

**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

No. B 62 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

10

and

**THOMAS NOMINEES PTY LTD
ACN 010 049 788**

Respondent

RESPONDENT'S SUBMISSIONS

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**HIGH COURT OF AUSTRALIA
FILED
2.2 DEC 2017
THE REGISTRY BRISBANE**

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Part I: Certification

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

Part II: Issues arising

2 These submissions relate to the 2009 year of income, where the appellant assessed the
 10 respondent in this appeal (the trustee Thomas Nominees Pty Ltd) as liable to tax under
 s 99A of the 1936 Act on the s 95 net income on the basis that no beneficiary was
 presently entitled to any trust income in that year. They include the issues arising for
 that year for both the respondent in B60 of 2017 (Martin Andrew Thomas) and the
 respondent. The principal issues in this appeal are described in Issues 8 at [3] of the
 respondent's submissions in B60 of 2017, but may include those described as
 alternative issue in the statement there of Issues 1 and 3.

3 Issue 8 is stated there as being whether, for 2009, the trust distributions having been
 made after the end of the financial year, this court should affirm the decision of the
 Full Court dismissing the appellant's appeal, or vary it, on the basis that:

- 20 (i) (as found by Greenwood J) the franked distributions were notionally
 allocated proportionately to the interim distributions by way of actual
 payments made to the beneficiaries; or
- (ii) the resolutions were effective (as the Full Court held) notwithstanding
 that they were passed after the end of the financial year; or
- (iii) the franked distributions were notionally allocated to the default
 beneficiary (Mr Thomas's mother, since deceased, of whose estate Mr
 Thomas is sole executor); or
- 30 (iv) on some other and, if so, on what basis.

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

4 The respondent has considered whether any notice should be given in compliance with
 s 78B of the *Judiciary Act 1903* (Cth) and has determined that notice is not required.

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

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5 Mr Thomas and the respondent refer to [5] to [8] of the submissions of the respondent
 in B60 of 2017.

Part V: Appellant's statement of applicable legislation

6 Mr Thomas and the respondent refer to [9] of the submissions of the respondent in
 B60 of 2017.

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

(a) Introduction

7 The relevant issues, arguments of the parties, and the reasoning and conclusions of the learned trial judge (Greenwood J) are set out at [51], [56], [160], [187], [188], [235], [337] and [530] of his reasons. It is submitted that there is no error in his Honour's reasoning and determination that Mr Thomas was presently entitled under s101 to 99.6% of the trust income distributed throughout the year, being that percentage of the total paid or applied for the benefit of him and Martin Andrew Pty Ltd (as to 0.4%) and, except as stated below, his conclusion.

8 The appellant in his Notice of Appeal has not appealed on the basis that the Full Court should have held Greenwood J to be wrong in these findings of fact.

9 Where Greenwood J erred, the present respondent submitted to the Full Court and submits here under the respondent's Notice of Contention, was in not ordering, there being no differential allocation of franked distributions by 30 June 2009 in respect of the interim distributions of income, that Mr Thomas's assessable income also included under Division 207 99.6% of the franking credits on the franked dividends received by the trustee, and that he was entitled to corresponding refundable tax offsets.

10 The Full Court should therefore have found, as a matter of construction of Division 207, that Greenwood J erred in his determination of Mr Thomas's taxable income, the tax payable thereon, and his entitlement to refundable tax offsets.

(b) Factual difference between 2009 and other years

11 For the 2009 year only, the trustee's financial accounts showed a net loss at 30 June 2009¹. Thus, the appellant argued before Greenwood J, the trustee was liable to be taxed under s 99A on the s 95 net income, and Division 207 did not confer any refundable tax offsets within s 67-25.

12 Furthermore, unlike the earlier years, the trustee executed its resolutions after the end of the year of income.

(c) Pagone J's reasons

13 Pagone J, with whom Dowsett J agreed, passed no comment on either the decision of Greenwood J that section 101 was engaged in respect of the interim distributions of income made to the beneficiaries throughout the year, or that the resolutions, also made in their favour, were made late.

14 It is submitted that the appellant is wrong at [13] in saying that Pagone J proceeded² on the basis that he was bound by paragraph (1)(b)(iii) of Applegarth J's declaration for the 2006 to 2008 years. Rather, his Honour construed the resolutions as:

¹ See reasons [51]

² At FCAFC [29]

- (a) being effective (notwithstanding that they were made after the end of the financial year – he did not explain why); and
- (b) having the same effect as Applegarth J gave to the corresponding resolutions in the earlier years.

(d) *Primary submissions*

(i) *Interim distributions*

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15 Clause 4(1) (originally clause 4) of the trust deed³ empowered the trustee to distribute trust *income* to and for the benefit of the beneficiaries throughout the year, whether or not, at the end of the year, it turned out that there was positive *net income* of the trust estate. The trustee *did* distribute income *throughout* the year, sourced in the dividends it received, and so by ss 95A, 97 and/or 101 of the 1936 Act, the beneficiaries were presently entitled or deemed to be presently entitled to that income.

16 There being only a small amount of income also applied for the benefit of Martin
20 Andrew Pty Ltd, Mr Thomas's share of the distributable income, being the income that was distributed throughout the year, was 99.6%.

17 As Gummow J said in *Federal Commissioner of Taxation v Vegners* at first instance⁴:

“Nor, in my view, was it essential for the effective exercise of the power contained in para. (a) of clause 2 of the Trust Deed that a payment or application of the income of the Trust Fund be preceded by some formal resolution on the part of the Company as trustee. Further, in my view, the making of each payment itself involved the exercise by the Company of a discretion as trustee within the meaning of s. 101 of the Act.”

30

18 Section 101 also reflects the principle that the Commissioner must take the world as he finds it. If income is paid to a beneficiary, then that beneficiary must be assessed under Division 6 of Part III of the 1936 Act. As Latham CJ and Williams J said in *Federal Commissioner of Taxation v Whiting*⁵, after analysing ss 96 – 99:

“The main assumption underlying the Act would appear to be that the person who derives the income should be in a position to pay the tax out of the income.”

40 19 It does not matter that another beneficiary might claim a better title. Unless and until such claim is considered by a Court of Equity and an order made in its discretion that

³ See Annexure ASC5 to the affidavit of AS Comino filed 5 May 2014

⁴ (1989) 90 ALR 547, 553.6; (1989) 20 ATR 1645, 1650.8, (1989) 89 ATC 5274; [1989] FCA 480[19], affirmed (1991) 91 ATC 4213, 5274 col 1.7, (1991) 21 ATR 1347

⁵ (1943) 68 CLR 199, 215.7.

the title is better⁶ and that the income be repaid (rather than, for instance, be made up out of future entitlements⁷), the beneficiaries have the income and must pay tax on it.

20 The only resolutions in 2009 were made after the end of the income year. This did not enliven any claim of title in the default beneficiary to the income already distributed earlier to Mr Thomas and Martin Andrew Pty Ltd. In any event, those interim distributions could not be, and have not been, clawed back from the beneficiaries.⁸ The capital remained intact, and those amounts were not income available for distribution in any later year.

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(ii) *Greenwood J's reasons*

21 His Honour dealt with this issue as follows:

“530 As to the present entitlement of the beneficiaries, I am satisfied, in any event, that in each of the income years, the beneficiaries were presently entitled to the distributable income of the trust having regard to Ms Abbott’s evidence of the journal entries she made so as to distribute ‘other income’ of the trust in a way consistent with the way in which the s 95 net income had been distributed between Mr Thomas and MAPL. I am also satisfied that s 101 of the 1936 Act coupled with the payments made to Mr Thomas by the trustee in the 2009 year rendered him presently entitled to a share of the income of the trust estate for the purposes of s 97(1)(a) of the 1936 Act. The alternative assessment to the trustee for the 2009 income year must be set aside.”

20

22 However, his Honour failed to go further and to consider the effect of this on Mr Thomas’s entitlement to assessable income and refundable tax offsets in the amount of 99.6% of the franking credits included by the trustee in the s 95 net income.

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(e) *Analysis*

23 His Honour, having found that Mr Thomas was presently entitled to 99.6% of the distributable income of the Thomas Investment Trust by reason of s 101 of the 1936 Act⁹, should have held that s 207-35 of the 1997 Act required that same proportion of the trustee’s statutory income comprising the franking credits in respect of those franked dividends be included in the beneficiaries’ assessable income, and that a refundable tax offset arising from that inclusion accrued to Mr Thomas under s 207-45 and Division 67 of the 1997 Act.

⁶ See e.g. *Alison v Alison* (1934) 51 CLR 653; *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330; *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409; *Steff v Fox* [2005] 3 All ER 693, *Pitt v Holt* [2013] AC 108.

⁷ *Downes v Bullock* (1858) 25 Beav 54 [53 ER 556]. Cf. Jacob’s *Law of Trusts in Australia*, 8th ed. at 17.37.

⁸ *Dwight v Commissioner of Taxation* (1992) 37 FCR 178, 190 2-192 9; *Cajkusic v Commissioner of Taxation* (2006) 155 FCR 430, 439[37]; [2006] FCAFC 164, *Oswal v Commissioner of Taxation* (2013) 233 FCR 110, 129[69], 134[88]-135[92], [2013] FCA 745; **Franknelly Nominees Pty Ltd v Abrugiato* [2013] WASCA 285 [230]

⁹ Reasons [530]

24 Accordingly, for the 2009 year of income, his Honour should have ordered that the objection decision for Mr Thomas be varied to be a decision that Mr Thomas be assessed under s 166 of the 1936 Act on the basis that:

(a) Mr Thomas's taxable income be worked out on a basis that includes in his assessable income:

(i) under s 97 of the 1936 Act, a 99.6% share of the s 95 net income of the Thomas Investment Trust estate (as varied as set out in order 5);

(ii) under s 207-35(3) of the 1997 Act, or s 207-35(3) when read with paragraph 6B(1)(b) of the 1936 Act, a 99.6% share of the franking credits included in the s 95 net income;

(b) the tax payable by Mr Thomas is Nil by reason of the application, against his tax liability, of tax offsets under s 207-45 of the 1997; and

(c) the remaining tax offsets be refunded under item 40 in the table in s 63-10(1) of the 1997 Act, by reason of their being refundable tax offsets within Division 67 of the 1997 Act.

(f) *Alternative submissions*

25 Alternatively, on the basis that the resolutions were effective notwithstanding that they were made after the end of the financial year, Mr Thomas and the trustee repeat Mr Thomas's submissions in B60.

(g) *Alternative construction of the trust deed*

30 26 In the further alternative, if the court holds that both the interim distributions and the resolutions were ineffective to confer present entitlement to income on the beneficiaries, it is submitted that references to "net income" in clause 4(a) of the trust deed should be construed as references to net income as defined in s 95 of the 1936 Act, with the result that it accrued with tax offsets to Mr Thomas's mother Carmel, as the sole Alternate Beneficiary¹⁰.

27 As *Bartlam v Union Trustee Co of Australia Limited*¹¹ shows, the word "income" takes its meaning from its context. Here, "the income of the trust property" in the second line of clause 4(1) means income receipts, the gross revenue items that come in to the trustee from the employment of trust corpus¹².

¹⁰ Carmel died earlier this year. Mr Thomas is her sole executor.

¹¹ (1946) 72 CLR 549, 556 7-557 1, 561.4-.5; affd (1946) 76 CLR 492, 498.7-500.1.

¹² So, for example, the *Trusts Act 1973* (Qld) uses "income" in the sense of gross income: see, e.g., ss 5 (In the definition of "possession"), 33(1)(g), (m) (Miscellaneous powers in respect of property), 49 (Deposit of documents for safe custody), 52 (Audit), 57(5), (6) (Power to carry on business), 78 (Abolition of rule in *Allhusen v Whittell*), 82(h) and (l) (Vesting orders), 87(1)(b) (Vesting orders etc in relation to infant's beneficial interests), 94 (Courts jurisdiction to make other orders) and 100 (Power of court to charge costs on trust estate), and where it means receipts less outgoings in respect of those receipts, it uses the expression "net income", as in s 42.

- 28 Consistently with this interpretation, clause 9 gives the trustee a lien or right of reimbursement “out of the capital and income of the Trust” from moneys payable by it and for all costs and expenses. Likewise, clause 4(2) (inserted 1 October 1992), in referring to the separate recording of categories of income, is clearly specifying gross income rather than profits, e.g. by the reference in clause 4(2)(a) to dividends.
- 29 This is so even though the trustee may have a lien or right of reimbursement out of such income.¹³
- 10 30 However, the clause then switches from referring to “income”, to the expression “net income”. The trust deed does not say whether the reference to “net income” is to “net income” calculated as receipts on revenue account less outgoings payable out of income, rather than capital, or whether it refers to s 95 net income as defined in the 1936 Act. However, the document must, of course, be construed in the light of relevant surrounding circumstances.¹⁴
- 31 The obvious (and it is submitted only) reason for ensuring that the whole of the “net income” is distributed by 30 June each year is to ensure that no income of the trust estate is taxed at the higher rate provided by s 99A(4)¹⁵ in respect of income to which no beneficiary is, or is deemed to be presently entitled, here, by distributing it to (in the events that have happened), Carmel. Why else would it not simply leave the income to be dealt with for the year as circumstances relating to the requirements of the income beneficiaries that arise from time to time, with the implication that income for a year be distributed to the income beneficiaries within a reasonable time¹⁶?
- 20 32 Further, the clause uses the expression “net income of the trust property”, which appears to be adapted from the words in s 95:
- 30 “*net income*’, in relation to a trust estate, means the total assessable income of the trust estate calculated .. as if the trustee were a taxpayer ... less all allowable deductions. ...”
- 33 This interpretation is supported, as well, by the aligning of the administration of the trust with the financial year for income tax purposes, by virtue of the definition of “year” in the Schedule, as this shows that the drafter had an eye on the income tax legislation.
- 34 As well, it may be inferred that the trustee, in making the amendment of 1 October 1992 providing, among other things, that the trustee may record as a separate category of income:-
- 40 “(b) ‘income, including capital gains, which’ has certain characteristics;”
- took the same view of the provision.

¹³ *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367.

¹⁴ *Re Gulbenkian's Settlements* [1970] AC 517, 522C-D per Lord Upjohn. Cf *Pacific Carriers Ltd v BNP Baribas* (2004) 218 CLR 451, *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, 995-6

¹⁵ Inserted in 1964 (the trust deed is dated 1 February 1979)

¹⁶ See, e.g., *Breadner v Granville-Grossman* [2001] Ch 523, 540.

35 It is submitted, accordingly, that the proper inference is that “net income” should be so interpreted.¹⁷

(h) *Further matters*

36 His Honour was seised of the whole question of whether Mr Thomas’s assessment
 10 was correct, not merely whether one integer in the assessment process – assessable
 income – was correct. Notwithstanding that his Honour accepted that for the 2009
 year the distributions of the dividends received throughout the year were effective to
 include 99.6% of the net income (within s 95 of the 1936 Act) in Mr Thomas’s
 assessable income under s 97 of the 1936 Act, his Honour did not state in his reasons,
 and declined to make express orders as to whether or not Mr Thomas was
 consequently entitled to additional assessable income and refundable tax offsets in the
 amount of 99.6% of the franking credits included by the trustee in the s 95 net income.

37 Section 14ZZP of the *Taxation Administration Act 1953* provides:

“14ZZP Order of court on objection decision

20 Where a court hears an appeal against an objection decision under
 section 14ZZ, the court may make such order in relation to the
 decision as it thinks fit, including an order confirming or varying
 the decision.”

38 However, s 22 of the *Federal Court of Australia Act 1976* includes:

“22 Determination of matter completely and finally

30 The Court shall, in every matter before the Court, grant ... all remedies
 to which any of the parties appears to be entitled ... in the matter, so
 that, as far as possible, all matters in controversy between the parties
 may be completely and finally determined and all multiplicity of
 proceedings concerning any of those matters avoided.”

39 It is submitted that his Honour should have determined the whole question and given
 precise directions to the Commissioner as to the steps he was required to take
 consequent upon the including of a 99.6% share of the net income of the trust estate in
 Mr Thomas’s assessable income for 2009. It is submitted that, consistently with his
 Honour’s (it is submitted erroneous) reasoning in relation to the earlier years of
 income, his Honour should have directed the Commissioner to allow Mr Thomas
 99.6% of the additional assessable income and refundable tax offsets and to refund the
 relevant excess accordingly.

40 **Part VII: Respondent’s argument on its Notice of Contention**

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

¹⁷ cf *Cajkusic v Commissioner of Taxation* (2006) 155 FCR 430, 434[13], 438[30], 439[34], [2006] FCAFC 164.

Part VIII: Estimate

41 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

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22 December 2017

A handwritten signature in black ink, appearing to be 'FL Harrison', written over a horizontal line.

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