

WEEKLY TAX BULLETIN

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PRACTITIONER ARTICLES

[592]

No free ride for beneficiaries buying assets out of the deceased estate: Shand case

- by Dr Brett Davies, Tax Partner, Legal Consolidated Barristers & Solicitors, Adjunct Reader, Curtin University

Beneficiaries often receive assets from a deceased estate without paying stamp duty, but is that always the case? *Shand v Chief Commissioner of State Revenue (NSW)* [2025] NSWSC 818 (reported at 2025 WTB 32 [566]) explores the tax consequences when a beneficiary, who is also the executor, decides to purchase an estate property.

Hmelnitsky J in *Shand* clarifies the tax treatment of such transactions, highlighting the complexities of balancing fiduciary duties with personal interests and the robust scope of the *Duties Act*.

Case background

In *Shand*, Fiona Shand, the executor and a beneficiary of her mother's deceased estate, purchased a residential property in Bondi Junction, valued at \$5,010,000, at a public auction in 2023. The estate, which included this unencumbered property, was to be held on testamentary trusts for the benefit of Fiona and her 3 siblings, with Fiona's trust entitled to 27.3% of the residue.

She signed a contract with herself, acting as vendor in her capacity as executor and purchaser in her personal capacity. What stamp duty, if any, should Fiona pay under the *Duties Act 1997* (NSW)? The usual dance ensued:

- NSW State Revenue assessed the transaction as an "agreement for the sale or transfer of dutiable property" under s 8(1)(b)(i), imposing duty on the full \$5,010,000.
- Fiona objected, arguing that the transaction was a "surrender of an interest in land" by the other beneficiaries under s 8(1)(b)(iii), limiting duty to 72.7% of the property's value (reflecting the other beneficiaries' combined interests).
- Alternatively, if neither provision applied, the transaction fell under s 8(1)(b)(ix) as "another transaction" resulting in a change in beneficial ownership, also attracting duty on the full value.

Court's findings

Hmelnitsky J dismissed Fiona's appeal, upholding the assessment under s 8(1)(b)(ix) finding:

1. No Valid "Agreement" Under s 8(1)(b)(i)

The Supreme Court rejected the Chief Commissioner's contention that the contract constituted an "agreement" under s 8(1)(b)(i). Citing *Minister Administering National Parks and Wildlife Act 1974 v Halloran*.

Hmelnitsky J noted that "a trustee cannot contractually deal with itself so as to sell trust property to itself in some capacity other than as trustee" (*Shand* at [43]). This reflects the common law "two-party rule", which holds that a contract requires at least 2 distinct parties, as affirmed in:

- *Clay v Clay* (2001) 202 CLR 410, [51] and;
- *Boensch v Pascoe* (2019) 268 CLR 593, [99] (*Shand v Chief Commissioner of State Revenue (NSW)* [2025] NSWSC 818, [41]).

The court said the contract, signed by Fiona in dual capacities, lacked "intrinsic validity" and was not a binding agreement for duty purposes, citing *Ingram v Inland Revenue Commissioners* [2000] 1 AC 293, 305D, 310G (*Shand* [41]).

2. No "Surrender of an Interest in Land" under s 8(1)(b)(iii) Duties Act 1997 (NSW)

Fiona argued that the other beneficiaries' interests in the unadministered estate were "interests in land" surrendered when she acquired the property, limiting duty to their 72.7%. The court disagreed, holding that "interest in land" in s 8(1)(b)(iii) "includes general law concepts of beneficial ownership in land but is not limited by them". It does not extend to the "non-specific, fluctuating interest" of a residuary beneficiary in an unadministered estate, as established in *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12, 17-18. Hmelnitsky J explained at [102]:

"[The expression "interest in land"] ... It is not used in a way that includes the non-specific, fluctuating interest concerning all estate assets that is commensurate with the right of a residuary beneficiary to the due administration of an estate prior to the ascertainment of the residue."

This finding in *Shand* aligns with long-standing precedents, such as *Lord Sudeley v Attorney-General* [1897] AC 11, 15 and *Dr Barnardo's Homes v Special Income Tax Commissioners* [1921] 2 AC 1, 10, which establish that residuary beneficiaries have no proprietary interest in specific estate assets during administration.

3. Statutory Context: Sections 63(2) and 29(3)

Fiona relied on s 63(2) of the *Duties Act 1997* (NSW), which reduces dutiable value for transfers by a legal personal representative to a beneficiary under an agreement to vary trusts. She argued that this supported a broad interpretation of "interest" to avoid unfair taxation. The court rejected this, noting that s 63(2) applies only to transfers in satisfaction of a beneficiary's entitlement, which was not the case here, as Fiona's 27.3% residuary entitlement remained intact. Hmelnitsky J stated at [87]:

"The plaintiff did not acquire the residential property in partial satisfaction of her entitlement under the Will. ... The only change to the interests of the plaintiff and other beneficiaries under the Will was that the residuary estate now included the cash that the plaintiff paid for the residential property, rather than the residential property."

Similarly, Fiona's analogy to s 29(3), which addresses valuation of partnership interests, was dismissed. The court found that s 29(3) does not assume a partner's interest in partnership assets is an "interest" in the statutory sense but rather prevents double taxation when partnership assets are separately transferred.

4. Application of s 8(1)(b)(ix)

As the transaction was neither an "agreement" nor a "surrender", it fell under s 8(1)(b)(ix) as "another transaction that results in a change in beneficial ownership of dutiable property" (at [103]). This catch-all provision, described in *Baxter v Chief Commissioner of State Revenue* [2024] NSWCATAD 153, [53] as capturing transactions outside specific categories, imposed duty on the full \$5,010,000, as the property's beneficial ownership changed from the estate to Fiona personally (at [103]).

Legal and practical implications

The *Shand* decision has implications for executors, beneficiaries, and tax professionals:

1. **Executor purchases and fiduciary duties** - Executors purchasing estate assets must have clear authority, such as through the will (as in *Shand*, where clause 15.2(r)(i)(A) permitted such transactions) or beneficiary consent, to avoid breaching fiduciary duties (*Shand* at [18], [105]). The court's rejection of a valid "agreement" underscores the need for careful structuring to avoid unintended tax consequences.
2. **Limited scope of s 63(2) Duties Act 1997 (NSW)** - Section 63(2) applies only when a transfer satisfies a beneficiary's entitlement under a trust variation agreement (at [84]-[87]). This means that an executor who purchases estate assets personally without it affecting their residuary share -- the exact scenario in *Shand* -- cannot rely on s 63(2) to reduce the duty payable.
3. **Broad reach of s 8(1)(b)(ix) Duties Act 1997 (NSW)** - The catch-all provision ensures that complex or novel transactions altering beneficial ownership are dutiable, protecting the revenue base (*Shand* [103]; *Baxter v Chief Commissioner of State Revenue* [2024] NSWCATAD 153, [53]). This reinforces the Duties Act's comprehensive approach to taxation, even in estate contexts.
4. **Practical advice** - Executors should seek tax advice before purchasing estate assets, as duty may apply to the full property value. Obtaining beneficiary consent or court approval can mitigate risks of disputes or tax challenges. Beneficiaries should be aware that their interest in an unadministered estate is not a proprietary "interest in land" for duty purposes, affecting tax outcomes in estate transactions.

Broader context: Estate Planning and Tax Strategy

The *Shand* case highlights the importance of strategic estate planning to minimise duty. For example, specific gifts (eg giving a property directly to a beneficiary) may avoid complexities associated with residuary trusts, where non-specific interests complicate duty assessments.

Trust variations under s 63(2) can reduce dutiable value, but only with clear agreements among beneficiaries (*Shand* at [84]-[87]). Comparing *Shand* with other jurisdictions, such as Victoria's *Duties Act 2000* or Queensland's *Duties Act 2001*, could reveal differences in treating residuary interests, though similar principles (eg *Livingston*) often apply (see *Commissioner of State Revenue (WA) v Rojoda Pty Ltd* (2020) 268 CLR 281, [57]).

Ultimately, these planning considerations must be viewed in light of the Duties Act's overarching policy, which is to capture any change in beneficial ownership. *Shand's* reliance on the catch-all provision in s 8(1)(b)(ix) confirms this policy, ensuring that unique transactions like an executor's purchase remain taxable to protect the revenue base.

Visualising the Duty impact

The difference in duty liability under s 8(1)(b)(iii) versus s 8(1)(b)(ix) is significant. Had Fiona succeeded, duty would have been assessed on \$3,642,270 (72.7% of \$5,010,000). Instead, s 8(1)(b)(ix) imposed duty on the full \$5,010,000 (*Shand* [9]).

Conclusion

Shand v Chief Commissioner of State Revenue clarifies the tax treatment of executor purchases from deceased estates, reinforcing the Duties Act's broad reach through s 8(1)(b)(ix). It highlights the distinction between residuary beneficiaries' expectations and legal ownership, limiting the scope of s 8(1)(b)(iii) and s 63(2). Executors and beneficiaries should approach such transactions with caution, ensuring compliance with fiduciary duties and seeking professional advice to navigate tax implications. For estate planners, the case underscores the value of structured wills and trust variations to optimise tax outcomes.