

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B 61 of 2017

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF
AUSTRALIA

BETWEEN:

THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

Appellant

and

MARTIN ANDREW PTY LTD
ACN 063 993 055

Respondent

10

RESPONDENT'S SUBMISSIONS

Filed on behalf of the Respondent: **MARTIN ANDREW PTY LTD**
Prepared by: HOPGOOD GANIM
Lawyers
Level 8, Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

High Court of Australia
FILED
2.2 DEC 2017
THE REGISTRY BRISBANE

Contact: Justin Byrne
Telephone: +61 7 3024 0467
Facsimile: +61 7 3024 0567
Email: j.byrne@hopgoodganim.com.au

Table of contents

| | | |
|----|--|----------|
| | Part I: Certification | 1 |
| | Part II: Issues arising | 1 |
| | Part III: Certification regarding s 78B <i>Judiciary Act 1903</i> | 1 |
| | Part IV: Contested statement in the appellant's narrative of relevant facts found or admitted | 1 |
| | Part V: Appellant's statement of applicable legislation | 1 |
| | Part VI: Argument in answer to the appellant's argument | 1 |
| | (a) <i>Issue 3 The construction and application of the twin resolutions in B60 and B61</i> | 1 |
| 10 | (a) <i>The respondent Martin Andrew Pty Ltd</i> | 3 |
| | Part VII: Respondent's argument on its Notice of Contention..... | 3 |
| | Part VIII: Estimate..... | 3 |

Part I: Certification

1 The submissions are in a form suitable for publication on the Internet.

Part II: Issues arising

2 Except to the extent that the submissions of the respondent in B60 of 2017 (“Thomas Primary Tax”) relate to the 2009 income year, the issues in this appeal are the same as those in B60 of 2017, as set out in [2] and [3] of the respondent’s submissions in that matter.

10 **Part III: Certification regarding s 78B *Judiciary Act 1903***

3 The respondent issued a s 78B notice on 17 November 2017.

Part IV: Contested statement in the appellant’s narrative of relevant facts found or admitted

4 The respondent refers to [5] to [8] of the submissions of the respondent in B60 of 2017.

Part V: Appellant’s statement of applicable legislation

20 5 The respondent refers to [9] of the submissions of the respondent in B60 of 2017.

Part VI: Argument in answer to the appellant’s argument

(a) *Issue 3: The construction and application of the twin resolutions in B60 and B61*

6 The appellant’s submissions in B60 avoid defending the construction of the twin resolutions underlying his amended assessments, being that the trustee intended to give 99% of the net income that resulted in the allocation of franking credits to Martin Andrew Pty Ltd, rather than to the respondent. His construction cannot be supported by any reasonable reading of the twin resolutions, which manifest a contrary intention.

30

7 Each of the appellant’s such assessments required one of the twin resolutions to be artificially ignored in its entirety. The appellant selects a fragment of what the trustee had written, criticises the rest, and says that the fragment bears out his case as to what the trustee meant. But the rule in the Court of Chancery is that to determine what a person truly means, one cannot fragment a single document¹. The twin resolutions must be read together.

8 As this Court said in *Halloran v Minister*:²

40

... equity does not work to defeat the lawful intentions of parties; its preference of substance to form and its regard for what ought to be done as having been done are indications of the contrary inclination.

9 Or as it is put in **Broom’s Legal Maxims*³ (footnotes omitted):

¹ See *Lewski v Commissioner of Taxation* [2017] FCAFC 145, at [121] Cf. *Jack v Smail* (1905) 2 CLR 684.

² (2006) 229 CLR 545, 568[65], [2006] HCA 3.

“The two rules of most general application in construing a written instrument are – 1st, that it shall, if possible, be so interpreted *ut res magis valeat quam pereat*, and 2ndly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties.”

10 A little later⁴

10 “Deeds, then, shall be so construed as to operate according to the intention of the parties, if by law they may; and if they cannot in one form, they shall operate in that which by law will effectuate the intention: *quando res non valet ut ago, valeat quantum valere potest ...*”

11 Australian cases applying such principles include **Lewski v Commissioner of Taxation*⁵ which, like the present case, involved the construction of a trustee’s distribution resolutions, which were to be read together.

12 The above principles allow a court to give effect to a resolution that states the result intended to be achieved, so long as the trustee is empowered to achieve that result.
20 Thus for example, a court should have no difficulty in giving effect to a distribution resolution such as that an amount be distributed a particular beneficiary that will result in that beneficiary’s assessable income being not more than, say, \$50,000.00. Here, the trustee made it clear what result was desired, but was held to have mistaken the formal mechanics required to achieve that result. Thus, to take the 2006 resolutions (set out at [19] and [34] of the reasons of Pagone J) the net income distribution resolution was appropriate but in lieu of the “franking credit distribution resolution”, the mechanics would have been clearer in a resolution along the following lines:

30 “Resolved that in making the following income distribution resolution, the expenses of the trust be allocated against gross income so that the following amounts of franked distributions are taken into account in working out the share distributed to each of the beneficiaries:

| BENEFICIARY | FRANKED DISTRIBUTIONS |
|-----------------|---|
| Martin A Thomas | Franked distributions carrying franking credits totalling \$2,416,217.92. |
| [MAPL] | Franked distributions carrying franking credits totalling \$228,900.38.” |

³ 10th ed (1939) at pp 361-362

⁴ Page 363, see also at pp 364, 365, 369, 375-377, 379-380..

⁵ [2017] FCAFC 145 [151].

13 Or the trustee could have been less specific and followed the form of words used in Applegarth J's declaration 1(b)(i), (ii) and (iii).

14 In the end, both Applegarth J and the Full Court construed the twin resolutions to confer an entitlement to 99% of the franked distributions upon the respondent. The methodology of twin net income distribution resolutions used by the trustee, one relating to total income and the other (the franking credit distribution resolution) purporting to deal with franking credits related to the franked distributions forming part of the trust's gross income, shows the amount of the franked distribution taken into account in working out the beneficiary's share of the trust's net income covered by s 97(1)(a) of the 1936 Act, that is to say, the beneficiary's "share amount".⁶

(a) *Application to the respondent Martin Andrew Pty Ltd*

15 The Martin Andrew Pty Ltd appeal relates only to the 2008 year of income. And it has been common ground, since the options concession, that the respondent Martin Andrew Pty Ltd owes no tax-related liability to the Commonwealth, whatever views are taken of the various issues. As far as this respondent is concerned, the only live question has been what credit should be placed in its franking account for the 2008 year, a matter that is important in considering whether it can frank dividends that it might declare. That depends on whether the trustee intended by its twin net income resolutions to allocate approximately 99% of the franking credits to it (rather than Mr Thomas), as the appellant asserts by his assessment, or only 1%, as the respondent contends.

16 Except as above and to the extent that the submissions of the respondent in B60 of 2017 relate to the 2009 income year, the respondent relies on the submissions of the respondent in that appeal.

30 **Part VII: Respondent's argument on its Notice of Contention**

17 The respondent's argument on its Notice of Contention is included in the argument above relating to the appellant's argument on its appeal.

Part VIII: Estimate

18 The estimated time required for the respondent's oral argument is included in the estimate of time in the submission of the respondent in B60 of 2017.

These submissions were settled by F L Harrison QC and M L Robertson QC

40

22 December 2017



FL Harrison QC
Telephone: (07) 3236 2766
Email: harrison@gibbschambers.com

⁶ See s 207-50(3)