Court of Appeal
Supreme Court

New South Wales

Case Name:	Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd
Medium Neutral Citation:	[2017] NSWCA 184
Hearing Date(s):	22 June 2017
Decision Date:	28 July 2017
Before:	Gleeson JA at [1]; Leeming JA at [2]; Sackville AJA at [24]
Decision:	1. Dismiss the respondents' Notice of Motion filed on 16 March 2017 objecting to the competency of the appeal. 2. Appeal allowed. 3. Set aside the answer to the separate question given by White J in [109] of the judgment delivered on 15 November 2016. 4. Set aside Orders 1-7 and 9 made by White J on 5 December 2016. 5. The respondents pay one third of the appellant's costs of the appeal, including one third of the appellant's costs of the respondents' notice of motion and one third of the appellant's costs of the summons seeking leave to appeal.
Catchwords:	TAXATION – payroll tax – operation of the "grouping of employees" provisions of the Payroll Tax Act 2007 (NSW) – whether trustee of a discretionary trust correctly grouped with another entity – whether object of the discretionary trust deemed to have a controlling interest in the business conducted by the trustee – whether a disclaimer executed by the object purporting to operate retrospectively could affect liability to payroll tax in a previous year – whether a discretionary object

can disclaim retrospectively

Legislation Cited:

Family Law Act 1975 (Cth), s 79
Income Tax Assessment Act 1936 (Cth), s 23(g)(iii)

Payroll Tax Act 1971 (NSW)
Payroll Tax Act 2007 (NSW), Pt 5
Succession Act 2006 (NSW)
Supreme Court Act 1970 (NSW)
Taxation Administration Act 1996 (NSW), ss 57, 106I(6)

Finance Act 1940 (UK), s 43(1)

Cases Cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41
Armitage v Nurse [1998] Ch 241
Australian Securities and Investments Commission v Carey (No 6) (2006) 153 FCR 509; [2006] FCA 814
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 387; [2012] HCA 56
Chamberlin and Bennett (in their capacity as Trustees of the Estate of the late Robert Henry Spry) v Spry [2008] VSC 562
Chief Commissioner of Stamp Duties for New South Wales v Buckle (1998) 192 CLR 226; [1998] HCA 4
Chief Commissioner of State Revenue v Paspaley [2008] NSWCA 184
Citibank Ltd v Papandony [2002] NSWCA 375
Commissioner of Taxation v Ramsden [2005] FCAFC 39; [2005] ATC 4136
Coolibah Pastoral Co v The Commonwealth (1967) 11 FLR 173
Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation (1990) 23 FCR 82
Davis and Sirise Pty Ltd v Federal Commissioner of Taxation [2000] FCA 44; 44 ATR 140
El Sayed v El Hawach (2015) 88 NSWLR 214; [2015] NSWCA 26
Federal Commissioner of Taxation v Word Investments Ltd (2008) 236 CLR 204; [2008] HCA 55
Freelance Global Ltd v Chief Commissioner of State Revenue [2014] NSWSC 127
Gallo v Dawson (1990) 64 ALJR 458
Gartside v Inland Revenue Commissioners [1968] AC

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Gilsan v Optus [No 2] [2005] NSWSC 38
In re Gulbenkian's Settlement Trusts (No 2) [1970] Ch 408
Kennon v Spry (2008) 236 CLR 366; [2008] HCA 56
Livingston v Commissioner of Stamp Duties (Qld) (1960) 107 CLR 411
Livingston v Commissioner of Stamp Duties (Qld) [1965] AC 494
MSP Nominees Pty Ltd v Commissioner of Stamps (South Australia) (1999) 198 CLR 494; [1999] HCA 51
National Employers Mutual General Insurance Association v Manufacturers Mutual Insurance Ltd (1989) 17 NSWLR 223
Perpetual Trustees Australia Ltd v Heperu Pty Ltd (2009) 76 NSWLR 195; [2009] NSWCA 84
Polo Enterprises Australia Pty Ltd v Pinctada Hotels and Resorts Pty Ltd [2015] NSWCA 397
Re Smith (Decd) [2001] 3 All ER 552
Robinson v Morrell Estate [2009] NSCA 127
Rowe v Federal Commissioner of Taxation (1982) 13 ATR 110
Smeaton Grange Holdings Pty Ltd v Chief Commissioner of State Revenue [2016] NSWSC 1594
South Sydney District Rugby League Football Club Ltd v News Ltd [2000] FCA 1541; 177 ALR 611
Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (New South Wales) (2011) 245 CLR 446; [2011] HCA 41
Westpac Banking Corporation v Hughes [2012] 1 Qd R 581; [2011] QCA 42

Texts Cited:

G Dal Pont and K Mackie, Law of Succession (LexisNexis 2013)
G Thomas and A Hudson, The Law of Trusts (2nd ed, 2010)
I Fullerton and HAJ Ford, The Law of Trusts (Looseleaf ed)
J Gleeson, "Spry's case: Exploring the limits of discretionary trusts" (2010) 84 ALJ 177
Lewin on Trusts (19th ed, 2015)
N Crago, "Principles of Disclaimer of Gifts" (1999) 28 University of Western Australia Law Review 65

Category:	Principal judgment
Parties:	Chief Commissioner of State Revenue (Appellant) Smeaton Grange Holdings Pty Ltd (First Respondent) Tri-City Smash Repairs Pty Ltd (Second Respondent) Ifould Holdings Pty Ltd (Third Respondent)
Representation:	Counsel: Ms J Needham SC / Ms S Kaur-Bains (Appellant) Mr I Young / Ms K Young (First, Second and Third Respondents) Solicitors: Crown Solicitor's Office (Appellant) NSW Compensation Lawyers (First, Second and Third Respondents)
File Number(s):	2016/369962
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity Division
Citation:	[2016] NSWSC 1594
Date of Decision:	15 November 2016
Before:	White J
File Number(s):	2014/366015

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **GLEESON JA:** I agree with Sackville AJA. I also agree with the additional observations of Leeming JA.

2 **LEEMING JA:** I agree with Sackville AJA's reasons and the orders his Honour proposes allowing this appeal. The parties framed this litigation, at first instance and on appeal, by reference to whether the disclaimer by an object of a discretionary trust was retrospectively effective, thereby defeating the Chief Commissioner's reliance on the grouping provisions in Part 5 of the *Payroll Tax Act 2007* (NSW). Thus the respondents' written submissions commenced:

> "At issue in this case is the question whether it is possible for a discretionary object of a discretionary trust to disclaim his right as a discretionary object, which disclaimer takes effect from the time the discretionary trust was settled."

3 The Chief Commissioner's principal submission was to challenge the reasoning of the primary judge to the effect that the law of disclaimer in relation to gifts could be applied analogously to the object of a discretionary trust. The Chief Commissioner submitted that because a fully constituted discretionary trust arose without any requirement of assent on the part of the object, and because the object of such a trust was merely the object of a power and had no real or personal interest which could be the subject of a gift, the doctrine of disclaimer, being a doctrine related to gifts, was inapplicable. It was submitted that *In re Gulbenkian's Settlement Trusts (No 2)* [1970] Ch 408 was wrongly decided.

4 I entirely agree with Sackville AJA that this appeal turns on statute, and that the starting point for analysis must be statute. It is in light of the deeming provisions in the legislation that the effect of the deed polls entered into by Mr Michael Gerace on 27 June 2014 fall to be determined.

5 The retrospectivity of the purported disclaimer was essential to the respondents' submission. It was essential because the goal was to escape the operation of the deeming provisions which applied in respect of the payroll tax obligations incurred by a company presently in liquidation many years earlier.

6 But precision is vital when making and analysing submissions invoking "retrospectivity". In particular, it is one thing for private parties to agree that their legal relations are to be taken to have been conducted on a particular basis, and for that agreement to have retrospective effect as between themselves. It is an entirely different thing for parties by their private agreement to alter with retrospective effect their relations with a third party. True it is that some general law doctrines have retrospective effect, but even so, the law is

astute to have regard to the prejudice which such operation may have on third parties.

7 McDougall J illustrated the distinction in *Gilsan v Optus [No 2]* [2005] NSWSC 38 at [6] (an appeal was allowed in part: [2006] NSWCA 171, but not in respect of this statement of principle):

> "In principle, it should be open to parties to a contract to agree upon the date (including in the past) from which their legal relations commence to have effect, and in principle it should be open to the courts to enforce that agreement. Indeed, Gilsan did not submit otherwise. However, Gilsan submitted that an agreement made with retrospective effect between Optus and AT&T could not affect rights that Gilsan had against Optus that had accrued before the agreement was made."

8 To similar effect, Finn J said in *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; 177 ALR 611 at [372]:

> "Where partners agree that their partnership is deemed to have begun on a date earlier than the actual date at which they commence to carry on business, that agreement while binding on the parties inter se will not render the partners liable to third parties in respect of claims attributable to the period prior to the actual commencement date: see *Lindley and Banks*, §7-24. As Rowlatt J said in *Waddington v O'Callaghan* (1931) 16 TC 187 at 197: 'You cannot alter the past in that way'."

9 Perhaps the clearest example is *Rowe v Federal Commissioner of Taxation* (1982) 13 ATR 110, where the husband and wife who were conducting a farming partnership entered into a deed on 16 May 1975 which purported to assign to a company the partners' interests in the capital, assets and future profits of the partnership retrospectively with effect from 1 July 1974. The joint judgment of Deane, Fisher and Davies JJ confirmed that the income from the farming business was derived by the partners until May 1975, notwithstanding the partners' agreement as between themselves that it was derived by the company from 1 July 1974. Their Honours said at 113:

> "The Deed of Assignment plainly proceeded on the basis that the relevant property was effectively assigned as at and from 1 July 1974 and that the previously existing partnership between the taxpayers had come to an end on 30 June 1974. Whatever may have been the consequences as between the parties, this was a position which could not retrospectively be brought about either as regards third parties or for the purposes of taxation law."

10 Similar considerations are involved whether the retrospective alterations of parties' rights, obligations, powers and privileges is brought about not by agreement but by operation of a general law doctrine (for example, rectification

in equity, or ratification by a principal). In *Gilsan*, McDougall J addressed the retrospective operation of rectification in equity, observing that a contract is rectified with retrospective effect, but because that is so, relief might be withheld where it might affect accrued rights of third parties, citing *Coolibah Pastoral Co v The Commonwealth* (1967) 11 FLR 173 at 190.

11 There are other instances where courts have resisted the retrospective alteration of the position of third parties. One example was given by Hodgson JA, with whom Meagher JA agreed, in *Citibank Ltd v Papandony* [2002] NSWCA 375 at [68], dealing with rescission for fraudulent misrepresentation:

> "If a subsequent rescission could have this effect, it would mean that, if A transfers property to B pursuant to a contract induced by B's fraudulent misrepresentation, and B transfers some of this property in turn to C, a bona fide purchaser for value, and A subsequently rescinds the contract (being content to recover from B such property as B then retained), C might retrospectively become guilty of conversion. I do not accept that this could be so."

12 That passage was cited approvingly by Allsop P and Handley AJA in *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 195; [2009] NSWCA 84 at [79], and their Honours added at [80]:

> "Like Hodgson JA, we have difficulty in understanding how a party with title when it acts can be guilty of conversion by reason of a later avoidance of his title at general law."

13 The same point was made by Chesterman JA, with the agreement of Martin J, in *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581; [2011] QCA 42 at [91]-[94].

14 Those decisions deal with the effect of retrospective aspects of general law principles upon other general law principles. If the issue is the impact of retrospectivity on statute, the analysis is different again.

15 If the question is not merely whether the retrospective operation of a legal principle affects a third party, but whether it undercuts the impact of a taxing act, and especially if it undercuts provisions of a taxing act designed to protect the revenue in the event of default by the primary taxpayer, then separate attention must be given, and at the outset, to statute. The approach adopted by both parties of directing and in large measure confining attention to the position at general law was, with respect, inapt.

16 I agree with Sackville AJA that the answer to the question as to whether a discretionary object can disclaim, and if so with retrospective effect, will not affect the outcome of this appeal. I further agree that, for that reason and because of the incompleteness of the submissions which were made, this Court should not resolve the question. That said, against the possibility that the issue will arise in the future, it may be of assistance to say something about how any such submission should be framed.

17 The object of a discretionary trust is a person to whom, in the exercise of discretion by the trustee, a distribution of trust property may be made without breach. Moreover, the object of a discretionary trust has rights against a trustee, including rights to compel the proper administration of trust, to restrain an actual or apprehended breach of trust and to be considered in the exercise of the trustee's discretion. The rights may be more substantial. In some (albeit relatively exceptional) circumstances leave may be granted to a discretionary object to bring a derivative suit on behalf of the trustee: see *El Sayed v El Hawach* (2015) 88 NSWLR 214; [2015] NSWCA 26. Speaking generally, the rights enjoyed by a discretionary object are neither assignable nor transmissible by will or operation of law; they are ordinarily not regarded as property.

18 I would reject the Chief Commissioner's submission that because disclaimer is a doctrine applicable to gifts of property, and because a discretionary object does not have property in the assets held on trust, a discretionary object cannot disclaim. The unstated premise is that disclaimer is *only* applicable to property, and that is the very issue which arises. The submission is falsified by the consideration that a residuary legatee may renounce his or her interest under a will – even if the estate has not been fully administered, and indeed even before a grant of probate has been made. See G Dal Pont and K Mackie, *Law of Succession* (LexisNexis 2013), [7.42]-[7.46]. Or consider *Livingston v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411 and [1965] AC 694. Mrs Coulson had quite limited rights in respect of the unadministered estate of her deceased first husband, but I have no doubt that she would have been able to disclaim the entirety of those rights after his death. (The position as to whether the next of kin may disclaim in intestacy may be doubtful in some

jurisdictions, as is suggested in a flurry of notes (1976) 40 Conv (NS) 292, (1977) 41 Conv (NS) 260 and (1978) Conv (NSW) 213, but is confirmed in this State by s 139(a) of the *Succession Act 2006* (NSW).)

19 If a purported disclaimer takes place before the disclaiming party has *any* right or interest at all, then it could well be that the disclaimer cannot then and there be effective. A disclaimer of a mere expectancy under a will prior to the testator's death cannot be effective; as it is said, "a disclaimer bites on something that can be disclaimed": see *Re Smith (Decd)* [2001] 3 All ER 552 at [10]; cf N Crago, "Principles of Disclaimer of Gifts" (1999) 28 University of Western Australia Law Review 65 at 69. (There is no occasion to express a view on the effectiveness of a promise for valuable consideration to disclaim, as to which some North American authorities are discussed in *Robinson v Morrell Estate* [2009] NSCA 127.) Thus it has been said that it is not possible for a discretionary object to disclaim in relation to a particular trust asset before the trustee has made any determination in relation to that asset: *Commissioner of Taxation v Ramsden* [2005] FCAFC 39; [2005] ATC 4136 at [34]-[36]. But it does not follow that there can be no disclaimer of the discretionary object's presently existing choses in action prior to there being any exercise of discretion in favour of the discretionary object by the trustee in respect of a particular trust asset; cf J Gleeson, "Spry's case: Exploring the limits of discretionary trusts" (2010) 84 ALJ 177 at 187.

20 A separate analysis is involved in considering whether a discretionary object may disclaim the rights it presently has, in advance of any exercise of the power to make a distribution, by taking the course adopted in this appeal and disclaiming the choses in action involving the due administration of the trust. If that occurs, such that the object no longer has any enforceable rights in relation to the trustee or the trust property, then there may be much to be said, by analogy with or extrapolation from *Armitage v Nurse* [1998] Ch 241, in favour of the proposition that there can no longer be a trust relationship as between the trustee and that discretionary object. If so, there will be a further question whether and in what circumstances equity would regard that as occurring retrospectively as between the discretionary object and trustee. I do

not express a view on either of these questions, which were not debated when the appeal was heard.

21 But all of the foregoing is subject to the operation of statute. As Sackville AJA has explained in more detail, the statutory provisions of present concern are drafted broadly and with a view to protecting the revenue where the primary taxpayer has failed to remit payroll tax. The status of being a member of a group is something which the respondents accepted gave rise, by dint of statute and statute alone, to the potential of liability pursuant to s 81 when another member of the group failed to pay an amount that it was required to pay under the Act in respect of any period. The language of s 81(1) is expressly temporal ("in any period"). The respondents accepted that at the end of each of the months in the roughly ten preceding years, the company in liquidation had failed to pay tax which it was required to pay. Although it is true that the penalties were not required to be paid until after the assessments had issued, the liability determined by s 81 accrued seven days after the end of each month from time to time.

22 The difficulty faced by the respondents' submissions is that there is no sound basis to construe the liability directly imposed by s 81(1) upon all members of the group as being in some way ambulatory such that it fluctuated from time to time depending upon the composition of that group and respected the retrospective alteration of group membership following a disclaimer. There is no textual basis for such a construction. I am conscious that it is wrong to construe every provision of a taxing statute so as to advance the purpose of raising revenue: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27; [2009] HCA 41 at [51]. But I do consider that it is appropriate to have regard to the narrower purpose of protecting the revenue in circumstances when the primary taxpayer is in default, which purpose would be subverted if the statute on its proper construction was susceptible to the unilateral retrospective disclaimer by a discretionary object.

23 For those reasons, as well as the reasons of Sackville AJA, the orders proposed by his Honour should be made.

24 **SACKVILLE AJA:** The parties have presented this case as turning on the effect under the general law of a "Deed Poll of Disclaimer" by which Mr Michael Gerace purported to disclaim his interest as a beneficiary under certain discretionary trusts. Despite the parties' approach to the case, the outcome primarily depends on the proper construction of provisions now contained in Part 5 of the *Payroll Tax Act 2007* (NSW) (**Payroll Tax Act**) relating to the "grouping of employers" for payroll tax purposes.

25 Payroll tax is a tax imposed on employers by whom "taxable wages" are paid. The tax payable is a specified percentage of the total wages paid by the employer above a specified "threshold amount" ($750,000 in the financial year ended 30 June 2014). One purpose of the grouping provisions is to prevent an employer avoiding payroll tax by splitting businesses into separate components so as to take advantage of multiple threshold amounts.[1] A second purpose is to make each member of a group liable for payroll tax due by another member of the group.

26 The proceedings arise out of the failure of Tri-City Trucks (NSW) Pty Ltd (In Liq) (**Tri-City Trucks**) to pay payroll tax over a seven year period (the 2005-2012 financial years) and subsequent investigations carried out on behalf of the appellant (**Chief Commissioner**). The audit findings made on behalf of the Chief Commissioner alleged that Tri-City Trucks and persons associated with it (including Michael Gerace) intentionally disregarded the payroll tax legislation and did not provide full and true disclosure during the investigation.

27 On or about 9 July 2014, the Chief Commissioner issued Payroll Tax Assessment Notices (**Assessments**) to the first respondent, Smeaton Grange Holdings Pty Ltd (**Smeaton**) and the second respondent, Tri-City Smash Repairs Pty Ltd (**Smash Repairs**).

28 The Assessments were issued to Smeaton as the trustee of the Smeaton Trust in respect of each of the financial years 2005-2012. The Assessments were for a total of $1,948,154.34 inclusive of interest and penalty tax. This amount was identical to the total of Assessments issued to Tri-City Trucks in respect of the

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[1] Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW) (Tasty Chicks) (2011) 245 CLR 446; [2011] HCA 41 at [8].

same financial years. The Assessments were issued to Smeaton on the basis that it was a member of the same group of companies as Tri-City Trucks and as a consequence of s 81 of the *Payroll Tax Act* Smeaton became liable to pay to the Chief Commissioner the payroll tax Tri-City had failed to pay.[2]

29 The Assessments issued to Smash Repairs were in respect of the 2009-2013 financial years and part of the 2014 financial year. The Assessments were for a total of $199,464.51 inclusive of interest and penalty tax. The Assessments were issued to Smash Repairs on the basis that the grouping provisions caused it to exceed the tax threshold in each of the relevant years and thus made it liable to pay payroll tax in respect of those years. On 14 October 2014, the Chief Commissioner disallowed objections lodged by Smeaton and Smash Repairs to the Assessments.

30 On 12 December 2014, Smeaton and Smash Repairs commenced proceedings in the Revenue List of the Equity Division seeking review of the Assessments issued to them. The proceedings were brought pursuant to s 97(1) of the *Taxation Administration Act 1996* (NSW) (**Taxation Administration Act**). Section 97(4) of the *Taxation Administration Act* provides that a review by the Supreme Court is taken to be an appeal for the purposes of the *Supreme Court Act 1970* (NSW) (**Supreme Court Act**). However, an "appeal" from an administrative decision is a creature of statute and confers original, not appellate jurisdiction on the court hearing the appeal.[3]

31 By an Amended Summons filed on 6 October 2015, the third respondent, Ifould Holdings Pty Ltd (**Ifould**) was joined as a plaintiff. Ifould, which is the trustee of the Gerace Family Trust, sought review of the Chief Commissioner's decision to include it in a group comprising Smeaton and Tri-City Trucks. Presumably, Ifould had previously lodged an objection to the Chief Commissioner's decision as otherwise it is not clear how the Equity Division would have jurisdiction to review the decision.[4]

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[2] Section 81 of the Payroll Tax Act is reproduced at [47] below.

[3] Tasty Chicks at [5]. As to the significance of s 97(4) of the Taxation Administration Act, see Tasty Chicks at [15]-[17].

[4] See Taxation Administration Act, ss 97(1), 103A(1); Chief Commissioner of State Revenue v Paspaley [2008] NSWCA 184 at [23]-[28] (Basten JA, Giles and Campbell JJA agreeing).

32 On 5 August 2015, the primary Judge (White J) ordered that the following question be determined separately and in advance of other issues in the proceedings:

> "Did the disclaimer signed by Michael Gerace dated 27 June 2014 in respect of the Smeaton Trust and the Gerace Family Trust mean that subs 106I(6) of the *Taxation Administration Act 1996* and s 72(6) of the *Payroll Tax Act 2007* have no application for the tax years in question?"[5]

33 The separate question was argued on 4 November 2015. In a judgment delivered on 15 November 2016, the primary Judge answered the separate question "Yes".[6] His Honour indicated that it followed that the Assessments issued to Smeaton and Smash Repairs had to be set aside.

34 On 5 December 2016, the primary Judge made orders by consent of the parties, as follows:

> "1. The notices of assessment for payroll tax, penalty and interest issued to [Smeaton] for each of 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012 financial years inclusive be revoked.
>
> 2. The notices of assessment for payroll tax, penalty and interest issued to [Smash Repairs] for each of the 2009, 2010, 2011, 2012 and 2013 financial years inclusive, together with the notice of assessment issued to [Smash Repairs] for the period 1 July 2013 to 31 October 2013 be revoked.
>
> 3. The decision of the [Chief Commissioner] contained in a letter dated 10 June 2014 to the extent that [Smeaton], [Smash Repairs] and [Ifould] were included in Groups 2 and 3 identified in Schedules marked 'A', 'B' and 'C' to the [Chief Commissioner's] Appeal Statement dated 10 June 2015 be revoked.
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> …
>
> 6. The matter is remitted to the [Chief Commissioner] for determination in accordance with the decision of the Court … pursuant to s 101(1)(d) of the Taxation Administration Act 1996 (NSW).
>
> …
>
> 9. Orders 1 to 7 be stayed until the finalisation of any appeal."

35 Group 2 in Schedules A and B to the Chief Commissioner's Appeal Statement filed in the Equity Division proceedings comprised Tri-City Trucks and Smeaton. Group 2 in Schedule C comprised Smeaton and Ifould. Group 3 in Schedules A and B comprised Tri-City Trucks and Ifould. Group 3 in Schedule

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[5] Section 72(6) of the Payroll Tax Act, which is in the same terms as s 106I(6) of the Taxation Administration Act, is reproduced at [43] below. The terms of the disclaimer are set out at [70]-[74] below.

[6] Smeaton Grange Holdings Pty Ltd v Chief Commissioner of State Revenue [2016] NSWSC 1594 (Primary Judgment) at [109].

C comprised Smeaton and TCT Management Services Pty Ltd, which was not a party to the proceedings.

36 The groupings in the Chief Commissioner's letter of 10 June 2010 included Smeaton and Smash Repairs for the period 1 July 2005 to 25 February 2013. Schedules A, B and C to the Chief Commissioner's Appeal Statement refer to the grouping of Smeaton and Smash Repairs as "Group 4". It may be that the consent orders are in error and that they should refer not only to Groups 2 and 3, but to Group 4.

37 An appeal lies to this Court from any judgment or order of the Court in a Division.[7] Section 103 of the *Supreme Court Act* provides, however, that:

> "An appeal shall, by leave of the Courthttp://www.austlii.edu.au/au/legis/nsw/consol_act/sca1970183/s19.html - court of Appeal, lie to the Courthttp://www.austlii.edu.au/au/legis/nsw/consol_act/sca1970183/s19.html - court of Appeal from a decision in proceedings in the Courthttp://www.austlii.edu.au/au/legis/nsw/consol_act/sca1970183/s19.html - court of any question or issue ordered to be decided separately from any other question or issue."

38 The Chief Commissioner filed a Notice of Appeal on 2 March 2017 on the basis that the appeal was from final orders made by the primary Judge on 5 December 2016 and that leave to appeal was not necessary. On 6 June 2017, the Chief Commissioner filed a summons seeking an extension of time in which to file an application for leave to appeal against the judgment of the primary Judge dated 15 November 2016 and the orders made on 5 December 2016. The summons, which was filed to guard against the possibility that the Chief Commissioner requires leave to appeal, also sought an order that this Court grant leave to appeal from the whole of the primary Judge's decision.

The legislation

Payroll Tax Act

39 Notwithstanding the obvious importance of the *Payroll Tax Act* and the *Taxation Administration Act* to the tax liability of Smeaton and Smash Repairs, the Court received very little assistance from the Chief Commissioner's representatives as to the structure and operation of the legislation. Mr Young,

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[7] Supreme Court Act, s 101(1)(a).

who appeared with Ms Young for the respondents, provided helpful commentary on the legislation in oral argument, but he could not be expected to fill completely the gaps left by the Chief Commissioner's submissions. It is trite but necessary to observe that the legislation must be the starting point when considering whether a party is liable to payroll tax or, for that matter, any other tax.

40 The *Payroll Tax Act* came into force on 1 July 2007 (s 2). Prior to that date, the grouping provisions affecting employers were contained in the *Taxation Administration Act*. Certain other provisions now in the *Payroll Tax Act* were previously in the *Payroll Tax Act 1971* (NSW). It was common ground at the trial and on appeal that there is no material difference between the relevant provisions of the *Payroll Tax Act* and their counterparts in the earlier legislation. It is, therefore, convenient to refer only to the provisions of the *Payroll Tax Act*.

41 Sections 6, 7, 8 and 9 of the *Payroll Tax Act* provide as follows:

> "**6 Imposition of payroll tax**
>
> Payroll tax is imposed on all taxable wages.
>
> **7 Who is liable for payroll tax**
>
> The employer by whom taxable wages are paid or payable is liable to pay payroll tax on the wages.
>
> **8 Amount of payroll tax**
>
> The amount of payroll tax payable by an employer is to be ascertained in accordance with Schedules 1 and 2.
>
> **9 When must payroll tax be paid**
>
> (1) A person who is liable to pay payroll tax on taxable wages must pay the tax:
>
> (a) within 7 days after the end of the month in which those wages were paid or payable, other than the month of June, and
>
> (b) within 21 days after the end of the month of June in relation to taxable wages paid or payable in the month of June.
>
> …"

42 "Employer" is defined for the purposes of the *Payroll Tax Act* to mean a person who pays or is liable to pay wages (s 3(1)). Part 3 of the *Payroll Tax Act* contains detailed provisions for determining how "wages" are to be calculated.

43 Part 5 of the *Payroll Tax Act* (ss 67-81) deals with "Grouping of employers". Section 72 provides as follows:

> "(1) If a person or set of persons has a controlling interest in each of 2 businesses, the persons who carry on those businesses constitute a group.
>
> …
>
> (2) For the purposes of this section, a person or set of persons has a controlling interest in a business if:
>
> (a) in the case of 1 person - the person is the sole owner (whether or not as trustee) of the business, or
>
> (b) in the case of a set of persons - the persons are together as trustees the sole owners of the business, or
>
> (c) in the case of a business carried on by a corporation:
>
> (i) the person or each of the set of persons is a director of the corporation and the person or set of persons is entitled to exercise more than 50% of the voting power at meetings of the directors of the corporation, or
>
> (ii) a director or set of directors of the corporation that is entitled to exercise more than 50% of the voting power at meetings of the directors of the corporation is under an obligation, whether formal or informal, to act in accordance with the direction, instructions or wishes of that person or set of persons, or
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> …
>
> (g) in the case of a business carried on under a trust - the person or set of persons (whether or not as a trustee of, or beneficiary under, another trust) is the beneficiary in respect of more than 50% of the value of the interests in the first-mentioned trust.
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> …
>
> (6) A person who may benefit from a discretionary trust as a result of the trustee or another person, or the trustee and another person, exercising or failing to exercise a power or discretion, is taken, for the purposes of this Part, to be a beneficiary in respect of more than 50% of the value of the interests in the trust."

44 A "group" is constituted by all the persons or bodies forming a group that is not part of a larger group (s 69). The expression "business" is defined very broadly (s 67).

45 Section 74 is headed "Smaller groups subsumed by larger groups". It provides as follows:

> "(1) If a person is a member of 2 or more groups, the members of all the groups together constitute a group.
>
> (2) If 2 or more members of a group have together a controlling interest in a business (within the meaning of section 72), all the members of the group and the person or persons who carry on the business together constitute a group."

46 Section 79(1) of the *Payroll Tax Act* empowers the Chief Commissioner to determine that a person who would, but for the determination, be a member of a group, is not a member of the group. Section 79(2) states that the Chief Commissioner:

> "may only make such a determination if satisfied, having regard to the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the … Chief Commissioner considers relevant, that a business carried on by the person, is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group."

A determination can be expressed to take effect from a date earlier than the date of the determination (s 79(5)).

47 Section 81 provides as follows:

> "**Joint and several liability**
>
> (1) If a member of a group fails to pay an amount that the member is required to pay under this Act in respect of any period, every member of the group is liable jointly and severally to pay that amount to the … Chief Commissioner.
>
> (2) If 2 or more persons are jointly or severally liable to pay an amount under this section, the Chief Commissioner may recover the whole of the amount from them, or any of them, or any one of them.
>
> (3) If, under this section, 2 or more persons are jointly and severally liable to pay an amount that is payable by any one of them, each person is also jointly and severally liable to pay:
>
> (a) any amount payable to the Chief Commissioner under this or any other Act in relation to that amount, including any interest and penalty tax, and
>
> (b) any costs and expenses incurred in relation to the recovery of that amount that the Chief Commissioner is entitled to recover from any such person.
>
> (4) A person who pays an amount in accordance with the liability imposed by this section has such rights of contribution or indemnity from the other person or persons as are just.
>
> (5) This section applies whether or not the person was an employer during the relevant period."

48 Part 6 of the *Payroll Tax Act* is headed "Adjustments of Tax". It includes the following provisions:

> "**82 Determination of correct amount of payroll tax**
>
> (1) For the purposes of this Part, the ***correct amount of payroll tax*** payable by an employer in respect of a financial year is the amount determined in accordance with Schedule 1 in respect of that financial year.
>
> (2) This Part applies in respect of payroll tax paid or payable whether as a group employer or as an individual employer.

(3) If an employer is liable for payroll tax both as an individual employer and as a group employer (for different periods in the same financial year) separate adjustments are to be made under this Part in respect of any period as a group employer and any period as an individual employer (and for that purpose separate determinations of the correct amount of payroll tax payable by the employer are to be made).

(4) In this Part:

group employer means an employer who is a member of a group.

individual employer means an employer who is not a member of a group.

83 Annual adjustment of payroll tax

(1) If the amount of payroll tax paid or payable by an employer when the employer made the returns relating to a financial year is greater than the correct amount of payroll tax payable by the employer in respect of the financial year, the Chief Commissioner (on application by the employer) is to refund to that employer an amount equal to the difference.

(2) If the amount of payroll tax paid or payable by an employer when the employer made the returns relating to a financial year is less than the correct amount of payroll tax payable by the employer in respect of the financial year, the employer must pay to the Chief Commissioner as payroll tax an amount equal to the difference.

(3) Any amount payable by an employer under this section in respect of a financial year must be paid within the period during which the employer is required to lodge a return under this Act in respect of the return period that is or includes the month of June in that financial year.

…"

49 Part 7 of the *Payroll Tax Act* is headed "Registration and returns". An employer who is not already registered must apply for registration if during a given month the employer pays or is liable to pay wages of more than the "weekly threshold amount per week" (s 86(1)(a)). If the employer is a member of a group, the obligation to register arises if during a given month the members of the group together pay or are liable to pay more than the "weekly threshold amount per week" (s 86(1)(b)). The application for registration is to be made within seven days after the end of the month concerned (s 86(2)). The "weekly threshold amount" is to be calculated in accordance with a formula in s 86(1).

50 Every employer who is registered or required to apply for registration as an employer must lodge a return within seven days after the end of each month (except June) (s 87(1)(a)). Every such employer must lodge a return within 21 days after the end of June in each year. The annual return relates both to the month of June and to the adjustment of payroll tax paid or payable by the employer during the financial year ending on the close of that month

(s 87(1)(b)). It is an offence for a person to fail or refuse to lodge a return (or other document) that is required to be lodged by a taxation law.[8]

51 Schedule 1 specifies the threshold amount for each financial year commencing on 1 July 2007. The threshold amount for the financial year commencing 1 July 2013 and subsequent financial years is $750,000 (cl 1).

52 Part 4 of Schedule 1 applies to "Groups with no designated group employer". Clause 12 states that each member of the group is liable to pay as payroll tax for the financial year the amount of dollars calculated in accordance with the following formula:

TW x R

"TW" represents the total taxable wages paid or payable by the employer concerned (as a member of the group) during the relevant financial year (cl 11). "R" refers to the percentage payable as payroll tax (5.45 per cent from 1 January 2011) (cl 1).

53 Part 2 of Schedule 2 provides for the calculation of payroll tax referable to particular periods. Clauses 2 and 3 provide as follows:

> "**2 Calculation by reference to return period**
>
> The amount of payroll tax that an employer is required to pay in relation to a return of wages in respect of a financial year or a part of a financial year is a proportion (equivalent to the ratio of the number of days to which the return relates to the number of days in the financial year) of the payroll tax that would be payable by the employer for the whole of that year.
>
> **3 Amount payable for whole of financial year**
>
> For the purposes of this Part, the payroll tax that would be payable by an employer for the whole of a financial year is to be ascertained on the basis of the following assumptions:
>
> (a) the assumption that the employer pays or is liable to pay taxable wages for the whole of the financial year,
>
> (b) the assumption that the total amount of taxable wages paid or payable by the employer during the financial year is a multiple (equivalent to the ratio of the number of days in the financial year to the number of days to which the return relates) of the taxable wages paid or payable by the employer during the period to which the return relates."

[8] Taxation Administration Act, s 57.

Taxation Administration Act

54 Section 8 of the *Taxation Administration Act* provides as follows:

> "**8 General power to make assessment**
>
> (1) The Chief Commissioner may make an assessment of the tax liability of a taxpayer.
>
> …
>
> (3) For the avoidance of doubt, an assessment of tax liability is taken to have been made when the Chief Commissioner calculates the tax liability of a taxpayer based on a return under the *Payroll Tax Act 2007* or any other Act prescribed by the regulations for the purposes of this subsection (whether or not the Chief Commissioner issues a notice of assessment as a result of that calculation or otherwise notifies the taxpayer of the calculation)."

55 Section 10(1) of the *Taxation Administration Act* requires a person who is liable to pay tax under a taxation law, before or at the time an assessment of the tax liability is made, to "fully and truly disclose to the Chief Commissioner all the facts and circumstances affecting the tax liability under the relevant taxation law". Section 11(1) empowers the Chief Commissioner to make an assessment on the information that the Chief Commissioner has from any source at the time the assessment is made.

56 Part 7 of the *Taxation Administration Act* deals with "Collection of tax". It includes the following provisions:

> "**43 Tax payable to the Chief Commissioner**
>
> Tax that is payable is payable to the Chief Commissioner.
>
> **44 Recovery of tax as a debt**
>
> If the whole or part of tax payable by a taxpayer has not been paid to the Chief Commissioner as required, the Chief Commissioner may recover the amount unpaid as a debt to the Chief Commissioner.
>
> …
>
> **45 Joint and several liability**
>
> (1) If two or more persons are jointly or severally liable to pay an amount under a taxation law, the Chief Commissioner may recover the whole of the amount from them, or any of them, or any one of them.
>
> …
>
> (3) A person who pays an amount of tax in accordance with the liability imposed by this section has such rights of contribution or indemnity from the other person or persons as are just."

"Taxpayer" is defined in s 3(1) of the *Taxation Administration Act* to mean:

> "a person who has been assessed as liable to pay an amount of tax, who has paid an amount as tax **or who is liable or may be liable to pay tax**". (Emphasis added.)

57 Section 119 specifies the effect of an assessment:

> "**119 Evidence of assessment**
>
> Production of a notice of assessment, or of a document signed by the Chief Commissioner purporting to be a copy of a notice of assessment, is:
>
> (a) conclusive evidence of the due making of the assessment, and
>
> (b) conclusive evidence that the amount and all particulars of the assessment are correct, except in objection or review proceedings when it is prima facie evidence only."

58 A signed certificate by the Chief Commissioner is admissible in proceedings under a taxation law and, in the absence of evidence to the contrary, is proof that the person named in the certificate is liable to pay tax and that an assessment of tax has been made and duly served (s 120).

59 Part 10 of the *Taxation Administration Act* provides for "Objections and reviews". A taxpayer who is dissatisfied with an assessment or any other decision of the Chief Commissioner under a taxation law (including the *Payroll Tax Act*) may lodge a written objection with the Chief Commissioner (s 86(1)). The Chief Commissioner is to consider the objection and either allow it in whole or in part or disallow it (s 91(1)).

60 A taxpayer who is dissatisfied with the Chief Commissioner's decision on the objection may apply either to the New South Wales Civil and Administrative Tribunal or to the Supreme Court for a review of the decision (ss 96(1), 97(1)). The court or tribunal dealing with the application has the power to confirm or revoke the assessment or other decision and to make another assessment or decision in lieu thereof (s 101(1)). No court or tribunal has jurisdiction or power to consider an assessment or other decision of the Chief Commissioner under a taxation law, except as provided under Part 10 of the *Taxation Administration Act* (s 103A).

Background

The Chief Commissioner's groupings

61 The Chief Commissioner's letter of 10 June 2014, (referred to in the orders made by the primary Judge) explained the Chief Commissioner's reasons for

grouping the entities involved in the proceedings. The following is a summary of the Chief Commissioner's reasoning.

Tri-City Trucks and Smeaton

62 Tri-City Trucks was placed in liquidation on 26 February 2013. At all material times prior to that date Michael Gerace held 100 per cent of the shares in Tri-City Trucks and was the sole director. By virtue of s 72(2)(c)(i) of the *Payroll Tax Act* he was deemed to have a controlling interest in the business conducted by Tri-City Trucks (because he was a director and was entitled to exercise more than 50 per cent of the voting power at meetings of directors).

63 Smeaton was the trustee of the Smeaton Trust under a Deed of Settlement executed on 27 August 2003. The General Beneficiaries under the Trust Deed were Ralph Gerace and members of his family, including his brother, Michael Gerace.

64 The Trust Deed provided that Smeaton was to stand possessed of the Trust Fund in trust for one or more of the General Beneficiaries in such shares or proportions as Smeaton should appoint before the Vesting Day (cl 2.2). In default of any such appointment Smeaton was empowered in each Accounting Period to apply the income from the Trust Fund to or for the benefit of such of the General Beneficiaries as it should determine (cl 3.1). The trustee had power in its absolute discretion to accumulate all or any of the income of the Trust Fund during an accounting period and to deal with that accumulation as an accretion to the Trust Fund (cl 3.2).

65 Michael Gerace was taken by the combined operation of ss 72(2)(g) and 72(6) of the *Payroll Tax Act* to have a controlling interest in the business conducted by Smeaton. This was because he was a person who might benefit from a discretionary trust (the Smeaton Trust) as a result of the trustee exercising a discretion in his favour. Michael Gerace was therefore deemed to be a beneficiary in respect of more than 50 per cent of the value of the interests in Smeaton Trust (s 72(6)). In consequence, he was taken to have a controlling interest in the business conducted by Smeaton (s 72(2)(g)).

66 Since Michael Gerace had a controlling interest in each of the businesses conducted by Tri-City Trucks and Smeaton, s 72(1) of the *Payroll Tax Act* deemed Tri-City Trucks and Smeaton to be part of the same group.

Smeaton and Smash Repairs

67 Ralph Gerace held 100 per cent of the shares in and was sole director of Smash Repairs. He was therefore deemed to control the business of Smash Repairs (s 72(2)(c)(i),(e) of the *Payroll Tax Act*). As Ralph Gerace was a General Beneficiary under the Smeaton Trust Deed, he was deemed to control the business conducted by Smeaton (s 72(6), 72(2)(g)). Accordingly, Smeaton and Smash Repairs were part of the same group (s 72(1)).

Ifould and Tri-City Trucks

68 Ifould was the trustee of a discretionary trust known as the Gerace Family Trust established many years ago by the parents of Michael and Ralph Gerace. Both Michael and Ralph Gerace were discretionary objects of the Gerace Family Trust. Since Michael Gerace was entitled to exercise more than 50 per cent of the voting power at meetings of the directors of Tri-City Trucks he was taken to have a controlling interest in its business (s 72(2)(c)(i)). Michael Gerace was also taken to have a controlling interest in the business conducted by Ifould since he was a discretionary object of the Gerace Family Trust (ss 72(6), 72(2)(g)). Accordingly, Tri-City Trucks and Ifould were part of the same group (s 72(1)).

A larger group

69 Smeaton was a member of two groups, namely, Smeaton and Tri-City Trucks and Smeaton and Smash Repairs. The effect of s 74 of the *Payroll Tax Act* was that all three entities were part of a single larger group. Ifould was also a member of the larger group. The result, among other things, was that each of Smeaton, Smash Repairs and Ifould was jointly and severally liable for the payroll tax due by other members of the larger group, including Tri-City Trucks (s 81).

The Disclaimers

70 On 27 June 2014, Michael Gerace executed a “Deed Poll of Disclaimer” and a “Deed Poll of Disclaimer 2004 Year” (**Disclaimers**). The only difference

between the two is that the latter was expressed to be executed out of an abundance of caution so as to apply specifically to the financial year ending 30 June 2004. It is only necessary to refer to the terms of the Deed Poll of Disclaimer (**First Disclaimer**).

71 The First Disclaimer defined "Trust" to mean the trust established by the Trust Deed dated 27 August 2003 by which the Smeaton Trust was created. "Trustee" was defined to mean Smeaton.

72 The Recitals to the First Disclaimer were as follows:

> "A. On 27 August 2003, the Trust was established by the Trust Deed.
>
> B. The Trustee was appointed trustee of the Trust by the Trust Deed and has continuously held such office up to and including the date of this deed.
>
> C. The Beneficiary wishes to irrevocably and absolutely disclaim any right, entitlement or interest in respect of the Trust or arising pursuant to the Trust Deed in the manner set out in this deed."

73 Clause 2 of the First Disclaimer provided as follows:

> "**2. DISCLAIMER**
>
> (1) The Beneficiary irrevocably and absolutely disclaims all of his rights, entitlements and interests howsoever arising whether in equity or in law in respect of the Trust or arising pursuant to the Trust Deed including but without limitation:
>
> (a) the right to prevent the misappropriation of capital;
>
> (b) the right to require the Trustee to exercise bona fide its discretion as to whether and if so to whom income shall be distributed;
>
> (c) the right to take and enjoy whatever part of the income the Trustee chooses to give;
>
> (d) the right to take and enjoy whatever part of the capital the Trustee chooses to give;
>
> (e) any other right, entitlement or interest arising whether in equity or in law as a consequence of the Beneficiary being specified as a General Beneficiary in the Trust Deed; and
>
> (f) any other right, entitlement or interest arising whether in equity or in law as a consequence of the Beneficiary being found to be a beneficiary under the Trust Deed.
>
> 2. This disclaimer takes effect on and from the date of settlement of the Trust."

74 The First Disclaimer was sent by Michael Gerace to Smeaton under cover of a letter as follows:

> "On or about 15 June 2014 I was first advised by my lawyers that I am included in and fall within the definition of general beneficiaries of the trust.
>
> Please find enclosed deed polls of disclaimer made by me in respect of the Trust.
>
> For the avoidance of doubt, I confirm that the disclaimer of all my interest in the Trust operates for all financial years (or part thereof) from the date of settlement of the Trust including all future financial years."

Primary Judgment

75 The primary Judge observed that the respondents (the plaintiffs in the Equity Division proceedings) contended that the Disclaimers were effective and operated retrospectively. According to the respondents it followed that Michael Gerace had never been a discretionary object of either the Smeaton Trust or the Gerace Family Trust.[9]

76 His Honour identified four principal questions for determination:[10]

> "[17] … First, whether it is possible for Michael Gerace to have disclaimed his right as a discretionary object. The Chief Commissioner contends that Michael Gerace's rights as a discretionary object did not amount to property and he had no property interest to disclaim. If the trustee exercised his discretion to appoint capital or income to Michael Gerace, then, but only then, according to the Chief Commissioner, could he disclaim the proposed distribution.
>
> [18] Secondly, whether disclaimer of Michael Gerace's rights as a discretionary object can be effected by a deed poll, without consideration being provided to him for the surrender of those rights. Michael Gerace was still named as a discretionary object in the trust deeds. The Chief Commissioner submitted that therefore, in the terms of s 72(6) he was "a person who may benefit … as a result of the trustee … exercising … a power or discretion."
>
> [19] Thirdly, whether Michael Gerace tacitly accepted his position as a discretionary object of either trust so that it was too late for him to disclaim.
>
> [20] Fourthly, whether the disclaimers could operate retrospectively so as to defeat the operation of the statute, notwithstanding that a liability for payroll tax was imposed on the employer (Tri-City Trucks) in each month in the tax years in question and was imposed on every member of a group of which Tri-City Trucks was a member when it failed to pay the tax for which it was liable."

It will be seen that the fourth question appears to assume that if the Disclaimers could have retrospective effect, they could "defeat the operation of the statute".

77 The primary Judge observed that Michael Gerace's interest as a discretionary object under the Smeaton Trust Deed entitled him to compel due

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[9] Primary Judgment at [16].

[10] Primary Judgment at [17]-[20].

administration of the Smeaton Trust, including the right to compel the trustee to act in good faith and to give due consideration to the exercise of its discretionary powers.[11] While his Honour did not doubt that in some statutory contexts, the rights of a discretionary object might be regarded as "property", the issue was not relevant to the question of whether the rights could be disclaimed.[12] His Honour followed the decision of Plowman J in *In re Gulbenkian's Settlement Trusts (No 2)*[13] (**Re Gulbenkian***)* that:

> "If a man cannot be compelled to accept a gift [there is] no reason why he should not be equally free to refuse to accept the exercise of a power which the donor has conferred on the trustees to make a gift in his favour."[14]

78 The primary Judge considered that there is no reason as a matter of principle why a person should be compelled to accept a personal right against his or her wishes.[15] Accordingly, his Honour rejected the Chief Commissioner's submission that Michael Gerace could not disclaim his rights as a discretionary object under the Smeaton Trust Deed.

79 The primary Judge held that the Disclaimers executed by Michael Gerace were effective notwithstanding that they were given without consideration.[16] His Honour also held, contrary to the Chief Commissioner's submissions, that it was not too late for Michael Gerace to disclaim his rights under the Smeaton Trust Deed.[17] The Chief Commissioner did not challenge either of these holdings on the appeal.

80 In addressing the fourth question, the primary Judge relied on the general principle that once a person disclaims a gift, the disclaimer operates from the time the gift was made. In his Honour's view, the authorities support the proposition that the disclaimer of a right conferred by a donor operates retrospectively.[18]

81 However, his Honour accepted that in the present case there was a further question as to how the general principle:

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11 Primary Judgment at [22].
12 Primary Judgment at [24].
13 [1970] Ch 408 at 418.
14 Primary Judgment at [25].
15 Primary Judgment at [26].
16 Primary Judgment at [62].
17 Primary Judgment at [91]-[92].
18 Primary Judgment at [101].

> "applie[d] in the application of the statute which imposed a liability on Tri-City Trucks each month to pay payroll tax and imposed a like liability on each group member if Tri-City Trucks defaulted."[19]

82 The Chief Commissioner had submitted that the inquiry required by s 72(6) of the *Payroll Tax Act* and its predecessor was directed to the facts as they existed at each particular time. His Honour rejected the submission:[20]

> "[103] … the general principle does not address the question of how the relevant statutory provisions apply where under the general law a transaction operates retrospectively, not merely because parties may have agreed to their arrangements having a retrospective effect, but because the general law so provides. As a matter of general principle, revenue statutes are to be construed having regard to the principles of general law.
>
> …
>
> [107] For present purposes it can be assumed that if the disclaimers were not effective, group members would have incurred a liability for the payroll tax for which Tri-City Trucks was liable on Tri-City Trucks' failing to meet that liability as it arose. The Chief Commissioner contends that the liability of Smeaton … and … Smash Repairs then arose only because Michael Gerace was, at those times, a person who could benefit from the trusts as a result of the trustees' exercising a power or discretion, and hence, he was taken to be a beneficiary in respect of more than 50 per cent of the value of the interests in the trust. As a matter of general law, it was open to Michael Gerace to disclaim the right whereby he could so benefit from the discretionary trusts and such a disclaimer would operate retrospectively. I see no reason that the general law principle as to the retrospective effect of a disclaimer cannot apply. That would be consistent with authority."

83 For these reasons, the primary Judge answered the separate question "Yes". It followed, in his Honour's view, that orders should be made revoking the assessments addressed to Smeaton and Smash Repairs.

Preliminary issues: jurisdiction and leave to appeal

Competence of the appeal

84 The respondents filed a notice of motion on 16 March 2017 seeking an order, relevantly, that the Chief Commissioner's appeal be dismissed as incompetent by virtue of the operation of s 102 of the *Taxation Administration Act*. Section 102 provides as follows:

> "**Giving effect to decision on review**
>
> (1) Within 60 days after the decision on the review becomes final, the Chief Commissioner must take any action that is necessary to give effect to that decision. That action may include amending any relevant assessment.

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19 Primary Judgment at [102]

20 Primary Judgment at [103].

> (2) If no appeal against the decision on the review is made within 30 days after the day on which the decision is made, the decision on the review is taken, for the purposes of this section, to have become final at the end of the 30-day period."

85 The respondents filed elaborate written submissions in support of the contention that the Chief Commissioner's appeal is incompetent. In substance the argument is that s 102(2) of the *Taxation Administration Act* specifies a period of 30 days within which an appeal must be commenced. Since the 30 day period expired on 4 January 2017 at the latest (being 30 days from the date of the primary Judge's orders), the Chief Commissioner's appeal is incompetent.

86 The textual basis for this submission is, to say the least, obscure. Section 102 of the *Taxation Administration Act* is not directed to the bringing of an appeal from a decision of the Court reviewing a decision of the Chief Commissioner. The section contains a direction to the Chief Commissioner to take the action necessary to give effect to a decision on the review. The expression "review" is defined to mean, relevantly, a "review by the Supreme Court … on an application made under Division 2 of Part 10" of the *Taxation Administration Act* (s 3(1)). Section 102(2) expressly states that if no appeal is brought within 30 days after the date of the review decision, the decision is taken **for the purposes of the section** to have become final at the end of the 30 day period. The finality of the decision is for the purposes of imposing an obligation on the Chief Commissioner to give effect to the decision. The competence of an appeal and whether orders should be made pending the hearing of any appeal are different questions.

87 The respondents submitted that the imposition of a stringent 30 day period for an appeal by the Chief Commissioner would operate fairly and in a reasonable and balanced manner as between successful taxpayers and the Chief Commissioner. This may or may not be the case, but it is beside the point. The question is whether the statute imposes such a time limit.

88 The respondents also sought to derive comfort from the legislative history of a differently worded provision in the *Income Tax Assessment Act 1936* (Cth). It is, however, difficult to see the relevance of this material to the construction of a differently worded provision in a State law.

89 The respondents' notice of motion must be dismissed.

Leave to appeal?

90 In the alternative, the respondents contend that the Chief Commissioner requires leave to appeal and that leave should not be granted. They submit that leave is required by virtue of s 103 of the *Supreme Court Act*[21] since the Chief Commissioner is seeking to appeal from a decision in the Equity Division proceedings of a question ordered to be tried separately. The respondents point out that in *Polo Enterprises Australia Pty Ltd v Pinctada Hotels and Resorts Pty Ltd* (**Polo**),[22] this Court observed that:[23]

> "…The fact that the determination of the separate question was a final decision does not, as Polo in its written submissions suggested, gainsay the requirement for such leave…".

91 The authority that determines the question of whether leave is required is *National Employers Mutual General Insurance Association v Manufacturers Mutual Insurance Ltd* (**MMI**), a decision of this Court.[24] *MMI* establishes that:[25]

> "…'decision' in s 103 is to be construed widely as embracing the determination of any issue submitted for separate trial whereas 'judgment' and 'order' in s 101 are to be understood as referring to formal court orders. Once a separate hearing of an issue is ordered then the decision given on that issue is to be subject to an appeal under s 103. If, however, that decision results in the making of a formal order or the direction of judgment there is no reason why the unsuccessful party is unable to take advantage of its appeal rights under s 101. Of course the occasion to do so would arise only in the case of a final order or judgment in respect of which an unqualified right of appeal is given."

92 In the present case, the primary Judge's answer to the separate question in the Primary Judgment led his Honour to make final orders in the proceedings on 5 December 2016. The orders did not cease to be final because they were stayed by Order 9 pending the finalisation of any appeal.

93 *Polo* is distinguishable from the circumstances here because the answer to the separate question in that case did not finally resolve the rights of the parties to the proceedings. The answer finally resolved one cause of action on which the plaintiff relied, but other causes of action remained on foot and awaited

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21 Reproduced at [37] above.
22 [2015] NSWCA 397.
23 Polo at [40] (Ward JA, Bathurst CJ and Tobias AJA agreeing).
24 (1989) 17 NSWLR 223.
25 MMI at 240F (Clarke JA); see also at 235E-G (Kirby P).

determination by the Court. It was presumably for that reason that Ward JA in *Polo* did not consider it necessary to refer to *MMI*.

94 The Chief Commissioner is therefore entitled to appeal as of right and does not require leave to appeal.

95 If, contrary to my view, the Chief Commissioner requires leave to appeal orders should be made extending the time for filing a summons seeking leave to appeal until 6 June 2017 and granting the Chief Commissioner leave to appeal.[26] Uncertainty as to whether the Chief Commissioner required leave to appeal provides an explanation for the Chief Commissioner's delay in filing the summons. The delay has caused no prejudice to the respondents who have been aware since the Chief Commissioner filed a notice of intention to appeal on 9 December 2016 that he intended to appeal. The issues raised by the Notice to Appeal are of sufficient significance and the arguments of the Chief Commissioner of sufficient strength to justify the grant of leave to appeal.

Submissions

Chief Commissioner's submissions

96 The Chief Commissioner's written submissions contended that the primary Judge erred in reasoning by analogy from the law governing the disclaimer of gifts. Unlike a gift at law, so the Chief Commissioner argued, the creation of a "fully constituted discretionary trust" is complete without any requirement of assent by the object. Thus, the principles governing disclaimer of a gift do not apply to the creation of a discretionary trust with nominated objects. A purported disclaimer by an object has no legal effect, except to give the trustee a defence to any action by the object that is inconsistent with the disclaimer. Indeed, the object could change his or her mind and the trustee would then need to consider whether to exercise the power under the trust deed to benefit the object.

97 According to the Chief Commissioner, the object of a discretionary trust can disclaim the benefit of a particular exercise by the trustee of a power in favour of the object. The exercise of the power gives the object a real or personal interest "akin to a gift", which requires consent to be completed. But, so the

[26] As to the principles, see Gallo v Dawson (1990) 64 ALJR 458, at 459 (McHugh J).

Chief Commissioner argued, no consent is required for the objects of a discretionary trust to be nominated and consequently they cannot disclaim their rights under the trust deed.

98 The Chief Commissioner's written submissions did not deal with the issue of retrospectivity or the interpretation of the *Payroll Tax Act*, except to assert that:

> "…in the context of s 72(6) of the [*Payroll Tax Act*] that communication [of a disclaimer] does not function to remove the object as an object of the discretionary trust, and in particular would not do so retrospectively, so that the object were regarded to have never been the object of a trust…".

99 The Chief Commissioner's written submissions in reply argued that to the extent that *Re Gulbenkian*, on which the primary Judge relied, stands for the proposition that the object of a discretionary trust can disclaim his or her interest, the decision should not be followed. The reply submissions asserted that, in any event, the question of retrospectivity must be determined by the provisions of the trust instrument. If the trust instrument permits retrospectivity, so the Chief Commissioner contended, a disclaimer by the object operates only as between the parties to the deed but does not operate *ab initio* as against the whole world.

Respondents' submissions

100 In view of the Chief Commissioner's submissions in chief, it is not surprising that the respondents identified the issue on appeal as:

> "…whether it is possible for a discretionary object of a discretionary trust, to disclaim his right as a discretionary object, which disclaimer takes effect from the time the discretionary trust was settled."

101 The respondents submitted that the balance of authority favoured the view that the object of a discretionary trust can disclaim his or her interest. Their written submissions dealt at some length with the authorities addressing this issue.

102 The respondents noted that the Chief Commissioner had contended, if only briefly, that the terms of deeds and arrangements cannot be changed retrospectively by the parties. The respondents accepted that this contention was correct. However, they submitted that:

> "this is not a case where there is any attempt to vary the terms of the trust deed retrospectively. Rather, by operation of law, the underlying factual matrix is changed. In that respect, disclaimer operates retrospectively, in a manner similar to rectification and agreed mutual rescission." (Citations omitted.)

Reasoning

Centrality of the legislation

103 As is apparent from the parties' submissions, both approached the challenge to the primary Judge's answer to the separate question on the footing that the critical issue is whether the general law permits the object of a discretionary trust to disclaim his or her rights under the trust deed. The parties gave brief consideration as to whether a disclaimer can take effect retrospectively, but their written submissions paid virtually no attention to the proper construction of the governing legislation. In particular, the Chief Commissioner's submissions seemed to regard it as self-evident that the position under the general law dictated whether the *Payroll Tax Act* made Smeaton and Smash Repairs liable to pay the amounts to which they had been assessed.

104 Taxation legislation must be construed having regard to general legal principles, not least because the statutory language often incorporates well recognised general law concepts. But that proposition does not relieve the parties or the Court from construing the legislation in accordance with the usual principles of statutory interpretation. The statutory language may or may not evince an intention to impose taxation or associated liabilities in a manner wholly consistent with the rights and obligations of the relevant parties as between themselves. Similarly, legislation may or may not use language in precisely the same way as established general law principles.

105 In the present case, the linchpin of the respondents' argument is that under the general law, Michael Gerace could disclaim his rights under the Smeaton Trust Deed. The respondents also contend that the Disclaimers executed by Michael Gerace operated retrospectively so as to take effect on the date the Trust Deed came into force. But even if those propositions correctly state the effect of general law principles they do not necessarily determine whether the grouping provisions of the *Payroll Tax Act* apply to Smeaton and Smash Repairs. In order to determine the liability of Smeaton and Smash Repairs to pay payroll tax it is necessary to consider the legislation which defines the circumstances in which an employer or member of a group is liable to pay payroll tax.

106 The point is illustrated by two cases involving discretionary trusts, one in the House of Lords, and the other in the High Court. *Gartside v Inland Revenue Commissioners*[27] (**Gartside**) is often cited as a leading authority on the rights of an object of a discretionary trust.[28] The issue in *Gartside* was whether the trustees of a particular discretionary trust, created by a will, were liable to pay estate duty by reason of s 43(1) of the *Finance Act 1940* (UK). The legislation applied where "an interest limited to cease on a death has been disposed of … after becoming an interest in possession".

107 Neither Lord Reid nor Lord Wilberforce, who delivered the leading judgments, approached the issue by considering whether the object of the discretionary trust had an "interest" under the general law. Much less did their Lordships treat the answer as determinative of the trustees' liability to estate duty. Lord Reid said that "the first and main question in this appeal is what is the meaning of the word 'interest' in [s 43(1)]".[29] Having answered that question, Lord Reid proceeded to consider whether the object had an "interest" within the meaning of the legislation. Lord Wilberforce's approach was similar.[30]

108 The decision of the High Court in *Kennon v Spry*[31] did not involve a taxation law but the powers of the Family Court under s 79 of the *Family Law Act 1975* (Cth) to alter the interests in any property of the parties to a marriage or either of them. The question was whether assets held in a discretionary trust of which the husband was the trustee and the wife an object constituted property for the purposes of s 79. Although different answers were given to the question, the Court approached the matter by construing the language of s 79, in particular the word "property".[32] As Gummow and Hayne JJ observed:[33]

> "The questions that arise in these matters raise a dispute about construction of the Act. That dispute is not resolved by considering only the ways in which the term 'property' may be used in relation to the trusts of the kinds described as 'discretionary trusts'."

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27 [1968] AC 553.
28 See at [114] below.
29 [1968] AC 553 at 602B (Lord Morris of Borth-y-Gest and Lord Guest agreeing).
30 [1968] AC 553 at 614.
31 (2008) 236 CLR 366; [2008] HCA 56.
32 Kennon v Spry at [52]-[54] (French CJ); at [89]-[90], [126] (Gummow and Hayne JJ).
33 Kennon v Spry at [90].

General law background

109 While the terms of the *Payroll Tax Act* and the *Taxation Administration Act* are central to the resolution of the appeal, it is convenient to refer to some general principles which provide context to the task of statutory construction.

Categories of discretionary trusts

110 As has been seen, the separate question is framed by reference to the effect of s 72(6) of the *Payroll Tax Act.* Section 72(6) applies to a "person who may benefit from a discretionary trust as a result of the trustee … exercising or failing to exercise a power or discretion…". The expression "discretionary trust" is not defined in the legislation.

111 The absence of a definition perhaps suggests that the drafter of the legislation assumed that the term "discretionary trust" has a settled meaning. However, the High Court has pointed out that the usage of this term "is descriptive rather than normative" and that it:

> "has no fixed meaning and is used to describe particular features of certain express trusts".[34]

112 In *Australian Securities and Investments Commission v Carey (No 6)*,[35] for example, French J distinguished between "exhaustive" and "non-exhaustive" discretionary trusts.[36] The first category includes trust deeds which give the trustee a discretion to distribute income among a class of beneficiaries, but require the trustee to distribute the entire income of the trust at specified intervals. The second category includes trust deeds conferring a discretion on the trustee to distribute any part or perhaps none of the income of the trust as he or she thinks fit.

113 The Smeaton Trust Deed was included in the appeal books, but the trust deed for the Gerace Family Trust has apparently been lost. (Nonetheless, the primary Judge found that both Michael and Ralph Gerace were discretionary objects of the Gerace Family Trust and there is no appeal from that finding). The provisions of the Smeaton Trust Deed, referred to at [77 _Ref488761036]

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[34] Chief Commissioner of Stamp Duties for New South Wales v Buckle (1998) 192 CLR 226; [1998] HCA 4 at [8] per curiam; Kennon v Spry at [47] (French CJ).

[35] (2006) 153 FCR 509; [2006] FCA 814.

[36] ASIC v Carey (No 6) at [21].

above, indicate that the Smeaton Trust can be described as a non-exhaustive discretionary trust.

Discretionary object's interest

114 In *Gartside*, Lord Wilberforce explained the nature of a discretionary object's interest:[37]

> "No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed."

This passage was quoted with approval in *Kennon v Spry*.[38]

115 In *MSP Nominees Pty Ltd v Commissioner of Stamps (South Australia),*[39] the High Court observed that the use of terms such as "beneficial interest" is apt to mislead when applied to the interests of an object under a discretionary trust. The Court had in mind the limited nature of the rights of the discretionary object.

Disclaimer by a discretionary object

116 The respondents' argument relied on the decision of Plowman J in *Re Gulbenkian*. That case concerned the effect of a release for valuable consideration in a deed of compromise. By cl 12 of the deed, Mr Gulbenkian, the object of a non-exhaustive discretionary trust, renounced the right to all income from the trusts. After the date the deed was executed, the trustees accumulated a large sum which had not been distributed.

117 One dispute concerned the effect of cl 12 of the deed. Certain beneficiaries argued that cl 12 meant that Mr Gulbenkian could no longer be an object of the

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37 Gartside at 617-618 (Lord Hodson agreeing).

38 Kennon v Spry at [74] (French CJ); see also at [125] (Gummow and Hayne JJ).

39 (1999) 198 CLR 494; [1999] HCA 51 at [34] per curiam.

trustees' discretion. Plowman J summarised the argument advanced by Mr Templeman QC on behalf of those beneficiaries as follows:[40]

> "… that the duty of the trustees under the power contained in clause 2(i) of the settlement is a duty owed to each object of the power to consider whether or not to exercise their discretion in its favour; that there is no reason in law why an object of that power should not release the trustees from that duty quoad hunc, and if he does so he thereupon ceases to be an object of the power. Mr Templeman submits this is in effect what clause 12 of the Lisbon agreement did."

118 Plowman J accepted the argument for these reasons:[41]

> "No authority was cited to me which in terms decides this point, but I see no reason for not accepting the argument. On the contrary, it appears to me to be in conformity with the general principle that no one can be compelled to accept a gift against his wish. As long ago as the Year Books it was somewhat quaintly said that 'a man cannot have an estate put into him in spight of his teeth.'
>
> …
>
> If a man cannot be compelled to accept a gift I see no reason why he should not be equally free to refuse to accept the exercise of a power which the donor has conferred on the trustees to make a gift in his favour. Despite Mr. Foster's argument to the contrary, the reasoning which applies to a direct benefit, such as a power to pay money to the object of the power, appears to me to apply equally to an indirect benefit, such as a power to apply the money for his benefit instead of paying it to him.
>
> I therefore hold that as from the date of the Lisbon agreement Mr. and Mrs. Gulbenkian ceased to be objects of the discretionary trust, and that consequently as from that date it was no longer competent for the trustees to exercise their discretion in favour of Mr. and Mrs. Gulbenkian either directly or indirectly.
>
> I should perhaps emphasise that the release which I am considering was a release for valuable consideration and I am not concerned to consider whether a different result might have followed if the release had been a voluntary release not under seal." (Citations omitted.)

119 *Re Gulbenkian* has been followed in Australia.[42] It has also been referred to with apparent approval by text writers. [43] For example, *Lewin on Trusts* treats *Re Gulbenkian* as authority for the proposition that:[44]

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[40] Re Gulbenkian at 418A.

[41] Re Gulbenkian at 418B-G.

[42] Chamberlin and Bennett (in their capacity as Trustees of the Estate of the late Robert Henry Spry) v Spry [2008] VSC 562 at [5] (Pagone J), holding that a discretionary object under a trust created by will could "release the trustees from any obligation in that she be considered in the future".

[43] Lewin on Trusts (19th ed, 2015) at [29-328]; I Fullerton and HAJ Ford, The Law of Trusts (Looseleaf) at [5.10150]; G Thomas and A Hudson, The Law of Trusts (2nd ed, 2010) at [7.46].

[44] Lewin on Trusts (19th ed, 2015) at [29-328].

> "One of the objects of a power of appointment may release the donee of the power from any duty to consider whether or not to exercise the power in his favour and if he does so he ceases to be an object of the power."

120 The most detailed discussion of *Re Gulbenkian* in Australia is by the Full Federal Court in *Federal Commissioner of Taxation v Ramsden*.[45] The Court accepted a submission founded on *Re Gulbenkian* that a beneficiary may disclaim an entitlement to income under the trust once it comes to his or her attention.[46] The Court considered that the decision in *Re Gulbenkian* applied the principles of disclaimer to hold that:[47]

> "just as a man cannot be compelled to accept a gift, he must be equally free to refuse to accept the exercise of a power which the donor has conferred on the trustees to make a gift in his favour. His Lordship applied principles of disclaimer to the gift under consideration, so as to enable N [the object], in effect, to disclaim the proposed gift prospectively in relation to the period after 1957..."

Nonetheless, the Full Federal Court stated earlier in the judgment, without elaboration, that "[a]t law an effective disclaimer operates retrospectively, and not merely from the time of disclaimer". [48] The Court did not explain what it meant by "[a]t law".

121 The actual decision in *FCT v Ramsden* was that the disclaimers of an entitlement to income were ineffective because they were qualified and therefore did not constitute an absolute rejection of the gift under the trust. There was, therefore, no occasion for the Court to consider the precise effect of a valid disclaimer by the object of a discretionary trust who has received no benefit from **the trust prior to the disclaimer.**

The legislative scheme

122 The proper construction of the grouping provisions of the *Payroll Tax Act* requires an understanding of the legislative scheme insofar as it relates to the grouping of employers and related entities. It is therefore necessary to explain the relationship between provisions to which reference has already been made.

123 Part 2 of the *Payroll Tax Act* imposes payroll tax. An employer by whom taxable wages are paid or payable is liable to pay payroll tax on such wages

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45 [2005] FCAFC 39.
46 FCT v Ramsden at [26(a)], [30].
47 FCT v Ramsden at [47].
48 FCT v Ramsden at [30].

(ss 6, 7). The amount of payroll tax to be paid is to be ascertained in accordance with Schedules 1 and 2 (s 8).

124 The person liable to pay payroll tax on taxable wages must pay the tax within seven days after the end of the month in which those wages were paid or payable (other than the month of June, in which case the period is 21 days) (s 9). Tri-City Trucks was therefore obliged to pay payroll tax on wages paid by it during a particular month within seven days after the end of the month, except for the month of June when it had to pay within 21 days.

125 The *Payroll Tax Act* contemplates that an employer who is liable to pay payroll tax will become registered as an employer and lodge returns calculating the amount of taxable wages paid or payable. An employer who is not already registered must apply for registration as an employer within seven days of the end of any month in which the employer pays or is liable to pay wages of more than the "weekly threshold amount" per week (s 86(1), (2)). An employer who is registered or required to be registered must lodge a return within seven days of the end of each month (except June, when the period is 21 days) (s 87(1)). The amount of payroll tax an employer is required to pay in respect of a particular month (or other period) is based on the return of wages in accordance with the formula in Schedule 2, Part 2, cll 2 and 3.

126 The key grouping provision is s 72(1) of the *Payroll Tax Act* which provides that if a person has a (deemed) controlling interest in two or more businesses, the persons who carry on those businesses constitute a group. One consequence of grouping is that the members of the group cannot each take advantage of the tax threshold. Another – of crucial importance in this case – is that if any member of a group fails to pay an amount that the member is required to pay under the *Payroll Tax Act* in respect of any period, every member of the group is liable jointly and severally to pay that amount to the Chief Commissioner (subject to the Chief Commissioner's power under s 79 to exclude persons from groups). Thus if Tri-City Trucks and Smeaton were part of the same group, Smeaton was jointly and severally liable with Tri-City Trucks to pay any amount the latter was required to pay but failed to do so.

127 Part 6 of the *Payroll Tax Act* provides for the adjustment of payroll tax to ensure that the employer pays the "correct amount of payroll tax" in respect of each financial year calculated in accordance with Schedule 1 (s 82(1)). Part 6 applies in respect of payroll tax paid or payable whether as a group employer or an individual employer (s 82(2)). If the amount of payroll tax paid or payable by an employer when the employer made the returns relating to a financial year is less than the correct amount of payroll tax payable by the employer in respect of that year, the employer must pay the Chief Commissioner the difference (s 83(2)). That amount must be paid within the period during which the employer is required to lodge a return – that is, within 21 days after the end of the financial year (s 83(3)). However, Part 6 appears to apply only where an employer has actually lodged returns relating to a financial year.

128 The amount of payroll tax payable by an employer is to be calculated in accordance with Schedules 1 and 2 of the *Payroll Tax Act.* In the case of a group with no designated employer, each member of the group is liable to pay as payroll tax for the financial year the amount of dollars calculated in accordance with the formula TW x R (Schedule 1, Part 4, cl 12). In this formula, TW represents total taxable wages paid or payable and R represents the percentage rate of payroll tax. There is no dispute that if the grouping provision applied to the respondents, the group had no designated employer.

129 The *Taxation Administration Act* empowers the Chief Commissioner to make an assessment of the liability of a taxpayer (s 8(1)). An assessment constitutes conclusive evidence that the amount and all particulars of the assessment are correct, except in objection or review proceedings when it is *prima facie* evidence only (s 119). However, Mr Young accepted that the liability of an employer or group member to pay payroll tax arises by virtue of the legislation itself and is not dependent upon the Chief Commissioner issuing an assessment.[49]

Smeaton's liability

130 Tri-City Trucks was required to register as an employer within seven days of the end of the month in which it first paid or became liable to pay taxable

[49] Freelance Global Ltd v Chief Commissioner of State Revenue [2014] NSWSC 127 at [36]-[41] (White J).

wages of more than the weekly threshold amount. It was common ground, however, that Tri-City Trucks never became registered and never lodged a return.

131 Nonetheless, Mr Young accepted that s 9(1) of the *Payroll Tax Act* obliged Tri-City Trucks to pay payroll tax within seven days after the end of each month in which it paid or was liable to pay taxable wages above the threshold (except for tax in respect of the month of June, which was payable within 21 days after the end of the month). Part 4 of Schedule 1 to the *Payroll Tax Act* prescribes a formula for the calculation of tax payable by each member of a group with no designated group employer (cl 12). The application of the formula is not dependent on any member of the group lodging returns. Thus, the amount due by Tri-City Trucks, and any member of the group of which it formed part, could be ascertained by reference to taxable wages paid or payable by Tri-City Trucks, regardless of its failure to lodge the required returns. As a practical matter it may take some time for the Chief Commissioner to calculate the amount of payroll tax due by a non-compliant employer. But that does not affect the employer's statutory liability to pay the tax.

132 Mr Young also accepted that s 81 of the *Payroll Tax Act* made Smeaton liable to pay to the Chief Commissioner the amount of payroll tax Tri-City Trucks was required to pay in respect of any period but had failed to pay (assuming both Smeaton and Tri-City Trucks to be part of the same group). Thus, if Tri-City Trucks failed to pay the amount of payroll tax due in respect of a particular month within seven days after the end of that month (or 21 days after the end of June), Smeaton would thereupon become jointly and severally liable to pay that amount to the Chief Commissioner. It follows that if Tri-City Trucks failed to pay what Part 6 of the *Payroll Tax Act* describes as the "correct amount of payroll tax" in respect of a financial year within 21 days after the end of the financial year, Smeaton became liable to pay the amount due to the Chief Commissioner, who could recover the whole of the amount unpaid by Smeaton as a debt (*Taxation Administration Act,* ss 44, 45(1)). This is the position even if Part 6 did not apply directly to Tri-City Trucks by reason of its failure to comply with its obligation to lodge returns for each month.

The separate question

133 The proceedings in the Equity Division involved a challenge by Smeaton and Smash Repairs to the assessments issued by the Chief Commissioner. The separate question identified by the primary Judge asks whether the Disclaimers executed by Michael Gerace mean that s 72(6) of the *Payroll Tax Act* had no application for the relevant years. The significance of the grouping provisions in relation to Smeaton is that if they apply, Smeaton incurred a liability to pay the payroll tax due by Tri-City Trucks. Accordingly, a more appropriate way of framing the question, at least in relation to Smeaton, may have been whether at the date the assessments were issued the *Payroll Tax Act* imposed a liability on Smeaton to pay the payroll tax for which Tri-City Trucks was liable in respect of the relevant financial years, but which Tri-City Trucks had failed to pay.

134 There is no dispute between the parties that apart from the effect of the Disclaimers, Smeaton was part of the same group as Tri-City Trucks during all relevant financial years. This came about because of the operation of s 72(1), read with s 72(2) and (6) of the *Payroll Tax Act.* There was no material change in the circumstances attracting these provisions at any time until Michael Gerace executed the Disclaimers on 27 June 2014, shortly before the Chief Commissioner issued the assessments.

135 The legislation clearly envisages that a group may come into existence and that it can also cease to exist. In addition, the legislation contemplates that the composition of a group can change from time to time. Section 82(3) of the *Payroll Tax Act*, for example, expressly contemplates that an employer may be liable for payroll tax as an individual employer and a group employer for different periods in the same financial year. Section 86(4) of the *Payroll Tax Act* provides that the Chief Commissioner may cancel the registration of a person as an employer if the person ceases to be liable to pay wages as described in s 86(1). One way in which an employer may cease to be liable to pay wages in any given month is if the employer is no longer a member of a group and its wages bill is below the threshold. Section 84(1) addresses the case of an employer who “changes their circumstances” during a financial year. A change of circumstances occurs, for example, when an employer becomes a group

employer (following a period as an individual employer) or ceases to be a group employer (and becomes an individual employer) (s 84(2)).

136 The grouping provisions of s 72 of the *Payroll Tax Act* are expressed in the present tense. The key provision is s 72(1) which states that if a person or persons **has** a controlling interest in each of two businesses, the persons who carry on those businesses (in this instance, Tri-City Trucks and Smeaton) **constitute** a group. Section 72 does not expressly specify the time at which the question posed by s 72(1) must be answered. However, the fact that the legislation contemplates that the existence and composition of a group can change from time to time indicates that s 72 is intended to be applied to circumstances as they exist during particular periods, such as a given month or a given financial year.

137 To put the matter another way, the language of s 72(1) of the *Payroll Tax Act* suggests that it is directed to a period or periods when the existence and composition of a group has to be ascertained for one or both of the following purposes:

(i) to calculate the amount of payroll tax (if any) an employer is liable to pay in respect of the relevant period or periods; and

(ii) to determine whether any other entities are members of the same group as the employer during the relevant period or periods and are, therefore, jointly and severally liable to pay to the Chief Commissioner the amounts of payroll tax unpaid by the employer in respect of the relevant period or periods.

138 This construction of the language of s 72 strongly implies that the existence and composition of a group must be determined according to the circumstances as they exist during the relevant period or periods. However, it is necessary to consider whether this construction is consistent with the purpose of the legislation, as derived from its text and structure.[50]

139 The fundamental purpose of the *Payroll Tax Act* is to impose payroll tax at specified rates on employers by reference to "taxable wages" (ss 6, 7, 8). An ancillary purpose is to ensure that tax due is collected by making members of a

[50] Certain Lloyd's Underwriters v Cross (2012) 248 CLR 387; [2012] HCA 56 at [25] (French CJ and Hayne J).

"group" jointly and severally liable for unpaid payroll tax due by an employer within the same group (s 81).

140 The legislation evinces an intention that the employer must pay all payroll tax due in respect of a financial year within 21 days of the end of the year. That intention would no doubt be expressed more clearly if Part 6 of the *Payroll Tax Act* did not condition the determination of the "correct amount of payroll tax" on the lodgement of returns by the employer during the relevant financial year. Nonetheless, as Mr Young accepted, the effect of s 9 of the *Payroll Tax Act* was to oblige Tri-City Trucks to pay the full amount of payroll tax for which it was liable in respect of each financial year no later than 21 days after the end of the financial year.

141 As has been noted, the joint and several liability of a member of the same group as the employer arises as soon as the employer fails to pay the payroll tax due by it to the Chief Commissioner (s 81). Smeaton (assuming it to be part of the same group as Tri-City Trucks) became liable to pay to the Chief Commissioner the amounts of payroll tax due by Tri-City Trucks in respect of each financial year at the expiration of 21 days from the end of that financial year.

142 The *Payroll Tax Act* provides for only one circumstance in which the liability of a group member to pay payroll tax can be altered "retrospectively". If the Chief Commissioner determines pursuant to s 79 that a person should not be a member of a group, for example, because that person's business is not connected with that of the employer, the determination can be made to operate from an earlier date.

143 Subject to this exception, the legislative scheme can only be given effect if the existence and composition of any group of which the employer forms part can be determined at the same time as the employer becomes liable to pay payroll tax to the Chief Commissioner. It is at that point, if the employer does not discharge its liability, that group members become jointly and severally liable to pay the Chief Commissioner the amount of payroll tax the employer has failed to pay. It is also at that point that the Chief Commissioner can enforce the group members' liability. The legislative scheme would be unworkable unless

the determination of group membership in accordance with s 72 of the *Payroll Tax Act* can be undertaken by reference to the legal relationships as they exist between the relevant parties at the time the employer's liability to pay payroll tax arises. That determination must be made on the basis of the facts as they exist at the relevant time.

144 As has been seen, the legislation recognises that the existence and composition of a group may change during a given financial year. This means that s 72 of the *Payroll Tax Act* may have to be applied at various times during a given financial year according to the legal relationships in force and the circumstances at the particular time. Smeaton became liable to pay payroll tax when Tri-City Trucks failed to discharge its obligation to pay payroll tax to the Chief Commissioner. For each of the financial years 2004-2005 to 2012-2013, Smeaton's liability arose no later than the expiration of 21 days after the end of the financial year. For the four month period from 1 July 2013 to 31 October 2013, Smeaton's liability arose no later than seven days after the second of those dates. Its statutory liability was complete before Michael Gerace executed the Disclaimers.

145 The Disclaimers executed by Michael Gerace may well have altered the rights of Smeaton (as the trustee) and Michael Gerace (as the discretionary object) as between themselves. The alteration may have taken effect from a date prior to the execution of the Disclaimers, subject to any exercise of the trustee's discretion in favour of Michael Gerace on the intervening period. The Disclaimers also may have affected the rights of other discretionary objects of the Smeaton Trust even though they were not party to the deed poll executed by Michael Gerace. These propositions are all consistent with the reasoning in *Re Gulbenkian*.

146 Assuming everything in the previous paragraph to be correct, the consequence is not that Smeaton's liability to pay payroll tax is retrospectively expunged. On the proper construction of the legislation, Smeaton became liable by force of statute at the expiration of a specified time after the end of each financial year (if not earlier). Smeaton's liability under the legislation was to be determined once and for all by reference to the legal relationships then in existence

(subject to s 79). A subsequent alteration of those relationships by the unilateral act of a discretionary object cannot change the operation of the legislation.

147 This conclusion rests on the proper construction of the *Payroll Tax Act* and the *Taxation Administration Act* but is consistent with the approach to the construction of taxation legislation. In *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation*,[51] for example, the Club claimed exemption from income tax on the ground that it was a club which "is not carried on for the purposes of profit or gain to its individual members and is … a club established for the promotion or encouragement of an athletic game".[52] Lockhart J held that:[53]

> "It is not sufficient to look to the formation of the body and to ascertain what was at that time the purpose of its formation. The statute gives a periodic operation to the words and directs the inquiry to a particular time, namely, the year of income so that consideration must be given not only to the purpose for which the society was established but also the purpose for which it is currently conducted."

This passage was approved in the majority judgment of the High Court in *Federal Commissioner of Taxation v Word Investments Ltd*.[54]

148 The conclusion I have reached is also consistent with the analysis of Hill J in *Davis and Sirise Pty Ltd v Federal Commissioner of Taxation* (**Davis**).[55] The issue in that case concerned an agreement between the parties to the lease of a yacht to extend the term of the lease from the original three years to five years, effective from the date of the original lease. The object of the retrospective adjustment to the lease as executed was to allow the lessor, who had purchased the yacht before entering into the lease, to take advantage of a sales tax exemption which applied if a yacht was leased for a term of at least four years.

149 Hill J rejected the lessor's claim to an exemption:[56]

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51 (1990) 23 FCR 82.
52 Income Tax Assessment Act 1936 (Cth) s 23(g)(iii).
53 (1990) 23 FCR 82 at 96. See also at 115, 116-117 (Beaumont J); at 122 (Foster J).
54 (2008) 236 CLR 204; [2008] HCA 55 at [34] (Gummow, Hayne, Heydon and CrennanJJ).
55 [2000] FCA 44; 44 ATR 140.
56 Davis at [55]-[56].

> "[55] Counsel for [the lessor] submitted that the sales tax law had to be seen against the background of the general law, … So much may be accepted. But that does not mean that the Commissioner is bound by the legal position 'as accepted by the parties' as was then submitted. The parties to an agreement can not effect a change to an agreement retrospectively so that the agreement between them is altered as against the rest of the world. The parties can, no doubt, enter into an agreement, binding as between them, that a prior agreement they have entered into will be construed in a particular way from the moment the prior agreement was entered into. But the original agreement will, so far as the Commissioner is concerned, govern their relationship until the time of its amendment. For example A and B may enter into an agreement which provides, inter alia, that certain income will, for the term of the agreement, be held by A in trust for B. Later the parties may as between them agree to alter the arrangement ab initio to provide that that income will not be held in trust for B, but will always be treated as belonging to A beneficially. The agreement will be binding inter partes, but for income tax purposes the income will, until the date of the agreement, still be treated as beneficially the income of B.
>
> [56] The example above noted should be distinguished from the case where parties have entered into an agreement under the mutual mistake that the document they have executed records the terms of their bargain when it does not. In such a case an application could be made to a court for rectification of the written document. But even where an order of a court is obtained to rectify the written agreement, the court order does not operate to alter the past. The order of the court merely recognises what has always been the case, namely that the true agreement between the parties was not that which they have mistakenly executed, but what they in truth agreed upon." (Citations omitted.)

150 Mr Young submitted, with little elaboration, that the present case is different because the Disclaimers took effect retrospectively by "operation of law". However, Disclaimers were executed by Michael Gerace as deeds poll. If the Disclaimers had any effect at law or in equity it was by virtue of their terms, just as the effect of the agreement in *Davis* depended on its terms. In my view, it does not alter the analysis to say that if the Disclaimers had retrospective effect it was by "operation of law".

Position of Smash Repairs

151 It was not suggested that the answer to the separate question might differ as between Smeaton and Smash Repairs. The same reasoning applies to both.

The Disclaimers

152 The conclusion I have reached makes it unnecessary to address the parties' submissions as to whether under the general law the object of a discretionary trust can disclaim his or her interest and, if so, whether the disclaimer can operate "retrospectively". Even if the answers to each of these questions is "yes", the Chief Commissioner's appeal must still be allowed. In my view it is

undesirable to attempt to resolve the general law issues, not all of which were canvassed in depth in the parties' submissions.

153 In particular, the Chief Commissioner submitted that despite *Re Gulbenkian* having stood for nearly 50 years, this Court should decline to follow it. Any observations made by this Court as to the correctness or otherwise of *Re Gulbenkian* would be obiter. In my view it is undesirable to consider the authority of a longstanding decision in a case where it is unnecessary to do so.

Orders

154 The wording of the separate question is perhaps not as precise as it might have been. But as the parties were content to accept the wording, I think the appropriate course is to answer it as follows:

Question 1

Did the disclaimer signed by Michael Gerace dated 27 June 2014 in respect of the Smeaton Trust and the Gerace Family Trust mean that subs 106I(6) of the *Taxation Administration Act 1996* and s 72(6) of the *Payroll Tax Act 2007* have no application for the tax years in question?

Answer

No, the Disclaimers do not have that effect. Section 106I(6) of the *Taxation Administration Act 1996* (NSW) (as in force at the relevant times) and s 72(6) of the *Payroll Tax Act 2007* (NSW) are to be applied to the circumstances of the present case independently of and without regard to the Disclaimers signed by Michael Gerace.

I propose the following orders:

1. Dismiss the respondents' Notice of Motion filed on 16 March 2017 objecting to the competency of the appeal.

2. Appeal allowed.

3. Set aside the answer to the separate question given by White J in [109] of the judgment delivered on 15 November 2016.

4. Set aside Orders 1-7 and 9 made by White J on 5 December 2016.

155 The consequence of those orders is that the matter will proceed in the Equity Division so that the outstanding issues can be addressed. The costs of the Equity Division proceedings will be a matter for the Judge hearing the case to determine.

156 The costs of an appeal ordinarily follow the event. In this case, however, the Court was not given the assistance it was entitled to expect from the Chief Commissioner's representatives on the critical question of statutory construction. A Court should not be left by the entity responsible for administering legislation to find its own way through the legislation. Despite the Chief Commissioner's success on the appeal, if it were not for the respondents' unsuccessful objection to the competency, I would have proposed that there be no order as to the costs of the appeal with the intent that each party bear his, or her or their own costs.

157 Because the respondents have failed in their objection to competency and on their contention that the Chief Commissioner requires leave to appeal, the respondents should be ordered to pay one third of the Chief Commissioner's costs of the appeal. This order extends to one third of the Chief Commissioner's costs of the respondents' Notice of Motion and one third of the Chief Commissioner's costs of the summons seeking leave to appeal.

158 I therefore propose the following additional order:

5. The respondents pay one third of the Chief Commissioner's costs of the appeal, including one third of the Chief Commissioner's costs of the respondents' notice of motion and one third of the Chief Commissioner's costs of the summons seeking leave to appeal.

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