

# The use of unstamped instruments in litigation



BY  
**ANDREW  
LYONS**

IT HAS BEEN common litigation practice to discount the unstamped status of instruments and address any anticipated difficulty by either stamping them shortly prior to a hearing or, if so required, at the hearing offering an undertaking under s4A(2) of the *Stamp Act 1894*. Thus unstamped instruments are frequently pleaded, and often admitted into evidence, without issue being taken about the failure to pay duty.

The need to review this practice has been highlighted by two single Judge Supreme Court decisions. In *Hoggett v O'Rourke*<sup>1</sup> paragraphs of a statement of claim that pleaded a share sale agreement were struck out by Holmes J on the ground that the agreement was unstamped.

Her Honour relied upon s4A(1) of the *Stamp Act 1894* which provided,

"An instrument chargeable with stamp duty (whether under this Act or under any prior Act) shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped."

Three broad aspects of Her Honour's reasons may be noticed.

First, s4A(1) did not expressly prohibit the pleading of an unstamped agreement. The cognate provisions in New South Wales, South Australia and Western Australia all contain express prohibitions upon such a pleading. Her Honour found that the difference was not material saying that "the breadth of s4A(1) effected by the expression 'available for any purpose whatever' is such...as to prevent reliance on the instrument in any form" and included a "prohibition of the pleading of an unstamped instrument".<sup>2</sup>

Secondly, even if the other party has admitted the unstamped instrument, this may not assist the party that has pleaded it.

In *Hoggett*, the defendant, by its pleading, admitted the agreement. Holmes J held that that admission could not "remedy any deficit caused by the unavailability of the unstamped share sale agreement".<sup>3</sup>

In so doing, she declined to apply dicta of Kaye J in *Moran Nominees Pty Ltd v Comptroller of Stamps (Vic)*<sup>4</sup> and referred to *Dent v Moore*<sup>5</sup> where the High Court rejected an argument that an admission allowed

proof of the party's case without the tender of the instrument or secondary evidence of its contents.<sup>6</sup>

Her Honour added that it did not "seem to [her] consistent with the purpose of s4A that its effect as a sanction on failure to stamp should be capable of avoidance by a party's admission."<sup>7</sup>

Thirdly, the expedient of offering an undertaking to pay the duty was, in Her Honour's opinion, incapable of saving the attacked pleading. In remarks that were *obiter dicta* as no undertaking was offered, Holmes J said,

"Section 4A(2) enables the admission in evidence of an unstamped document on such an undertaking, but it does not overcome the fundamental problem that such a document may not be relied on as founding a cause of action. If, of course, stamp duty were paid, the agreement would be available for that purpose."<sup>8</sup>

The *Stamp Act 1894* has been superseded by the *Duties Act 2001* which at s487 provides,

- (1) Unless an instrument is properly stamped, it –
  - (a) is not available for use in law or equity or for any purpose; and
  - (b) must not be received in evidence in a legal proceeding, other than a criminal proceeding.
- (2) However, a court may receive the instrument in evidence if –
  - (a) after it is received in evidence, the instrument is given to the commissioner as required by arrangements approved by the court; or
  - (b) if the person who produces the instrument is not the person liable to pay the duty, the name and address of the person so liable, and the instrument, is given to the commissioner as required by arrangements approved by the court.
- (3) A court may receive in evidence an unsigned copy of an instrument that is imposed with duty or effects or evidences a transaction that is imposed with duty if the court is satisfied –
  - (a) the instrument of which it is a copy is properly stamped; or
  - (b) the copy is properly stamped under s494.

First, like its predecessor, the general prohibition in s487(1)(a) does not expressly address the pleading of unstamped instruments. In a later decision, *Caxton Street Agencies Pty Ltd v Korkidas*,<sup>9</sup> Holmes J said that the effect of s487(1)(a) is the same as its predecessor.

Secondly, other provisions fortify this prohibition, especially s482(1) that obliges a person acting "under an instrument that has not been properly stamped [to] immediately give notice in the approved form to the Commissioner".

Thirdly, the undertaking procedure in s487(2), like that in its predecessor, s4A(2), is directed at the receipt of instruments into evidence. It does not address the pleading of unstamped instruments. In *Caxton Street Agencies* Her Honour expressed the

same attitude to s487(2) as she had (see above) in *Hoggett* in relation to s4A(2).<sup>10</sup>

Fourthly, s487(2) changes the terms upon which unstamped instruments may be received into evidence. An instrument may be received if "after it is received in evidence, [it] is given to the commissioner as required by arrangements approved by the court". In contrast, s4A(2) was more onerous requiring an undertaking to pay the duty and any penalty.

Fifthly, once stamped the instrument may be pleaded and admitted into evidence with its validity and operation unaffected by the *Duties Act*.<sup>11</sup>

This decision highlights how current practice requires review so that stamp duty issues are addressed earlier in proceedings than has previously been the case.

#### Notes

- 1 (2002) 1 Qd R 490; [2000] QSC 387.
- 2 Paragraph 15.
- 3 Paragraph 16.
- 4 84 ATC 4707 at 4710 – 4711.
- 5 (1919) 26 CLR 316, 325 ff. (The Court).
- 6 At 327.
- 7 Paragraph 16.
- 8 Paragraph 19.
- 9 (2002) QSC 210 at paragraph 13.
- 10 At paragraphs 14 & 15.
- 11 Caxton Street Agencies at paragraph 16.

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