JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 51/99

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**THE STAMP COMMISSIONER**	**APPELLANT**
AND	**YVONNE ELAINE BOLTON**	**RESPONDENT**

Lackston Robinson with John Francis & Duane Thomas
Instructed by Director of State Proceedings for the appellant

Dr. Randolph Williams for Respondent

9th , 10th October & 20th December 2001

FORTE, P:

This is an appeal from an order of Courtenay Orr, J in which he allowed an appeal from the decision of the Commissioner of Stamp Duties and Transfer Tax, assessing transfer tax on property 8 West Pine Way Barbican Terrace, Kingston 6 at $109,452.50 with interest of $18,945.75. The decision of the Commissioner was thereby set aside by the learned judge.

The property was originally owned by Kenneth Donald Bolton and his wife Vandolyn Bolton as joint tenants. On November 5 , 1988 Kenneth Bolton died and by virtue of paragraph 11(5) of Part 11 of the First Schedule of the Transfer Tax Act, which

will be referred to fully later in this judgment, no transfer tax was payable. The death of Mr. Bolton was accordingly noted on the Certificate of Title.

On June 26, 1994 Vandolyn Bolton died and on the 17th March 1995, as her personal representative, Mrs. Yvonne Elaine Bolton, the respondent declared a Revenue Affidavit. On 7th April, 1998 the respondent having been appointed Administrator of the estate, submitted to the Commissioner of Stamp Duties (the "appellant") per her Attorneys, documents of the estate, for assessment of transfer tax. On May 14, 1998 the transfer tax liability was assessed, and the respondent's attorney was informed on the 1st June, 1998. On June 18, 1998 the respondent objected to the assessment and on July 10, 1998, the appellant confirmed the assessment by "Notice of Decision." The respondent thereafter appealed the decision. On the 26th March 1999 Courtenay Orr, J made the order earlier referred to. As a result, the appellant now appeals.

The grounds on which the appellant does so, though amounting to three in number can be reduced to the single issue of what is the proper interpretation of paragraph 11(5) of Part 11 of the First Schedule of the Transfer Tax Act (the "Act"). This single issue relates to whether or not having regard to the wording of paragraph 11(5), the respondent was entitled to relief from the transfer tax as Courtenay Orr J found.

Paragraph 11(5) states as follows:

> "(5) Nothing in sub-paragraph (3) shall apply in relation to any property which is shown to the satisfaction of the Commissioner to be a dwelling-house which was –
>
> (a) owned by the deceased or, as the case may be, by the deceased and his spouse jointly or as tenants in common, or by the deceased and any one or more of the following relatives of the deceased, whether jointly or as tenants in common, that is to say –
>
> (i) mother or step-mother;
> (ii) father or step-father,
> (iii) son or step-son;
> (iv) daughter or step-daughter;

(v) sister or brother, whether of the whole of half blood;
(vi) grandfather or grandmother;
(vii) grandson or granddaughter; and

(b) used as the principal residence of each of them:

Provided that more than one residence of the deceased shall not be accepted as having been his principal residence for the purposes of this sub-paragraph."

To put paragraph 11 (5) into proper context, a look at other relevant sections of the Act is appropriate.

Firstly Section 5 (1) makes provision for the payment of tax upon death. It states:

"5. (1) On the death of any individual after the 31st day of May, 1974, all property of which he was, at his death, competent to dispose shall, for the purposes of taxation in conformity with subsection (2) and (3) of section 12, be deemed to be, for a consideration equal to its market value at the date of his death, transferred by him at the date of his death to the persons to whom such property passes on his death.

...

(2) No tax shall be payable in respect of the transfer of property by any personal representative to a person as legatee in the course of administration of the deceased's estate."

This section deems that the property which passes on death, is for a consideration equal to its market value at that time, and consequently transfer tax based on subsection (2) and (3) of section 12, is payable as to that market value.

Subsection (2) of section 12 after stating that "tax shall on the assumption introduced by subsection (1) of section 5, be imposed with respect to the total consideration of such transfer by an individual as that subsection describes" then mandates that the tax shall be computed in accordance with the table of rules as set out in the subsection.

Then, importantly and most relevant to the issue in this case subsection (3) states:

> "(3) In relation to tax imposed by virtue of subsection (1) of section 5 –
>
> (a) the provisions of Part 11 of the First Schedule shall have effect; and
> (b) the other provisions of this Act (in so far as they are applicable in relation thereto) shall apply subject to the provisions of subsection (2) of this section and Part 11 of the First Schedule aforesaid."

In this regard two sections of Part 11 of the First Schedule are relevant – paragraph 11(3) and paragraph 11(5) already set out heretofore. Noting that there is a direct reference to paragraph 11(3) in paragraph 11(5) I set out hereunder the content of 11(3):

> "(3) The property passing on the death of an individual competent to dispose thereof shall be taken to include any property which (having been so disposable) passes –
>
> (a) to his personal representative; or
> (b) either immediately on his death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; or
> (c) at a period ascertainable only by reference to the deceased's death."

Paragraph 11(5) thereafter then excludes as "disposal property" for the purposes of paragraph 11(3) and the relevant sections of the Act – section 5(1) and section 12, property which passes on death to the named classes of persons, providing it is a dwelling house which was "used as the principal residence of each of them."

Counsel for the respondent advances, as did the learned judge find, that paragraph 11(5) extends this benefit to a case in which the deceased, who is without family devises his property to anyone not included in the class of persons defined in the paragraph, so long as it was a dwelling house which he used as his principal residence. On the other hand, the appellant contends that on a true construction of the paragraph, it is clear that the benefit extends only to the deceased who devises his

dwelling-house to his spouse or any of the class of persons named, with the added condition that it must have been the principal place of residence of "each of them."

In order to resolve the two opposing contentions, it would be useful to look at the history of these provisions.

I begin by noting that Section 5(1) of the original Act in 1971 appears to have given exemption for taxation in respect of transfer on death.

In 1975 by the Transfer of Tax (Amendment) Act 1975 the Act was amended by deleting Section 5(1) and substituting therefor the present section 5(1) which as we have seen requires that property which an individual is competent to dispose of is to be deemed to be transferred for a consideration equal to market value at the date of his death. It was also in 1975, that the present section 12 was introduced into the Act.

In 1971 because there was no taxation on property transferred at death there was no necessity for what is now Part 11 of the First Schedule, and so the original Act had no such provision. In 1975, however Part 11 of the First Schedule entitled "Special Provisions as Regards Tax Respecting Transfer on Death" was also introduced. In so far as is relevant, paragraph 11(3) and (4) were in 1975 the same as now appear in the Schedule. However, it is important to note the provisions as they were introduced in paragraph 11(5) in the 1975 Amendment Act. It reads:

> "(5) Where it is shown to the satisfaction of the Commissioner that the persons entitled to a joint tenancy mentioned in sub-paragraph (4) consisted of the deceased and his spouse and that, immediately before his death, the property subject to such joint tenancy was a dwelling house used as the principal residence of each of them, nothing in sub-paragraph (3) shall apply in relation to that joint tenancy:
> Provided that more than one residence of the deceased shall not be accepted as having been his principal residence for the purposes of this sub-paragraph."

In this provision the Act sought to give exemption for transfer tax in respect of property owned jointly by husband and wife. The paragraph made it specific that the property

had to be the dwelling house which was the principal residence of "each of them" that is to say – the family home. There was therefore no doubt that the provision only related to such property and that it had to be property for which the deceased and his/her spouse were joint tenants. It appears that the exemption did not then apply to property which was solely owned by the deceased or owned by them as tenants in common, even though it was a dwelling-house which was the principal residence of "each of them."

In 1988, by the Transfer Tax (Amendment) Act, 1988, the Act was again amended. Section 8 of the amending Act provided as follows:

> "8 – Part 11 of the First Schedule to the principal Act is hereby amended by deleting sub-paragraph (5) of paragraph 11 (excluding the proviso) and substituting therefor the following –
>
> '(5) Nothing in sub-paragraph (3) shall apply in relation to any property which is shown to the satisfaction of the Commissioner to be a dwelling-house which was –
>
> (a) owned by the deceased or, as the case may be, by the deceased and his spouse jointly or as tenants in common; and
> (b) used as the principal residence of each of them:'."

For the first time, the spouse could benefit from the exemption where the dwelling-house was the principal residence of "each of them," even if the house was owned solely by the deceased, or as tenants-in-common with the spouse. Paragraph 11(5) was again amended in 1997, to extend the benefit to other relatives, apart from spouses e.g. mother, father, son, daughter etc all of which have been earlier set out.

In spite of the history of the legislation, the appellant contends that paragraph 11(5) extends the exception to property owned solely by a deceased, and no matter to whom it is devised, so long as it is a dwelling house and the principal residence of the deceased. The difficulty that readily confronts such a construction of the paragraph, is subparagraph (b) which requires not only that the dwelling house should be the principal residence but also that it should be the principal residence of "each of them."

The learned judge in arriving at his conclusion dealt with this point as follows:

After deciding that the existence of a spouse is an alternative not a requirement he states:

> "If one selectively comminutes the provision one gets the following result:
> Nothing in sub-paragraph 3 shall apply in relation to any property.
>
> (1) which is shown to the satisfaction of the Commissioner to be a dwelling house which was
>
> Either
>
> (2) (a) owned by the deceased
>
> OR
>
> (2) (b) in the situation where there is a spouse, owned by the deceased and his spouse jointly or as tenants in common,
>
> And
>
> (3) is used as the principal residence of each of them.
>
> Certainly in requirement 3, 'them' cannot apply in all circumstances, because as we have seen the existence of a spouse is an alternative. Thus if one asks, like Lord Green in ***Re Bidie*** (supra). ... what is the true meaning of the phrase 'each of them?' One must go back to the alternatives pointed at (2)(a) the deceased (b) deceased and spouse. The words 'each of them' cannot apply literally to alternative 2(a), hence it cannot apply in all circumstances, but only in the alternative where there is an existing spouse."

The learned judge obviously based his decision by dividing the paragraph into alternatives divorcing in a sense, the property owned solely by the deceased from that owned by deceased and spouse. I cannot agree with that approach. The section clearly seeks to give exemption for transfer tax to the "family home" whether owned solely by the deceased or jointly with the spouse. If construed in that way, sense can be given to the words "each of them" because those words restrict the exemption to cases where husband and/or wife used the dwelling house as the principal residence.

On the other hand, legal gymnastics have to be undertaken to give any sensible meaning to the words "each of them," if the sole ownership by deceased of the property is to be construed as a separate and distinct entitlement, from the cases in which the property is owned jointly by a spouse. Indeed, the use of the words "as the case may be" in paragraph 11(5)(a) which introduces the joint ownership with the spouse, in my view, clearly indicates that the legislature intended to bestow the exemption on property which is family property whether owned solely by the deceased or jointly with the spouse.

In the event, I would allow the appeal, set aside the order of the Court below, and enter judgment for the appellant with costs to be taxed if not agreed.

HARRISON, J.A:

I agree with the reasoning and conclusion of Forte, P, in this appeal, on the interpretation to be given to paragraph 11(5) of Part II of the First Schedule to the Transfer Tax Act.

I wish to add that Orr, J. was in error by treating paragraph 11(5) as disjunctive, thereby consequently concluding that the existence of a spouse is an alternative.

The history of the said legislation, as traced by the learned President reveals that in 1975, the Transfer of Tax (Amendment) Act specifically provided for the exemption from taxation, a dwelling-house, which had been jointly owned by the deceased and his spouse and used as the principal dwelling-house, by them, immediately prior to his death. The Act therefore contemplated both joint ownership and joint occupancy,

immediately prior to the death of one of the joint tenants. That, therefore, was the tenor and intendment of the statute, demonstrated by the amendment in 1975.

The amendment in 1988 of paragraph 11 of the First Schedule [Transfer Tax (Amendment) Act,] merely extended the categories of ownership of the dwelling-house to include:

> (a) sole ownership of the deceased and
>
> (b) ownership as tenants in common by the deceased and his spouse,

but importantly, it retained the condition, that such dwelling-house was:

> "used as the principal residence of each of them."

Joint occupancy was contemplated and preserved.

In the current Act sub-paragraph (5)(a) "the ownership sub-paragraph" (further extended by the 1997 amendment), must be read conjunctively with sub-paragraph (5)(b) the "joint residency sub-paragraph" emphasizing the condition of user "... as the principal residence of each of them." This interpretation would serve to maintain the fact that the intention of the legislature was that, for example, the sole ownership "... owned by the deceased" must be accompanied by the user of multiple parties:

> "... (a) and
>
> (b) used as the principal residence of each of them (Emphasis added)."

in order to qualify for the exemption.

Any other interpretation would do violence to the purpose and intendment of the Act.

There was no such fundamental change in the interpretation of the statute as contended for by counsel for the appellant.

In the instant case, it cannot be shown, that in the case of deceased Vandolyn Bolton, as a sole owner, during her sole ownership, that the property was "used as the principal residence", that is, the family house, of "... each of them."

The said dwelling-house cannot therefore qualify for exemption from taxation under the provisions of the said paragraph 11(5) of the First Schedule to the Act.

I agree that the appeal should be allowed.

PANTON, J.A.

I agree.

FORTE, P:

Appeal allowed. Order of the court below set aside. Judgment entered for the appellant. Costs of the appeal to the appellant to be taxed if not agreed.