

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

NO B 62 OF 2017

THE COMMISSIONER OF TAXATION  
OF THE COMMONWEALTH OF  
AUSTRALIA  
Appellant

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THOMAS NOMINEES PTY LTD  
ACN 010 049 788  
Respondent

APPELLANT'S SUBMISSIONS IN REPLY  
(2009 YEAR)

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Filed on behalf of the Appellant: The Commissioner of  
Taxation of the Commonwealth of Australia

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55I of the *Judiciary Act 1903*

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## Part I: Certification

1. The submissions are in a form suitable for publication on the Internet.<sup>1</sup>

## Part II: Argument

2. The Commissioner refers to and repeats his primary submissions in this appeal relating to the 2009 income year, in particular at AS B60 [31] (Summary), [78] (Pagone J's Reliance on *Executor Trustee*), and [85] (Pagone J's approach to the 2009 Year).
- 10 3. **Issue 8.** The Respondent Trustee submits that the principal issues in this appeal are described as Issue 8, but may include those issues described as alternative issues in the statement of Issues 1 and 3.
4. The Trustee's submissions in this matter are not responsive to the Commissioner's submissions relating to Pagone J's approach to the 2009 Year and do not deal in any substantive way with the reasons of Pagone J concerning the 2009 income year.<sup>2</sup>
- 20 5. **Issues raised not apt for determination.** The issues that are raised by the Trustee's submissions in this appeal are not apt for determination by this Court, as each entails consideration of extensive evidence and determination of complex and contested questions of fact.
6. **Disposition.** Rather, the Court should:
  - 30 (a) determine the Commissioner's appeal (being that Pagone J's approach to the 2009 year was infected with error, in particular because of his conclusion that he was bound by the Declaration of the Queensland Supreme Court);
  - (b) otherwise remit the matter to the Full Federal Court.
7. **Position on remitter.** The appeals relating to the 2009 income year give rise to a discrete set of factual and legal questions concerning the proper basis for the taxation of the Trustee and the Beneficiaries, and the Trustee's submissions in support of its Notice of Contention serve to highlight the factual complexity attending those discrete questions.
- 40 8. On any remitter of this matter to the Full Federal Court, the Commissioner will contend that he (the Commissioner) correctly assessed the Trustee to income tax in accordance with

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50 <sup>1</sup> Capitalised terms used in these reply submissions are as defined in the Commissioner's principal submissions of 24 November 2017 filed in the Thomas Primary Tax appeal, B60. For convenience, the submissions of the Commissioner and the Respondent in B60 are treated as the principal submissions and referred to as **AS B60** and **RS B60** respectively. Reference to paragraphs in this appeal are denoted by B62, to the MAPL Primary Tax appeal by B61 and to Thomas Penalty by B63, where AS refers to the Commissioner's submissions and RS refers to the Respondent's submissions.

<sup>2</sup> As the Trustee observes in its submissions at [13], Pagone J "passed no comment" on Greenwood J's decision that s 101 was engaged in respect of the interim distributions of income in 2009.

s 99A of the 1936 Act on the s 95 net income of the Trust for the 2009 year of \$173,743,<sup>3</sup> consistent with the analysis set out below.

9. The Trustee's primary submissions are set out at AS B62 [11]-[39]. In response, the Commissioner says as follows.

10. **No net distributable income of the Trust in 2009.** Section 97 of the 1936 Act operates to include in a beneficiary's assessable income an amount calculated by reference to the share of the income of the trust estate to which the beneficiary is presently entitled. The Trust had no net distributable income for the 2009 income year but incurred a loss of \$7,700,597.<sup>4</sup> It must follow that neither Mr Thomas nor MAPL could have been presently entitled to a share of any income of the Trust as there was none in which to share.

11. The term "income of the trust estate" in ss 97(1) and 101 of the 1936 Act refers to net distributable income, which is to be identified by reference to appropriate accounting principles subject to any contrary intention to be found in the trust instrument.<sup>5</sup> In this case, the terms of the Trust Deed do not disclose such a contrary intention:

- (a) having regard to the terms of the Trust Deed, the income of the Trust estate, being the subject of the power of the Trustee to distribute, is the net income (not gross income) remaining after the Trustee has paid the Trustee's "proper costs, expenses and outgoings";<sup>6</sup>
- (b) clause 4(5) of the Trust Deed permits expenses and outgoings of the Trust to be allocated against and deducted from income or capital of any one or more categories in such a manner as the Trustee sees fit;<sup>7</sup>
- (c) there is no evidence that the Trustee expressly allocated expenses differentially between any categories of income, and the unchallenged finding of Greenwood J was that it did not do so.<sup>8</sup>

12. Greenwood J correctly paraphrased s 101 of the 1936 Act at FCA [88], saying to the effect

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<sup>3</sup> FCA [39] and [51].

<sup>4</sup> FCA [290].

<sup>5</sup> *Cajkusic v Commissioner of Taxation* [2006] FCAFC 164; (2006) 155 FCR 430 at 439 [34]; *Federal Commissioner of Taxation v Totledge* [1982] FCA 75; (1982) 40 ALR 385; (1982) FLR 149 at 159-160; *Zeta Force Pty Ltd v Federal Commissioner of Taxation* [1998] FCA 728; (1998) 84 FCR 70 at 74-75; *Commissioner of Taxation v Bamford* [2010] HCA 10; (2010) 240 CLR 481. The majority judgment in *Bamford* also relied on the analysis of Sundberg J in *Zeta Force Pty Ltd v Federal Commissioner of Taxation* [1998] FCA 728; (1998) 84 FCR 70 at 74-75. See also *Bamford* at 506, referring to *Commissioner of Taxation v Totledge* [1982] FCA 75; (1982) 40 ALR 385; (1982) 60 FLR 149 at 157-158 per Bowen CJ, Deane and Fitzgerald JJ.

<sup>6</sup> FCA [461].

<sup>7</sup> FCA [21].

<sup>8</sup> FCA [496].

that it provides that where a trustee has a discretion to pay or apply income of the trust estate to or for the benefit of the specified beneficiaries, a beneficiary in whose favour the trustee exercises his discretion shall be deemed to be presently entitled to the amount paid to him or applied for his benefit by the trustee in the exercise of that discretion.

13. However, in respect of the 2009 income year, in contrast, at FCA [530], Greenwood J appears not to have had regard to the predicate of the trustee's discretion in s 101 of the 1936 Act to pay or apply income of the trust estate, that predicate being the existence of distributable income. Greenwood J has dealt with payments *simpliciter* without regard to whether such amounts are in the nature of distributable income. This appears from Greenwood J's focus on the fact of the payments made by the Trustee to Martin Thomas, and from the following words in FCA [530]: "section 101 of the 1936 Act coupled with the payments made to Martin 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 section 97(1)(a) of the 1936 Act." (Emphasis added.)

14. When discussing the concept of "present entitlement", Greenwood J referred at FCA [98] to a passage from the judgment of Latham CJ and Williams J in *Commissioner of Taxation v Whiting*,<sup>9</sup> to the effect that:

- (a) when the 1936 Act speaks of a beneficiary being presently entitled to a share of income, it refers to the right of a beneficiary to obtain immediate payment, rather than to the fact that a beneficiary has a vested interest; and
- (b) by s 101 of the 1936 Act, a beneficiary in whose favour the trustee exercises a discretion to pay or apply income of a trust shall be deemed to be presently entitled to the amount paid or applied.<sup>10</sup>

15. Greenwood J then found at FCA [99] that *actual payment* gives rise to a present entitlement under s 101 of the 1936 Act, consistent with the concept of being "presently entitled" for the purposes of s 97. Greenwood J observed that where the instrument is silent about the nature and extent of a beneficiary's interest, if any, in the gross income of the trust estate, the nature and extent of that interest (if any) falls to be determined according to the settled principle described in *Commissioner of Taxation v Totledge*<sup>11</sup> that a beneficiary under a trust who is entitled to income will ordinarily only be entitled to receive actual payment of

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<sup>9</sup> (1943) 68 CLR 199.

<sup>10</sup> [1943] HCA 45; (1943) 68 CLR 199 at 215.

<sup>11</sup> (1992) 60 FLR 149 at 157 and 158.

the appropriate share of surplus or distributable income.<sup>12</sup>

16. By reasoning from the fact of payments made by the Trustee to Mr Thomas, Greenwood J arguably did not pay sufficient regard to the evidence of the character of those payments. Greenwood J did not appear to give consideration to the state of the evidence about this issue. Had he done so, he would have observed: (a) that there was an absence of any evidence in the form of either resolutions or accounting treatment to the effect that the payments were treated as interim distributions of Trust income; and (b) that there was positive evidence that the payments were treated as non-refundable drawings,<sup>13</sup> not as appointments of net income (of which there was none).<sup>14</sup>

17. As to the state of the evidence:

(a) there was no objective evidence that in making the payments the Trustee was exercising discretion to pay Trust income for the benefit of Mr Thomas in his capacity as a Beneficiary. The evidence, the effect of which was summarised by Greenwood J,<sup>15</sup> was to the contrary: the financial records of the Trust prepared in the 2009 income year showed that certain amounts were recorded as drawings but that, before the end of that year, those amounts had been completely offset by other transactions the details of which are not explained;<sup>16</sup> and, thus,

(b) the evidence before Greenwood J did not support a conclusion that in making the relevant payments the Trustee was exercising its discretion to pay or apply 'income of a trust estate' within the meaning of s 101 for the benefit of Mr Thomas in his capacity as a beneficiary of the Trust (whether or not it was able to do so); instead,

(c) the net effect of the evidence regarding payments to Mr Thomas in 2009 is that, when the payments were made, the Trustee was not exercising a discretion to pay such income for Mr Thomas's benefit.

18. Thus, this case is not one involving a simple omission by the Trustee to prepare, as a formality, resolutions to record the distribution of trust income to Mr Thomas.<sup>17</sup> In the circumstances, s 101 of the 1936 Act did not operate such that Martin Thomas was deemed

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<sup>12</sup> The facts found by Greenwood J that appear relevant to his conclusion in respect of the Thomas Nominees 2009 orders are described by him at FCA [484]-[486].

<sup>13</sup> Annexure BA-12 to the Affidavit of Elizabeth Abbott filed 5 May 2014: statement of transactions (drawings by Martin Thomas) on the account of the Thomas Investment Trust between 1 July 2008 and 30 June 2009.

<sup>14</sup> FCA [26]-[42].

<sup>15</sup> FCA [217], [236], [237], [239], [287], [291], [294], [304], [306] and [308].

<sup>16</sup> FCA [332]-[337].

<sup>17</sup> *C.f. Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547, 553.6.

to be presently entitled to the amount of the relevant payments.

19. It is therefore also irrelevant that the only resolutions of the Trustee in respect of the 2009 Year were made after 30 June, following the conclusion of that financial year, as that fact does not alter the character of the payments made to Mr Thomas.

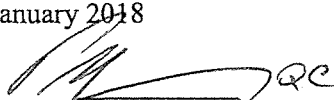
10 20. In response to the Trustee's alternative submissions on the interpretation of the Trust Deed, the Commissioner submits that Greenwood J was correct to find that, as a matter of the construction of the words of clause 4 of the Trust Deed, including the absence of any definition of the term "income", that term was to be construed as a reference to income from all sources and that, accordingly, "net income" was to be construed as a reference to that income less expenses of the Trust.<sup>18</sup>

20 21. Greenwood J correctly rejected the submission that Mr Thomas and MAPL conducted their affairs as if, for the purposes of the Trust Deed, the term "income" in clause 4(a) refers to the section 95 income of the Trust, such that an estoppel by convention prevents a departure from that position.<sup>19</sup> As for the application of any estoppel by convention, the Commissioner refers to his reply submissions in the Thomas Primary Tax proceeding B60 at [12(a)].

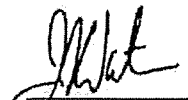
30 22. If the Trust Deed had been intended to ascribe to the terms "income" or "net income" a meaning consistent with the concept of s 95 net income, it might contain references to the features of that particular and confined concept of income, consistent with the provisions of the 1936 Act. No such references are present in the Trust Deed. Thus, as Greenwood J observed at FCA [453],<sup>20</sup> there is no *prima facie* basis for limiting the definition of "income" in the Trust Deed to s 95 income.

40 23. As to Mr Thomas's further alternative submission relating to the accrual of tax offsets to Carmel Thomas, in her capacity as sole alternate beneficiary, if pressed, the Commissioner considers this submission to have been answered by the matters at [10]-[22], above, and, in any event, to be a matter appropriate for remitter to the Full Federal Court.

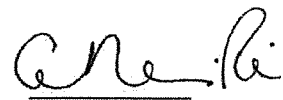
Dated: 25 January 2018

  
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<sup>18</sup> FCA [455].

<sup>19</sup> FCA [525].

<sup>20</sup> FCA [453].