Powers of appointment: some estate duty implications

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Powers of appointment are a useful tool of the estate planner. Peter Kite analyses some recent cases, including Re Silk, which suggest that there may be a simple way to avoid the application of section 8 of the Estate and Gift Duties Act 1968. His analysis also reveals a possible conceptual difficulty inherent in the structure of that Act.

The use of a general power of appointment is one way in which a settlor or testator can provide for persons, such as members of his family, in a manner that will relate to their needs. Under the Estate and Gift Duties Act 1968, the use of a power which is a general power of appointment as defined in that Act can have certain undesirable gift duty consequences if the power is exercised in favour of anybody other than the holder of the power. Thus, in many situations a more desirable alternative will be to establish a trust and give the power to trustees alone or, for reasons that will be outlined later, to trustees jointly with the person primarily intended to benefit from the exercise of the power. Nevertheless, in this paper it is intended to consider how a general power of appointment may be effectively used in estate planning, placing particular emphasis on keeping the property which is subject to the power out of the dutiable estate of the holder of the power.

The paper is divided into two parts. Part I is concerned, albeit briefly, with the provisions of the Estate and Gift Duties Act 1968 and how they may be avoided by the donee of a general power insofar as they bring into that person's dutiable estate property which is subject to a general power of appointment. The use of various drafting practices is also discussed in relation to joint and discretionary powers, and to powers which may only be exercised during the donee's lifetime.

Part II considers in detail whether a general power of appointment which may be exercised only during the donee's lifetime, and which is not exercisable by will, may be said to exist "at the time of his death" so as to bring the property subject to that power within the scope of the Act. That analysis requires a

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consideration of a number of cases which touch upon the question of whether it is possible, in an estate duty context, to place in sequential order the series of events which take place at death and, if so, what consequences follow. It also requires a consideration of a number of cases which are relevant in determining the meaning of the expression "at the time of his death", particularly the recent decision of the High Court of Australia in *Re Silk*.[1] It will be submitted that a general power of appointment which may be exercised by the donee of the power during his lifetime only is not a general power of appointment which the donee has "at the time of his death" and that the property subject to the power is not caught by section 8 of the Estate and Gift Duties Act 1968.

I. GENERAL POWERS OF APPOINTMENT: THE ACT

A. The Relevant Statutory Provisions

The relevant provision in the Estate and Gift Duties Act 1968 is section 8. It provides that "The dutiable estate shall include any property over or in respect of which the deceased had at the time of his death a general power of appointment." The expression "general power of appointment" is defined by section 2(1) of the Act. The definition of that expression introduced by section 2 of the Death Duties Act 1909 remained substantially unaltered until the Estate and Gift Duties Amendment Act 1966 came into force. The latter Act applies in respect of any power or authority conferred by the will of any person dying on or after 1 April 1967, conferred by an inter vivos settlement executed on or after that date, or created in any other manner whatsoever on or after that date.

Section 2(1) of the Estate and Gift Duties Act 1968 defines a general power of appointment as including:

> Any power or authority —
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> (i) Conferred by the will of any person . . . ; or
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> (ii) Conferred by any settlement *inter vivos* . . . ; or
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> (iii) Created in any other manner whatever . . . —
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> which enables the holder of the power or authority, or would enable him if he was of full capacity, to obtain or appoint or dispose of any property, or to charge any sum of money upon any property, as he thinks fit for his own benefit, whether exercisable orally or by instrument *inter vivos* or by will or otherwise howsoever; but does not include any power or authority exercisable by a person in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee:

It should be noted that for the purposes of the above provision it makes no difference whether or not a donee or holder of a general power of appointment exercises that power. The test applied by the statute depends upon whether the power is in existence at the time prescribed.[2] Furthermore, general powers of appointment exercisable in a fiduciary capacity are specifically excluded from the

1 (1976) 6 A.T.R. 321.

2 This is common to most equivalent provisions in other Commonwealth countries. See, e.g. s. 23 Finance Act 1975 (U.K.) — the new capital transfer tax provision — and s. 7(1) and s. 4 of the Probate Duty Act 1962 (Vic.).

statutory definition.[3] Therefore, where a general power of appointment is conferred upon a trustee of an inter vivos or testamentary trust in his capacity as trustee, the property subject to that power will not form part of the holder's dutiable estate upon his death.

Prior to the amendment of the statutory definition of the expression "general power of appointment" by the Estate and Gift Duties Amendment Act 1966[4] it is difficult to establish just what the definition was intended to achieve. The definition proved to be subject to certain limitations, and those limitations still subsist within the definition as it applies to a general power of appointment conferred by the will of a person dying on or before 31 March 1967, conferred by settlement inter vivos on or before that date, or created in any other manner on or before that date.

The first important limitation of the pre-1966 definition of the expression "general power of appointment" was that it applied only where the power was "exercisable by instrument inter vivos or by will". Hence it did not apply where the power could be exercised orally.[5] The second important limitation was that the definition did not include a power to call for capital thereby making that capital the property of the holder of the power: that is a power to "obtain" property as distinct from a power to "appoint" or "dispose of" property.[6] These limitations were expressly removed by the 1966 amendment.

B. Avoidance of the Statutory Provisions

It has been suggested that a general power of appointment can represent a particularly useful device in estate planning.[7] However, the extent of its usefulness must depend upon the degree to which a general power of appointment may be conferred upon a donee without bringing into the dutiable estate of that person the property subject to the general power of appointment, thereby rendering the property subject to duty both in respect of the estate of the donor and the estate of the donee.

3 Section 7(1)(j) of the Victorian statute refers to a "purely" fiduciary capacity. The effect of this qualification is not clear — see Ford *Principles of the Law of Death Duty* (Melbourne, 1971) 245, 251.

4 Section 2(1).

5 *C.S.D.* v. *Pratt* [1929] N.Z.L.R. 163.

6 Idem. Whether or not *Pratt* really did decide the point has led to an interesting jurisprudential argument: see *Re Going* [1951] N.Z.L.R. 144 and *Re Manson* [1964] N.Z.L.R. 257, where the Court of Appeal reaffirmed that the definition was not wide enough to encompass a power to obtain, notwithstanding the fact that two subsequent United Kingdom decisions, *Re Penrose, Penrose* v. *Penrose* [1933] Ch. 793 and *Re Parsons, Parsons* v. *Attorney-General* [1943] Ch. 12 had held the opposite in relation to a similar provision in the United Kingdom legislation, s. 5(2) Finance Act 1894.
For a case where a contrary conclusion was reached see the judgments in the High Court of Australia in *Re Silk* (1976) 6 A.T.R. 321.

7 For a more extensive consideration of the advantages that may be obtained by using a general power of appointment refer M. C. Cullity, "Powers of Appointment", *1977 Conference Report,* Canadian Tax Foundation, 744; R. J. Bauman, "General Powers of Appointment Under the Ontario Succession Duty Act and Related Death Tax Legislation" (1974) 32 U.T. Fac. L. Rev. 159; W. B. Bolich, "The Power of Appointment: Tool of Estate Planning and Drafting" [1964] Duke L.J. 32; L. R. Rusoff, "Powers of Appointment and Estate Planning" (1971) 10 J. Family L. 443.

There are two aspects to the problem. The first is how the donee of a general power of appointment can prevent the property subject to the power from forming part of his duitable estate. The second is how the draftsman can confer a general power of appointment in such a manner as to prevent the property subject to the power from forming part of the dutiable estate of the donee of the power.

A donee of a general power of appointment has two options open to him if he wishes to avoid the property subject to the power from forming part of his dutiable estate on his death. First, he may disclaim the general power appointment. A person may not be compelled to accept the beneficial interest in the property, but it is clear that acceptance of the gift will be presumed until the contrary is established. Lord Halsbury L.C. said in *Standing* v. *Bowring*:[8] "You certainly cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation." Cotton L.J. expressed a similar view when he said:[9]

> Now, I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it'. When informed of it he may repudiate it, but it vests in him until he so repudiates it.

For the purposes of the Estate and Gift Duties 1968, a disclaimer of an interest under a disposition made inter vivos or by will (or of an interest under an intestacy) does not constitute a "disposition of property". Therefore a disclaimer of a general power of appointment does not constitute a gift to those entitled to succeed to the property in default of an appointment. Furthermore, the disclaimer of a general power of appointment will prevent the property subject to the power from forming part of the donee's dutiable estate.

Secondly, the donee of a general power of appointment may irrevocably exercise that power and appoint all or part of the property subject to the power. If the exercise of the power extends to all the property subject to the power, the donee will have put an end to the trust. The power may be exercised by the donee of the power either in his own favour, or in favour of some other person. If the donee exercises the power in his own favour consideration may have to be given to planning the donee's affairs in such a manner as to ensure that the property does not form part of the donee's dutiable estate by reason of the fact that on his death the property passes under his will or on his intestacy.[10] If the donee exercises the power in favour of another person that exercise of the power will constitute a "disposition of property" for the purposes of the Estate and Gift Duties Act 1968.[11]

8 (1885) 31 Ch. D. 282, 286.

9 Ibid., 288. There appears to be no time limit in which a person must disclaim: *Re Paradise Motor Co. Ltd.* [1968] 1 W.L.R. 1125; cf. the disclaimer of an interest under an intestacy — s. 81 Administration Act 1969.

10 Section 7 Estate and Gift Duties Act 1968.

11 See para. (e) of the definition of "disposition of property" in s. 2(1) of the Act. As to the possible consequences, see ss. 10-12 and 61 of the Act.

One way in which the draftsman may ensure that property subject to a power of appointment does not form part of the donee's dutiable estate is to make the exercise of that power subject to the consent of another person.[12] That person may also be a donee of the power, in which case the power is a joint power, or it may be some other person such as a trustee.

Where the power is a joint power, the law has long been clear. In *Attorney-General* v. *Charlton*[13] James L.J. stated:[14] "A joint power of appointment is, in my opinion, an entirely different thing in intention and practical operation from a general and absolute power of appointment in one individual."

The matter was again considered in *Re Churston Settled Estates.*[15] In that decision, after observing that a person who has a general power of appointment over property although not quite in the same position as an owner of that property, is treated for all practical purposes as if he were the owner, Roxburgh J. asked the question:[16] "Ought that [doctrine] to be applied to a joint power of appointment or to a power of appointment to which the consent of somebody is required?" Expressing the view that it makes no difference whether the consent that is required is that of a donee of the power or some other person and citing with approval the above dictum of James L.J., Roxburgh J. concluded that a joint power of appointment could not be considered a general power of appointment.[17]

Whether a power of appointment that may only be exercised with the consent of some person other than a donee of the power, such as a trustee, is a general power of appointment was considered by the Privy Council in *Commissioner of Estate and Succession Duties* v. *Bowring.*[18] In this case, the deceased was the settlor of a trust fund. Under the terms of the deed of trust, the settlor had a power to amend or revoke the trusts with the consent of the trustees. The deed of trust contained a provision that it should be governed by the law of Massachusetts. The laws of that State did not authorise the court to control the trustees in the exercise of their power to consent to the revocations or amendments of the trust, provided that they acted honestly and did not act with an improper motive. The question arose of whether the deceased was "competent to dispose" of the settled property for the purposes of Barbados estate duty legislation. In *Bowring's* case the Board answered the other half of the question posed by Roxburgh J. in *Re Churton Settled Estates,* forming the opinion that a power of appointment which may be exercised only with the consent of another person is not a "general" power of appointment.[19]

12 As the cases discussed will show, such a power of appointment does not constitute a general power of appointment either at Common Law or under the Estate and Gift Duties Act 1968. As such powers fall outside the scope of s. 8 of the Act they are of some importance and for this reason are discussed here.

13 (1877) L.R. 2 Ex D. 398.

14 Ibid., 412.

15 [1954] 1 Ch. 334.

16 Ibid., 344.

17 In *Re McEwen* [1955] N.Z.L.R. 575 it was not considered whether the power that was held to be a general power of appointment might not be such a power by reason of the fact it was a joint power, cf. *Commisioner of Estate and Succession Duties* v. *Bowring* [1962] A.C. 171.

18 Idem.

19 At least when the trustees have a wide discretion as to whether they will give or withhold their consent.

The view that a general power of appointment does not exist when the trustees (or some other person) have a discretion as to whether they will consent to an exercise of the power, with the result that the donee of the power is not entitled to insist upon payment being made, is supported by the decision in *Pratt's* case.[20] The provision in the testator's will under consideration in *Pratt's* case provided that "the trustee . . . may from time to time raise . . . " part of the corpus of the trust and " . . . may pay the same . . . " to the donees of the power. At first instance Sim J. held:[21] " . . . the testator intended his trustees to have a discretion as to whether or not they would make any payment under the authority in question." Therefore, the learned Judge found the deceased did not have a general power of appointment conferred upon him by the will. In the Court of Appeal, Ostler and Blair JJ. agreed with this finding. Reed and Smith JJ. disagreed, holding that the trustees were under a duty to act upon request but not disputing the view that if the trustees had been given a discretion the power could not have been a general power of appointment within the terms of the statute.

It may also be possible for the draftsman to endeavour to ensure that property subject to a general power of appointment does not form part of the donee's dutiable estate on his death by providing that the power may be exercised by the donee during his lifetime only, that is by an inter vivos exercise of the power and not by a testamentary exercise of the power. The Estate and Gift Duties Act 1968[22] catches property subject to a general power of appointment by the donee of the power "at the time of his death". If the power is one that may only be exercised during the donee's lifetime it is arguable that the general power of appointment has ceased to be exercisable by the donor at the moment of his death and therefore the property which was subject to the power is not caught by the Act. This argument does not appear to have been considered by the New Zealand courts. In the second part of this paper, it is therefore proposed to consider the argument in more detail for, if it is sustainable, it provides a means of utilising a general power of appointment without producing the adverse consequence of rendering the property subject to the power liable to duty as part of the estate of the donee of the power to the extent to which the power has not been exercised.

II. GENERAL POWERS OF APPOINTMENT EXERCISABLE ONLY IN THE THE DONEE'S LIFETIME

A. The Times at which the Act Applies

Under section 8 of the Estate and Gift Duties Act 1968, property over or in respect of which the deceased held a general power of appointment will form part of the deceased's dutiable estate if that power existed "at the time of his death". The expression "at the time of . . . death" is not defined in the Act. Other provisions in the Act use varying expressions in fixing the time at which it must be ascertained whether other property exists which forms part of the deceased's dutiable estate. For example, section 11(2) of the Act excludes from the deceased's dutiable estate certain property in respect of which the deceased

20 [1929] N.Z.L.R. 163. 21 Ibid., 166. 22 Section 8

has retained an interest in that property for which full consideration has been paid or is owing "at the date of his death". Section 13 of the Act includes within the dutiable estate any beneficial interest in joint property held by the deceased "immediately before his death".

These variations in wording in the Act when prescribing the time at which it must be ascertained whether certain property forms part of the deceased's dutiable estate appear to have attracted little attention in the past[23] and it may well be that, as Kitto J. observed in *Robertson* v. *Federal Commissioner of Taxation*[24] "it is only in an exceptional case that the lack of precision matters".

The question must therefore be asked whether it is possible to distinguish between the instant or moment of death and the times immediately before and immediately after death and thereby give an order of precedence to a series of events which apparently happen at the same moment. Certainly the New Zealand statute would appear to envisage a distinction at least between the time "immediately before" death,[25] "the time of"[26] and "the date of" death.[27] If it is possible to distinguish between the instant of death and the times immediately before and immediately after death, the further question must be asked of the relevance, if any, of such a distinction in relation to general powers of appointment.

B. Death: A Sequence of Events?

In *Keel Estates (No. 2), In re Aveling* v. *Sneyd*[28] the argument was put before the Court of Appeal that it was necessary "to divide up by a minute process of temporal calibrations the series of events which occurred, beginning with (for it was the first of them) . . . death". The argument did not commend itself to the court. However, as no liability or charge for estate duty arises until death occurs,[29] Evershed M.R. was prepared to concede that there must be some distinction drawn in time between death and the imposition of duty. That, however, was the limit of the court's concession. In dismissing counsel's argument, Evershed M.R. stated:[30]

> I am prepared (for the sake of argument) to accept the view that some interval of time must elapse, or be deemed to elapse, between the death and the imposition of the duty. But I cannot go further and assume that the duty attaches by some infinitesimal margin of time before there arises or springs into existence the next succeeding beneficial limitation.

Insofar as Evershed M.R. was prepared to recognise a distinction in time between death and the imposition of estate duty, the decision in *Keel Estates* is not inconsistent with the decision of Palles C.B. in *Re Augusta Magan*[31] but in fact

23 The general powers of appointment under consideration in both *Pratt's* case [1929] N.Z.L.R. 163 and *Re Manson* [1974] N.Z.L.R. 257 were exercisable only during the lifetime of the donee, yet in neither case does it appear to have been argued that the general powers of appointment did not exist "at the time of . . . death".

24 (1952) 86 C.L.R. 463, 482.

25 Section 13. The value of an interest in a joint tenancy would be negligible if valued taking death into account as the interest ceases on death.

26 Section 8. 27 Section 11(2). 28 [1952] 1 Ch. 603.

29 "It is not until there is an estate of a deceased person that the Act speaks": *Robertson* v. *F.C.T.* supra n. 24 per Kitto J. at 486.

30 Supra n. 28 at 617. 31 [1922] 2 I.R. 208 (The case was decided in 1908).

the latter decision would appear to go a considerable way towards accepting the "minute process of temporal calibration" rejected in the decision in *Keel Estates.*

In *Re Magan* the deceased was the donee of a general power of appointment conferred upon her by her mother's will. The power was contingent upon the deceased failing to leave issue surviving her on her death. To use the words of Palles C.B., the deceased died "without ever having been married". The deceased's will, in which the general power of appointment was exercised, purported to be made "in pursuance of the power contained in my mother's will, and of all other powers and authorities whatsoever". The question arose whether the property subject to the power was, on the death of the deceased, "settled" property under the will of her mother for the purposes of the Finance Act 1894 (U.K.) in the sense that it was "for the time being limited to or in trust for any persons by way of succession".[32] If the property was "settled" property and passed under her mother's will, it would not form part of the deceased's estate for duty purposes.

Until the deceased's death, the law contemplated the deceased might have children. Such children would take under the will of the deceased's mother. Palles C.B. therefore found that "up until the moment of" her death, the property was settled property. However, at that moment the possibility of there being issue ceased and only the deceased could take under her mother's will. Therefore at the moment of the deceased's death the property ceased to be "settled" property. As the Chief Baron stated:[33]

> Thus arises a question of some nicety: was the property 'settled' when it passed from Miss Magan at the moment of her death? I am of the opinion that it was not. The two events — death and the passing of property — took place, in point of time, at the moment; but in nature one preceded the other. The passing of the property was the effect of the death; the death was the event upon which it passed, and in nature the event must precede the effect which is to ensue upon it. This is so, not only metaphysically, but it is a recognised principle of our law.

The decision in *Re Magan* was reached by dividing up into a series of events the various events which transpired at the moment of the deceased's death: death itself, the consequence that the deceased could not be survived by issue, the consequence that the property in question was no longer limited to or in trust for any persons by way of succession, and the passing of the deceased's estate. It is suggested that it would be difficult to better describe the approach of the court than one of dividing up "by a minute process of temporal calibrations the series of events which occurred, beginning with . . . death".

While the reasoning adopted in *Re Magan* would not have received the approval of the court[34] in the subsequent case of *Keel Estates,* it did find favour with the High Court of Australia in *Robertson* v. *Federal Commissioner of Taxation.*[35] In *Robertson* the deceased held shares in a company, the articles of association (article 6) of which contained a provision to the effect that on the death of the deceased

32 Within s. 2 of the Finance Act 1894 (U.K.).
33 Supra n. 31 at 210.
34 There is no reference to its having been cited.
35 (1952) 86 C.L.R. 463. The case is discussed at greater length by Willis, *The preference share as a tool of estate planning,* in this volume.

all the shares in the company would be divided into two classes. The division would take place according to whether or not at the date of the deceased's death these shares were held by the deceased (no. 2 class shares) or by persons other than the deceased (no. 1 class shares). Upon the death of the deceased the no. 2 class shares would acquire less valuable rights than the no. 1 class shares. Therefore, upon the death of the deceased, the shares held in his name would lose a substantial part of their value while the shares held by other persons would substantially increase in value, thereby reducing the duty payable on the deceased's estate. The question for the court was the basis on which the shares were to be valued.

The Commissioner relied upon two provisions in the Estate Duty Assessment Act 1914-47 (Commonwealth). The first provision was section 16A(1) allowing the Commissioner for the purpose of assessing the value of shares for estate duty purposes to assume that at the date of death the company's memorandum and articles of association were such that the company was eligible to obtain a listing on the Stock Exchange. The second provision was section 8(4)(e) of the Act, bringing within the deceased's estate a beneficial interest in property which the deceased had "at the time of his decease" but which as the result of a settlement or arrangement made by him "passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person".

The court held the Commissioner could not rely on section 16A(1) as once the deceased had died, the articles no longer prevented the company from obtaining a listing on the Stock Exchange. Therefore, there was no need to apply that section in order to notionally alter the articles in relation to article 6. The decision of Kitto J. makes it clear that the court regarded the conversion of the deceased's shares into no. 2 shares by the operation of article 6 as an event subsequent to death, the learned Judge stating[36]

> . . . the very method of reasoning which *Magan's* case supports requires the conclusion that the application of the Estate Duty Assessment Act itself to the particular case is a consequence of, and therefore is logically to be treated as subsequent to, the death of the deceased . . .

The Commissioner's argument under section 8(4)(e) of the Act was also rejected, the court finding no beneficial interest in the shares passed, accrued or devolved on or after the death of the deceased. All that happened was that after the deceased's death the no. 2 shares were less valuable than before his death.

It may also be that support for the "temporal calibration" concept rejected in *Keel Estates* may be found in the recent opinion of the Privy Council in *Commissioner of Stamp Duties (N.S.W.)* v. *Bone*.[37] The deceased, Mrs Bone, made loans to each of her children. On the same day as the loans were made, the deceased made her will appointing her children as her executors and including a clause in the will forgiving "all sums whether for principal or interest" owing to her by her children. For the purpose of assessing duty on the deceased's estate,

36 Ibid., 486.

37 (1976) 6 A.T.R. 66 on appeal from the High Court of Australia (1974) 4 A.T.R. 553. And see Green "Blood and Bone" [1977] N.Z.L.J. 220 for an analysis of the decision and an assessment of its applicability in New Zealand.

the Commissioner included the amounts of principal outstanding under the loans.

Under section 102(1)(a) of the Stamp Duties Act 1920 (N.S.W.), the estate of a deceased person is deemed to include "all property of the deceased which is situate in New South Wales at his death . . . to which any person becomes entitled under his will". The issue therefore arose of whether the debts were property of the deceased at her death. Certainly the debts were property of the deceased immediately before her death, but as has been observed:[38] " . . . at the moment of her death, her will began 'speaking'. Two things happened at the same time — her death and the will becoming operative." If these events, death and the will becoming operative, are regarded as happening at the same time, assuming the release clause in the will was effective, the debts ceased to be the property of the deceased at her death. Therefore they could not form part of her estate by virtue of section 102(1)(a) of the Act. The Privy Council did not accept this argument, nor did they consider it in their opinion, yet they held the debts formed part of the deceased's estate by virtue of section 102(1)(a) of the Act. It is therefore possible to argue that, if the opinion of the Board in *Bone's* case is correct, the two events of death and the will becoming operative must have occurred in that order. If the events had occurred at the same time the will would have operated to extinguish the debts.

C. At the Time of . . . Death

It might be said that there is no doubt as to the meaning of the expression "at the time of . . . death" for the matter is determined by the decision of Rowlatt J. in *Attorney-General* v. *Quixley*.[39] The question in that case was whether estate duty was payable in respect of a "death gratuity" payable in relation to the deceased's employment and which, upon the death of the deceased, became payable to her personal representative. The relevant statutory provision was section 2(1)(a) of the Finance Act 1894 (U.K.) (under which property passing on the death of a deceased person is deemed to include property of which at the time of his death the deceased was competent to dispose). Rowlatt J. considered the proceeds of the gratuity could not come within that provision alone:[40]

> I think that, so far, the mere words in subsection (1)(a) point to a disposition which a person can make at the time of his death in the sense of effectively, while still alive and till the moment of death, when the breath leaves his body — in other words, at his disposition *inter vivos*.

However, after taking into consideration the further "deeming" provision contained in section 22(2)(a) of the Act, Rowlatt J. found the deceased must be deemed to have been competent to dispose of the property in question and therefore estate duty was payable in respect of it.

It is apparent that in *Quixley,* Rowlatt J. clearly construed the expression "at the time of . . . death" as meaning "immediately before . . . death". Therefore,

38 Green, op. cit., 229. The will began 'speaking' by virtue of s. 24 Wills Act 1837 (U.K.).
39 (1929) 98 L.J.K.B. 315; affirmed by the Court of Appeal (1929) 98 L.J.K.B. 652.
40 Ibid., 317.

if this construction is equally applicable to the Estate and Gift Duties Act 1968, a power to dispose of property which may be exercised only during the lifetime of the donee will nevertheless be exercisable by him "at the time of his death" and the property subject to the power will be caught by section 8 of that Act. However, it is submitted there may be grounds for distinguishing the decision in *Quixley* in New Zealand having regard to the differing provisions in the New Zealand and English legislation insofar as they relate to property subject to a general power of appointment.

On a general level three distinctions may be made between the Estate and Gift Duties Act 1968 and the Finance Act 1894 (U.K.). First, there is a difference in the primary description of the property passing on death. In New Zealand, it is property over or in respect of which the deceased held a general power of appointment; in England, it is property of which the deceased was competent to dispose. In *Re Going*[41] Hutchison J. observed:[42]

> The words 'competent to dispose' in the English section are not technical words . . . while the New Zealand words 'a general power of appointment' are technical words bearing a well recognised meaning.

Secondly, under the English provision, the expression "competent to dispose" covers two distinct situations, one where a person has an estate or interest in property that would enable him to dispose of it, the other where a person has such a general power[43] as would enable him to dispose of the property. In section 8 of the New Zealand Act, the first situation is omitted.[44] In *Re Going,* after referring to the English and New Zealand statutory provisions, Hay J. stated:[45]

> A comparison of the . . . [English] provisions with the corresponding provisions of our own statute makes it apparent that the latter were derived from the former. For that reason, great significance attaches to the variations, which it must be assumed were deliberately made by our legislature.

Thirdly, unlike the New Zealand statutory provisions, the English provisions are deeming provisions. Section 2(1) of the Finance Act 1894 (U.K.) deems certain property to pass on a person's death, including property of which the deceased was competent to dispose. Section 22(2)(a) of that Act then deems a person to be competent to dispose of certain property.

On a more specific level, it might be asked why, if as Rowlatt J. stated "at the time of . . . death" means immediately before death, it is necessary for the English provisions to deem a person to be competent to dispose of property if he has a power or authority enabling him to appoint or dispose of that property by instrument inter vivos? The ability of a person to dispose of property by instrument inter vivos is a consequence of the deceased being alive and a deeming provision is therefore unnecessary.

41 [1951] N.Z.L.R. 144. 42 Ibid., 149; approved by Hay J. at 171.

43 Cf. "General power of appointment": In *Re Going* at 171 Hay J. expressed the view that "that difference of itself calls for a more limited construction as to the scope of our section than is the case in England".

44 But see s. 7 Estate and Gift Duties Act 1968.

45 Supra n. 41 at 171. See also *Re Manson* [1964] N.Z.L.R. 257, 270.

In considering the applicability of the interpretation of the expression "at the time of . . . death" adopted by Rowlatt J. in *Quixley* to section 8 of the New Zealand Act, reference must be made to decisions of Australian and Canadian courts, particularly the decisions of the Supreme Court of Victoria in *Re Alex Russell, deceased*[46] and the Canadian Federal Court in *Mastronardi Estate* v. *The Queen.*[47] In the first of these cases it was submitted on behalf of the Commissioner of Probate Duty that the expression "at the time of death" meant immediately prior to death. In the second case, it was submitted on behalf of the Minister of National Revenue that the expression "immediately before . . . death" meant at the instant of death. In each case the court rejected the submission that the two temporal concepts could be equated.

In *Re Alex Russell,* the deceased sold land to a company. The purchase price was paid partly in cash and partly by the allotment to the deceased of 20,000 preference shares of £1 each in the capital of the company at a premium of £4 per share. The preference shares conferred on the holder the right to a fixed dividend on paid up capital and a right to rank in a winding up as regards return of capital in priority to ordinary shares, but did not participate further in the profits or assets of the company. The deceased had a power exercisable by notice in writing to convert the preference shares into ordinary shares, such ordinary shares carrying a right on a winding up of the company to participate in the surplus assets of the company. Hence, while the shares remained preference shares, those shares could only be regarded as having a value of £2. The deceased did not exercise the power of conversion during his lifetime.

The Commissioner included in the deceased's notional estate an amount of £80,000 in excess of the amount returned by the executors. Among the contentions put forward on behalf of the Commissioner was that as the deceased obtained a right to convert the preference shares into ordinary shares, paragraphs (f) and (j) of section 104(1) of the Administration & Probate Duties Act 1958 applied. Under paragraph (f) property was caught if it was property of which, "at the time of his death" the deceased was competent to dispose.

On behalf of the Commissioner it was argued the property in question consisted of all the rights which would have attached to the 20,000 preference shares if, before his death, the deceased had exercised his right to convert these shares into ordinary shares. McInerney J. rejected this submission, holding the property that was the subject of the power consisted of the preference shares registered in the name of the deceased. The "rights" to which the Commissioner referred had no separate existence beyond the preference shares themselves, and therefore did not constitute property of the deceased.

McInerney J. went on to consider whether the power which attached to the preference shares existed at the time when the Act required the composition and value of the deceased's estate to be ascertained, that is, at the time of the deceased's death, bearing in mind the power to convert the preference shares into ordinary shares could be exercised by the deceased only during his lifetime and did not survive his death.

46 [1968] V.R. 285.
47 [1976] C.T.C. 572 (Federal Court); affirmed by Federal Court of Appeal [1977] C.T.C. 355.

Having considered the provisions in the Victorian Act corresponding with section 13 of the Estate and Gift Duties Act 1968 — which includes within the dutiable estate of a deceased person the beneficial interest of that person in property as a joint tenant, the Victorian Act using the expression "immediately prior to . . . death" and the New Zealand Act using the equivalent "immediately before . . . death" — McInerney J. was unable to accept that the expression "at the time of . . . death" appearing in paragraphs (f) and (j) of section 104(1) of the Victorian Act should be construed as referring to a time immediately before the death of the deceased:[48]

> It is clear that up to the very moment of his death the [deceased] retained and could have exercised the power conferred on him . . . of delivering a notice in writing of his desire to convert all or any of his preference shares into ordinary shares . . . It could not, however, be exercised by will. The [deceased] not having exercised that power during his lifetime, it ceased, upon his death, to exist or to be exercisable.

The differences between the New Zealand and English statutory provisions have already been noted. Certainly the Victorian provisions considered in *Re Alex Russell* contained a dual primary description of the property in question. However, in considering the relevance of that decision in New Zealand, it is interesting to observe the comments of McInerney J. as to the similarity of the New Zealand and Victorian statutory provisions. Although the finding on the "time of death" point was sufficient to decide the case before him, the learned judge went on to consider whether the deceased's power to convert the preference shares into ordinary shares could be regarded as conferring upon the deceased a general power of appointment, or making him competent to dispose of the shares. In the course of this consideration, in which the decisions in *Pratt's* case[49] and *Re Manson*[50] are discussed, McInerney J. commented:[51]

> *Pratt's* case . . . was a decision as to the meaning of the phrase 'power of appointment' in section 5(1)(a) of the Death Duties Act 1921 — a paragraph in substantially similar terms to section 104(1)(f) of the Administration and Probate Act 1958.

In *Mastronardi* v. *The Queen*[52] the statutory provision under consideration was section 70(5) of the Income Tax Act (Canada) which provides that where a person dies, he is deemed to have disposed

> immediately before his death of each property owned by him at that time that was a capital property and to have received proceeds of disposition therefor equal to the fair market value of the property at that time.[53]

The deceased owned shares in a company which had an insurance policy over his life. He died unexpectedly. The Minister of National Revenue sought to value the shares owned by the deceased having regard to the fact that the insurance

48 Supra n. 46 at 301. 49 [1929] N.Z.L.R. 163. 50 [1964] N.Z.L.R. 257.
51 Supra n. 46 at 307. Section 5(1)(a) of the Death Duties Act 1921 is now s. 8 of the Estate and Gift Duties Act 1968.
52 [1976] C.T.C. 572; and see the case note (1976) 24 C.T.J. 597.
53 Section 70(5)(c) of the Act contains the corresponding "step-up" provision deeming such property to have been acquired by its recipient at a cost equal to its fair market value immediately before the deceased's death.

policy was worth $500,000. In support of this basis of valuation, reliance was placed on the converse argument to that presented by the Commissioner in *Re Alex Russell.*[54] On behalf of the Minister it was argued that "immediately before . . . death" meant at the instant of death. Therefore at the time referred to in the subsection, the insurance policy had become payable, thereby increasing the value of the company's shares. The fair market value of the shares would reflect the fact that the proceeds of the policy had increased the value of the shares and, according to the view taken by the Minister, the shares should be valued on that basis.

Gibson J. rejected this argument, holding that the words "immediately before his death" should not be construed as meaning the equivalent of the instant of "death . . . ".[55] The view was expressed by the learned judge that valuation[56]

> . . . must be considered as having taken place at some other time rather than at the instant of death of the deceased and no premise of imminence of death of the deceased should form any part of such valuations .

D. Re Silk[57]

The deceased died in October 1975, her husband having pre-deceased her some nine years earlier. The husband's will, having made various dispositions, required his trustees to divide the residuary estate into two equal parts holding each of those parts upon trust. One of these trusts made provision for the testator's wife, the other for his children. Insofar as the trust in respect of his wife (the deceased) was concerned clause 6A(a) of the will provided that the income from that trust should be paid to her during her lifetime. The clause then continued as follows:

> And I authorise and direct my trustees notwithstanding the trusts declared by this my will at any time or times during the period of five years from the date of my death on the request in writing of my wife to raise any sum or sums out of the capital of such half part of my residuary estate not exceeding in the aggregate one half of such part and pay the same to my wife for her use and benefit in addition to the income of the share of my residuary estate to which she is entitled and after the expiration of such period of five years at any time or times on the request in writing of my wife to raise any sum or sums out of the capital of such half part of my residuary estate and pay the same to my wife for her use and benefit in addition to the income of the share of residuary estate to which she is entitled.

On the death of the testator's wife, the capital and income was to be held for the beneficiaries of the trust created in respect of the other half of the testator's residuary estate.

At the deceased's death, the five year period referred to in clause 6A(a) of her husband's will had expired and consequently the limitation on the amount of capital that could be raised was no longer effective. The deceased could therefore,

54 Supra n. 46.

55 Supra n. 52 at 576. No judicial authority was referred to in support of this finding. Although counsel cited English, Australian and Canadian authorities, Gibson J. found them of no substantial assistance in interpreting s. 70(5).

56 Ibid., 576.

57 (1976) 6 A.T.R. 321.

up until her death, require the trustees to raise and pay to her a sum of money equal to the value of her entire one half share in her husband's residuary estate. The Commissioner of Probate Duty claimed the value of the interest formed part of the deceased's estate for duty purposes as property over or in respect of which the deceased had "at the time of her death" a general power of appointment within section 7(1)(f) of the Probate Duty Act 1962 (Vic.). Alternatively, the Commissioner relied on section 7(1)(j) of that Act which included within the estate of the deceased property of which "immediately prior to her death" she was competent to dispose.

At first instance[58] Pape J. found in favour of the estate. He held that in the circumstances, the only relevant provision was section 7(1)(j) of the Act. The line of reasoning adopted by the learned judge rested on three propositions, two of which involve matters of statutory interpretation, and the third a matter of the interpretation of the will of the husband of the deceased. The first finding on a matter of statutory interpretation was that the words "immediately prior to . . . death" appearing in paragraph (j) referred to an "infinitely short" period of time before death. The second was that the deceased could not have been competent to dispose of the property unless immediately prior to her death she was able to acquire the property in question. Insofar as the interpretation of the will was concerned, Pape J. held the trustees were authorised to raise the sums requested and to pay them to the deceased for her use and benefit alone: they were not authorised to make payment to the personal representative of the deceased. Therefore, said the learned judge, it followed that immediately before her death all the deceased could have done in respect of the exercise of the power conferred upon her by clause 6A(a) of her husband's will was to take the preliminary step of making a request in writing to the trustees to raise money out of the capital of the one half share in the residue of her husband's estate in order that the money might be paid to her. It would have been impossible for the trustees to have raised the money and paid it to the deceased in the infinitely short period of time which would elapse before her death. As it was impossible for the deceased to acquire the money immediately before her death, she could not have been competent to dispose of it.

On appeal by the Commissioner,[59] the Full Court of the Supreme Court of Victoria took a different view. All three judges[60] rejected the three propositions relied on by the judge at first instance. Gillard J. expressed the view that Pape J.'s opinion that "immediately prior to . . . death" meant an infinitesimally[61] short period of time before death placed a too restrictive meaning on the expression which was " . . . intended to pick up any property over which a deceased person might have a power or authority of disposal which would otherwise terminate on death."[62] Lush J. did not express a view on the meaning of the expression "immediately prior to . . . death". However, the Full Court rejected the view that whether property subject to a power or authority of disposal that would

58 (1975) 5 A.T.R. 613.
59 (1975) 5 A.T.R. 624.
60 Gillard, Lush and Crockett JJ., Crockett J. agreeing with the judgment delivered by Lush J.
61 Pape J. in fact referred to an "infinitely" short period of time: supra n. 58 at 623.
62 Supra n. 59 at 627.

otherwise terminate on death could form part of the estate of a deceased person depended upon whether the power could in fact be exercised by the deceased during a short period of time at the end of his lifetime.

The Full Court also rejected the contention that a power or authority to obtain property, thereby forcing the proprietor of the legal or equitable interest in that property to part with title to the person exercising the power or authority, was not sufficient to make the person exercising the power or authority competent to dispose of that property for the purposes of paragraph (j).

On the point of the interpretation of the will, the Full Court held that the phrase in clause 6A(a) of the will "for the use and benefit" was not inconsistent with payment being made by the trustees after the death of the deceased. If the deceased gave to the trustees written notice to make payment of a specific amount which was within the limits contained in the clause, she was entitled to the money. The clause did not require as a condition of payment that the deceased should be living when payment was made. Therefore, the Full Court found that immediately before her death, the deceased had a right to require the trustees to make payment to her in terms of clause 6A(a) of her husband's will. The right to payment would arise immediately and questions of whether it was in fact possible to make payment were irrelevant. Therefore, for the purposes of section 7(1)(j) of the Act, the deceased immediately prior to her death was competent to dispose of the property in question.

An appeal on behalf of the estate to the High Court of Australia was dismissed.[63] The leading judgments were delivered by Stephen and Mason JJ.[64] The court agreed with the Full Court in finding that the relevant statutory provision in the Probate Duty Act was section 7(1)(j). The only member of the High Court to consider the meaning of the expression "immediately prior to . . . death" appearing in that provision was Stephen J. who observed that " . . . the temporal requirement of the section will be satisfied whenever a deceased [had], at the moment before his death, the legal competency to dispose."[65]

The High Court also agreed with the Full Court insofar as it took the view that a person is competent to dispose of property for the purposes of paragraph (j) if the person vested with the power or authority could, by the exercise of that power or authority, bring about the loss of ownership of property owned by another person: it is irrelevant whether the new owner became the holder of the power, or some other person became the holder of the power. As Mason J. stated[66]

> The appointment of property by a donee of a power to himself is correctly described as a disposition and an acquisition. The fact that it is an acquisition by the appointer

63 (1976) 6 A.T.R. 321.

64 Gibbs J. expressed a brief opinion on the concept of "competency to dispose" and in other respects agreed with Stephen and Mason JJ. Murphy J. delivered a short and substantially unreasoned judgment also dismissing the appeal. Jacobs J. dissented from the decision of the majority.

65 Supra n. 63 at 324. Mason J. discussed the expression "immediately prior to . . . death" (at 327), but only for the purposes of contrasting it with the expression "at the time of . . . death" appearing in paragraph (f).

66 Supra n. 63 at 328.

does not deny its other character as a disposition by him. So long as he possesses the power to appoint he is competent to dispose of the property which is the subject of the power.

The Court also took the view that in determining whether immediately prior to her death the deceased was competent to dispose of property, questions relating to the practical ability of the deceased to make an effective disposition were irrelevant. On the matter of the interpretation of the will, it was accepted that the Full Court was correct in its interpretation of clause 6A(a) insofar as the right of the deceased to make payment was not conditional upon the survival of the deceased after a request had been made.

The High Court therefore dismissed the appeal, holding that the right conferred upon the deceased by clause 6A(a) of her husband's will to request the trustees to raise money from her husband's residuary estate rendered her competent to dispose of that property immediately prior to her death. Consequently, on her death, that property formed part of the deceased's estate pursuant to section 7(1)(j) of the Probate Duty Act 1962 (Vic.).

Two observations need to be made in respect of the power conferred by the will of the deceased's husband. The first is that the testator used the words "authorise and direct" when empowering his trustees to raise sums out of capital on a request in writing from the deceased. As the judge at first instance observed[67] these words conferred a power coupled with a duty on the trustees and not merely a discretionary power. Upon a request being made, the trustees were bound to comply with it. The Full Court and High Court took the same view.[68]

Secondly, the power conferred upon the deceased was exercisable by the deceased only during her lifetime[69] and could not be exercised by will: "It is quite clear that whatever power was conferred upon the deceased by cl. 6A(a) of her husband's will, such power came to an end on her death."[70] It is for this reason that the Commissioner did not succeed under paragraph (f) of section 7(1) of the Probate Duty Act 1962 (Vic.), an aspect of the decision in *Re Silk* it is now proposed to consider in more detail.

E. The Alternative Argument in Re Silk

As has been stated, in *Re Silk* the Commissioner relied on both paragraphs (f) and (j) of section 7(1) of the Victorian Act, succeeding under paragraph (j) but failing to succeed under paragraph (f). However, the judgments of the various courts, insofar as they relate to paragraph (f), are of particular interest in the context of section 8 of the New Zealand Act for, as has been noted earlier, that paragraph includes within the dutiable estate of a deceased person property over

67 Supra n. 58 at 617.

68 In the Full Court, Lush J. observed (supra n. 59 at 633): "The making of the request placed the trustees under a duty devoid of any element of discretion, to raise the money and to pay it". In the High Court (supra n. 63 at 326), Mason J. expressly approved of this observation.

69 Notwithstanding that the survival of the deceased was not a condition precedent to payment being made.

70 Supra n. 59 per Gillard J. at 624.

or in respect of which the deceased had a general power of appointment "at the time of his death".

At first instance, it was conceded by counsel for the Commissioner that, having regard to the decision in *Re Alex Russell*,[71] the Commissioner could not rely on paragraph (f). The application of paragraph (f) was therefore not argued before Pape J., although the point was taken that *Re Alex Russell* was wrongly decided, thereby preserving the Commissioner's right to argue the application of paragraph (f) on appeal.

Before the Full Court, it was in fact argued on behalf of the Commissioner that the decision in *Re Alex Russell* was wrong. This argument was disposed of very shortly. The court agreed that *Re Alex Russell* was correct.[72] However, the judgments delivered by Gillard and Lush JJ. contain some interesting comments as to the meaning of the expression "at the time of . . . death". Gillard J. rejected any suggestion that the expression "at the time of . . . death" could mean immediately before or immediately after death, commenting[73]

> The phrase 'at the time of death' means what it says. It does not mean, as was contended for on behalf of the Commissioner, that a power which ceased at death also existed at the time of death. I find that contention completely contradictory.

In emphasising the need for a "strict interpretation" when considering the statutory criteria specifying the time at which a deceased person's estate is to be determined for duty purposes, Gillard J. drew attention to the varying temporal expressions used in the Act, among them the expression "immediately prior to . . . death". Having made similar observations, Lush L.J. concluded:[74]

> So far as I know it has never been contended that a power exercisable by will is not a power which the deceased had 'at the time of his death', and if such an approach is accepted it would exclude from the description of powers existing 'at the time of death' any power which the deceased could exercise only in his lifetime.

The Commissioner's argument under paragraph (f) met a similar fate in the High Court. Stating that the words "at the time of . . . death" must be given "their precise and literal meaning"[75] Stephen J. emphasised the "nice but quite deliberate distinction"[76] between the temporal concepts of "immediately prior to . . . death" appearing in paragraph(j), and "at the time of . . . death" appearing in paragraph (f), concluding that as death was the event which terminated the power conferred upon the deceased by clause 6A(a) of her husband's will it could not have been exercisable "at the time of her death".

Mason J. expressed reluctance to draw the distinction alluded to by Stephen J. but accepted that the Act required such a distinction to be made. He therefore agreed with the Full Court that the Commissioner could not succeed under paragraph (f), concluding that in the case under consideration: "As death is the event which terminates . . . [the deceased's] power to make a request in writing it cannot be said with accuracy that the power existed at that time."[77]

71 [1968] V.R. 285.
72 Supra n. 59 per Gillard J. at 625, Lush J. at 633.
73 Supra n. 59 at 624.
74 Supra n. 59 at 634.
75 Supra n. 63 at 322.
76 Idem.
77 Supra n. 63 at 327.

F. The Relevance of the Alternative Argument in New Zealand

It is implicit in the decision of the High Court of Australia in *Re Silk* that a general power of appointment which the donee may exercise only during his lifetime (because the death of the donee is the event upon which the power is terminated) is not a general power of appointment which exists at the time of the donee's death. If this statement represents the law in New Zealand, it must follow that property over or in respect of which a person has a general power of appointment, that power being exercisable only during the lifetime of the donee and not being exercisable by him by will, cannot be property "over or in respect of which the deceased had at the time of his death a general power of appointment" for the purposes of section 8 of the Estate and Gift Duties Act 1968. It would therefore be possible to prevent property which is the subject of a general power of appointment from forming part of the donee's dutiable estate on his death merely by ensuring that the power may be exercised only during the donee's lifetime. The donor of the power could make provision for a gift over in default of appointment in his will in the case of a testamentary settlement and in the deed of trust in the case of an inter vivos settlement. The effect of section 8 of the Act would thereby be restricted to the situation where the general power of appointment could be exercised during the donee's lifetime and by will, or only by will.

As has been shown, prior to the decision in *Re Silk,* the authorities were far from settled as to whether it was possible in an estate duty context to consider death and its consequences as a series of events, each divided in time. The decision of the English Court of Appeal in *Keel Estates*[78] stands as authority for the firm rejection of such an approach. However, the decision in *Re Magan*[79] which represents a contrary approach, has found favour with the High Court of Australia in *Robertson's* case.[80] Furthermore, although not the subject of consideration in *Bone's* case,[81] the conclusion reached by the Board in that case requires a temporal sequence to be given to the events which transpired at the death of the deceased, for without the acceptance of such a sequence of events, the Commissioner could not have succeeded.

As to whether there is a distinction between a power which exists immediately before death and a power which exists at the time of death, the decision in *Quixley*[82] would appear to deny the existence of such a distinction. The result is that any argument which rests upon such a distinction being drawn is destined to failure. However, the decision in *Re Alex Russell*[83] clearly rejects the contention that the expression "at the time of . . . death" means immediately before or prior to death, while the converse proposition is supported by the decision in *Mastronardi Estate* v. *The Queen.*[84] The decision in *Re Silk* also rejected the contention that the expressions "at the time of . . . death" and "immediately prior to . . . death" may be equated.[85]

78 [1952] 1 Ch. 603. 79 [1922] 2 I.R. 208. 80 (1952) 86 C.L.R. 463.
81 (1976) 6 A.T.R. 66. 82 (1929) 98 L.J.K.B. 315. 83 [1968] V.R. 285.
84 [1976] C.T.C. 572. *Mastronardi* was decided after *Re Silk.*
85 The Full Court in *Re Silk* expressly approved of the decision in *Re Alex Russell* but the High Court did not refer to it.

It must be conceded that all the judges in *Re Silk* to whose decisions reference has been made, in discussing the meaning of the expression "at the time of . . . death", placed considerable emphasis on the different temporal concepts used in paragraphs (f) and (j) of section 7(1) of the Probate Duty Act 1962 (Vic.). As Mason J. explained,[86] paragraph (j) was derived from section 104(1) of the Administration and Probate Act 1958 (Vic.). In that Act, the relevant time prescribed was "at the time of . . . death". It was amended in 1962 to read "immediately prior to . . . death". Mason J. also noted that in section 7(1) of the 1962 Act, the expression "immediately prior to . . . death" or its equivalent "immediately before . . . death" is used on four occasions[87] whereas the expression "at the time of . . . death" appears twice in the same subsection.[88] As the learned judge commented, "the difference cannot be ignored".[89]

However, this does not necessarily detract from the argument that the interpretation of the words "at the time of . . . death" adopted in *Re Silk* applies in relation to those words as they appear in section 8 of the New Zealand Act. First, it must always be asked why, if it was intended that section 8 of the New Zealand Act should apply to a general power of appointment which existed "immediately before" or "prior to" the donee's death but which is terminated by his death, the legislature did not adopt either of these alternative expressions in place of the words "at the time of . . . death" as they did in section 13 when dealing with joint property. Secondly, it is relevant to note that *Re Alex Russell* was decided under section 104 of the Administration and Probate Act 1958 (Vic.).[90] In concluding that a power which came to an end upon death was not a power which existed "at the time of . . . death", McInerney J. considered the other temporal concepts adopted by section 104(1) of that Act, in particular paragraph (e) which, in including within a deceased person's estate his beneficial interest in joint property, used the words "immediately before . . . death". It is suggested that it is difficult to see why a general power of appointment exercisable only during the lifetime of the deceased and terminating on his death should not require a similar temporal expression before property subject to that power forms part of the holder's dutiable estate on his death pursuant to section 8 of the New Zealand Act.

A further objection that might be raised against placing reliance upon the decisions in *Re Alex Russell* and *Re Silk* is that in neither of those cases was it decided that the power or authority in question was in fact a general power of appointment. In *Re Alex Russell* McInerney J.[91] raised the question of whether the deceased's preference shares were property over which he had a general power of appointment but, having reached a conclusion on the time of death issue, found it unnecessary to answer the question. Similarly, in *Re Silk,* the finding that the power or authority did not exist "at the time of . . . death" made it unnecessary for consideration to be given to the question of whether clause 6A(a)

86 Supra n. 63 at 327.
87 Section 7(1)(d), (e) (i) & (j).
88 Section 7(1)(c) & (f).
89 Supra n. 86.
90 The testator in that case died on 22 November 1961. The Probate Duty Act came into force on 1 July 1962. By virtue of s. 2(2) of that Act, the provisions of s. 104 of the Administration and Probate Act 1958 applied to the testator's estate.
91 Supra n. 71 at 300.

of her husband's will conferred upon the deceased a general power of appointment over a one half share of his residuary estate. In *Re Silk,* Lush J. in the Full Court[92] was the only judge to express doubts as to the existence of a general power of appointment. In the High Court, Stephen J.[93] simply stated "whatever the power" conferred upon the deceased, it did not exist at the time of her death. Mason J.[94] commented that the statutory definition of a general power of appointment was of little assistance and that "the frailty of the Commissioner's argument stems not so much from the elements in the statutory definition" as the requirement that the power should exist at the time of the deceased's death.[95] Murphy J.[96] was prepared to assume the existence of a general power of appointment, but only for the purpose of finding it did not exist at the time of death. However, it is submitted that the failure of the courts in either of these cases to make a finding on the question of whether there was in existence a general power of appointment over property does not detract from the persuasive authority of the decisions. In order for property to be caught under section 8 of the New Zealand Act, as with the corresponding statutory provisions under consideration in *Re Alex Russell* and *Re Silk,* two conditions have to be satisfied. The first is that the property in question is subject to a general power of appointment. The second is that the general power of appointment over that property exists at the time of death. A finding that either condition is not satisfied is sufficient for a court to make a finding in favour of the estate of the deceased person. Whether the power under consideration is or is not a general power of appointment is irrelevant if that power does not exist at the time of its holder's death.

III. CONCLUSIONS

The advantages that may accrue from using a power of appointment as an estate planning device must be balanced against the disadvantages that may follow in terms of the liability to death duty pursuant to section 8 of the Estate and Gift Duties Act 1968 of the property subject to the power. It has been suggested in this paper there may be two general ways of avoiding the effect of section 8 of the Act. The first is to confer upon the donee a power which is not a general power of appointment within the terms of the section. The second is to confer a general power of appointment ensuring that it comes to an end at the donee's death and therefore does not exist "at the time of his death" for the purposes of the section.

Section 8 of the Act catches property subject to a "general power of appointment" as that expression is defined in section 2(1) of the Act. A power of appointment which may not be exercised by its donee without the consent of some other person, whether or not that person is also a donee of the power, is not a general power of appointment either at Common Law or for the purpose of the

92 Supra n. 59 at 634.
93 Supra n. 63 at 322.
94 Ibid., 327.
95 Idem.
96 Supra n. 63 at 333.

Act. Therefore, property subject to the power will not form part of the donee's dutiable estate on his death.

Where it is specifically desired to confer a general power of appointment upon a person, it may nevertheless be possible to prevent the property subject to the power from forming part of the donee's dutiable estate on his death by restricting the exercise of the power to the lifetime of the donee. This proposition rests on the argument that section 8 of the Act applies only to property subject to a general power of appointment where that power may be exercised by its donee "at the time of his death". If the donee's death is the event which terminates the power, the power cannot exist "at the time of his death".

English authorities do not support the arranging of events which happen at the moment of death into a temporal sequence, or the drawing of a distinction between the times of "death" and "immediately before death". However, there are more recent decisions to the contrary which support the argument outlined above, those decisions having been reached under legislation which bears greater similarity to the New Zealand legislation than does the English legislation. Whether the argument will succeed in New Zealand remains to be seen. It is predicted, not without some confidence, that success is likely.