

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P22 of 2012

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF WESTERN AUSTRALIA

BETWEEN:

MONTEVENTO HOLDINGS PTY LTD
First Appellant

EUGENIO SCAFFIDI
Second Appellant

and

GIUSEPPE DIEGO SCAFFIDI
First Respondent

MARIA SCAFFIDI BY GUARDIAN AD LITEM THE PUBLIC TRUSTEE
Second Respondent

APPELLANTS' REPLY

Part I: Certification for publication

1.1 The appellants certify that these submissions are in a form suitable
for publication on the internet.

2 Part II: Reply to the argument of the respondent

Facts

2.1 The appellants accept the references to further facts as set out in paragraphs 4.2, 4.4, 4.5(b), 4.7, 4.8, 4.9, 4.10 and 4.11 of the first respondent's submissions.

2.2 As to paragraph 4.3 of the first respondent's submissions, the appellants agree that the Trust Deed contains provisions relevant to

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the appeal in addition to clause 11.03 and will refer to such provisions as necessary in oral argument.

2.3 As to paragraph 4.5(a) of the first respondent's submissions, the appellants accept that Salvatore Scaffidi was the settlor of the Trust, and the reference to Antonio Scaffidi in paragraph 5.3 of the appellants' submissions is an error.

10. 2.4 As to paragraph 4.5(c) of the first respondent's submissions, the appellants say that pursuant to clause (c) of the Deed of Variation of the Scaffidi Family Trust, Scaffidi Holdings Pty Ltd replaced Scaffidi Nominees Pty Ltd as the sole trustee of the Trust effective 1 July 1995. **(AB p76)**

Applicable statutory provisions

2.5 The appellants accept the corrections to the appellants' reproduced provisions of the *Stamp Duties Act 1920 (NSW)* as set out in paragraph 5.2 of the first respondent's submissions.

Principles of construction

2.6 The appellants accept the general statements of principles relevant to the construction of the Trust Deed as set out in paragraphs 6.4 to 6.11 of the first respondent's submissions.

20 2.7 The approach taken to construction of trusts depends on finding the meaning of the language of the contract from the intention which the parties expressed, *not* the subjective intentions which they may have had, but did not express: ***Byrnes v Kendle*** [2011] HCA 26 at [98], [102] per Heydon and Crennan JJ. (*emphasis added*)

General powers of appointment

2.8 Contrary to paragraph 6.12 of the first respondent's submissions, the appellants do not contend that the statutory regime regarding the imposition of tax and death duties prevailing in 1977 provides the only context relevant for the construction of clause 11.03.

2.9 However, there can be no doubt that regime was part of the surrounding circumstances known to the parties at the time, and informed the solicitors who drafted the Trust Deed: CA [96] per Buss JA (**AB 179**); CA [158] per Murphy JA and Hall J (**AB 191**).

2.10 The risk that an individual appointor (who is also a beneficiary) becoming a trustee would be treated as effectively owning the trust property and thereby having a general power of appointment, is avoided by the appointment of a corporate trustee given the doctrine of separate legal entity of a corporation. By its express words, clause 11.03 does not limit the operation of that doctrine because the clause is not concerned with the control of corporate trustees.

2.11 Paragraph 6.16 of the first respondent's submissions refer to **ASIC v Carey (No 6)** (2006) 153 FCR 509 at [37]; [2006] FCA 814 and in paragraph 6.17 submits this is the effective position under section 100 of the *Stamp Duties Act 1920* (NSW).

2.12 In **Public Trustee v Smith** (2008) 1 ASTLR 48; [2008] NSWSC 397 (cited by the majority below at CA [151] (**AB 190**)), White J doubted that it is correct to say that a beneficiary who controls the trustee has what approaches a general power of appointment, merely because a beneficiary can compel its exercise in favour of himself: [135]. His Honour stated at [138]:

*"I do not understand **ASIC v Carey (No 6)** to establish that because a beneficiary of a discretionary trust controls the appointment or removal of the trustee, or controls the exercise of the trustee's powers and can appoint trust property to himself or herself, that the holder of such a power is the beneficial owner of the trust property irrespective of the terms of the trust deed."*

2.13 As to paragraph 6.18 of the first respondent's submissions:

2.13.1 it is the existence of a general power of appointment under death and estate duties legislation that gave rise to adverse taxation consequences for an individual;

2.13.2 whilst the appointor ultimately controls the trust, this is only true in a limited sense, because the appointor cannot, in any legal sense, direct the trustee how to act;

2.13.3 the trustee does not have power to remove himself or herself;

2.13.4 since clause 11.03 precludes only an individual appointor from acting as a trustee if that individual is also a beneficiary, there is no need to preclude a beneficiary from acting as appointor or trustee to avoid adverse tax consequences.

- 10 2.14 Despite **ASIC v Carey (No 6)**, legal writers in 1977 contemplated the problem of the “general power of appointment” arising under sections 100 – 102 of the *Stamp Duties Act 1920* (NSW), and opined that the problem could be resolved by appointing a corporate trustee, even one controlled by appointor/beneficiary: TW Magney “A Comparative Analysis of Estate Planning Vehicles” (1977 – 78) 12 *Taxation in Australia* 222 at 239; DH Bloom “The Discretionary Trust – Some Practical Implications” (1975) 9 *Taxation in Australia* 586 at 593, 595.
- 2.15 In examining the language of clause 11.03 to determine the express intention of the settlor, the words respond precisely to an avoidance of the consequences flowing from that legislative regime.
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Limitations on the power of an appointor to appoint themselves as trustee

2.16 Even the majority below recognized that, notwithstanding the general law’s most salutary rule that an appointor should generally not appoint himself or herself as a trustee, clause 11.03 does not expressly or by necessary implication contain a general prohibition on the appointor appointing himself or herself as a trustee: CA [158] (**AB 191 – 192**).

2.17 Without any prohibition on the appointment of a corporate trustee controlled by the individual appointor/beneficiary, the requisite

independence of the trustee's powers can be preserved given the separate legal entity of a corporate trustee.

Objects and purposes are not mutually exclusive

2.18 As to paragraph 6.33 of the first respondent's submissions, no authority is offered for the proposition. In fact the majority below held that the purpose of ensuring the office of trustee is seen as wholly separate from the position of the appointor/beneficiary was precisely to avoid a risk the appointor is treated as effectively owning or having a contingent interest in the trust property: CA [158]. **(AB 191)**

10 Single person companies

2.19 The provisions of the Corporations Act that did not exist in 1977 do not assist in the construction of clause 11.03.

Language of the Trust Deed

2.20 As to paragraph 6.48 of the first respondent's submissions, there is nothing in the language of the Trust Deed that supports an interpretation that the words "*that individual shall not be eligible to be appointed as a Trustee*" in clause 11.03 are wide enough to legitimately encompass a prohibition on an entity legally separate to, but controlled by that "individual" from being appointed to the office of trustee. If that was intended, it would have been expressly stated.

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Dated 17 September 2012



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