

SUPREME COURT OF QUEENSLAND

CITATION: *WB Rural Pty Limited v Commissioner of State Revenue*
[2017] QSC 141

PARTIES: **WB RURAL PTY LIMITED AS TRUSTEE FOR THE
WHITSUNDAY TRUST**
ACN 067 848 499
(applicant/appellant)

v

COMMISSIONER OF STATE REVENUE
(respondent)

FILE NO/S: SC No 11701 of 2015
SC No 11810 of 2015

DIVISION: Trial Division

PROCEEDING: Application
Appeal

DELIVERED ON: 30 June 2017

DELIVERED AT: Brisbane

HEARING DATE: 4 November 2016

JUDGE: Bond J

ORDERS: **The orders of the Court are that:**

- 1. The amended application in proceeding 11701 of 2015 is dismissed.**
- 2. Save insofar as it challenges the Commissioner's decision concerning the appellant's objection to the reassessment of land tax in respect of the financial year ending 30 June 2010, the appeal in proceeding 11810 of 2015 is dismissed.**

CATCHWORDS: CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – RESTRICTIONS ON COMMONWEALTH AND STATE LEGISLATION – where the applicant had right of appeal to the Supreme Court from a decision of the respondent pursuant to s 69 of the *Taxation Administration Act* 2001 (Qld) – where the right of appeal was conditional upon the applicant first paying the whole of the amount of the tax and interest payable – where applicant argued that State Parliaments cannot confer judicial power without also conferring a proportionately regulated right of appeal to the State Supreme Court – where the applicant argued that the right of appeal in s 69 was not a proportionately regulated right of appeal – whether the *Taxation Administration Act*

2001 (Qld) conferred judicial power on the respondent

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where s 53 of the *Land Tax Act* 2010 (Qld) provided an exemption from land tax on the basis that the land in question was used solely for primary production – where the respondent made a decision that the applicant was not entitled to an exemption – where the applicant argued that the decision was void for jurisdictional error because it was unreasonable in the sense described in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 – whether the respondent’s decision was void for jurisdictional error

Land Tax Act 1915 (Qld), s 11

Land Tax Act 2010 (Qld), s 4, s 6, s 7, s 8, s 9, s 16, s 17, s 18, s 32, s 53

Taxation Administration Act 2001 (Qld), s 3, s 6, s 7, s 8, s 9, s 10, s 11, s 17, s 19, s 21, s 22, s 26, s 27, s 29, s 30, s 31, s 45, s 63, s 64, s 65, s 66, s 67, s 68, s 69, s 77, s 132

Judicial Review Act 1991 (Qld)

Acts Interpretation Act 1954 (Qld), s 27A

British Imperial Oil Co Ltd v Federal Commissioner of Taxation (1925) 35 CLR 422, cited

Flegg v Crime and Misconduct Commission [2014] QCA 42, cited

Francis v Crime and Corruption Commission [2015] QCA 218, cited

Harvey v Commissioner of State Revenue [2015] QCA 258, cited

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51, cited

Luton v Lessels (2002) 210 CLR 333, cited

Minister for Immigration and Border Protection v SZVFW [2017] FCAFC 33, cited

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, cited

Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525, cited

Precision Data Holdings Ltd v Wills (1991) 173 CLR 167, cited

Roach v Minister for Immigration and Border Protection [2016] FCA 750, cited

Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd [2016] QSC 108, cited

COUNSEL: B Walker SC, with M May, for the applicant/appellant
B O’Donnell QC, with E Hoiberg, for the respondent
P Dunning QC, with A Keyes, for the intervener

SOLICITORS: Cooper Grace Ward for the applicant/appellant
Crown Solicitor for the respondent
Crown Solicitor for the intervener

Background

- [1] The applicant (**the Trustee**) is the trustee for the Whitsunday Trust, and in that capacity owns some 1,400 hectares of rural land in the Whitsunday region. The Woodwark Bay resort is located on that land. Prior to 2014, the Trustee had received a deduction applicable in respect of land tax payable under the *Land Tax Act* 1915 (Qld) (now repealed), and later an exemption from land tax under the *Land Tax Act* 2010 (Qld), on the basis that the land in question was used solely for primary production.
- [2] In March and April 2014, a delegate of the respondent (**the Commissioner**) wrote to the Trustee requesting that documentation be provided to support its entitlement to the deduction/exemption for primary production.
- [3] A course of correspondence between the parties followed. Ultimately, by letters dated 30 June 2014 and 31 July 2014, the Commissioner's delegate advised the Trustee that the Commissioner had determined that the Trustee was not entitled to the primary production deduction/exemption, and issued reassessment notices to the Trustee for the financial years ended 30 June 2010 to and including 30 June 2014 (**the assessment decisions**).
- [4] The Commissioner based the assessment decisions on evidence indicating that the land was being made available for the exclusive use of clients of the Woodwark Bay resort which was located on the land. For that reason it could not be said that the land was used solely for the business of agriculture, pasturage or dairy farming, as was required in order to qualify for the primary production deduction/exemption.
- [5] On 12 September 2014 the Trustee lodged an objection to the assessment decisions. Further correspondence between the parties ensued. On 22 September 2015 a different delegate of the Commissioner made a decision disallowing the objection and confirming the assessment decisions (**the objection decision**).
- [6] The Trustee had a right of appeal from the objection decision pursuant to s 69 of the *Taxation Administration Act* 2001 (Qld) (**the Administration Act**). That section relevantly provided (emphasis added):

69 Right of appeal or review

- (1) This section applies to a taxpayer if—
- (a) the taxpayer is dissatisfied with the commissioner's decision on the taxpayer's objection; and
 - (b) **the taxpayer has paid the whole of the amount of the tax and late payment interest payable under the assessment to which the decision relates.**
- (2) The taxpayer may, within 60 days after notice is given to the taxpayer of the commissioner's decision on the objection—
- (a) appeal to the Supreme Court; or

...

- [7] On 18 November 2015 the Trustee commenced Supreme Court proceeding 11701 of 2015 in which it sought a declaration that s 69(1)(b) of the *Administration Act* was beyond the legislative competence of the Queensland Parliament insofar as it purported to preclude the Supreme Court from reviewing the objection decision unless the Trustee first paid to the Commissioner the amounts the subject of the assessments to which the Commissioner's decision related.
- [8] On 20 November 2015 the Trustee commenced Supreme Court proceeding 11810 of 2015 by filing in the Supreme Court a purported appeal against the objection decision pursuant to s 69 of the *Administration Act*, but without paying the whole amount of the tax and late payment interest prior to appealing as was required by s 69(1)(b) for the financial years

ending 30 June 2011 to 30 June 2014. The Trustee accepts that if its constitutional argument in proceeding 11701 of 2015 is unsuccessful, then its appeal ought to be dismissed in respect of those years.

- [9] Although the only relief actually sought in proceeding 11701 of 2015 was the declaration in relation to s 69(1)(b), the Trustee by its written submissions advanced an alternative claim, namely a claim for a declaration that the objection decision was void for jurisdictional error. The contention was that the decision was unreasonable in the sense described in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. At the hearing before me, leave was sought and obtained to introduce claims for declaratory and alternative forms of relief in relation to the alleged jurisdictional error.
- [10] The Commissioner opposed the relief sought by the Trustee in each proceeding. The Attorney-General for the State of Queensland (**the Attorney-General**) intervened in support of the Commissioner's argument in respect of the constitutional issue raised by the Trustee.

The application for a declaration that s 69(1)(b) is constitutionally invalid

Is it necessary to determine the Trustee's constitutional argument?

[11] The elements of the Trustee's constitutional argument were as follows:

- (a) State Parliaments cannot confer judicial power without also conferring a proportionately regulated right of appeal to the State Supreme Court, that requirement arising so as to ensure that "there is but one stream of authority in Australia and it flows from [the High Court] throughout the nation" (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 138 per Gummow J.)
- (b) When, by relevant parts of the *Administration Act*, the Queensland Parliament conferred jurisdiction on the Commissioner to issue an assessment (or reassessment) or to determine an objection under that Act, it conferred judicial power on the Commissioner.
- (c) The Queensland Parliament had failed to confer a proportionately regulated right of appeal to the State Supreme Court from such decisions because of the burden on the exercise of the appeal right imposed by s 69(1)(b) of the *Administration Act*.

[12] The Commissioner and the Attorney-General contended that the attack on the constitutional validity of s 69(1)(b) of the *Administration Act* must fail, pointing out that in *Harvey v Commissioner of State Revenue* [2015] QCA 258, the Court of Appeal (McMurdo P, Philippides JA and Burns J concurring) considered the constitutional validity of s 69(1)(b) and concluded:

Although courts have long recognised the harshness of provisions such as s 69(1)(b), they are standard in taxation statutes and consistent with long standing legislative policy to protect the revenue both at a State and Federal level ...

[There is nothing] in the requirement in s 69(1)(b) that the taxpayer pay the assessment before a merits appeal or review can be entertained which offends the Kable principle. Section 69(1)(b) was not repugnant to or incompatible with the institutional integrity of Queensland courts resulting from their constitutional position in the Australian legal system which flows from Chapter III Commonwealth Constitution. This contention is baseless.¹

[13] The Trustee correctly contended that these remarks were *obiter dicta*. It invited me to consider an interesting and detailed argument which it developed in support of its principal proposition concerning the condition applicable to the manner in which a State parliament can confer judicial power; and then to consider the remaining elements of its argument.

¹ *Harvey v Commissioner of State Revenue* [2015] QCA 258 at [80].

- [14] The Attorney-General, however, contended that I should not proceed in that way. She submitted (and I accept) that as a general principle I should not decide a constitutional question unless I am satisfied that there exists a state of facts which make it necessary to decide that question in order to determine rights of the parties which are in actual controversy. The relevant authorities were summarized recently by Perry J in *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 in these terms:

Questions of constitutional validity should be addressed only when it is necessary “to do justice in the given case and to determine the rights of the parties”: *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ) (quoted with approval in *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 at 199 [141] (Hayne, Kiefel and Bell JJ); see also *Duncan v New South Wales* [2015] HCA 13; (2015) 255 CLR 388 at 410 [52] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ); and *AMF15 v Minister for Immigration and Border Protection* [2016] FCAFC 68 at [53] (Flick, Griffiths and Perry JJ). In other words, it is only when the Court “cannot do justice, in an action properly brought” without deciding on the constitutional validity of legislation that the Court is entitled to “take out this last weapon from [the Court’s] armoury”: *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 590 (Higgins J) (quoted with approval in *Re Patterson* at 473-474 [250]-[251] (Gummow and Hayne JJ)). Notwithstanding the applicant’s careful and considered arguments on the subject of invalidity, determinations of constitutional validity that would be no more than obiter are not appropriate: *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 347 (Isaacs ACJ), 356 (Starke J); *Re Patterson* at 474 [251] (Gummow and Hayne JJ).²

- [15] The Attorney-General contended, and I agree, that in this case the preferable course would be to determine first whether the relevant provisions of the *Administration Act* confer judicial power on the Commissioner. If they do not, then it would be unnecessary (and therefore inappropriate) to consider the correctness or application of the constitutional principle for which the Trustee contended.
- [16] Accordingly, the question I will address first is whether the relevant conferral of power on the Commissioner is a conferral of judicial power.

The legislative scheme

- [17] For the financial years ended 30 June 2011 to 30 June 2014,³ land tax was imposed on the taxable value of taxable land by virtue of s 6 of the *Land Tax Act 2010* (Qld).
- [18] Under that Act liability for land tax arises at midnight on 30 June immediately preceding the financial year (s 7). The person who is liable to pay the tax is the owner of the taxable land at the time the liability arose (s 8).
- [19] The taxable value of land is assessed by determining the lesser of the value of the land for the financial year, valued pursuant to the *Land Valuation Act 2010* (Qld), and the average value of the land across three financial years (if available): ss 16 to 18. Land tax is applied at the rate provided for in particular schedules to the *Land Tax Act 2010*: s 32.
- [20] Part 6 of the *Land Tax Act 2010* provides for a number of categories of “exempt land”. Exempt land is excluded from the definition of taxable land and is therefore not subject to land tax: s 9. Section 53 of the *Land Tax Act 2010* provides that land which is used solely for the business of agriculture, pasturage or dairy farming is exempt land.
- [21] Although the *Land Tax Act 2010* thus contains provisions which impose the liability and create a regime which by its own operation would render the amount of the liability calculable, the *Land Tax Act 2010* does not itself contain the provisions which set out the

² *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 at [194].

³ Although land tax for the financial year ended 30 June 2010 was imposed pursuant to the now repealed *Land Tax Act 1915* and the question as to whether the land in question was used solely for the business of agriculture, pasturage or dairy farming was relevant for the applicability of a deduction rather than an exemption, the legislative scheme was broadly similar in that financial year. No party contended that any different analysis applied in relation to the repealed Act.

mechanism by which tax is assessed, the time for payment is created, or a debt is established in relation to the tax.

- [22] Indeed, the *Land Tax Act* 2010 specifically recognizes that it does not contain all the provisions about land tax: s 4(1). It states that the *Administration Act* contains provisions dealing with the assessment of land tax, payment of tax, imposition of interest and penalty tax, objections and appeals against, and reviews of assessments of tax: s 4(2).
- [23] Consistently with that provision of the *Land Tax Act* 2010, the *Administration Act* provides that its main purpose is to make general provision about the administration and enforcement of revenue laws and that each revenue law must be read together with the *Administration Act* as if they together formed a single Act: s 3. The *Land Tax Act* 2010 is specifically nominated as a revenue law: s 6(4).
- [24] The *Administration Act* creates the office of the Commissioner and specifies that the Commissioner “is responsible for the administration and enforcement of the tax laws”: ss 7 and 8. Section 9 confers on the Commissioner the powers given under the tax laws and also the power to do all things necessary or convenient to be done for performing the Commissioner’s functions.
- [25] Section 10 permits the Commissioner to delegate her powers under a tax law to an appropriately qualified public service employee. Of course if the powers are exercised by a duly authorized delegate the decision is still regarded as a decision of the Commissioner: see s 27A(3D) of the *Acts Interpretation Act* 1954 (Qld).
- [26] Section 11 of the *Administration Act* relevantly provides that the Commissioner must make an assessment if the Commissioner is satisfied a taxpayer has a liability for tax and the taxpayer’s liability is not required or permitted, under a revenue law, to be made by self-assessment. Pursuant to s 27, the Commissioner may make an assessment on the available information the Commissioner considers relevant.
- [27] Subject to ss 21 and 22 (which set out limitation periods), s 17 confers on the Commissioner a general power to make a reassessment of a taxpayer’s liability for tax at any time. Section 27 also applies to reassessments.⁴ There is no contention that the reassessments relevant to the present case were not made within the applicable limitation periods.
- [28] Section 26 of the *Administration Act* (which also applies to both assessments and reassessments) provides:

26 Assessment notice to be given to taxpayer

- (1) The commissioner must give notice of the making of an assessment (an assessment notice) to the taxpayer.
- (2) The assessment notice must state—
 - (a) the amount of the tax assessed; and
 - (b) the date by which the tax must be paid; and
 - (c) the taxpayer’s right to object to the assessment; and
 - (d) the basis on which unpaid tax interest may accrue; and
 - (e) if assessed interest or penalty tax is payable under the notice—enough information to enable the taxpayer to ascertain the basis for the assessment of the interest or penalty tax; and
 - (f) ...

⁴ See the definition of “assessment” in schedule 2 of the *Administration Act*.

- (g) for a reassessment—the amount of the liability for tax under the previous assessment.

[29] The *Administration Act* contains a number of other provisions which operate by reference to the assessment notices issued by the Commissioner. Relevantly for present purposes:

- (a) Tax payable must be paid by the date stated in the assessment notice as the date by which the tax must be paid, that date being required to be at least 30 days after the assessment notice was given to the taxpayer: s 30.
- (b) Late payment interest is payable on the date it accrues: s 31.
- (c) Amounts payable must be paid to the Commissioner by cash or cheque or as prescribed: ss 29 and 45(1).
- (d) If the whole or part of an amount payable is not paid as required, then the unpaid amount is a debt payable to the State, and the Commissioner may recover the unpaid amount for the State in a court of competent jurisdiction: s 45(2).
- (e) Under s 132(1)(a), an assessment notice is conclusive evidence of the proper making of the assessment, and, under s 132(b)(ii), conclusive evidence that the ‘amount and all particulars of assessment are correct’ in proceedings other than an appeal or review of a decision on an objection.

[30] The *Administration Act* provides a method of internal review, by which the Commissioner considers and determines objections to the Commissioner’s own assessment decisions. Thus:

- (a) A taxpayer who is dissatisfied with an original assessment or a reassessment may object pursuant to s 63 of the *Administration Act*.
- (b) An objection against an assessment may be made on any grounds: s 64.
- (c) The objector must set out the objection in writing, with detail of the grounds relied upon, and lodge it with copies of all relevant material within 60 days after the assessment notice was given: s 65(1).
- (d) The objector has the onus of proving the objector’s case: s 66.
- (e) The Commissioner must allow the objection, completely or partly, or disallow it, and give written notice to the objector of the Commissioner’s reasons for decision: ss 67 and 68.
- (f) If the decision is to allow the objection in whole or in part, then the Commissioner must make any reassessment necessary to give effect to the decision: s 19(1).

[31] Section 77 provides that the relevant parts of *Judicial Review Act* 1991 do not apply to assessments or to the Commissioner’s decision to disallow, in whole or in part, an objection against an assessment. The *Administration Act* specifies only two avenues for a taxpayer dissatisfied with the Commissioner’s decision on a taxpayer’s objection:

- (a) First, if the taxpayer has paid the whole of the amount of tax (and any late payment interest) under the assessment to which the decision relates, the taxpayer may appeal to the Supreme Court: ss 69(1)(b) and 69(2)(a).
- (b) Second, and, again, if the taxpayer has paid the whole of the amount of tax (and any late payment interest) under the assessment to which the decision relates, the taxpayer may apply to the Queensland Civil and Administrative Review Tribunal for review: ss 69(1)(b) and 69(2)(b).

- [32] One other possibility which is open to such a dissatisfied taxpayer is an application to the Supreme Court for judicial review in exercise of its supervisory jurisdiction over inferior courts or tribunals in cases of jurisdictional error. I will return to that possible course.
- [33] If a court or QCAT makes a decision about a taxpayer's tax law liability, then the Commissioner must make any reassessment necessary to give effect to the decision: s 19(1).

Analysis of whether the conferral of power is the conferral of judicial power

- [34] The main purpose of the *Administration Act*, and the Commissioner's principal function, are the executive functions of administration and enforcement of the tax laws, including the *Land Tax Act 2010*.
- [35] The fact that the Commissioner makes assessments by the application of legal criteria to the facts and circumstances of a particular case does not of itself mean that what is involved is an exercise of judicial power. Proceeding in that way is also characteristic of many administrative functions: see *Luton v Lessels* (2002) 210 CLR 333 at [21] per Gleeson CJ (with whom McHugh J agreed); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 188-189.
- [36] The Trustee correctly submitted that one factor that is often considered critical is whether the decision is one that determines existing rights and duties as they already stand, or whether the decision is merely the ascertainment of a fact which the legislature has adopted as the standard upon which its will operates to create rights and duties: see *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422 per Isaacs J at 435.
- [37] The Trustee submitted that the Commissioner's assessment could not be so regarded because the liability was created by the *Land Tax Act 2010* and the decision of the Commissioner must be regarded as a decision about whether the existing right or duty actually exists.
- [38] I reject this argument.
- [39] The proposition that the *Land Tax Act 2010* creates a liability is only part of the story: see [21] to [23] above. If the two statutes are read as a whole (as both statutes contemplate should be done) it is plain that it is the assessment by the Commissioner under the *Administration Act* which quantifies the amount owed, fixes the time by which it must be paid, and establishes the interest which must be paid. The assessment by the Commissioner, and whether it is paid within the time for which the assessment provides, together constitute the factum on which s 45(2) of the *Assessment Act* operates, thereby creating new rights and obligation which are to govern the future (i.e. the debt payable to the State, which the Commissioner may recover for the State).⁵ This factor strongly supports the conclusion that the power to make an assessment decision is not judicial power.
- [40] Other facts which support that conclusion are:
- (a) The Commissioner's assessment within jurisdiction is binding and authoritative (because it constitutes conclusive evidence of the matters referred to in s 132) but it is not final, because it may be altered by an objection decision or by the Court or QCAT. Although referred to as an appeal, in fact when an appeal is lodged and considered by the Court, it will do so in an exercise of original and not appellate

⁵ Cf *Luton v Lessels* (2002) 210 CLR 333 at [22], [67].

jurisdiction. The appeal proceeding would be the first application of judicial power to the question.⁶

- (b) The Commissioner is not given power to make a decision enforceable by execution. If the State wishes to recover the debt because the requisite amount has not been paid to the Commissioner within time, the Commissioner must (on the State's behalf) have recourse to the Courts in the same way as any other debt is enforced.⁷ That which is enforceable is the debt which came into being in the way described at [39] above.

- [41] The Trustee contended that a factor which pointed the other way was the fact that the power to issue reassessment was the subject of a limitation period. I agree with the Commissioner's submission that this was a factor which was equivocal at best. The Trustee also pointed out that there was no discretion exercised in the determination of whether a part of land was used "solely for the business of agriculture, pasturage or dairy" and whether it is owned by the one of the types of people set out in s 53. However, as I noted at [35] above, the application of legal criteria to the facts and circumstances of a case does not of itself mean that the power exercised is judicial power.
- [42] In my view the provisions of the *Administration Act* which confer on the Commissioner the power to make assessments of land tax do not confer judicial power on the Commissioner.
- [43] Should any different view be taken of the conferral of power to make objection decisions? I think not. The objection decision is a review by the Commissioner of a decision made by the Commissioner. The objection decision should be regarded as merely an internal review of the original decision, but not different in character to the original decision. The Trustee submitted that the fact that s 66 provides that an objector "has the onus of proving the objector's case", was suggestive that the power is judicial. I am unable to regard it as such. The language used merely reflects the reality that the taxpayer moving the internal review has the onus of demonstrating the need for the change the taxpayer seeks to have made.
- [44] It follows that the provisions of the *Administration Act* which confer on the Commissioner the power to determine objections to the Commissioner's own assessment decisions do not confer judicial power on the Commissioner.

Conclusion

- [45] Because there is no conferral of judicial power on the Commissioner, it is unnecessary to consider the correctness or application of the constitutional principle for which the Trustee contended. The Trustee's application for a declaration that s 69(1)(b) was beyond the legislative competence of the Queensland Parliament should be dismissed. It follows that the Trustee's appeal to the Supreme Court from the objection decision must also be dismissed.

The application for relief on the basis of alleged jurisdictional error

The jurisdiction to review

- [46] It was common ground before me that the Court retained its ordinary supervisory jurisdiction to grant relief for jurisdictional error made by the Commissioner in the exercise of her power to make a decision on a taxpayer's objection. The Trustee's written submissions in reply (at [18] to [22]) recognized the existence of some uncertainty as to the forms of relief available for jurisdictional error. However, the Trustee submitted, and the Commissioner agreed, that if I was persuaded of the existence of the alleged jurisdictional error, I had jurisdiction to grant relief by way of declaration: cf *Sierra Property Qld Pty*

⁶ *Luton v Lessels* (2002) 210 CLR 333 at [74].

⁷ *Luton v Lessels* (2002) 210 CLR 333 at [23], [67].

Ltd v National Construction Management Pty Ltd [2016] QSC 108 per Jackson J at [50], citing *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.

The objection decision and the relevant material before the Commissioner

- [47] As I have previously recorded, the initial reassessments were issued by the Commissioner's letters of 30 June 2014 and 31 June 2014. By the covering letters the Commissioner advised that she had determined that the relevant blocks of land held by the Trustee were not eligible for the deduction/exemption applicable in respect of land used solely for primary production.
- [48] On 12 September 2014, the Trustee lodged one objection dealing with all the reassessments. By that objection, the Trustee sought to satisfy the Commissioner that the Trustee was eligible for a full exemption as provided for under s 53 of the *Land Tax Act* 2010 and, where applicable, s 11 of the previous Act.
- [49] It is appropriate first to consider the relevant statutory provision in a little more detail. It will suffice to do so by reference only to the exemption specified in s 53 of the *Land Tax Act* 2010, because the deduction specified in s 11 of the previous Act was in similar terms.
- [50] Section 53 of the *Land Tax Act* 2010 provided:

53 Land used for primary production

- (1) This section applies to land, or a part of land, that is used solely for the business of agriculture, pasturage or dairy farming.
- (2) The land, or the part of the land, is exempt land if it is owned by any of the following—
 - (a) an individual, other than a trustee or absentee;
 - (b) a trustee of a trust, if all beneficiaries of the trust are persons mentioned in paragraph (a), (c) or (d);
 - (c) a relevant proprietary company;
 - (d) a charitable institution.
- (3) For this section, if part of the land is exempt land, the commissioner must apportion the taxable value of the land between use for a purpose mentioned in subsection (1) and use for any other purpose.
- (4) This section does not apply to land owned by the manager of a time-sharing scheme.
- (5) In this section—

beneficiary includes a beneficiary in the first instance and a beneficiary through a series of trusts.

exempt foreign company see the Corporations Act, section 9.

proprietary company see the Corporations Act, section 9.

relevant proprietary company means a proprietary company—

- (a) that is not an exempt foreign company; and
- (b) in which no share or interest is held, whether directly or through interposed companies or trusts, by a body corporate other than a proprietary company that is not an exempt foreign company

- [51] In order for the exemption to apply in relation to the Trustee, the following conditions would have to be met:
- (a) as the land was owned by a trustee of a trust, each of the beneficiaries of the Trust must be either:
 - (i) an individual other than a trustee or absentee;

- (ii) a relevant proprietary company; or
- (iii) a charitable institution;
- (b) the land or the part of the land must be used for the business of agriculture, pasturage or dairy farming (the primary production business); and
- (c) the primary production business must be the sole use of the land or the part of the land.

[52] Clearly if any of the beneficiaries of the trust was an individual, it would be necessary that the individual be “other than an absentee” for the exemption to apply. “Absentee” was a term defined in s 31 as follows:

31 Meaning of absentee

- (1) An absentee is a person who does not ordinarily reside in Australia.
- (2) An absentee includes a person who—
 - (a) cannot satisfy the commissioner that he or she ordinarily resides in Australia; and
 - (b) when ownership of the person’s land is decided for this Act—
 - (i) is absent from Australia; or
 - (ii) has been absent from Australia for more than half of the 12 month period ending when the ownership is decided.
- (3) An absentee does not include—
 - (a) a public officer of the Commonwealth or of a State who is absent in the performance of the officer’s duty; or
 - (b) an individual (the employee) employed by an employer in Australia for a continuous period of 1 year immediately before the employee’s absence, if the commissioner is satisfied that—
 - (i) the employee is absent in the performance of the employee’s duty for his or her employer; and
 - (ii) the employee’s absence will not be longer than 5 years.
- (4) Subsection (3)(b) stops applying, for that absence, as soon as it is longer than 5 years.
- (5) In this section—

Australia includes an external Territory.

[53] On 11 December 2014, the Commissioner and the Trustee reached an agreement that the Trustee would submit further material in support of the objection and the Commissioner would subsequently issue a letter setting out her preliminary findings and conclusions, and then the Trustee would have an opportunity to respond before the objection was determined.

[54] The Trustee provided further information to the Commissioner:

- (a) by email of 3 February 2015; and
- (b) by email of 10 March 2015.

[55] By letter dated 22 May 2015, the Commissioner set out her preliminary findings and the Trustee was invited to provide clarification and further information in support of its objection. Amongst other things, the Commissioner:

- (a) advised the Trustee of the eligibility criteria identified at [51] above;
- (b) requested copies of the trust deed of the Whitsunday Trust and any deeds of amendment; and

- (c) requested that the Trustee provide "... a list of the Trust's beneficiaries as at each relevant 30 June (i.e. from 2009 to 2013), if it is not clearly ascertainable from the trust deed".
- [56] The Trustee lodged further information material in support of its objection by email on 22 July 2015. Amongst other things, the Trustee responded to the request for the trust deed and information about the beneficiaries. The letter noted that there had been no previous issues raised concerning the Trustee's eligibility for exemption. The email then provided a copy of the trust deed, but, curiously, despite acknowledging the request for information about the beneficiaries, did not provide any. Instead the email only advised the Commissioner that "the corporate trustee of the Trust has been the same since the Trust was formed in November 1997".
- [57] By letter dated 14 August 2015, the Commissioner requested further clarification. The letter solely addressed the question of the eligibility criteria. The Commissioner made these points:
- (a) The first schedule to the trust deed for the Whitsunday Trust identified that the initial unitholder of units in the trust was "Lifecell Pty Ltd ... as trustee of the Jodee Rich Family Trust". Given that no register of unit holders was provided, the Commissioner considered that the Trustee was advising that the only beneficiary of the trust for the period in question was Lifecell Pty Ltd as trustee of the Jodee Rich Family Trust.
 - (b) As the Commissioner's 22 May 2015 letter had advised, one of the conditions of eligibility was that all beneficiaries of the Whitsunday Trust had to be of a particular type. The Commissioner again drew the Trustee's attention to the specific terms of the legislation and the particular requirements of the definitions, including that "beneficiary" included beneficiary at first instance and through a series of trusts.
 - (c) Upon the information submitted to date the Commissioner was not satisfied that all the beneficiaries of the Whitsunday Trust were of a type entitling the Trustee to the deduction/exemption.
 - (d) The Commissioner advised (emphasis added):
 11. As the beneficiary of the Whitsunday Trust is Lifecell as trustee for the JRF Trust, **evidence must be provided to establish the beneficiaries of the JRF Trust and whether they are of a type to meet the condition in s.11(5) of the repealed Act and s.53(2) of the Land Tax Act.** If a beneficiary of the JRF Trust includes a trustee of another trust, then the beneficiaries of that other trust must also be of a permitted type. This tracing continues as necessary.
 12. In the circumstances, **please provide evidence to establish that all the 'beneficiaries' of the Whitsunday Trust, at first instance and through a series of trusts, are either an individual that is not an absentee, a relevant proprietary company or an exempt charitable institution/charitable institution. The evidence will need to include:**
 - trust deed and list of beneficiaries as at 30 June 2009 to 2013 of the JRF Trust
 - trust deed and list of beneficiaries of any other trust as at 30 June 2009 to 2013, that is a 'beneficiary' of the Whitsunday Trust through a series of trusts and
 - **confirmation with supporting documentation that each beneficiary is of a permitted type.**
- [58] The Trustee responded via email on 21 August 2015. That email:
- (a) attached the register of unitholders for the Whitsunday Trust which named as the two unit holders, Tasman Pacific Pty Ltd, and Rushta Pty Ltd as trustee for The Maxine Rich Family Trust;

- (b) confirmed that Tasman Pacific Pty Ltd was a “relevant proprietary company” and provided a company search as supporting documentary evidence;
- (c) stated in relation to the other unit holder:

The Category A beneficiary of the Maxine Rich Family Trust is Maxine Nicole Rich (Ms. Rich). Ms. Rich is an Australian resident and has resided in Australia for the past fifty two years. Ms. Rich has never been an absentee as defined in section 3A(2) of the Repealed Act and section 31(2) of the Land Tax Act. I attach a rates notice from Woollahra Municipal Council as Appendix C. This rates notice is proof of Ms. Rich's joint-ownership, in conjunction with Mr. Rich of a residence located at [address not reproduced].

The Maxine Rich Family Trust has not made any distributions from 2009 to 2015. Prior to 2009 the Trust made several distributions to a wholly owned Australian proprietary company.

I attach a copy of the Trust Deed for the Maxine Rich Family Trust as supporting documentary evidence. The Trust Deed for the Maxine Rich Family Trust is attached as Appendix D.

[59] The relevant clauses of the Maxine Rich Family Trust were as follows:

- (a) by clause 3.1:

Until the Vesting Date the Trustee shall hold the income of the Trust Fund derived during each respective Year of Income upon the following trusts:

- (a) if, on the last day of that Year of Income there be one or more Nominated Beneficiaries then living or in existence, then to pay the same to or apply the same for the benefit of such Nominated Beneficiary, if there be but one, and, if there be more than one, to pay or apply the same to or for the benefit of such one or more to the exclusion of any other or others in such shares and proportions as the Trustee may before the expiration of that Year of Income determine. Any determination by the Trustee under this sub-clause 3.1 shall be made in writing placed with the Trust papers and its effect recorded in the Trust books. If the Trustee fails to make any such determination then it shall hold such income upon trust for the Nominated Beneficiaries equally among them; or
- (b) if, on the last day of the Year of Income there be no Nominated Beneficiary then to pay or apply the same to or for the benefit of such one or more to the exclusion of the other or others of the Eligible Beneficiaries living or in existence on the last day of that Year of Income and in such shares and proportions as the Trustee may before the expiration of that Year of Income determine. Any determination by the Trustee under this sub-clause 3.1 shall be made in writing placed with the Trust papers and its effect recorded in the Trust books. If the Trustee fails to make any such determination then it shall hold such income:
 - (i) upon trust for such of Category A of the Eligible Beneficiaries as are living or are in existence on the last day of such Year of Income if more than one then equally among them;
 - (ii) if there be no such persons taking under (i) above then upon trust for such of Category B of the Eligible Beneficiaries as are living or are in existence on the last day of such Year of Income if more than one equally among them; and

[and so on for Categories D-G]

- (b) by the definitions in clause 1:

“**Eligible Beneficiaries**” means

CATEGORY A – Maxine Rich

...

“**Nominated Beneficiaries**” means such person or persons being Eligible Beneficiaries as may for the time being have been declared by the Trustee to be a nominated beneficiary. Such declaration shall be one under the hand of the Trustee (and shall be kept with the Trust papers) and may declare any person or persons to be a nominated beneficiary for a stipulated time, or until such nomination shall be revoked. The Trustee may revoke any such nomination at any time whether the same may have been expressed to be for a stipulated period or until revocation and may at any time declare new or additional nominated beneficiaries;

[60] Thus it may be observed about the Maxine Rich Family Trust:

- (a) For any year of income Rushta Pty Ltd held the income of the Trust Fund for the benefit of a Nominated Beneficiary, if one existed (clause 3.1(a)). A “Nominated Beneficiary” was an Eligible Beneficiary who had been declared by the Trustee to be a Nominated Beneficiary (clause 1.1).
- (b) If there was no Nominated Beneficiary, then for any year of income Rushta Pty Ltd held the income for the benefit of any Eligible Beneficiary that Rushta Pty Ltd determined (clause 3.1(b)).
- (c) But if there was:
 - (i) no Nominated Beneficiary; and
 - (ii) Rushta Pty Ltd had failed to make any determination,

then Rushta Pty Ltd was to hold the income on trust for such Category A Eligible Beneficiaries as were living or in existence on the last day of the year of income, and if there were no such person in existence, then the income would be held on trust for such Category B Eligible Beneficiaries as may be in existence, and so on, until the Category G Eligible Beneficiaries were reached (clause 3.1(b)).

[61] The objection decision was made on 22 September 2015. It was made by the Commissioner’s delegate, the Senior Review Officer, Administrative Review, on behalf of the Commissioner. The relevant findings on the question whether the beneficiaries were of the type necessary to establish eligibility for the deduction/exemption were as follows:

- 52. For the reasons set out below, the Commissioner is not satisfied that the Trustee falls within s.11(5)(b) of the repealed Act and s.53(2)(b) of the Land Tax Act.
- 53. As the land owner (the Trustee) is a trustee of a trust, under s.11(5)(b) of the repealed Act and s.53(2)(b) of the Land Tax Act, the beneficiaries of the trust must not be of a type excluded in s.11(5)(b) of the repealed Act and are of a type specified in s.53(2)(b) of the Land Tax Act. That is, the beneficiaries must be an individual that is not an absentee, a relevant proprietary company or an exempt charitable institution/charitable institution.
- 54. 'Absentee', 'relevant proprietary company' and 'exempt charitable institution' are defined respectively in ss.3A, 2 and 13A of the repealed Act.
- 55. 'Absentee' and 'charitable institution' are defined respectively in s.31 and Schedule 4 of the Land Tax Act. 'Relevant proprietary company' is defined within s.53(5).
- 56. The Trust points out in paragraph 19 of the Objection that the Commissioner raised no issues as to the Trustee's qualification, as a trustee of a trust, to claim the deduction/exemption. The Commissioner acknowledges that during the investigation, it was not considered whether the provisions of s.11(5)(b) of the repealed Act and s.53(2)(b) of the Land Tax Act were satisfied. Consequently, the Trust was asked to submit further information.
- 57. In the July response, a copy of the Deed of Trust for the Trust dated 14 November 1997 (Trust Deed) was provided as requested in the May 2015 letter.
- 58. The First Schedule of the Trust Deed provides that the initial unitholder of the initial 20 issued units is Lifecell Pty Ltd as trustee for the Jodee Rich Family Trust (JRF Trust).
- 59. In the August 2015 letter, noting that a beneficiary is defined in the repealed Act and the Land Tax Act to include a beneficiary in the first instance and through a series of trusts, the Commissioner requested clarification and further information to establish whether all the beneficiaries of the Trust are an individual that is not an absentee, a relevant proprietary company or an exempt charitable institution/charitable institution.
- 60. In response, the Trust has advised in the August response that as at 30 June 2009, and unchanged since, the Trust has 10,679,885 issued units held by the following beneficiaries:

Tasman Pacific Pty Ltd	8,771,927
Rushta Pty Ltd ATF Maxine Rich Family Trust	<u>1,907,958</u>

61. The Trust submits that Tasman Pacific Pty Ltd is a 'relevant proprietary company' as defined in s.2 of the repealed Act and s.53(5) of the Land Tax Act, and in support has provided an ASIC company search. Upon review, the Commissioner accepts this submission.
62. With respect to Rushta Pty Ltd ATF Maxine Rich Family Trust (MRF Trust), it must be established that all the beneficiaries of the MRF Trust are an individual that is not an absentee, a relevant proprietary company or an exempt charitable institution/charitable institution.
63. The Trust has provided a copy of the trust deed of the MRF Trust and states that no distributions have been made from the MRF Trust from 2009 to 2015, and as such, for those years, there has been no 'beneficiary' as defined by s.3F of the repealed Act and s.24 of the Land Tax Act. These sections provide that the beneficiaries of a discretionary trust when a liability of land arises are the persons in who favour a power of appointment has been exercised during the 12 month period ending when the liability arises.
64. Where the power of appointment has not been exercised during the 12 months prior to the relevant 30 June, it is the Commissioner's position that the beneficiaries are the default beneficiaries referred to in the default clause of the trust deed. Where the trust deed contains no express default clause, any class of beneficiary given preference under the deed may be considered to be default beneficiaries.
65. Clauses 3.1 (a) and (b) of the trust deed of the MRF Trust stipulates who are the default beneficiaries in the circumstances that there are 'Nominated Beneficiaries' or no 'Nominated Beneficiaries'. 'Nominated Beneficiaries' is defined in clause 1.1 of the trust deed to mean 'Eligible Beneficiaries' that have been declared by the trustee to be a nominated beneficiary. 'Eligible Beneficiaries' is defined in clause 1.1 of the trust deed and particular beneficiaries are identified and listed in 'Category A' to 'Category G'.
66. No information has been provided to the Commissioner as to whether there are any 'Nominated Beneficiaries' and if yes, evidence that the beneficiary is an individual that is not an absentee, a relevant proprietary company or an exempt charitable institution/charitable institution. Further, in the circumstance that there are no 'Nominated Beneficiaries', evidence that all of the 'Eligible Beneficiaries' are either an individual that is not an absentee, a relevant proprietary company or an exempt charitable institution/charitable institution, has been provided.
67. Accordingly, in the circumstances, the Commissioner is not satisfied that the Trustee falls within s.11(5)(b) of the repealed Act and s.53(2)(b) of the Land Tax Act. Under s.66 of the TAA, the Trust has the onus of proving its objection.
68. By way of further comment, the Commissioner notes that the Trust has submitted that Maxine Rich (Category A in the definition of 'Eligible Beneficiaries') is an Australian resident who has resided in Australia for the past 52 years, and she has never been an 'absentee' as defined in s.3A(2) of the repealed Act and s.31(2) of the Land Tax Act. In support of this submission, a copy of a rates notice for her residence in Vaucluse, NSW has been provided.
69. On the evidence provided, the Commissioner is not satisfied that Ms Rich is not an absentee as defined. To establish that Ms Rich is not an absentee as at each relevant 30 June, further evidence confirming that Ms Rich was not absent on 30 June or had not been absent for more than half of the previous year would be required.

The alleged jurisdictional error

[62] The Trustee submitted that:

- (a) the Commissioner's power to determine objections is subject to a condition that the Commissioner act reasonably in exercising that power; and
- (b) the findings referred to above reveal jurisdictional error because they are unreasonable in the sense discussed in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[63] The Commissioner did not resist the proposition that the exercise of power to determine an objection was subject to the implied condition of reasonableness.

[64] In *Francis v Crime and Corruption Commission* [2015] QCA 218 Fraser JA observed (at [33], Morrison JA and Mullins J agreeing) in relation to the unreasonableness ground of judicial review that:

- (a) it involved a stringent test, and was rarely established;
- (b) it did not sanction a review on the merits;
- (c) it was not made out merely if the court disagrees with an evaluative decision or with the weight attributed to a factor taken into account in the decision;
- (d) in *Flegg v Crime and Misconduct Commission* [2014] QCA 42 at [3] and [16]:
 - (i) the President had expressed the test, with reference to *Minister for Immigration and Citizenship v Li*, as being “whether the ... decision was so unreasonable that it lacked an evident and intelligible justification when all relevant matters were considered”; and
 - (ii) Gotterson JA (Margaret Wilson J agreeing) noted that the *Wednesbury* principles did not allow a challenge to a decision “on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the [appellate tribunal] disagrees”.
- (e) the court’s task was to examine the reasoning of the impugned decision to determine whether it was a decision that could be justified even though “... reasonable minds could reasonably differ” or whether the decision was so unreasonable that it lacked an evident and intelligible justification.

[65] And, in *Minister for Immigration and Border Protection v SZVFW* [2017] FCAFC 33, Griffiths, Kerr and Farrell JJ observed at [38]:

The following general principles may be extracted from the three leading authorities [of *Li*, *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11] (further general guidance is provided by the Full Court’s decision in *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28):

- there is a legal presumption that a statutory discretionary power must be exercised reasonably in the legal sense of that word (*Li* at [63] per Hayne, Kiefel and Bell JJ; *Singh* at [43] per Allsop CJ, Robertson and Mortimer JJ; *Stretton* at [4] per Allsop CJ and at [53] per Griffiths J);
- nevertheless, there is an area within which a decision-maker has a genuinely free discretion, which area is bounded by the standard of legal reasonableness (*Li* at [66]; *Stretton* at [56] per Griffiths J);
- the standard of legal reasonableness does not involve a court substituting its view as to how a discretion should be exercised for that of a decision-maker (*Li* at [66]; *Stretton* at [8] per Allsop CJ and [76] per Griffiths J);
- the legal standard of reasonableness is not limited to what is in effect an irrational, if not bizarre, decision and an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified (*Li* at [68]);
- in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions (*Li* at [74]; *Stretton* at [62] and [70] per Griffiths J);
- legal unreasonableness “is invariably fact dependent” and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases (*Singh* at [48]; *Stretton* at [10] per Allsop CJ and at [61] per Griffiths J);
- the concept of legal unreasonableness can be “outcome focused”, such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error (*Singh* at [44]; *Stretton* at [12]-[13] per Allsop CJ);

- where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification (*Singh* at [45]-[47]).

[66] The Trustee contended that the Commissioner’s findings at [66] to [69] of the Objection Decision were unreasonable in the relevant sense because:

- (a) there was no evidence before the Commissioner to suggest that anybody had been made a “Nominated Beneficiary”;
- (b) there was no evidence to suggest that Ms Rich resided anywhere other than Australia;
- (c) there was evidence that Ms Rich resided in Australia;
- (d) there was evidence from which it would be inferred that no person had ever been made a “Nominated Beneficiary”;
- (e) when regard was had to the evidence which was before the Commissioner (namely the email referred to at [58] above and the rates notice), it is not possible to comprehend how the Commissioner reached the decision that she did;
- (f) where the evidence is all one way, and there is no evident and intelligible explanation for why that evidence is insufficient to establish the finding sought, then a failure to make such a finding will be unreasonable and result in jurisdictional error.

[67] I reject this submission. I make the following observations.

[68] First, it must have been obvious from the Commissioner’s letter dated 22 May 2015 referred to at [55] above, that the only point of her requesting information about the beneficiaries of the trust was to enable proper consideration of the eligibility criteria and, in particular, s 53(2) of the *Land Tax Act* 2010.

[69] Second, the Trustee’s email response on 22 July 2015 evidently realized that. But it suffered from the flaw which I pointed out at [56] above, namely it did not provide the requisite information.

[70] Third, the Commissioner’s letter dated 14 August 2015, discussed at [57] above, could not have been clearer in relation to the Commissioner’s concerns. The repeated request for evidence that the beneficiaries were of the type necessary to establish eligibility, and the specification that the necessary evidence would need to include confirmation “with supporting documentation”, were both notable and unambiguous.

[71] Fourth, the Trustee’s response via email on 21 August 2015 contained only the information identified at [58] above. As to this:

- (a) The provision of information about Ms Rich as recorded at [58](c) above would only be relevant information if:
 - (i) Rushta Pty Ltd had made no declaration of a Nominated Beneficiary; and
 - (ii) Rushta Pty Ltd had failed to make any determination, so that the default position operated and Ms Rich, as the Category A Eligible Beneficiary, would therefore be the only beneficiary.
- (b) It may be observed that the Trustee’s letter neither confirmed those facts nor provided any supporting documentation concerning them. It simply made the statement about Ms Rich and said only that no distribution had in fact been made. This was a glaring and unexplained failure to provide what had been requested.
- (c) The Trustee’s response revealed that the Trustee must have been conscious of the fact that if any of the beneficiaries of the trust was an individual, it would be

necessary that the individual be “other than an absentee” for the criteria to be met. The letter did confirm that Ms Rich had never been an absentee because she had been resident in Australia, but provided no supporting documentation for that proposition, the rates notice being only evidence of ownership not of residence at the times and for the periods made material by the statutory definitions. This too was a glaring and unexplained failure to provide what had been requested.

- [72] In my view the Commissioner’s decision was carefully reasoned and the view that the delegate came to did not lack an evident and intelligible justification. To the contrary, the evident justification for the decision was that the Trustee simply had not provided evidence of the matters necessary to discharge the onus which the *Administration Act* imposed on it. This conclusion was not unreasonable. Indeed, the Commissioner was justified in not drawing inferences in favour of the Trustee and in not accepting the mere assertion in correspondence concerning the residence question, given that the failure to provide evidence occurred in the face of two requests by the Commissioner, the second of which:
- (a) fairly and carefully drew the Trustee’s attention to the matters of which the Commissioner would need to be satisfied;
 - (b) requested evidence which established the requisite eligibility criteria; and
 - (c) specifically requested both confirmation **and** supporting documentation.

Conclusion

- [73] Jurisdictional error is not made out. No occasion arises to grant any of the relief sought in that regard.

The orders which should be made

- [74] The amended application in proceeding 11701 of 2015 should be dismissed.
- [75] Save insofar as it challenges the Commissioner’s decision concerning the appellant’s objection to the reassessment of land tax in respect of the financial year ending 30 June 2010, the appeal in proceeding 11810 of 2015 should be dismissed.
- [76] I will hear the parties on costs.