

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 60 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 THOMAS

Respondent

RESPONDENT/CROSS-APPELLANT'S SUBMISSIONS

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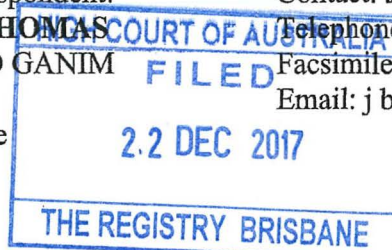


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Part I: Certification

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

Part II: Issues arising

2 The ultimate question on this appeal is whether the resolutions of the trustee Thomas Nominees Pty Ltd streamed the franked distributions forming part of its income in each year so that the respondent was entitled to a refund of the tax offsets claimed in his income tax returns, or to some other amount of refundable tax offsets.

10 3 Notwithstanding the basis on which the appellant obtained special leave to appeal, it is submitted that the principal issues that arise in determining that question are as follows (unless stated otherwise, an issue relates to all four years of income):

(a) Issue 1: Whether the relevant provisions of Division 207 of the *Income Tax Assessment Act 1997* (“the 1997 Act”) as they stood during the relevant financial years permitted the notional streaming of franked distributions in a way that resulted in the franking credits in respect of those franked distributions being allocated in proportions different from the trustee’s sharing of the distributable income of the trust estate within Division 6 of Part III of the 1936 Act (for 2009, this arises, if at all, only as an alternative under Issue 8, below);

(b) Issue 2: If “no” to Issue 1, whether the proportions of distributable income vested in the beneficiaries as declared by Applegarth J’s Order 1(b) made in **Thomas Nominees Pty Ltd v Thomas*¹ are the facts upon which the income tax legislation operates for the purposes of the appellant’s assessments by reason of:

(i) the principle in *Executor Trustee and Agency Company of South Australia Ltd v Deputy Federal Commissioner of Taxes (South Australia)*² (“*Executor Trustee*”); or

(ii) s 118 of the *Constitution* of the Commonwealth of Australia and/or s 185 of the *Evidence Act 1995* (Cth);

(this issue does not arise for 2009);

(c) Issue 3: Whether, on their proper construction, the trustee’s resolutions drafted in terms of distributing “net income”, including to allocate franking credits (and TFN withheld and foreign tax credits), each of which pertains to a particular class of income, should be interpreted as:

¹ (2010) 80 ATR 828, 2010 ATC 20-223, [2010] QSC 417

² (1939) 62 CLR 545 See also **Stewart Dawson and Co (Vic) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683, 691 1 to 691 2, **Danmark Pty Ltd v Federal Commissioner of Taxation* (1944) 2 AITR 517, 564.5 – 564.9 per Williams J.

- (i) distributing that class of income which allocates those credits, being franked dividends, so as to achieve the allocation of approximately 99% of the credits to the respondent; or
- (ii) requiring the allocation of approximately 1% of the credits to the respondent, as per the appellant's assessments;

(for 2009, this arises, if at all, only as an alternative under Issue 8, below);

- 10 (d) Issue 4: If such resolutions are not construed to vest approximately 99% of that class of income which allocates franking credits to the respondent, whether the appellant is bound by the *Executor Trustee* principle or s 118 or s 185 to so treat them as having that result;
- (e) Issue 5: If not, whether there is an estoppel by convention binding on the trustee and the beneficiaries and as a result, by the *Executor Trustee* principle, requiring the appellant to assess in accordance with the effect that those parties have given to those resolutions, including in their income tax returns and franking account;
- 20 (f) Issue 6: If not, whether the court should rectify the resolutions so as to achieve a result in accordance with the trustee's intention as reflected in those returns and franking account;
- (g) Issue 7: If not, whether, having regard to the fact that Greenwood J at first instance decided the matter on a basis not argued for by either party, in order to achieve procedural fairness for the respondent, the court should order that the respondent have leave to rely on the further evidence sought to be led before Greenwood J and the Full Court to provide an alternative basis for supporting those returns, and whether that alternative basis leads to a result favourable to the respondent;
- 30 (h) Issue 8: For 2009, the trust distributions having been made after the end of the financial year, whether this court should affirm the decision of the Full Court dismissing the appellant's appeal, or vary it, on the basis that:
 - (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
 - 40 (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 (the respondent's mother, since deceased, of whose estate the respondent is sole executor); or
 - (iv) on some other and, if so, on what basis.

Part III: Certification regarding s 78B Judiciary Act 1903

4 The respondents issued s 78B notices on 17 November 2017.

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

5 The respondent says that the appellant's "Bifurcation Assumption", under which
 10 franking credits can be bifurcated from franked distributions (dividends) and dealt
 with separately for tax purposes, does not exist. The matter in controversy which led
 to the proceedings before Applegarth J was not the Bifurcation Assumption. It was
 the issue identified as Issue 1, namely whether franking credits were allocated *pari*
passu with all distributable income (like capital gains, as held in *Commissioner of*
*Taxation v Greenhatch*³) or whether they could be allocated by, *and together with*, a
 separate "streaming" of the franked distributions, if the trust deed so permitted – see in
 particular QSC [44]. It was common ground before the Full Court that under Division
 20 207 franking credits may be allocated to a beneficiary specifically entitled to franked
 distributions, rather than in the same proportions in which distributable income is
 shared under s 97 of the 1936 Act, as Applegarth J indeed held. Thus, the respondent
 says, Applegarth J was correct to hold that the trust deed permitted a streaming of
 franked dividends and so permitted the trustee to allocate, *by that streaming*, the
 franking credits differentially and to direct the trustee (Order 1(a)) that the allocation
 of franking credits among the beneficiaries conferred a financial benefit and falls to be
 dealt with by the trustee (separately, in the exercise of its fiduciary duty to take
 taxation benefits into account in the exercise of its powers). Further the appellant's
 submissions are incorrect in saying:

- 30 (a) that the appellant, in connection with his audit, expressed concerns over the
 correctness of the Bifurcation Assumption⁴;
- (b) that Applegarth J held that:
- (i) any principle as expressed in the appellant's formulation of the
 Bifurcation Assumption was correct in law⁵;
- (ii) franking credits pursuant to Division 207 are a discrete category of
 income received into the trust estate separately from the franked
 distributions.

40 6 Contrary to [22]⁶, the originating summons filed in the Supreme Court sought
 directions and equitable rectification if required⁷, not advice, e.g., as to whether a
 proposed course of action would be authorised. And Applegarth J gave directions, not
 any such advice, and made declarations of right that led him to dismiss the application

³ (2012) 203 FCR 134, [2012] FCAFC 84 ([2013] HCATrans 104).

⁴ At [17]: the submissions refer to Applegarth J at [6] and [48], which paragraphs do not support that statement.

⁵ At [22].

⁶ Last paragraph.

⁷ As to the effect of such a direction see **Macedonian Orthodox Community Church of St Petka Incorporated v His Eminence Petar the Diocesan Bishop* (2008) 237 CLR 66, 91 [62], [2008] HCA 42.

for rectification. (In this regard, the jurisdiction to make declarations of right and to order rectification arises where the right exists and is *capable of being contested*, not whether it is being contested)⁸. The distinction is, in any event irrelevant. *Executor Trustee* itself was a case where the trustee had merely sought judicial advice in the Supreme Court⁹ In giving that advice the Supreme Court “made an order declaring that upon the true construction of the will the appellant was empowered in the exercise of its discretion to pay or distribute ...” The point was that as the beneficiaries were parties to those Supreme Court proceedings their entitlements were crystallised in accordance with the Supreme Court’s order.

10

7 Paragraph [27] of the appellant’s submissions implies that *Executor Trustee* was the only argument before Greenwood J, whereas the respondent raised all the above issues before Greenwood J (Issue 7 relating to procedural fairness being raised, however, only after delivery of judgment). All these issues (other than the respondent’s Issues 2(ii) and 8(ii), (iii) and (iv) were also argued before the Full Court.

8 It is submitted that it is a misreading of Pagone J¹⁰ to say¹¹ that Pagone J reached a provisional conclusion that Division 207 operated upon the Net Income Resolutions to allocate the franking credits between the Beneficiaries in proportion to the share of the net income recorded in those Resolutions.

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Part V: Appellant’s statement of applicable legislation

9 The appellant’s statement is incomplete. Relevant legislation includes:

- (a) Commonwealth Constitution, s 118;
- (b) *Evidence Act 1995* (Cth), ss 4, 7, 48, 51 and 185 and the definitions of “Australian Court” and “judge” in Part 1 of the Dictionary;
- (c) *Income Tax Assessment Act 1936* (Cth), ss 6B, 95A;
- (d) *Income Tax Assessment Act 1997* (Cth) as amended to 26 June 2008: ss 6-5, 6-10, 63-10, 67-10, 67-20, 67-25, 200-5 to 200-20, 200-35 and 207-25;
- (e) *Uniform Civil Procedure Rules* (Qld) Rule 668.

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

Overview

10 Paragraph 88 of the appellant’s submissions implies that Greenwood J found that the amended assessments correctly reflected the application of Division 207 to the

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⁸ *Racal Group Services Ltd v Ashmore* [1995] STC 1151, at 1157; *Pitt v Holt* [2013] 2 AC 108, [2013] UKSC 26[139].

⁹ See at 548 4.

¹⁰ At [19-22]

¹¹ At [29b]

resolutions. This is manifestly incorrect, as the appellant's own cross appeals against Greenwood J's decision in QUD 72 of 2016 (Mr Thomas) and QUD 78 of 2016 (Martin Andrew Pty Ltd) demonstrate. It was common ground before the Full Court that Greenwood J's construction of Division 207 and the resolutions, which left none of the franking credits to be shared between the beneficiaries, was wrong. It was common ground before the Full Court that if Greenwood J's finding in respect of the 2009 year was correct – being that Mr Thomas was presently entitled to 99.6% of the distributable income by reason of section 101 of the 1936 Act, then Mr Thomas was obliged to include in his assessable income 99.6% of the franking credits and was entitled to a corresponding amount of refundable tax offsets.

- 10
- 11 If paragraph [88] of the appellant's submissions is a contention that Greenwood J's construction of Division 207 and the resolutions was correct, then it is submitted that it is contrary to the appellant's cross appeals before the Full Court, and special leave to appeal from the Full Court's decision should be revoked.

Issue 1: Analysis of the principal statutory provisions

(a) *Introduction*

- 12 In applying the relevant legislation, it needs to be borne in mind that:

20 the income of the trust estate is the money or property that actually comes in to the hands of the trustee¹². On the other hand, the net income referred to in s 95(1) of the 1936 Act is a notional amount (assessable income less allowable deductions) by reference to which the tax payable by the trustee and/or beneficiaries is calculated;

- 30 (i) there may, by the operation of s 97 of the 1936 Act, be a disconformity between the amount actually received or receivable by the beneficiary and the taxable income of a trustee in respect of which a beneficiary may be liable to pay income tax;
- (ii) by reason of the fact that a beneficiary may become entitled to only the income of a trustee less the trustee's expenses, the amount receivable by beneficiaries may be less than the amount of the franked distributions received by the trustee, yet the legislation contemplates that the beneficiaries may be entitled to the whole of the franking credits and tax offsets relating to those franked distributions.

40 (b) *Analysis of Division 207*

- 13 The core provision relevant to the present case was s 207-35 in Subdivision 207B which included (underlining added):

“207-35 Gross-up - distribution made to, or flows indirectly through, a partnership or trustee

¹² *Federal Commissioner of Taxation v Totledge Pty Ltd* (1982) 40 ALR 385, 393 1 to end of page; (1982) 60 FLR 149, (1982) 82 ATC 4168, (1982) 12 ATR 830 (applied in *Commissioner of Taxation v Bamford* (2010) 240 CLR 481, 506 [39], [2010] HCA 10)

Additional amount of assessable income

...

Allocation of the additional amount of assessable income

- (3) Despite any provisions in Divisions ... 6 of Part III of the [1936 Act], if:
- (a) a franked distribution is made ... to ... the trustee of a trust in an income year; and
 - (b) the assessable income of the ... trust for that year includes an amount (the *franking credit amount*) that is all or a part of the additional amount of assessable income included under subsection (1) in relation to the distribution; and
 - (c) the distribution flows indirectly to an entity that is . . . a beneficiary ... of the trust; and
 - (d) the entity has an amount of assessable income for that year that is attributable to all or a part of the distribution;
- then, the entity's assessable income for that year also includes so much of the franking credit amount as is equal to its share of the franking credit on the distribution.”

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20 14 Note the distinction made between the actual franking credit and the “franking credit amount” that is included in the assessable income of the beneficiary.

15 Section 207-25 in the Guide to Subdivision 207-B (Franked distribution received through certain partnerships and trustees) describes the result as being (underlining added):

“The distribution is regarded as flowing indirectly to the entity under this Subdivision.

30

On the basis of a notional amount of the entity's share of the distribution, the entity may be entitled to have an amount included in its assessable income and/or a tax offset under this Subdivision.”

16 Subsequent provisions¹³ describe the process, not as “distribution” of the additional assessable income, but of “allocation” of that additional assessable income resulting in the franked distribution being taken to flow indirectly to the beneficiary or partner.¹⁴

17 It is submitted that the expression “attributable to” is used here in the sense of indicating a notional source of the assessable income¹⁵. Section 207-35 continues:

¹³ See, e.g., the heading to ss 207-35(3), s 207-55(1) and (2) and 207-57(1).

¹⁴ that is to say it may be less than what is required for conventional tracing (as to which, see, e.g., See *Syme v Commissioner of Taxes (Vic)* (1914) 18 CLR 519, 525 2; - 526.2; *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598, 611.0-9 and *Foskett v McKeown* [2001] 1 AC 102, 127; [2000] UKHL 29)

¹⁵ cf *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd* (2005) 225 CLR 488, 514 [80], [2005] HCA 70 and the discussion of that decision in *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 258 CLR 523, 541 [51], [2013] HCA 61

“Example. A franked distribution of \$70 is made to the trustee of a trust in an income year. The trust also has \$100 of assessable income from other sources. Under subsection (1), the trust's assessable income includes an additional amount of \$30 (which is the franking credit on the distribution). The trust has a net income of \$200 for that income year

There are 2 beneficiaries of the trust, P and Q, who are presently entitled to the trust's income. Under the trust deed, P is entitled to all of the franked distribution and Q is entitled to all other income.

The distribution flows indirectly to P (as P is entitled to a share of that net income and has a 100% share of the distribution under section 207-55). P therefore has an amount of assessable income that is equal to its share of the distribution. Under this subsection, P's assessable income also includes the full amount of the franking credit (as P's share of the franking credit on the distribution is \$30 under section 207-57). Q's share of the net income therefore does not include any of the franking credit ”

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18 This is a simple example, as there are no expenses to be set off against the income. But where there are expenses, the amount of actual income received by the beneficiary will depend on how the trustee allocates those expenses – they may be allocated *pari passu*, or they may be allocated by reference to the income related to those expenses (for example, the question would arise as to the allocation of interest on moneys borrowed to acquire the shares that earn the franked distributions); or there may (as in the present case under clause 4(5) of the trust deed) be an absolute discretion in the trustee as to how the expenses are to be allocated against the income.

19 The above example applies *mutatis mutandis* to entitlements conferred, as here, by the exercise of the special power of appointment, which is read back into the settlement as if the trustee were filling in a blank left by the settlor in the trust deed as to which beneficiaries are to get which proportions of which ingredients of income¹⁶.

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20 In particular, nothing in the legislation or in the example suggests that there is any restriction on how outgoings may be allocated against the notional franking credit amount and the other income. That is left to the terms of the trust deed and the general law of trusts, and the legislation makes it clear that the allocation is to occur whether or not the beneficiary actually receives the franked distribution.

21 Apart from the reference in the heading above [38] to the supposed “Bifurcation Assumption”, [33] to [39] and [42](a) of the appellant's submissions, they correctly (although perhaps inadequately) summarise the effect of the relevant provisions of Division 207, and in particular of Subdivision 207B (Franked distribution received through certain partnerships and trustees).

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22 But they err in [40] in treating the notional “allocation” of a share of a franked distribution to a beneficiary as creating a present entitlement to a particular share of the net income of the trust estate, in that the inclusion of the franking credit in the assessable income does not necessarily result in an equal amount of that franking credit being identifiable in the net income required to be included in the beneficiary's tax return, leading to the erroneous conclusion in [41] that the two must necessarily be proportionate. As can be seen from the chapeau to s 207-35(3) and the example, the allocation is expressly disconnected from the overall sharing of distributable income.

¹⁶ See *Muir or Williams v Muir* [1943] AC 468, 483 6, *Queensland Trustees Limited v Commissioner of Stamp Duties* (1952) 88 CLR 54, 65.1, *Pedley-Smith v Pedley-Smith* (1953) 88 CLR 177, 190 2.

23 Section 207-45 provided (underlining added):

“207-45 Tax offset - distribution flows indirectly to an entity

An entity to whom a franked distribution flows indirectly in an income year is entitled to a tax offset for that income year that is equal to its share of the franking credit on the distribution, if it is:

- (a) an individual; or
- (b) a corporate tax entity when the distribution flows indirectly to it; or

10

...

Note. The entities covered by this section are the ultimate recipients of the distribution because the distribution does not flow indirectly through them to other entities. As a result they are also the ultimate taxpayers in respect of the distribution and are given the tax offset to acknowledge the income tax that has already been paid on the profits underlying the distribution.”

24 Section 207-55 provided (underlining added):

“207-55 Share of a franked distribution

Object of Section

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- (1) The object of this section is to ensure that:
 - (a) the amount of a franked distribution made to ... the trustee of a trust is allocated notionally among entities who derive benefits from that distribution; and
 - (b) that allocation corresponds with the way in which those benefits were derived.

Note: An entity can derive a benefit from the distribution (and therefore has a share of the distribution) without actually receiving any of the distribution see sub-section (2) of this section and the example at the end of section 207-50.

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- (2) An entity's share of a *franked distribution is an amount notionally allocated to the entity as its share of the distribution, whether or not the entity actually receives any of that distribution.
- (3) That amount is equal to the entity's share of the distribution as the focal entity in column 3 of an item of the table.

Note: An entity's share of the distribution is based on the share of the distribution of each preceding intermediary entity through which the distribution flows, starting from the intermediary entity to whom the distribution is made.

This means that in some cases (see items 2 and 4), more than one item of the table will need to be applied to work out the share of the distribution of an ultimate recipient of the distribution

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<i>Share of a franked distribution</i>			
Item	Column 1 For this intermediary entity and this focal entity :	Column 2 The intermediary entity's share of the franked distribution is: ...	Column 3 The focal entity's share of the franked distribution is:
3	the trustee of a trust is the <i>intermediary entity</i> and the trustee or a beneficiary of the trust is the <i>focal entity</i> if (a) a franked distribution is made to the trustee, and (b) the trustee or beneficiary has, in respect of the trust, a share amount mentioned in subsection 207-50(3)	(a) if the trust has a positive amount of net income for that year - <u>the amount of the franked distribution</u> , or (b) otherwise - nil	<u>so much</u> of the amount worked out under column 2 of this item <u>as is taken into account in working out that share amount</u>

25 Where, as here, there are trust expenses, the share of the franked distribution (and thus the franking credit) that is “allocated notionally”¹⁷ to the beneficiary is not determined by the amount of the trustee’s net income actually paid to or applied for the benefit of the beneficiary. The criterion for notional allocation is only that there is at least some positive amount included in the beneficiary’s assessable income under s 97. The example in s 207-50 makes this clear (underlining added):

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“Example: A franked distribution of \$140 is made to a partnership. An amount equal to the franking credit on the distribution (\$60) is included in the partnership's assessable income under section 207-35. Because the partnership has losses of \$300 from other sources, it has a partnership loss of \$100 for the income year

The partnership has 2 equal partners. One partner is the trustee of a trust and the other partner is an individual. The distribution flows indirectly to each partner under subsection (2). Each partner has a share of the partnership loss (\$50), a share of the distribution under sections 207-55 (\$70) and a share of the franking credit under sections 207-57 (\$30)

The individual partner is allowed a tax offset of \$30 under section 207-45

Because the trust has \$100 of income from other sources, it has a net income of \$50 for that income year (\$100 minus the share of the partnership loss of \$50).

20

The trust has one individual as a beneficiary, to whom the distribution flows indirectly under subsection (3). The beneficiary's share of the franked distribution is \$70 under section 207-55 and its share of the franking credit is \$30 under section 207-57. The beneficiary is therefore allowed a tax offset of \$30 under section 207-45.”

26 Thus the full franking credit amount is allocated or “flows through” even if no actual dividend is paid to the beneficiary.

27 Where there is more than one beneficiary potentially entitled to benefit, an examination of which beneficiaries benefit and to what extent must be undertaken to

¹⁷ See s 207-55(1)(a).

work out the proportion in which the franking credits are to be shared. Section 207-57 provided:

“207-57 Share of the franking credit on a franked distribution

- (1) An entity's share of a *franking credit on a *franked distribution is an amount notionally allocated to the entity as its share of that credit, whether or not the entity actually receives any of that credit or distribution.
- (2) Work out that amount as follows:

$$\frac{\text{Amount of the *franking credit on the *franked distribution}}{\text{Amount of the *franked distribution}} \times \frac{\text{Entity's *share of the *franked distribution}}{\text{Amount of the *franked distribution}}$$

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28 It is to be noted that the drafter also speaks in terms of actually receiving a credit, yet as the appellant points, out a franking credit is merely a tax construct and can never be actually received. Those words in the resolution cannot be ignored. Sense must be made of them. Parliament speaks of the actual receipt of credits, and this informs the reader of the resolutions that the trustee's intention was to confer an entitlement to that specific class of income that “gave” the credit to the beneficiary, being franked dividend income.

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29 The above construction of Division 207 is also supported by the Explanatory Memorandum (“EM”) to the *New Business Tax System (Imputation) Bill 2002*, paragraph 5.36. The EM can be used for confirmation, or where there is any ambiguity in the text¹⁸ (underlining added):

“Adjustment of the amount included in the assessable income of an entity to whom a distribution flows indirectly

...

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5.36 It is possible ... that the amount attributable to the franking credit is not proportionate. For example, a discrepancy between the beneficiary's share of the distribution and the amount of the franking credit included in the beneficiary's assessable income may occur where the beneficiaries of a trust do not all have an interest in the dividend income of the trust. A share of the franking credit on a franked distribution would generally be included in the share of the net income of the trust of all the beneficiaries, including those beneficiaries who do not have an interest in the dividend.

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5.37 In this case, the assessable income of the beneficiaries will be adjusted. The assessable income of the beneficiaries with an interest in the dividend income will include an amount equal to their proportionate share of the franking credit based on their interest in the dividend. The assessable income of the other beneficiaries will not include any amount attributable to the franking credit on the distribution. [Schedule 1, item 1, subsection 207-45(1)].”

¹⁸ Section 15AB(1)(b)(ii) and (2)(e) of the *Acts Interpretation Act 1901*.

(c) *The appellant's submissions*

30 The appellant frames the so-called Bifurcation Assumption as:

“14. The assumption ... that the taxation benefit given by a franking credit pursuant to Div 207 was discrete category of income received into the trust estate separately from the franked distributions to which it related ...”

10 31 It was, and is, common ground that this is not so. Rather, the question is whether the twin resolutions, which have as their subject matter the trust's net income, achieved the result that the appellant in the Full Court accepted could be achieved¹⁹:

“MR LOONEY: Certainly something that would have worked to achieve streaming ... is a resolution that ... deals with entitlements to franked distributions as a form of income differentially from other income. That would achieve streaming ...”;

20 32 The respondent says that the twin resolutions stream 99% of the credits to the respondent. The appellant assessed on the basis that they stream 1% of the credits to the respondent. The issue before the Full Court was which was correct. But the appellant now says,²⁰ for the first time, that Greenwood J was correct, and the franking credits disappear altogether. In any event, the issue is to be resolved as if there were a contest between the beneficiaries as to whether the respondent had the beneficial interest in 99% or in only 1% or none of that class of income which requires the allocation of the credits²¹. In this contest the statutory onus of proof plays no part. And if the resolutions are wholly ineffective, then the assessments are wrong and the matter must be remitted for the appellant to reassess²².

30 33 Confusion is also caused by the appellant's indiscriminate use of the word “distribution” in four senses, as referring to:

- (a) a dividend paid by a company to its shareholders;
- (b) the exercise by the trustee of its discretion to pay or apply an amount of income to or for the benefit of a beneficiary;
- (c) the allocation of an additional amount of assessable income to a beneficiary to whom a franked distribution notionally flows indirectly; and
- 40 (d) the entitlement of the beneficiary resulting under s 207-45 to a tax offset equal to its share of the franking credit on the distribution notionally flowing to the beneficiary.

Issue 2: The Supreme Court of Queensland orders construing the legislation

¹⁹ Transcript, p 178, lines 18-22

²⁰ See appellant's submissions [88].

²¹ See *Stewart Dawson and Co (Vic) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683, 691 1 to 691 2, *Danmark Pty Ltd v Federal Commissioner of Taxation* (1944) 2 AITR 517, 564.5 – 564.9 per Williams J

²² See *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417.

34 The respondent's notice of appeal to the Full Court included:

"12. The Court ... erred (Reasons [445] – [446]) in:

- (a) failing to distinguish correctly between the Supreme Court's (non-binding) consideration of the taxation legislation pursuant to s 96 of the *Trusts Act 1973* (Qld) and its binding determination in the course of deciding the Trustee's application for rectification orders, being the beneficiaries' respective entitlements to distributable income;
- 10 (b) deciding that the [appellant] was not bound to apply s 97 of the 1936 Act to the beneficiaries' respective entitlements to distributable income as determined by the Supreme Court in the course of its making the declarations and discussing the trustee's application for rectification as set out at Reasons [58]."

35 Here, except in this court, there was no dispute as to the amount of the credits and corresponding offsets to be shared among the beneficiaries, and except in this court, no dispute that the aggregate had been shared; only as to who received what share. The determination in 12(a) (above) might well have been binding if the appellant had been a party to the application. But it is submitted that on the *Executor Trustee* principle²³ it is only the actual determination as to the beneficiaries' beneficial entitlements to income that are the acts upon which the tax Acts operate. Accordingly the question does not arise whether, if Applegarth J had held that they could be dealt with separately, the appellant would have been bound by that determination.'

20

36 Further, it is submitted that the appellant, having first thought that he could assert different entitlements from those declared by Applegarth J because he was not a party to those proceedings, having later realised that that was not the case, ought to have applied, *semble* under Queensland UCPR Rule 668, to set aside those orders on the basis that he only "discovered" the true legal position subsequently.²⁴

30

37 Accordingly the relevant principles and authorities are discussed below in relation to the issue that *does* arise, namely the interpretation of the twin resolutions.

²³ Often expressed as being that the Commissioner must take the world as he finds it. Other cases applying such a principle include *Manning v Federal Commissioner of Taxation* (1928) 40 CLR 506, 508, [1928] HCA 9 [4], *Executor Trustee and Agency Co of South Australia Ltd v Deputy Federal Commissioner of Taxation* (SA) (1939) 62 CLR 545, 561 ff; further proceedings (1940) 64 CLR 413 (Dixon J), **Danmark Pty Ltd v Federal Commissioner of Taxation* (1944) 2 AITR 517, 564; (1944) 7 ATD (191 and 333, *Cridland v Cmr of Taxation* (1977) 140 CLR 330 at 341, *Federal Commissioner of Taxation v Sara Lee* (2000) 201 CLR 520; *Commissioner of Taxation v Noza Holdings Pty Ltd* (2012) 201 FCR 445, [2012] FCAFC 43

²⁴ The Full Court held in **Meacham & Leyland Pty Ltd v New Hope Collieries Pty Ltd* 14 July 1977 (No 3159 of 1975) (second last paragraph) in relation to RSC O.45 r.1, re-enacted in the current UCPR Rule 668, that the state of the law (in that case a change in the relevant legislation) was a fact "arising" after the judgment, but it is submitted that that reasoning would apply equally to the "discovery" of the true legal position

Issue 3: The construction and application of the twin resolutions

(a) 2006-2008 income years

38 The respondent's argument on this issue for these years are contained in the submissions relating to Martin Andrew Pty Ltd (B61 of 2017).

(b) 2009 income year

10 39 The respondent's argument on this issue for this year is contained in the submissions relating to the trustee (B62 of 2017).

Issue 4: The Supreme Court of Queensland orders construing the trust deed and the resolutions

(a) Introduction

40 This issue also involves whether:

20 (a) the assessments at the time of the application, which the respondent did not dispute, excluded the jurisdiction of the Supreme Court to determine the rights of the trustee and beneficiary *inter se* notwithstanding that no Part IVC proceedings had been instituted (see appellant's submissions [60]-[62]);

(b) the Supreme Court had power to determine the rights of the beneficiaries to distributable income.

(b) Jurisdiction

30 41 The appellant's submissions refer throughout to Applegarth J having given advice. Section 96 of the *Trusts Act 1973* (Qld) refers, not to "advice", but to directions. Directions are made as a consequence of the Court construing the deed and resolutions, which construction is binding on the parties to the proceedings. And in any event, a court may determine substantive rights in such a proceeding,²⁵ although a court will not ordinarily do so without giving the beneficiaries a right to be heard²⁶.

(c) Orders of a superior court of record

42 As well as giving directions under s 96 of the *Trusts Act 1973* (Qld), Applegarth J made the declarations set out at [58] of the reasons, and ordered that the application by the trustee for rectification be dismissed. The Supreme Court is a superior court of record, and its orders are effective even if they were, or its reasons for them were, wrong, until such time as they are set aside²⁷. The dismissal of the claim for rectification conclusively determined the issue as to the entitlements of the

²⁵ *Re Fletcher* [1947] QWN 11; *Re Otto Maletz* [1948] QWN 30, *Re Littlewood* [1954] QWN 41; **Macedonian Orthodox Community Church of St Petka Incorporated v His Eminence Petar the Diocesan Bishop* (2008) 237 CLR 66, 91 [62] 102 [104] – [105], [2008] HCA 42 (see also per Kiefel J at 127 [195]); *Brown as executor of the estate of the late Petar Vezmar (No 2)* [2016] NSWSC 1752 [7] – [8].

²⁶ See *Re Willoughby City Council (as Manager of the Talus Reserve Trust)* [2016] NSWSC 1717 [86]

²⁷ *Cameron v Cole* (1944) 68 CLR 571, 585, 590, 598 and 605, [1944] HCA 5; *Re Macks; ex parte Saint* (2000) 204 CLR 158, 177[20] - 178[23], 184 [49], 235[216] - 236, 274[328] - 275[329]; *State of New South Wales v Kable* (2013) 252 CLR 118, 133 [32]; [2013] HCA 26

beneficiaries to the rights to that income which carried the benefit of the franking credits created by the 1997 Act as between the trustee as applicant and the respondent and Martin Andrew Pty Ltd as respondents.²⁸ The appellant was given the opportunity to be heard²⁹, but he declined to appear.

43 First, there is nothing in the passages from *Executor Trustee*³⁰ that the appellant has set
 10 out³¹ to suggest that³² it was relevant that it was a party to the application that was
 seeking to resile from the court's determination. Second, the declaration was
 appropriate (and in any event, it was the order of a superior court of record), and its
 function was to establish the basis for the dismissal of the application for rectification.
 Third (see appellant's submissions [72]), the respondent did not and does not submit
 that the issue is a question of *res judicata* or issue estoppel as between himself and the
 Commissioner.

44 In any event, before the passage cited by the appellant at [73], Latham CJ³³ said:
 (underlining added):

20 "The order of the Supreme Court is certainly conclusive in relation to the
 rights inter se of the parties to the proceedings in which it was made. It could
 have been challenged upon appeal, but so long as it stands, the rights of the
 annuitants to receive income from the trustee are the rights declared in the
 order—no more and no less. There is no means whatever whereby either the
 trustee or the annuitants can, as a matter of right, vary those rights ...

30 ... A particular decision of a court as to the interest of a person ... as to his
 right to receive moneys by way of income, may be wrong. But the
 commissioner cannot impose land tax upon interests in land which, if a
 contrary decision had been given, the taxpayer ought to have, but in fact does
 not have; nor can he impose income tax upon income which the taxpayer does
 not derive but which, upon the hypothesis of a contrary decision, he would
 have derived."

45 And before the passage cited by the appellant at [77], Dixon J³⁴ (with whom Evatt J³⁵
 agreed), said (underlining added):

"The orders ... fix the rights of the beneficiaries in relation to the income of
 the land upon which the tax is levied, and, in my opinion, they control the
 situation.

²⁸ See, e.g., *Co-Ownership Land Development Pty Ltd v Queensland Estates Pty Ltd* (1973) 47 ALJR 519, 522; (1973) 1 ALR 201; *Shoe Machinery Co Ltd v Cutlan (No 2)* [1986] 1 Ch 667, 670-671, *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355, *Cottingham v Earl of Shrewsbury* (1843) 3 Hare 627, 638 [67 ER 530], *The Laws of Australia* (Westlaw AU online) [25.4.1080], [16.1.860].

²⁹ See at [11], [48].

³⁰ (1939) 62 CLR 545.

³¹ At [73] [77].

³² See Appellant's submissions [69].

³³ At 561.

³⁴ At 570.

³⁵ At 570.

There is no question of *res judicata* or issue-estoppel. But the rights in question being measured by the nature and extent of the interests which are taken in the land as at 30th June 1938, we must look at all operative instruments which define those interests. The orders define the interests of the six beneficiaries. It is true that they do not purport to give new interests and that in law they operate only as declarations determining, as between trustee and beneficiary, the interests otherwise existing, that is, arising under the will. But it is none the less true that the beneficiaries can, after the making of the orders, have no interest in the land inconsistent with the orders."

10 46 McTiernan J³⁶ also rejected the Commissioner's argument that he could contest the correctness of the Supreme Court's orders. The reasons of Starke J³⁷ do not bear on the present issue.

47 So the Supreme Court's declarations and its orders dismissing the rectification proceedings fix and thus foreclose the questions of the entitlements to income which carries the benefits pertaining to the franking credits, i.e. the dividend income.

20 48 The appellant submits incorrectly that this order 1(b)(iii) either "purports to declare, or depends for its correctness upon the construction, or determination of the legal effect, of a taxation law in so far as each refers to "benefits pertaining to the franking credits". Order 1(b)(iii) does not purport to declare how a taxation law applies. Rather, it declares the income entitlements of the beneficiaries arising from the resolutions by reference to monetary allocations made to each, which are described as the benefits pertaining to the franking credits.

30 49 So even if, contrary to Applegarth J's decision (and the common position of the parties before the Full Court), Division 207 operated on the basis of a *pari passu* allocation of distributable income, the effect of the decision in *Executor Trustee* is that the beneficiaries remain entitled to their interests unless and until that correction is made on appeal against his Honour's order, or the appellant has the order set aside by the Supreme Court. Importantly, the tax effect, in such a case, is not to alter the respondent's 99% share of the franking credits, but to alter his share of s 95 net income to be a 99% share. So, on either construction of Division 207, the assessments are wholly excessive and he is entitled to refundable tax offsets.

(d) *Part IVC of the Taxation Administration Act 1953 (Cth)*

40 50 Applegarth J's judgment merely establishes beneficial interests in income, which are facts. Whether the Commissioner has or has not raised a tax assessment based on his view of the facts is wholly irrelevant to the Supreme Court's inherent jurisdiction to determine beneficial interests in trust income. An assessment merely establishes the amount of tax payable by the taxpayer to the Commonwealth unless and until it is challenged in Part IVC proceedings.

51 An assessment does not establish in any way the Commissioner's opinion of the facts³⁸, if he happens to hold any opinion at all (he need not, and often will not where

³⁶ At 572.

³⁷ Pages 564 and ff

he engages section 166 with s 167 of the 1936 Act. And so it is in this case, for the appellant points out that at the time of Applegarth J's order there was a "deemed" assessment under s 166A of the 1936 Act against Martin Andrew Pty Ltd. And he claims he did not apply his mind to the assessments of the respondent, and merely acted on the respondent's returns.

52 A submission the appellant made that the Supreme Court is without jurisdiction to
 10 determine beneficial interests in income as between trustee and beneficiaries because
 he had made alternative assessments of the trustee and some of the beneficiaries was
 correctly rejected by the Supreme Court of Western Australia in *Whitby Land Co Pty
 Ltd v Caratti Trust*.³⁹ He has watered his submission down here to be that the trustee
 and beneficiaries must wait to approach the Supreme Court until the Part IVC process
 (presumably for any one of them) is over. Wait for what? The submission does not
 survive scrutiny. A decision of the Administrative Appeal Tribunal obviously has no
 effect on the rights of a taxpayer beneficiary because it does not exercise judicial
 power; it finds the facts afresh⁴⁰. And a decision of the Federal Court in Part IVC
 proceedings as to a taxpayer's beneficial entitlement to income does not bind the
 trustee, the other beneficiaries, or even the taxpayer, as the appellant correctly
 20 submitted to the Full Court in *Morlea Professional Services Pty Ltd v Richard Walter
 Pty Ltd (in liq)*⁴¹ in analogous circumstances⁴². If anyone should wait, it is the
 appellant who should wait for the Supreme Court to make its findings, as Logan J
 pointed out in *Groves v Commissioner of Taxation (No 4)*.⁴³

(e) *Full faith and credit*

53 Section 118 of the *Constitution* provides:

"118. Recognition of laws etc. of States

30 Full faith and credit shall be given, throughout the Commonwealth to
 the laws, the public Acts and records, and the judicial proceedings of
 every State."

54 Section 185 of the *Evidence Act 1995* (Cth) provides:

"185 Faith and credit to be given to documents properly authenticated

40 All public acts, records and judicial proceedings of a State or Territory
 that are proved or authenticated in accordance with this Act are to be
 given in every court, and in every public office in Australia, such faith
 and credit as they have by law or usage in the courts and public offices
 of that State or Territory."

³⁸ *Danmark*, supra.

³⁹ [2017] WASC 131

⁴⁰ Cf *British Imperial Oil v Federal Commissioner of Taxation* (1925) 35 CLR 422, 435 & ff, per Isaacs J.

⁴¹ [1999] 96 FCR 217, [1996] FCA 1820

⁴² See also *Evans v Federal Commissioner of Taxation* [1988] FCA 329, at [44]

⁴³ [2012] FCA 658.

55 In *Harris v Harris*⁴⁴ Fullagar J, after a detailed consideration of the authorities on the equivalent provision of the United States *Constitution*, which he declined to follow, held, on a consideration of both s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth) (see now s 185 of the *Evidence Act 1995* (Cth)) and s 118 of the *Constitution* that a decree of divorce pronounced by the Supreme Court of New South Wales must be recognised as valid in Victoria, and could not be challenged in Victoria on the ground that it was pronounced without jurisdiction. Subsequent cases (including cases in the High Court containing references in passing to the present issue) are considered in detail in *Re DEF and The Protected Estates Act 1983*.⁴⁵ None of these cases casts any doubt on a conclusion that these sections required the Federal Court, at least in proceedings conducted in Queensland, to Applegarth J's orders the same effect as would a Queensland court (unless and until they were set aside by or on appeal from the Supreme Court.

Issue 5: Estoppel by convention

56 It is submitted that Greenwood J erred in rejecting the estoppel by convention submission⁴⁶ on the basis of absence of evidence of the understanding of the settlor⁴⁷. The Thomas Investment Trust was established by settling the sum of \$10, and the respondent had ultimate control by reason of his being the Appointor⁴⁸, so the relevant intentions were that of the trustee, the Appointor and the benefitting beneficiaries.

57 As with the issue of rectification (see the cases referred to below), the issue is the intention and understanding of the active parties, rather than that of the settlor of the nominal sum that created the trust. In particular, it is submitted that this was assumed to be the case by the members of this Court in **Fischer v Nemeske Pty Ltd*⁴⁹ who considered the issue of estoppel by convention. The respondents rely on their submissions as set out in [155] to [159] of Greenwood J's reasons

58 The question of which beneficiary is entitled to the income associated with franking credits is to be considered, in Part IVC proceedings, in the same way as the Supreme Court would determine the issue⁵⁰. Here, in allocating the franking credits in a net income distribution resolution to one beneficiary rather than another, the trustee is manifesting an intention to apply the franked distribution income associated with the franking credits to that beneficiary so that the franking credits effectively reach that beneficiary rather than be wasted.

59 In doing this, the trustee acted in accordance with the wishes of the only interested beneficiaries (the Nominated Beneficiaries⁵¹), who acted on the basis that they had

⁴⁴ [1947] VLR 44

⁴⁵ [2005] NSWSC 534 [48] and ff, and in *Ocalewicz v Joyce* [2012] NSWSC 1163 [18] – [24], [35 – [36], see also *Shoard v Palmer* (1989) 98 FLR 402, 408, *In The Estate of Tamburn* (2014) 119 SASR 143; [2014] SASC 58 (s 118 does not have the effect that a grant of probate in one State has effect in other States in the absence of re-sealing of that grant [15]), *Evans v Strachan* (1999) 153 FLR 293, [1999] TASSC 115, and *Re PQR and The Protected Estates Act 1983* [2005] NSWSC 729 [20], in which Campbell J applied his decision in *Re DEF*

⁴⁶ Reasons [525].

⁴⁷ Reasons, para [525].

⁴⁸ See the Schedule and clauses 3, 6, 8, 9

⁴⁹ (2016) 647 [86], [87] (Kiefel J), 674, [190], [195], 675 [196] (Gordon J), [2016] HCA 11.

⁵⁰ **Stewart Dawson & Co (Vic) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683, 691 1 to .2,

**Danmark Pty Ltd v Federal Commissioner of Taxation* (1944) 2 AITR 517, 564 5- 9 per Williams J.

⁵¹ See clause 5(a)(i) and the Schedule.

become entitled to the relevant franked distributions by lodging their returns and in the case of the respondent, receiving the refunds.⁵²

- 60 The rights between the beneficiaries are fixed by the actions of the trustee, and the appellant must assess in accordance with those rights. *A fortiori* here, where the Supreme Court has made orders determining how those rights have been fixed.

Issue 6: Rectification

- 10 61 As an alternative to relying on the decision of the Supreme Court of Queensland in *Thomas Nominees*, the trustee, the respondent and Martin Andrew Pty Ltd applied to the Federal Court for rectification of the resolutions to conform with the trustee's intentions. In this regard, it has been common ground that the trustee could have achieved what it had intended to do, and was empowered to distribute income and franked dividends differentially, which power it attempted to exercise. "A misdescription of a power which has otherwise been validly exercised is capable of remedy, if necessary, by an ordinary rectification suit"⁵³.
- 20 62 It is submitted that in rejecting this claim, Greenwood J erred in failing to determine whether the intention of the trustee objectively ascertained as manifested in the resolutions, or in the alternative, the legal effect of the resolutions, was contrary to the true intention of the trustee by its governing mind and will (being that of the respondent, he being both Appointor under the Trust deed, and the Managing Director of the trustee appointed pursuant to a resolution of directors dated 22 December 1988, and empowered to act on behalf of the trustee in all matters by regulations 96 and 96(a) contained in the Articles of Association of the trustee)⁵⁴.
- 30 63 His Honour erred also in deciding that the resolutions that in terms referred to "franking credits" (and so must be objectively construed to mean franking credits) were intended by the trustee's accountant (Ms Abbott) to mean "franking credit benefits"⁵⁵, and that the reference to franking credits was a reference only to the refundable tax offset aspect of franking credits available to the respondent only. This was also contrary to the evidence that showed that Ms Abbott did not so intend⁵⁶, and that she also included the amounts of the franking credits in each beneficiary's assessable income, and included them in Martin Andrew Pty Ltd's franking account balance⁵⁷. It involved the fallacious reasoning that because Ms Abbott's principal intention, when allocating the amounts of the franking credits between the beneficiaries, was to ensure that the respondent obtained the maximum refundable tax offsets, when Ms Abbott used the term franking credits she meant what his Honour chose to describe as franking credit benefits, that is to say, tax offsets, not franking credits⁵⁸.
- 40 64 In any event, the intention of the trustee was to ensure that:

⁵² As to acquiescence by a beneficiary see, e.g., *Jacobs' Law of Trusts in Australia*, 7th ed., para [2236], pp 618-620, *Halsbury's Laws of England*, 4th ed re-issue, Vol 48, paras 975 and ff

⁵³ *Kain v Hutton* [2008] 3 NZLR 61[60]. Cf. *Briggs v Gleeds (Head Office)* [2015] Ch 212.

⁵⁴ See e.g. Greenwood J at [153], [228], [244], [250], [253]-[255], [267] [272], [348], [495], [522], [524].

⁵⁵ Reasons [481]-[482].

⁵⁶ Reasons [472].

⁵⁷ Reasons [487].

⁵⁸ Reasons [487].

- (a) all the income was distributed;
- (b) the income was distributed among the respondent and Martin Andrew Pty Ltd; and
- (c) it was distributed in a manner that resulted in the respondent including a certain amount in his assessable income under Division 207, thereby entitling the respondent to refundable tax offsets in that amount under Division 67 (and resulting in Martin Andrew Pty Ltd including a certain amount in its assessable income under Division 207, and thereby entitling it to tax offsets and also to credits to its franking account in that amount).

10

65 Accordingly, if the resolutions were construed objectively to distribute the distributable income in different shares from that determined by the Supreme Court of Queensland, his Honour should have rectified the resolutions to accord with the trustee's true intention.⁵⁹

20

66 There is sufficient material to find the trustee's intention⁶⁰ to be the intention found by the Supreme Court. The Federal Court has the power in its accrued jurisdiction to rectify documents⁶¹. If despite the Supreme Court's decision, the resolutions as drafted did not reflect the trustee's intentions, then they should be rectified in this forum.

Issue 7: Procedural fairness

67 The issues for the 2006-2008 years were, relevantly:

30

- (a) whether the appellant had to administer the income tax legislation on the basis that the Supreme Court orders determined each beneficiary's share of trust income and of franking credits;
- (b) if not, whether under the trustee's twin resolutions made at each year's end, the respondent's and Martin Andrew Pty Ltd's shares of the franking credits were in the same proportion as, or were in a different proportion from, their respective shares of trust income.

68 It is submitted that Greenwood J failed to decide the proceeding before him within the scope of the controversy between the parties, and as a result denied the respondent procedural fairness⁶², by adopting, without notice to the respondent, a construction of

⁵⁹ *Re Butler's Settlement Trusts* [1976] Ch 251, **Commissioner of Stamp Duties v Carlenka* (1995) 41 NSWLR 329; *Oates Properties Pty Ltd v Commissioner of State Revenue* (2003) 53 ATR 308; [2003] NSWSC 596; **Franknelly Nominees Pty Ltd v Abrugiato* [2013] WASC 285 [178].

⁶⁰ As to whose intention is to be considered, see, in relation to rectification of trust deeds, *Public Trustee v Smith* (2008) 1 ASTLR 488, [2008] NSWSC 397[73] (settlor's intention taken to be that of the solicitor), *Re Kirkham (as Trustee of the Kirkham Family Trust)* [2010] WASC 106[8] (settlor's intention ignored), *Re Keadley Pty Ltd* [2015] SASC 124 [37] (solicitor settlor and clients), *Domazet v Jure Investments Pty Limited* [2016] ACTSC 33[71] (mistake by solicitor as to perpetuity period rectified), *Sanwick Pty Ltd v Kalyk* [2016] NSWSC 100[18] (intention of the client).

⁶¹ See, e.g., **Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 308 and *Fortron Automotive Treatments Pty Ltd v Jones* [2006] FCA 1239 [18], [29] (French J)

⁶² *Autodesk v Dyason (No 2)* (1993) 176 CLR 300, 301.8-302.9, 303 3, 308 1-308.8, 309.6-309.8, 312 4-312.6; *Friend v Brooker* (2009) 239 CLR 129, 171[114]-174[118], particularly at 172[115], *Palmer St Developments Pty Ltd v J & E Vanjak Pty Ltd* [2016] QCA 138[20]-[21].

Division 207 outside the scope of that controversy,⁶³ resulting in a conclusion that the twin resolutions made each year were wholly ineffective to require *any* statutory income to be included in the respondent's assessable income under s 207-35, and thus to allow the respondent *any* tax offsets under s 207-45⁶⁴.

69 It is submitted that, having failed to do that, his Honour should have allowed the respondent's subsequent application to reopen his case to adduce evidence that will allow him to be assessed properly on his Honour's construction of Division 207, if it is ultimately held to be correct.⁶⁵

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Part VII: Respondent's argument on its Notice of Cross Appeal and Notice of Contention

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

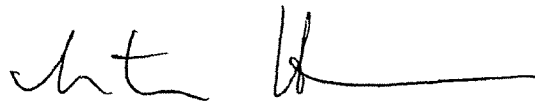
Part VIII: Estimate

71 It is estimated that 5 hours will be required for the presentation of the respondent's oral argument in respect of this matter and in respect of appeals B61 of 2017, B62 of 2017 and B63 of 2017.

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

22 December 2017



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⁶³ As to which, see s 207-35(1), the appellant's argument summarised by his Honour at [171] and [172], the respondent's argument summarised at [340], and the assessments before the Court assessing the amounts of the franking credits to the appellant and Martin Andrew Pty Ltd

⁶⁴ Reasons [520].

⁶⁵ See generally *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 [24]