strange".[19]

Perhaps for Australia[20] the obvious solution to this problem is that we must look to whether the loss or outgoing is an allowable deduction under the Act. If the loss or outgoing is thus deductible, perhaps it may be said that the payment of compensation for it is automatically assessable income. Such an approach would leave the compensation principle itself intact, so that where the *restituendum* is an asset, the principle would require that you look to the asset's character as capital or income, and where the *restituendum* is a loss or outgoing, the principle (logically enough) would require that you look to the character of the loss or outgoing as an allowable deduction. And it would accord with the policy of the Act as expressed in ss. 26(j), 26(k), 72(2), 74(2) and 82F(1). By tying the present problem to the deductibility sections of the Act and the vast amount of case law thereon, we would at least find ourselves on familiar ground.

The case of *Levy* v. *Federal Commissioner of Taxation*[21] does not conflict with the above proposition. It is true that Kitto, J. there said: "In my opinion, this assessment could not stand whatever were to be decided in previous years."[22] But the case did not, on the present analysis, relate to a true Class 3 situation at all. It concerned the assessability of payments recouped as compensation for losses to the taxpayer through misappropriation. The

[17] *Infra* at nn.36-37.

[18] The present argument assumes that s.26(j) of the Act has no application and would not extend the words "amount received by way of insurance or indemnity for or in respect of any loss" to cover an amount received by way of damages. But see *Federal Commissioner of Taxation* v. *Wade*, *supra* n.3 (Kitto, J.).

[19] *Abbott* v. *Philbin* (*Inspector of Taxes*) (1961) A.C. 352 at 370-71. Another illustration of the argument by exposition of consequences used in this paragraph may be found in the *London & Thames Case*, *supra* n.2 at 748 (Willmer, L.J.).

[20] The comments which follow are applicable where the system operates with the twin concepts of *income* and *deduction*, and do not apply where the sole tax concept of *profit* is used.

[21] (1960) 8 A.I.T.R. 127.

[22] *Id.* at 134.

restituendum was not the incurring of a loss or outgoing but the sum of money lost by the taxpayer, and thus would fall within Class 1 above.

However, there are two Australian cases which may indicate that the suggested approach cannot be taken. In *Allsop* v. *Commissioner of Taxation*,[23] Barwick, C.J. and Taylor, J. doubted whether the proposition could be accepted without qualification.[24] In *H. R. Sinclair Pty. Ltd.* v. *Commissioner of Taxation*,[25] Taylor, J. said:

> The character of the amount which the appellant received cannot, in the absence of some appropriate statutory provision, be thought to vary according to whether or not deductions were claimed and allowed of expenditure which includes the sum now reimbursed.[26]

And Owen, J. said:

> . . . the fact that the amounts so paid were properly claimed and allowed as deductions in assessing the company to tax in those earlier years does not determine the question whether the amount so refunded is to be regarded as part of the company's assessable income for the year in which the refund was received.[27]

These two cases concerned the assessability of lump sum refunds made to the taxpayer by a government instrumentality of overpayments made by the taxpayer over a number of years. It may be doubted whether these were compensation cases at all. The payments were not compensation for the incurring or even the paying of an outgoing; they were refunds of the outgoings themselves. But if dicta in the *Allsop* and *Sinclair Cases* apply to true compensation cases, so that deductibility of the loss or outgoing does not indicate that the compensation for it is assessable, what other test do you apply?

In *Allsop's Case* it was not necessary to face this broad problem because the receipt was an undivided amount for refund and release of other claims. The Court held that the receipt had not been dissected and could not be apportioned. The release of claims involved the giving up of a capital asset (presumably on one of the principles listed in Class 2 above, though this is unclear), and therefore the consideration for the release was capital. There being a mixed receipt which could not be apportioned, none of it was assessable income. In *Sinclair's Case,* Taylor, J. found it unnecessary to face the broader issue, because there the taxpayer had engaged in lengthy negotiations before it received its refund, so his Honour could hold that the receipt was the product of an activity of the taxpayer's business. But what would his Honour have done if the taxpayer had done nothing to obtain the refund? What principle would he then have applied? It is submitted that the problem above postulated with regard to medical expenses would arise, the Court wanting to invoke principles of assessability but being unable to find any, unless the character of the receipts be tied to the character of the outgoing itself by the compensation principle or its equivalent in a refund situation.

The taxpayer's activity in negotiating for the refund, which was important for Taylor, J., did not seem to be so significant for Owen, J., who found that the refund was received by the taxpayer in its capacity as a sawmiller, so that it was part of the proceeds of the taxpayer's business. To the present writer it seems hardly more helpful to ask whether the refund was received as a business receipt, or in a business capacity, than simply to ask whether the refund is assessable. The words are appropriate as the expression of a conclusion, but not as the enunciation of a test. It is submitted, therefore, that Owen, J.'s judgment cannot be relied on as supplying the solution to the problem posed in the last paragraph above.

[23] (1965) 9 A.I.T.R. 724.
[24] *Id.* at 733.
[25] *Supra* n.12.
[26] *Id.* at 112.
[27] *Id.* at 113.

There fortunately may be some authority for the present suggestion. In *Carapark Holdings Ltd.* v. *Commissioner of Taxation*[28] the High Court (Kitto, Taylor and Owen, JJ.) said . . .

> . . . in general, insurance moneys are to be considered as received on revenue account where the purpose of the insurance was to fill the place . . . of any outgoing which has been incurred on revenue account in consequence of the event insured against, whether as a legal liability or as a gratuitous payment actuated only by considerations of morality or expediency.[29]

This seems to say that if the outgoing has been incurred "on revenue account", and the purpose of the insurance was to compensate for that outgoing, then the compensation may be assessable income. Setting aside for the moment the requirement of purpose,[30] the question will be whether the outgoing has been incurred on revenue account, and it is submitted that this means that the outgoing must be an allowable deduction.[31]

It is interesting to note that the present suggestion would impliedly involve disagreement with the approach of Kitto, J. in *Guinea Airways Ltd.* v. *Federal Commissioner of Taxation,*[32] where his Honour in considering a question of deductibility inverted the process thus:

> . . . unless the compensation is a receipt on revenue account, the loss consisting of the difference between the compensation and the cost price of the goods destroyed cannot be a loss of an income nature. It is useful, therefore, to consider whether the compensation is a revenue receipt.[33]

If the above passages from the *Guinea Airways* and *Carapark Cases* are both right, we have a vicious circle, for we must look to the deductibility of the outgoing to determine the character of the compensation receipt (*Carapark Case*), and yet we must look to the character of the compensation receipt in determining the deductibility of the loss or outgoing (*Guinea Airways Case*).

It is submitted that Kitto, J.'s *dictum* in the *Guinea Airways Case,* even if correct and helpful on the facts of the case, should not be treated as of general application. On the facts of that case, the compensation was paid for the loss of tangible assets, aeroplane parts, and thus the receipt fell under Class 1 in the present analysis, the issue then being whether the asset was trading stock (or, more generally, whether the taxpayer dealt in the asset) or a capital asset. This is very familiar territory, and the answer on the facts of the case would come with relative ease. When, therefore, his Honour invoked the compensation principle in solving his *deductibility* problem, he was able to obtain an answer to his problem with equal ease. But suppose, as in *John Fairfax & Sons Pty. Ltd.* v. *Federal Commissioner of Taxation,*[34] the outgoing had been for legal expenses, and assume that the taxpayer was able to recover some compensation for the outgoing from his public risk insurer.[35] To solve the problem of whether the loss or outgoing is deductible by asking whether the compensation receipt is assessable is quite unhelpful, because in a Class 3 situation the principles of assessability are so uncertain

[28] (1967) 40 A.L.J.R. 506.

[29] *Id.* at 509.

[30] Which, in any event, goes to *identifying* the *restituendum* rather than to classifying it. See the next Section.

[31] It must be admitted that payments by the company to defendants of the deceased employee may not have been deductible under s.51, although they might properly have been charged to revenue account. The High Court relied upon U.K. authorities where the issue was whether the outgoing would be so chargeable.

[32] (1949) 83 C.L.R. 584.

[33] *Id.* at 592.

[34] (1959) 101 C.L.R. 431.

[35] Of course, s.26(j) of the Act may apply here. Insofar as it does apply in any case, it makes Kitto, J.'s approach doubly difficult, for his Honour's approach would then involve a vicious circle *both* at general law (on the *Carapark Case*) and by statute.

(unless the present suggestion is adopted). At least, in the deductibility area, we know the sorts of questions to ask. It is therefore submitted that the best way to break the vicious circle is to opt for the *Carapark* approach rather than Kitto, J.'s approach in the *Guinea Airways Case.*

In summary, then, it is argued that in a Class 3 situation the logical approach to the question of assessability is that of looking to the character of the loss or outgoing as a deductible outgoing. On the present state of the authorities, such an approach seems open in a true compensation case.

Identifying the Restituendum

The above analysis can do no more than to indicate what principles of assessability apply in a given situation, and it assumes that we know what the *restituendum* is in such situation. However, there is typically a threshhold problem of determining what the receipt was "for", that is of identifying the *restituendum.* The position will be further complicated if, on the facts, the payment was made or accepted "for" a number of items. The Australian cases on this question indicate that if the taxpayer dissects his claim and the payor meets it in full, the court can have regard to the taxpayer's dissection.[36] If the payor makes a dissection, even though the lump sum is accepted by the taxpayer, it would seem that the court cannot have regard to the dissection.[37] Where the parties do not dissect the receipt, the question will be whether the court can step in and apportion the receipt as to its various components. On this question the case law is confused. *McLaurin's Case*[38] and *Allsop's Case*[39] both indicate that no apportionment can be made, and that, in consequence, no part of the receipt is assessable income. However, there is a *dictum* of Windeyer, J. to the opposite effect in *National Mutual Life Association of Australia Ltd.* v. *Federal Commissioner of Taxation,*[40] and the English position would appear to be that unless an apportionment can be made the whole receipt is taxable.[41]

The *London & Thames Case* is basically concerned with this problem of identifying the *restituendum.* It was assumed that if the *restituendum* was the wharf, the receipt was of capital, and if the *restituendum* was lost profits, the receipt was income. It is in this context, then, that the decision in the case must be approached.

The London & Thames Case

The facts of the case are as follows. The taxpayer owned a number of jetties at its Thames Haven oil installation where tankers bringing oil berthed for purposes of discharge. On April 22, 1953, a tanker struck and damaged one of the jetties. The taxpayer claimed damages in the sum of £115,618 from the owners of the tanker. This figure had two component parts: first, cost of repairs in the sum of £83,167; secondly, consequential damage for the loss of the use of the jetty for 380 days. The consequential damage was quantified at £32,450. This figure was arrived at by means of an arbitrary calculation based on a percentage of the capital cost of the jetty (perhaps, it was suggested, because the jetty was fairly new, and no figures were available as to the rate of profit which could ordinarily be

[36] *McLaurin* v. *Federal Commissioner of Taxation* (1961) 104 C.L.R. 381. But see 7 C.T.B.R. (N.S.) Cases 101 and 102.

[37] See 4 C.T.B.R. (N.S.) Case 7.

[38] (1961) 104 C.L.R. 381.

[39] *Supra* n.24.

[40] (1958) 102 C.L.R. 29 at 50.

[41] In *Wales* v. *Tilley* (1941-43) 25 T.C. 136, it was assumed at 150 that it was for the Attorney General, not the taxpayer, to concede that the receipt was apportionable.

expected to accrue from its use). Apparently no objection was made at any stage as to this method of quantifying the damage; certainly it was not an issue before the Court of Appeal.

The owners of the tanker admitted liability but limited their liability under the Merchant Shipping Acts to £77,875, and that amount, together with appropriate interest, was paid in a lump sum without any dissection.

The taxpayer was insured against physical damage but not against consequential damage. It reached an agreement with its underwriters that the sum recovered from the owners of the tanker should be apportioned rateably as between the physical damage and the consequential damage, and that the underwriters should pay to it the unrecovered balance in respect of the physical damage. Thus the taxpayer recovered the sum of £26,738 from its underwriters, this sum representing, by agreement between the taxpayer and underwriters, partial compensation for the cost of repair (and certain legal expenses). The portion of the sum paid by the owner of the tanker which, on the basis of the above agreement, represented consequential damage was £21,404.

The Inland Revenue Commissioner treated this sum of £21,404 as income. On appeal, the Special Commissioners confirmed the assessment and stated a case for the English High Court. Buckley, J. held that the sum recovered was in respect of a capital loss, and was therefore a capital receipt and not taxable. The Court of Appeal (Willmer, Harman and Diplock, JJ.) reversed Buckley, J.'s decision.

It should be noted in passing that both parties apparently assumed that the compensation for repair costs (a Class 3 receipt) could not be of an income nature. This may have been a proper assumption under United Kingdom taxation law, where tax is levied under Case I of Schedule D of the Income Tax Act on *profit*. However, it could be argued that repair costs were a charge against profits, so that compensation for them was received on revenue account. In Australia, if the analysis suggested in Class 3 is correct, the receipt would be assessable if the repairs would have been deductible under s.51 or s.53 of the Act. The test would be whether the outgoing was made in restoration of a part of the asset (deductible), or in reconstruction of the entirety (not deductible).[42] One has the uneasy feeling, in trying to apply this test to a given situation, that the law is trespassing on purely metaphysical territory. At least, the test is sufficiently nebulous to render accurate predictions about its application impossible, and assumptions by litigants foolhardy. A second test may be derived from *W. Thomas & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation*[43] where Windeyer, J. said:

> The works in question can all be fairly described as repairs to the building. They were done to make good a deterioration that had occurred by ordinary wear and tear or by the operation of natural causes during the passage of time.[44]

The accident in the *London & Thames Case* can hardly be said to have been the result of normal wear and tear or of the operation of natural causes. Perhaps, however, one should not overemphasise this *dictum*.

The sum at issue in the *London & Thames Case* was the £21,404. Willmer, L.J. quoted from Lord Clyde in *Burmah Steamship Co. Ltd.* v. *Inland Revenue Commissioners*[45] as "stating in very succinct form the problem which has to be solved in a case of this sort":[46]

> . . . it is very relevant to enquire whether the thing, in respect of which

[42] See *supra* n.7.
[43] (1965) 9 A.I.T.R. 710.
[44] *Id.* at 719.
[45] (1931) S.C. 156.
[46] *Supra* n.2 at 751.

> the taxpayer has recovered damages or compensation, is deprivation of one of the capital assets of his trading enterprise, or, short of that, a mere restriction of his trading opportunities.[47]

His Honour here appears to be making two assumptions:

(i) that if the compensation is for the loss of a tangible asset (and thus within Class 1 above), it is a capital receipt, presumably because the wharf is a capital asset;

(ii) that if the compensation is for the "restriction of [the taxpayer's] trading opportunities" (and thus compensation for the loss of an intangible asset, within Class 2 above), it is a revenue receipt.

Thus, on the basis of his Honour's assumptions, we could say that the question was whether the compensation was "for" a Class 1 asset, or a Class 2 asset.

However, the second of his Honour's assumptions is open to question. The *restituendum* may be within Class 2, and in that Class we have seen at least one test of assessability is whether or not the *restituendum* is the profit-earning apparatus of the taxpayer. It may have been possible to argue, combining the principles in the *Van den Bergh*[48] and *Glenboig Cases*,[49] that the compensation was for the sterilisation for 380 days of the taxpayer's profit-earning apparatus. Counsel for the taxpayer seems to have been content to put his argument on the basis that compensation was for the sterilisation of the wharf itself, rather than for the sterilisation of the profit-earning structure. Counsel's argument was met by pointing out, *inter alia*, that even if the wharf itself had been undamaged, the taxpayer might have recovered the same sum as damages, calculated in the same way, as, for example, if the ship had sunk in the harbour entrance, blocking access to the wharf.[50] But even in such circumstances, it may still be argued that the taxpayer's profit-earning apparatus has been sterilised: that is, not only could it be said that the taxpayer lost the opportunity to make certain profits but that the whole structure and conduct of the taxpayer's business was affected. The answer to this argument may have been that the effect on the taxpayer's business, being for only 380 days, was not sufficiently permanent or serious to interfere with his profit-earning apparatus. But, again, the taxpayer's *whole* business in relation to that wharf was interfered with. As an argument, it seems more convincing than the one in fact put by counsel.

On Willmer, L.J.'s assumptions, the question was (in the present terminology) whether the *restituendum* fell within Class 1 or Class 2. What, that is, was the *restituendum*?

In the crucial part of each of their judgments, each member of the Court of Appeal identified a Class 2 *restituendum* on the facts of the case. The compensation was made not for sterilisation of the wharf as a capital asset, but for the loss of profit which would have been earned by the use of the wharf. Although the calculation of compensation was made on a determination of a percentage of the value of the wharf, that method of calculation was not decisive (though it may have been a "factor"),[51] just as the method of calculation by reference to loss of profits was not decisive in the *Glenboig Case*.[52] Buckley, J. at first instance held that all the damages recovered flowed directly from the physical injury to the wharf.[53] The Court of Appeal pointed out that the damage to the wharf did not constitute the cause of action.

> The cause of action was based upon the loss sustained by the taxpayers by the negligent navigation of the tanker, and the loss sustained because

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[47] *Supra* n.46 at 160.
[48] *Supra* n.13.
[49] *Supra* n.8.
[50] *Supra* n.2 at 753 (Willmer, L.J.), and 757 (Diplock, L.J.).
[51] *Id.* at 756 (Diplock, L.J.).
[52] *Supra* n.8 at 463.
[53] *Supra* n.1 at 339.

> the jetty could not be used for 380 days would have been recoverable even if there had been no physical harm to the jetty. . . .[54]

In other words, it was not that the physical harm to the jetty produced the consequential loss, but that both the physical harm and the consequential loss flowed from a common cause, the negligent navigation.

This approach may provide an answer to Buckley, J.'s argument, but it does not follow from the Court of Appeal's reasoning that the receipt *must* therefore be income. Buckley, J. says that, in finding what the payment represented, it is important to observe that the consequential damage due to loss of use has a close causal connection with the physical damage to the asset, and through this connection the consequential damage tends to acquire the capital character of the physical asset. The Court of Appeal denies that this causal relationship exists, saying that both the physical damage and the consequential damage have the same cause. But even if this is so, it only refutes Buckley, J.'s argument and the question still remains, what does the payment for "consequential damage" represent? Does it represent lost profit or the sterilisation of a Class 2 asset?

And when everything has been said, one gets the feeling that the Court of Appeal has answered the question without really giving any reasons at all (other than reasons for rejecting proposed solutions). The distinction between payments in compensation for lost profits, and for sterilisation of an asset, is certainly a difficult one, perhaps even contentless. But surely the proper approach for the Court would be to give some guidelines for future application of the principle, rather than to apply it without proper elaboration.

How far did the Court pay regard to the taxpayer's treatment of the compensation receipt? Certainly the dissection of the tanker-owner's payment by the taxpayer and his underwriter was accepted by the Court without question, even though the parties to the agreement to dissect were not the parties to the claim for and receipt of compensation. This seems to indicate that the taxpayer's dissection, and no-one else's, is crucial.[55] What if the taxpayer had called the receipt compensation for consequential damages through sterilisation of the wharf (or as suggested above, of the taxpayer's profit-earning apparatus) for 380 days? The case leaves open the question of whether the Court would be bound by the taxpayer's treatment of the receipt, but it is submitted that the tenor of the judgments is against giving the taxpayer a free hand. Willmer, L.J. drew distinctions between total loss and partial injury,[56] and between a thing which is enjoyed by consuming it, and a thing which is enjoyed by using it.[57] What the taxpayer says about the matter presumably could not affect these distinctions. Diplock, L.J. said:

> An alternative way in which Mr. Monroe puts it is that the £21,000 compensation was paid to the taxpayers for not using their capital asset, the jetty. But I think that this is no more than ingenious semantics designed to bring this case within some of the words used in the *Glenboig* case.[58]

This indicates that the Court will not be swayed by the taxpayer's "ingenious semantics" and perhaps the fact that the Court did not, apparently, emphasise what the taxpayer said about the amount, but rather assumed that it was treated as consequential damage for loss of the use of the jetty, is significant.[59]

Nevertheless, it is clear that there is still plenty of scope for the draftsman to make use of his knowledge of taxation law. By using words suggesting a

[54] *Supra* n.2 at 757 *per* Diplock, L.J.
[55] And see *supra* n.39.
[56] *Supra* n.2 at 748.
[57] *Id.* at 749.
[58] *Id.* at 757.
[59] Contrast the present approach with that of the Court of Appeal in *Heaton* v. *Bell* (1968) 1 W.L.R. 1385, where Danckwerts, L.J. set out the relevant correspondence and documents at great length.

capital receipt in documents and letters relevant to the receipt, the whole transaction may be given a capital flavour, and while the Court may not want to be in the hands of the draftsman, it is difficult to see how it can avoid looking to the written evidence of the transaction. Certainly, the *London & Thames Case* does not provide the solution.

R. P. AUSTIN, Case Editor — Fourth Year Student.

LEGAL AND EQUITABLE ESTATES: THE CONCEPT OF DUALISM

VANDERVELL v. *I.R.C.*[1]

Background

Section 23C (1) (c) of the Conveyancing Act, 1919 (N.S.W.),[2] which is identical to s.53 (1) (c) of the Law of Property Act 1925 (U.K.), has recently received much judicial attention. Successor to s.9 of the Statute of Frauds, which was enacted in 1677 and was designed to prevent fraud by requiring written evidence to support actions based on certain transactions, the section has "recently received a new lease of life as an instrument in the hands of the Revenue".[3] Stamp duties are a constantly increasing source of revenue, especially in New South Wales and the other Australian States, where the State Governments do not levy income tax. Although no longer an absolute proposition,[4] it may still be generally stated that "the Statute taxes instruments and does not tax transactions".[5] The Revenue authorities have therefore been relying on s.23C (1) (c)[6] to ensure that certain transactions are in writing, in order that the Revenue Acts can render the instruments subject to duty.[7] This has caused lawyers, intent on minimising duty on transactions, to enter upon elaborate schemes to avoid the application of s.23C (1) (c), and thus avoid the creation of dutiable instruments.

In 1960, to the delight of the Revenue authorities, the House of Lords extended the scope of s.23C (1) (c). In *Grey* v. *I.R.C.*,[8] it was argued that if X holds property in trust for A who is the absolute equitable owner, and A directs X to hold the property in trust for the absolute benefit of B, this is not a "disposition" of an equitable interest within the meaning of s.23C

[1] (1967) 2 A.C. 291; (1967) 1 All E.R. 1.

[2] S.23C (1) (c) states: "Subject to the provisions of this Act with respect to the creation of interests in land by parol . . . a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing".

[3] *Vandervell* v. *I.R.C.*, *supra* n.1, *per* Lord Wilberforce, (1967) 2 A.C. at 329; (1967) 1 All E.R. at 18.

[4] See, e.g., N.S.W. Stamp Duties Act, 1920-1968, s.66C.

[5] *Per* Lord Loreburn, L.C., in *Minister of Stamps* v. *Townend* (1909) A.C. 633 at 639. His Lordship was referring to the N.Z. Stamp Act, 1882, and was citing with approval a similar statement of Lord Esher, M.R. in *I.R.C.* v. *C. Angus & Co.* (1889) 23 Q.B.D. 579 at 589. It is submitted that the same comment applies to the N.S.W. Stamp Duties Act, 1920-1968.

[6] For the sake of consistency, the provision will be referred to in this article as s.23C (1) (c) whether the English or the N.S.W. Act is being considered. As noted, the provisions in the two Acts are identical, and it is submitted that they have precisely the same effect.

[7] E.g., the N.S.W. Stamp Duties Act, 1920-1968 in s.66 attaches liability to stamp duty to "conveyances", which are defined in s.65 to include, *inter alia*, "every . . . *instrument* . . . whereby any property in New South Wales is transferred to or vested in or accrues to any person. . . ."

[8] (1960) A.C. 1.