



Lewski v Commissioner of Taxation

[2017] FCAFC 145

12 December 2017

Chair: Andrew Broadfoot QC

Presenters: Claire Nicholson, Anna Wilson



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Outline

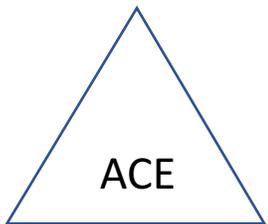
1. Facts
2. Procedural history
3. Key issues
4. Questions

Facts

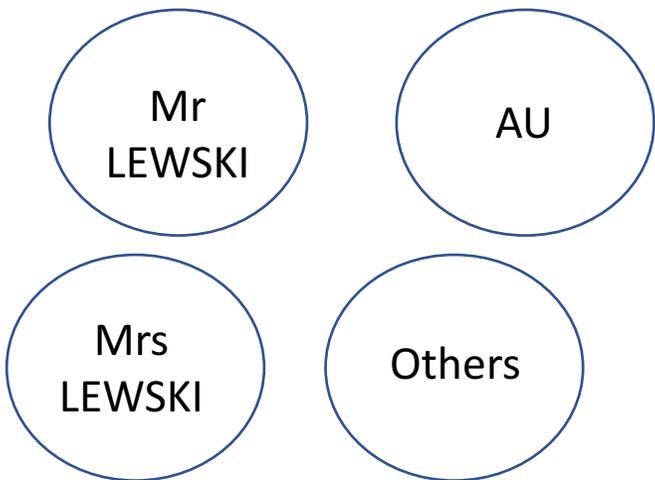
Trustee: Australian Commercial Property Syndications Pty Ltd (ACPS)



Trust: ACE No 4 Trust



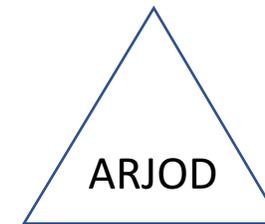
SB: Mr Lewski & others
 GB: Mrs Lewski
 GB: Australian Commercial Underwriting Pty Ltd & Others



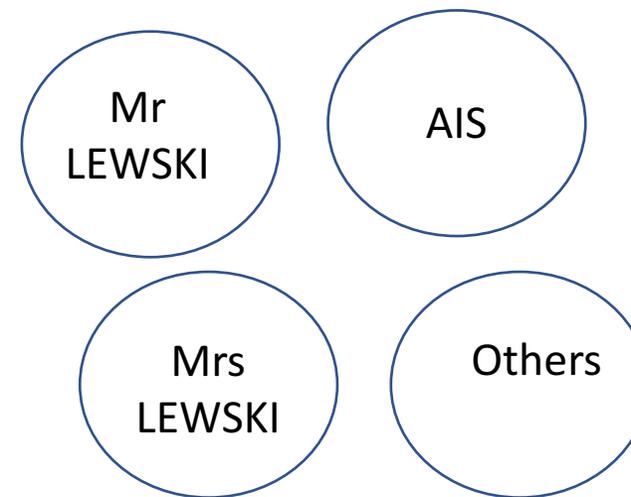
Trustee: Drewvale



Trust: Arjod Trust



SB: Mr Lewski
 GB: Mrs Lewski
 GB: Australian Investment Securities Pty Ltd (AIS) & Others





Facts

Three key sets of facts:

- The Glendale Deal
- The Trustee Resolutions
- The Deeds of Disclaimer



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Facts – the Glendale Deal

ACPS was a member of Glendale Property Syndicate (**GPS**).

30 June 1999

- GPS entered into interdependent:
 - Contract of sale of Real Estate; and
 - Contract of Sale of Business (Business Agreement).
- Agreed to buy the land and business of a nursing home, which had 127

Approved Places



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Facts – the Glendale Deal

Contract of Sale of Real Estate

Price

- Deposit: \$1m payable on execution of agreement, being 30 June 1999
- Settlement: \$1.74m – due on Settlement Date, being 31 October 1999
- First Post Settlement: \$2.5m – due on later of 1 July 2000 and date of issue of Planning Permit
- Final Post Settlement: \$12m (subject to certain adjustments) – payable on Date of Completion



Facts – the Glendale Deal

Contract of Sale of Real Estate

Relevant condition (GC 9.1)

- *'[u]pon payment of all purchase and other moneys payable by the purchaser under the contract the vendor shall deliver to the purchaser such registrable instrument or instruments of transfer of the land sold as will enable the purchaser to become registered as proprietor of the land sold...'*
- Note there is no obligation to deliver the transfer prior to payment



Facts – the Glendale Deal

Business Agreement

Purchase Price

- Deposit: \$1.75m payable on execution of the agreement, being 30 June 1999
- Balance: \$5.51 million (subject to adjustments) – payable on Completion, being 31 October 1999 or such other date as agreed



Facts – the Glendale Deal

Business Agreement

Relevant condition (clause 3)

- Purchaser to apply to Department of Health and Aged Care to become an Approved Provider
- If Approval not obtained by Completion, Vendor to hold Approved Places on trust until Approval obtained, up to 12 months, after which a third party can be nominated as an Approved Provider



Facts – the Glendale Deal

Actual Payments

- Real Estate Contract:
 - Deposit of \$1m paid on 30 June 1999
 - Settlement Amount paid on 31 October 1999
- Business Agreement
 - Deposit of \$1.75m paid on 30 June 1999
 - Balance paid 31 October 1999



Facts – the Glendale Deal

ACPS interest in GPS

- 22 December 2003: ACPS entered into Deed of Settlement regarding its tax liability
- Commissioner accepted:
 - 30 June 1999: ACPS had 40% interest in GPS
 - Following years up to 30 June 2006: ACPS had 2% interest in GPS



Facts – Trustee Resolutions

- Resolutions made 30 June 2006 by trustee of ACE Trust (Mr Lewski)
- Resolutions made 30 June 2007 by trustee of Arjod Trust (Drewvale, directors of which were Mr Lewski and David Lewski)
- The resolutions were in substantially similar terms
- Three resolutions of relevance in each year

Facts – Trustee Resolutions

ACE Trust	Arjod Trust
Resolution 1	Resolution 1
<p>Income of the trust fund:</p> <p>In accordance with the trust deed it was resolved to determine that for the year ended 30 June 2006 income of the trust includes all amounts (including capital gains) taken into account in calculating the net income of the trust.</p>	<p>Income of the trust fund:</p> <p>In accordance with the trust deed it was resolved to determine that for the year ended 30 June 2007 income of the trust includes all amounts (including capital gains) taken into account in calculating the net income of the trust.</p>



Facts – Trustee Resolutions

ACE Trust	Arjod Trust
Resolution 2	Resolution 2
<p>Distribution of trust income:</p> <p>It was resolved to pay, apply and set aside the income of the trust, as defined in the deed, for the year ending 30 June 2006 to or for the benefit of the beneficiaries in the manner and of the type as allowed under the deed such that the assessable income for taxation purposes of each beneficiary (and the class of assessable income from which their respective entitlements are appointed) is:</p> <ul style="list-style-type: none">• Roslyn Lewski: 100% of income	<p>Distribution of trust income:</p> <p>It was resolved to pay, apply and set aside the income of the trust, as defined in the deed, for the year ending 30 June 2007 to or for the benefit of the beneficiaries in the manner and of the type as allowed under the deed such that the assessable income for taxation purposes of each beneficiary (and the class of assessable income from which their respective entitlements are appointed) is:</p> <ul style="list-style-type: none">• Australian Investment Securities Pty Ltd: First \$3.5m• Roslyn Lewski: balance

Facts – Trustee Resolutions

ACE Trust	Arjod Trust
Resolution 3	Resolution 3
<p>Variation of income:</p> <p>It was resolved that should the Commissioner of Taxation disallow any amount as a deduction or include any amount in the assessable income of the trust, and not distribute that amount so disallowed as a deduction, or so include in the assessable income in accordance with the above appropriation, such amount or amounts are to be deemed to be distributed on 30 June 2006 in the following manner:</p> <ul style="list-style-type: none"> • Australian Commercial Underwriting Pty Ltd: 100% 	<p>Variation of income:</p> <p>It was resolved that should the Commissioner of Taxation disallow any amount as a deduction or include any amount in the assessable income of the trust, and not distribute that amount so disallowed as a deduction, or so include in the assessable income in accordance with the above appropriation, such amount or amounts are to be deemed to be distributed on 30 June 2007 in the following manner:</p> <ul style="list-style-type: none"> • Australian Investment Securities Pty Ltd: 100%



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Procedural History

Assessments

- ACPS:
 - 2006: net income \$676,209, carry forward losses \$11,053,152
 - Amendment requested by ACPS in October 2009:
 - net income \$10,108,621
- Drewvale
 - 2007: net income \$6,643,498, carry forward losses \$2,143,060:
 - net taxable income \$4,500,438



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Procedural History

Assessments

- Applicant
 - 2006: did not return any trust distributions
 - 2007: did not return any trust distributions



Procedural History

Amended Assessments to Applicant

14 May 2013

- 2006: taxable income: \$10,117,621
 - ACPS did not have a tax loss for 1999 year on basis did not incur Settlement Amount under Real Estate Contract and Balance under Business Agreement in 1999 year
 - Net income of ACE Trust in 2006 year was \$10,108,621 (s 95)
 - Applicant presently entitled to \$10,108,621 at 30 June 2006 (s 97)



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Procedural History

Amended Assessments to Applicant

14 May 2013

- 2007: taxable income: \$3,204,593
 - No tax loss for Drewvale in 2000 year
 - Net income of Arjod Trust in 2006 year was \$6,643,199 (s 95)
 - Applicant presently entitled to \$3,143,199 at 30 June 2007 (s 97)



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Procedural History

- 5 July 2013 – Objection lodged for both years
- 9 July 2015 – Objection Decision
 - 2006: allowed in part – partial deduction for Glendale Deal allowed, reducing applicant’s present entitlement to \$9,878,621 (down from \$10,108,621) – further amended assessment issued 18 August 2015
 - 2007: disallowed in full
- 4 September 2015 – AAT Application for review
- 15 December 2015 – Applicant executed disclaimers



Procedural History

Applicant's Grounds for Review in AAT

- Settlement Amount of \$1.74m incurred on 30 June 1999
- Balance of \$5.51m incurred on 30 June 1999
- Additional grounds not in objection:
 - Deeds of Disclaimer rendered applicant not presently entitled to any of the income of the ACE or Arjod Trusts at relevant times
 - ACPS resolution for the 2006 year was ineffective and SB ought to have been assessed rather than applicant



Procedural History

Tribunal Decision	
Ground	Tribunal
40% of Settlement Amount of \$1.74m incurred on 30 June 1999	No at [212]
40% of Balance of \$5.51m incurred on 30 June 1999	No at [212]
Leave to rely on Deeds of Disclaimer	Refused at [57]-[61]
Deeds of Disclaimer effective	No at [62]-[98]
Leave to rely on ground that ACPS resolution for the 2006 year was ineffective	Refused at [104]-[106]
ACPS resolution ineffective	No at [108]-[140]



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Key Issues

Issues raised on appeal

1. The Incurred Issue
2. The Trust Resolutions Issue
3. The Leave to Raise New Grounds Issue
4. The Disclaimers Issue
5. The Ultra Vires Issue



Issue 1: Incurred

Commissioner's arguments

Settlement Amount not incurred until date of Settlement because there was no liability to pay the Settlement Amount until delivery of the registrable transfer of land, relying on *Malouf*

Settlement of Real Estate Contract made contemporaneous with Completion of Business Agreement, which was dependant on occurrence of further events

Balance under Business Agreement not incurred until further performance by Vendor and happening of further events outside control of Purchaser and Vendor, relying on *Malouf*

Promise to pay remained executory until these events happened

Completion of Business Agreement was made contemporaneous with Settlement of Real Estate Contract, which was dependant on occurrence of further events



Issue 1: Incurred

Principles

- *‘An outgoing may be incurred if it is definitely committed to and presently existing, notwithstanding that it may be theoretically defeasible or possibly contingent.’
(Coles Myer Finance Ltd (1993) 176 CLR 640)*
- *‘Where an amount is payable under a contract, determining whether and, if so, when the amount is incurred requires reference to “the true interpretation of the particular language of the contract”.’ (Woolcombers (1993) 47 FCR 561)*
- *‘Further, much will depend upon the nature of the contractual arrangements, which involves looking at the circumstances of the particular case.’ (Malouf (2009) 174 FCR 581)*

Full court at [107]



Issue 1: Incurred

Full Court's Findings

- Contract of Sale of Real Estate
 - Settlement Amount definitively committed to on 30 June 1999
 - No obligation on Vendor to deliver an instrument of transfer
 - No condition precedent requiring Vendor to take any action before obligation to pay became unqualified



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Issue 1: Incurred

Full Court's Findings

- Business Agreement
 - Balance definitively committed to on 30 June 1999
 - No obligation on Vendor to deliver anything to bring payment obligation into existence
 - Language was unconditional and imposed obligation to pay Balance on a fixed date



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Issue 1: Incurred

Key points

- No changes to accepted principles
- Not authority for proposition that post execution payments are incurred at time of execution
- Findings turned on the lack of obligations or conditions that needed to be satisfied prior to liability for subsequent payments arising



Issue 2: New grounds

Principles

- *'The decision whether to allow an amendment ought to be made on the same considerations of justice upon which such decisions are regularly made in litigation. It was in the past a reproach to the law that the real issues in taxation appeals could be refused a hearing for a defective objection, and Parliament has legislated to remove that reproach; an amendment under s 190 should not be considered with reluctance, but on its merits.'*
 - *Lighthouse Philatelics v Commissioner of Taxation* (1991) 32 FCR 148, (156), quoted by the Full court at [125]
- Principles in *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 are relevant, adjusted to the particular context: Full Court at [126]



Issue 2: New grounds

Full Court's findings

- In refusing leave, the Tribunal had regard to the prejudice to the Commissioner in two respects:
 - If the Deeds of Disclaimer ground was litigated and won by the applicant, the Commissioner was out of time to assess the trustee of the ACE Trust at 30 June 2006 or the Arjod Trust at 30 June 2007, as no beneficiary would be presently entitled to the income at those dates
 - If the ACPS trust resolution ground was litigated and won by the applicant, the Commissioner could assess the Trustee but may be prejudiced in the recovery of the tax liability



Issue 2: New grounds

Full Court

Did not make a finding on this issue because of its findings on the Disclaimers Issue and Ultra Vires Issue but made an observation that the Tribunal appeared to not have, but should have, considered:

- The nature and importance of the new grounds;
- The reason for not raising the issue earlier;
- The adequacy of the explanation given;
- The effect granting leave would have on the hearing



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Issue 2: New grounds

Full Court

Regarding prejudice to the Commissioner, the Full Court doubted that the inability to issue an assessment against or inability to recover tax from another taxpayer should weigh heavily against the grant of leave and that such a consideration does not appear to be one of the considerations referred to in *Aon*.



Issue 2: New grounds

Key points

- Leave to add new grounds has previously been refused based the Commissioner's inability to assess a third party.
- *DTMP v Commissioner of Taxation* [2016] AATA 684, [24]:

'The contention that it would be ground breaking for prejudice to the Commissioner's position viz a viz third parties to be influential must be rejected. It is contrary to authority. In the present matter, that type of prejudice is not only influential, it is determinative.'



Issue 3: Ultra vires

Was the ACPS resolution made on 30 June 2006 ineffective?

- Argument arose because of drafting of resolution 2
 - Trust Deed allowed distribution of 'net income' (cl 3.3)
 - Resolution 2 provided for distribution of 'the income of the trust as defined in the deed'



Issue 3: Ultra vires

ACE Trust	Arjod Trust
Resolution 2	Resolution 2
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Issue 3: Ultra vires

Full Court

It was at least open for the Tribunal to interpret Resolution 2 as being, in substance, a resolution to distribute the Net Income of the Trust



Issue 4: Trust Resolutions

Amended Assessments

- Amended assessments issued 14 May 2013 on basis that:
 - ACE Trust had net income of \$10,108,621 for 2006 and Mrs Lewski was presently entitled to this amount
 - Arjod trust had net income of \$6,643,199 for 2007 and Mrs Lewski was presently entitled to \$3,143,199 of that amount
- Accordingly, the amended assessments appear to have triggered the contingency in resolution 3, such that the corporate beneficiary is assessable on the increase rather than Mrs Lewski

Issue 4: Trust Resolutions

ACE Trust	Arjod Trust
Resolution 3	Resolution 3
<p>Variation of income:</p> <p>It was resolved that should the Commissioner of Taxation disallow any amount as a deduction or include any amount in the assessable income of the trust, and not distribute that amount so disallowed as a deduction, or so include in the assessable income in accordance with the above appropriation, such amount or amounts are to be deemed to be distributed on 30 June 2006 in the following manner:</p> <ul style="list-style-type: none"> • Australian Commercial Underwriting Pty Ltd 	<p>Variation of income:</p> <p>It was resolved that should the Commissioner of Taxation disallow any amount as a deduction or include any amount in the assessable income of the trust, and not distribute that amount so disallowed as a deduction, or so include in the assessable income in accordance with the above appropriation, such amount or amounts are to be deemed to be distributed on 30 June 2007 in the following manner:</p> <ul style="list-style-type: none"> • Australian Investment Securities Pty Ltd: 100%



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Issue 4: Trust Resolutions

“...it is tolerably clear that the words were concerned with a scenario where the Commissioner disallows a deduction claimed by the trust and, as a consequence, the amount of that deduction is not available in calculating the amount distributed to the beneficiary or beneficiaries.”

Full Court at [118]



Issue 4: Trust Resolutions

Full Court

- Full Court found that the trust deed in each case authorised the making of resolutions to distribute income on alternative bases
- However, considered that this was sufficiently open to doubt so as to express conclusions in the event that it was wrong about this
- Presently entitled means vested in interest and possession
- A contingent interest does not meet these requirements
- Wrong to construe resolutions as distinct and sequential. They should be read together



Issue 4: Trust Resolutions

Full Court	
IF OK to make resolutions to distribute income on alternative bases:	If <u>not</u> OK to make resolutions on alternative bases then:
<ul style="list-style-type: none">• if the two resolutions are read together, the distribution to Mrs Lewski was contingent in that it depended on the occurrence of an event which may or may not take place.• Therefore, Mrs Lewski was not presently entitled.	<ul style="list-style-type: none">• the question is whether the invalid “variation of income” resolution could be severed.• Full Court held that it can’t and entire resolution fails such that Mrs Lewski was not presently entitled.



Issue 4: Trust Resolutions

Impact on taxpayers

- TD2012/22
 - Example 6 suggests that, as the Tribunal found, the correct analysis is that the second resolution exhausts the trustee's power of appointment and there is nothing in respect of which the third resolution can operate
 - For 2006 this would mean all income is assessable to Mrs Lewski
 - For 2007 it would mean all income beyond \$3.5 million is assessable to Mrs Lewski



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Issue 4: Trust Resolutions

Impact on taxpayers

- Taxpayers may now wish to review previous “contingent” resolutions and determine whether they wish to rely on the protection of the TD 2012/22 as to the effect of such resolutions, or whether they wish to apply the Lewski decision to render such resolutions invalid



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Issue 5: Disclaimers

15 December 2015

- Mrs Lewski executed Disclaimers of Entitlement to Income for the ACE Trust and the Arjod Trust

Issue 5: Disclaimers

ACE Trust	Arjod Trust
<p>I understand and acknowledge that I am one of the beneficiaries of the ACE No 4 Trust (ACE No 4).</p> <p>I hereby disclaim and reject absolutely any entitlement I have to any interest whatsoever that I may have now or in the future or have had at any time since 1 July 2005, to any income, capital or gift at all from ACE No. 4.</p> <p>This disclaimer takes effect on and from 1 July 2005.</p>	<p>I understand and acknowledge that I am one of the beneficiaries of the Arjod Trading Trust (Arjod).</p> <p>I hereby disclaim and reject absolutely any entitlement I have to any interest whatsoever that I may have now or in the future or have had at any time since 1 July 2006, to any income, capital or gift at all from Arjod.</p> <p>This disclaimer takes effect on and from 1 July 2006.</p>



Issue 5: Disclaimers

Tribunal

- Disclaimer, if effective, would have retrospective effect.
- Mrs Lewski therefore never presently entitled to income
- Disclaimed income would be taxable in the hands of the trustees under either ss 99A or 99
- Default beneficiaries only gain entitlements from the date of execution of disclaimers



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Issue 5: Disclaimers

Tribunal

- Relied on Tamberlin J in *Nemesis Australia Pty Ltd v Federal Commissioner of Taxation* (2005) 150 FCR 152
- See also last line of ATOID 2010/85



Issue 5: Disclaimers

Impact of *Smeaton Grange*

- Between the dates of the hearing and decision in *Lewski*, decision in *Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd* [2017] NSWCA 184 was handed down
- *Smeaton* was about grouping for payroll tax purposes. One person was a discretionary object of two discretionary trusts. He retrospectively disclaimed that interest



Issue 5: Disclaimers

Impact of *Smeaton Grange*

- NSWCA said this was effective at general law as between beneficiary and trustee, but did not affect payroll tax position
- Payroll Tax Act speaks in present tense and looks at position at a point in time
- Special leave application made but refused



Issue 5: Disclaimers

Full Court

- Unresolved issue as to whether *Smeaton Grange* analysis might have application to taxation of trusts under Division 6
- Commissioner put forward submissions to this effect that, even if there had been valid disclaimers, they had no operation or effect for the purposes of s 97(1)(a)(i)
- Full Court said it was unnecessary to decide this but noted:
 - a contrary view was accepted by the Full Court in *Ramsden* but the issue was not in dispute in the appeal;
 - a contrary submission by the Commissioner was accepted in *Nemesis*



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Issue 5: Disclaimers

Full Court

- Mrs Lewski gave Mr Lewski unfettered authority to handle all of her financial affairs. He acted as her agent
- Therefore Mrs Lewski learned of distributions when Mr Lewski obtained knowledge of them. As he made the resolutions or participated in their making, he knew of them from the outset



Issue 5: Disclaimers

Full Court

- Mr Lewski under a duty to inform Mrs Lewski of the distributions as they were material transactions that affected her financial position and potential liability to tax
- In that context Court held that it was open to the Tribunal to find that Mrs Lewski was taken to have knowledge of and to have accepted the distributions before the disclaimers were made
- Once accepted, there could be no valid disclaimer



Questions?