

**IN THE HIGH COURT OF AUSTRALIA**

**BRISBANE REGISTRY**

**No. B 60 of 2017**

**BETWEEN: THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA**

**AND: Appellant  
MARTIN ANDREW THOMAS  
Respondent**

**No. B 61 of 2017**

**BETWEEN: THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA**

**AND: Appellant  
MARTIN ANDREW PTY LTD  
ACN 063 993 055  
Respondent**

**No. B 62 of 2017**

**BETWEEN: THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA**

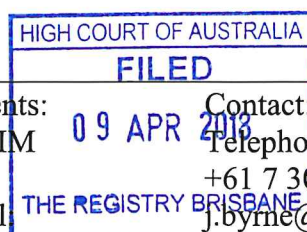
**AND: Appellant  
THOMAS NOMINEES PTY LTD  
ACN 010 049 788  
Respondent**

**No. B 63 of 2017**

**BETWEEN: THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA**

**AND: Appellant  
MARTIN ANDREW THOMAS  
Respondent**

**RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS**



Filed on behalf of the Respondents: Contact: Justin Byrne  
Prepared by: HOPGOOD GANIM Telephone: +61 7 3024 0467  
Lawyers Facsimile: +61 7 3024 0567  
Level 8, Waterfront Place Email: j.byrne@hopgoodganim.com.au  
1 Eagle Street  
BRISBANE QLD 4000

## Table of contents

<b>Part I: Certification .....</b>	<b>1</b>
<b>Part II: Outline .....</b>	<b>1</b>
<i>The Court should determine all issues necessary for there to be a final judgment.....</i>	<i>1</i>
<i>Issues to be argued.....</i>	<i>1</i>
<i>Interpretation of the principal statutory provisions .....</i>	<i>1</i>
<i>The construction and application of the twin resolutions .....</i>	<i>2</i>
(a) <i>2006-2008 income years.....</i>	<i>2</i>
(b) <i>2009 income year .....</i>	<i>2</i>
<i>The Supreme Court of Queensland orders made after construing the legislation .....</i>	<i>2</i>
(a) <i>Executor Trustee.....</i>	<i>2</i>
(b) <i>Part IVC of the Taxation Administration Act 1953 (Cth).....</i>	<i>2</i>
(e) <i>Full faith and credit.....</i>	<i>3</i>
<i>Estoppel by convention .....</i>	<i>3</i>
<i>Rectification .....</i>	<i>3</i>
<i>2009 year for Mr Thomas and Thomas Nominees Pty Ltd.....</i>	<i>3</i>
<i>Procedural fairness.....</i>	<i>3</i>
<i>Penalty assessments .....</i>	<i>3</i>

## Part I: Certification

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

## Part II: Outline

*The Court should determine all issues necessary for there to be a final judgment*

1. In view of the length of time that has passed since the ATO audit commenced, in May 2009, and the institution of the appeals, in June 2012,<sup>1</sup> the public interest requires an end to this litigation.<sup>2</sup> So too the interests of justice for the taxpayers, and in particular, for Mr Thomas, require an end to the blight of continuing litigation on his life and his business affairs.
2. In particular, by the time of any rehearing in the Full Federal Court, two judges who heard the matter will have retired,<sup>3</sup> and it is submitted that this is not an appropriate case to be determined by Perram J alone, or by a further hearing on the papers by Perram J and additional judges - to achieve justice, a further hearing will be required.
3. As well, whatever the result of a rehearing below, at the least if the matter is decided on the issue of rectification or estoppel by convention, it may well be that the matter will be sought to be brought to this Court again, for example, on the issue of whose intention one looks to with trustees in seeking rectification (on which, it is submitted, Greenwood J erred), and on the application of the *Executor Trustee* principle in such cases.
4. Accordingly it is submitted the Court should decide all issues necessary to be determined for there to be a final judgment in this Court, rather than (if the matter is not resolved by the consideration of the *Executor Trustee* and full faith and credit issues), remit one or more issues for reconsideration by the Full Court.

*Issues to be argued*

5. Despite the importance of the *Executor Trustee* and full faith and credit issues to the determination of the present appeal, it is submitted that these cannot be properly considered without, before that, a consideration of the terms of the relevant legislation, of the trust deed and of the resolutions.<sup>4</sup>

*Interpretation of the principal statutory provisions*

6. It will be submitted that the relevant provisions of Division 207 of the *Income Tax Assessment Act 1997* ("the 1997 Act") as they stood during the relevant financial years, (i) required a notional allocation of all the franking credits that flowed to a trust estate among the trustee and/or the beneficiaries (contrary to Greenwood J's reasons) and (ii) permitted that allocation to be made by reference to a beneficiary's entitlement to income that comprised franked dividends, rather than necessarily in the same proportions as that beneficiary's share of the net income of the trust estate (within

<sup>1</sup> Including substantial periods when decisions were reserved - [2015] FCA 968 was reserved for 11 months; [2017] FCAFC was reserved for nearly 8 months.

<sup>2</sup> *interest reipublicae ut sit finis litium*.

<sup>3</sup> Pagone J retired on 31 March 2018. Dowsett J will retire (by statute) on 27 April 2018.

<sup>4</sup> Mr Harrison will deal with all issues other than those relating specifically to the 2009 year, procedural fairness (which depends on an explanation of the 2009 year issues), and penalties, and Mr Robertson will follow him to deal with those issues.

Division 6 of Part III of the 1936 Act) (for 2009, this arises, if at all, only as an alternative under Issue 8, below).

- submissions issue 1 B60 paras. 34-37 p. 12 and paras 40-52 pp. 13-16

*The construction and application of the twin resolutions*

(a) 2006-2008 income years

7. The respondent's arguments on this issue (issue 3) for these years are contained in the submissions relating to Martin Andrew Pty Ltd (B61 of 2017), paras. 6 to 16.

10

8. It will be submitted that, on a consideration of the terms of the trust deed (see reasons Pagone J [18] (4 AB 1823-1825)) the two resolutions (2AB pp. 902 & ff) taken together should be construed as identifying individual types of income (dividend income and foreign income) that are comprised in overall net income and allocating them between Mr Thomas and Martin Andrew Pty Ltd in certain shares so as to treat those types as the components that make up their respective shares of overall net income, just as was done in the ESISuper case<sup>5</sup> and in accordance with the example to section 207-35 in Div 207.

20

9. Alternatively, if as a matter of construction of Div 207, franked distributions cannot be differentiated from overall net income (see issue 1), then the resolutions are to be interpreted in accordance with their evident primary intention, being to assign to Mr Thomas an entitlement to that share of the net income (i.e. including franked distributions) as would include in his assessable income the franking credit amounts as stated in the relevant franking credit distribution resolutions (cf per Pagone J at [29] (4 AB 1837), or rectified to accord with that intention (see below).

(b) 2009 income year

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

30

*The Supreme Court of Queensland orders made after construing the legislation*

(a) *Executor Trustee*

11. Further and alternatively, it will be submitted that the proportions of distributable income vested in the beneficiaries as declared by Applegarth J's Order 1(b)(iii) made in *Thomas Nominees Pty Ltd v Thomas* are the facts upon which the income tax legislation operates for the purposes of the appellant's assessments by reason of the principle in *Executor Trustee* (this issue should not arise for 2009).

- submissions issues 2 and 4 B60 paras. 34-37 p. 12 and paras 40-52 pp. 13-16

40

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

12. It will also be submitted that the assessments at the time of the application, which the respondents did not dispute, did not exclude the jurisdiction of the Supreme Court to determine the rights of the trustee and beneficiaries *inter se*, *a fortiori* since the Federal Court was not seized of any Part IVC proceedings.

- submissions B60 paras. 50-52 pp. 15

<sup>5</sup> *Electricity Supply Industry Superannuation (Qld) Ltd v Deputy Commissioner of Taxation* (2003) 53 ATR 120; (2003) 199 ALR 339, 343; 2003 ATC 4573; [2003] FCAFC 138.

(e) *Full faith and credit*

13. It will be submitted that s 118 of the *Constitution* and s 185 of the *Evidence Act 1995* (Cth) likewise required the appellant to assess in accordance with order 1(b)(iii) of Applegarth J as to the beneficiaries' vested and indefeasible entitlements to income, and preclude any construction of the Part IVC provisions that would otherwise require the Federal Court not to give it full faith and credit to his Honour's declaration.

- submissions B60 paras. 53-55 pp. 16-17.

*Estoppel by convention*

10 14. It will be submitted that further, as the trustee and all relevant beneficiaries, being Mr Thomas and Martin Andrew Pty Ltd (by Mr Thomas) (the only Nominated Beneficiaries) and Carmel Thomas (the only Alternate Beneficiary, and thus the default income beneficiary), were present at the relevant directors' meetings (2AB pp. 902 & ff, and see also Applegarth J at [10] (3 AB 1171)), and have acquiesced in the position as reported in the relevant returns, there is an estoppel by convention binding on the trustee and the beneficiaries and, as a result, one aspect of the *Executor Trustee* principle required 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;

- submissions issue 5 B60 paras. 56-60 pp. 17-18.

20 *Rectification*

15. It will be submitted that, if not, 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 accounts, and in the evidence of Mr Thomas and Ms Abbott .

- submissions issue 6 B60 paras. 61-66 pp. 18-19.

*2009 year for Mr Thomas and Thomas Nominees Pty Ltd*

30 16. 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 bases advanced in the submissions for issue 8 in B62 paras. 7-39 pp. 2-7. In any event, the appellant's appeal should be dismissed because he did not appeal against Greenwood J's order (AB 1461) that Mr Thomas was presently entitled to a 99.6% share of the net income.

*Procedural fairness*

17. As this issue depends on the analysis underlying the submissions for the 2009 year of income, it will be dealt with following those submissions (above). It will be submitted that, Greenwood J having decided the matter on a basis not argued for by either party, his Honour ought to have ordered that the respondent have leave to rely on the further evidence sought to be led his Honour and the Full Court to provide an alternative basis for supporting those returns.

- submissions issue 7 B60 paras 67-69 pp. 19-20

40 *Penalty assessments*

18. The Full Court decision in Mr Thomas's favour establishes that Mr Thomas's position was relevantly arguable. The Commissioner does not seek a finding from this Court that the Full Court's view of the law was unreasonable. See also submissions on issue 9 in B63 paras. 7-32.

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

Dated: 9 April 2018.

10

A handwritten signature in black ink, appearing to read 'FL Harrison', with a long horizontal flourish extending to the right.

---

FL Harrison QC

Telephone: (07) 3236 2766

Email: [harrison@gibbschambers.com](mailto:harrison@gibbschambers.com)