

# SUPREME COURT OF QUEENSLAND

CITATION: *WB Rural Pty Limited v Commissioner of State Revenue & Anor* [2018] QCA 255

PARTIES: **WB RURAL PTY LIMITED AS TRUSTEE FOR THE WHITSUNDAY TRUST**  
**ACN 067 848 499**  
**(appellant)**  
v  
**COMMISSIONER OF STATE REVENUE**  
(first respondent)  
**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**  
(second respondent)

FILE NO/S: Appeal No 7697 of 2017  
SC No 11701 of 2015  
SC No 11810 of 2015

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2017] QSC 141 (Bond J)

DELIVERED ON: 8 October 2018

DELIVERED AT: Brisbane

HEARING DATE: 4 April 2018

JUDGES: Sofronoff P and Philippides JA and Douglas J

ORDERS

- 1. Leave to amend notice of appeal refused.**
- 2. Appeal dismissed.**
- 3. Appellant to pay respondents' costs.**

CATCHWORDS: CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – RESTRICTION ON COMMONWEALTH AND STATE LEGISLATION – where the first respondent issued reassessment notices under the *Land Tax Act 2010* (Qld) in respect of property owned by the appellant – where the appellant lodged an objection to the reassessments – where the objects were disallowed and the assessments were confirmed by the first respondent – where the appellant submitted that the power exercised by the first respondent in making assessments and determining objections to such assessments by the making of a reassessment is an exercise of judicial power – whether the exercise of the first respondent's power involves the creation of new rights and duties, or the determination of existing

rights and duties

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – RESTRICTION ON COMMONWEALTH AND STATE LEGISLATION – where the appellant seeks leave to amend the notice of appeal by addition of a new ground, that s 69(1)(b) *Taxation Administration Act* 2001 (Qld) is invalid because it confers a right of appeal to the Supreme Court only where the amount of disputed tax has already been paid to the first respondent – where this submission was not argued below – where there is no authority for the proposition that a statutory right of appeal from an administrative decision cannot be condition upon the fulfilment of the duty created by that decision – whether leave to amend the notice of appeal by addition of this ground should be granted

*Land Tax Act* 2010 (Qld), s 4, s 6, s 7, s 8  
*Taxation Administration Act* 2001 (Qld), s 69

*Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; [1926] HCA 58, cited

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

*Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1, cited

*Kruger v The Commonwealth* (1997) 190 CLR 1; [1997] HCA 27, cited

*Luton v Lessels* (2002) 210 CLR 333; [2002] HCA 13, cited  
*Nicholas v The Queen* (1998) 193 CLR 173; [1998] HCA 9, cited

COUNSEL: B Walker SC, with M May, for the appellant  
 T Sullivan QC, with E Hoiberg, for the first respondent  
 P Dunning QC SG, with A D Keyes, for the second respondents

SOLICITORS: Cooper Grace Ward Lawyers for the appellant  
 Crown Law for the first and second respondents

- [1] **SOFRONOFF P:** The applicant owns 1,400 hectares of land in the Whitsunday region. In 2014 the respondent issued reassessment notices under the *Land Tax Act* 2010 (Qld) which had the effect of substantially increasing the incidence of the Land Tax that was payable.<sup>1</sup> On 12 September 2014 the applicant lodged an objection to those reassessments. The objections were disallowed and the assessments were confirmed.
- [2] There is a right of appeal from such a decision disallowing an objection. Section 69 of the *Taxation Administration Act* 2001 (Qld) provides, relevantly:

---

<sup>1</sup> The reassessments related to liabilities for the financial years ended 30 June 2010 to 30 June 2014. Those assessments were made under successive statutes, namely, the *Land Tax Act* 1915 and the *Land Tax Act* 2010. However, nothing turns upon the change in legislation and I will only consider the 2010 Act.

**“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; ...”

- [3] On 18 November 2015, by proceeding 11701 of 2015, the applicant sought a declaration that s 69(1)(b) of the *Taxation Administration Act* 2001 was beyond the legislative competence of the Queensland Parliament insofar as it purported to preclude the Supreme Court from reviewing the objection decision without the applicant first having paid the amounts assessed. On 20 November 2015, no doubt in order to preserve its position, the applicant commenced an appeal in the Supreme Court by way of proceeding 11810 of 2015. However, the amount of tax payable was not paid before that appeal was commenced.
- [4] At first instance the two proceedings were heard together. It was common ground that if the applicant failed to succeed in proceeding 11701 of 2015 then the appeal constituted by proceeding 11810 of 2015 would also be unsuccessful.
- [5] The applicant’s argument for invalidity ran as follows:
  - (a) By certain provisions of the *Taxation Administration Act* 2001, conferring power upon the Commissioner to make assessments and to determine objections to such assessments, the Queensland Parliament conferred judicial power on the Commissioner;
  - (b) A State Parliament cannot confer judicial power without also conferring a right of appeal to the State Supreme Court;
  - (c) The effect of the requirement conditioning the right of appeal upon the prior payment of the assessed tax is that Parliament has not provided a sufficient right of appeal;
  - (d) As a consequence s 69 is invalid.
- [6] At first instance Bond J held that the appellant’s argument failed at the first hurdle. His Honour concluded that the Commissioner’s powers to make the relevant decisions were not judicial powers. Accordingly, his Honour dismissed both proceedings.
- [7] The appellant now appeals against that decision. In my respectful opinion Bond J was right for the following reasons.
- [8] It is necessary to refer to other relevant provisions of the statutory scheme of which s 69 of the *Taxation Administration Act* is a part.

[9] Sections 6, 7 and 8 of the *Land Tax Act* 2010 are as follows:

**“6 Imposition of land tax on taxable land**

- (1) This Act imposes land tax, for each financial year, on all taxable land.
- (2) Land tax is imposed on the taxable value of taxable land.

**7 When a liability for land tax arises**

A liability for land tax for a financial year arises at midnight on 30 June immediately preceding the financial year.

**8 Who is liable to pay land tax**

The owner of taxable land when a liability for land tax arises is liable to pay the tax.”

[10] Section 4 of *Land Tax Act* 2010 expressly provides that it “does not contain all the provisions about land tax”. Section 4(2) states that the *Taxation Administration Act* contains provisions dealing with, among other things, assessments of tax.

[11] Section 6 of the *Taxation Administration Act* provides that the *Land Tax Act* 2010 is “a revenue law”. Section 3(3) of the same Act provides:

“Each revenue law must be read together with this Act as if they together formed a single Act.”

[12] Section 7 of the *Taxation Administration Act* establishes the Office of Commissioner of State Revenue. Section 8 confers upon the Commissioner the responsibility for “the administration and enforcement of the tax laws”.

[13] Section 11 of that Act provides:

**“11 When commissioner makes an assessment**

- (1) The commissioner must make an assessment if—
  - (a) the commissioner is satisfied a taxpayer has a liability for tax; and
  - (b) the taxpayer’s liability is not required or permitted, under a revenue law, to be made by self assessment.
- (2) Also, the commissioner may make an assessment—
  - (a) if the taxpayer’s liability for tax is required or permitted to be made by self assessment under the revenue law; or
  - (b) even if the taxpayer’s liability for tax is nil.
- (3) If the commissioner does not make an assessment under subsection (2), the commissioner’s decision not to make the assessment is a non-reviewable decision.

**12 Compromise assessments**

- (1) This section applies if, in assessing a taxpayer's liability for tax, it is difficult or impracticable for the commissioner to properly determine the amount of the taxpayer's liability because of a complexity or uncertainty or for another reason.
- (2) The commissioner may make an assessment of the taxpayer's liability under a written agreement with the taxpayer (a *compromise assessment*).
- (3) The compromise assessment is a non-reviewable decision.
- (4) Nothing in this part requires the commissioner to make a compromise assessment for a taxpayer."

(Emphasis in original)

[14] Section 17 of the Act confers upon the Commissioner a general power to make a reassessment of a taxpayer's liability for tax. Section 27 of the Act provides that the Commissioner may make an assessment or a reassessment on the available information which the Commissioner considers relevant.

[15] Section 26 of the Act 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) ...
  - (g) for a reassessment—the amount of the liability for tax under the previous assessment."

(Emphasis in original)

[16] Section 30 of the Act provides that "tax payable under a tax law" must be paid upon certain defined dates. Section 45(2) provides that the whole or part of an amount "payable under a tax law" that is not paid "is a debt payable to the State". The same sub-section confers a power upon the Commissioner to recover that sum in a court of competent jurisdiction.

- [17] Section 63 of the *Taxation Administration Act* confers upon a dissatisfied taxpayer a right to object. Pursuant to ss 67 and 68 of the Act the Commissioner must allow the objection, completely or partly, or disallow it. Section 77 provides that the *Judicial Review Act 1991* does not apply to an assessment or a decision disallowing an objection against an assessment. However, as I have already said, s 69 provides avenues by way of appeal to the Supreme Court or the Queensland Civil and Administrative Tribunal.
- [18] The core of the appellant’s argument is the following:
- “The making of a reassessment by the Commissioner involves a determination of existing duties – ie. the taxpayer’s liability for land tax. It also does something new by converting that liability into one that is payable. But this new aspect is so closely connected with the determination of the parties’ existing rights and duties that it does not warrant a different categorisation of the nature of the power involved. Further, the nature of the decision involved in creating the new duty is one that is made by reference to the application of existing standards, not the creation of new ones.”<sup>2</sup>
- [19] The argument depends upon accepting that there is a pre-existing “liability for land tax” in respect of which the Commissioner must make a “determination of the parties’ existing rights and duties”.
- [20] Indeed, it is the major premise of the appellant’s argument that:
- “The amount of the “land tax” for which a taxpayer is liable is governed by the terms of the *Land Tax Act 2010* (Qld); not by the Commissioner’s statement in a notice of assessment of what that amount is.”<sup>3</sup>
- [21] Upon the basis that the taxpayer already has a “liability for land tax”, the appellant then argues that the “function of the Commissioner is merely to quantify that pre-existing liability”, a task that is no different from “the quantification exercises that a court would undertake in determining an ordinary debt claim (or indeed in assessing unliquidated damages)”.<sup>4</sup>
- [22] The argument is fallacious because it misconstrues the terms “liability” and “liable” as they are used in ss 7 and 8 of the *Land Tax Act 2010*.
- [23] The words “liable” and “liability” are flexible and chameleon-like. Their meaning depends entirely upon context.
- [24] In some contexts, a person is under a liability because the person owes a duty for which that person is answerable in law.<sup>5</sup> In other contexts events have occurred which render a person obliged to pay a sum of money, submit to a penalty or to some prohibition although it still lies within the discretion of some other person to decide whether that liability will be enforced.<sup>6</sup> These are the most common senses in which the terms are used. Generally, therefore, the words are used in a context that means that they refer to the status of a person who is vulnerable to the

---

<sup>2</sup> Appellant’s outline para [14].

<sup>3</sup> Appellant’s outline para [17].

<sup>4</sup> *Ibid.*

<sup>5</sup> *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 at 428 – 430.

<sup>6</sup> *James v Young* (1884) 27 Ch D 652.

correlative exercise of a legal right that inheres in another.<sup>7</sup> It is this meaning that the appellant employs.

[25] However, the legal vulnerability of a person to another person may arise not only because that other person has a legally enforceable *right*; it may also arise because the other person has a legal *power*.

[26] The distinction between rights and duties on the one hand and powers and liabilities on the other hand was examined in detail by Professor Wesley Hohfeld.<sup>8</sup> As he said, in relation to power and liability:

“... the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved ...”<sup>9</sup>

[27] Professor Hohfeld gave the example<sup>10</sup> of a Virginia statute that provided “that all free white male persons who are twenty-one years of age and not over 60 shall be *liable* to serve as jurors ...”. He pointed out that the enactment imposed “only a liability and not a duty”. The liability was one to have a duty created. That duty would arise only when, in the exercise of their powers, the Court officers had done what was necessary to impose that duty to perform the functions of a juror.

[28] Most of the other examples given by Professor Hohfeld related to powers derived from private instruments such as trusts or contracts.

[29] However, the whole of modern administrative law, which was in its infancy in 1913 when Professor Hohfeld was writing, is concerned with the exercise of statutory powers to affect a person’s legal status or rights or duties. As the editors of the 6<sup>th</sup> edition of *de Smiths’ Judicial Review*<sup>11</sup> put it:

“Judicial review also goes someway to answering the age old question of “who guards the guards?” by ensuring that public authorities responsible for ensuring accountability of government do so within the boundaries of their own lawful powers.<sup>12</sup>

... In recent years, it is increasingly being realised that in a constitutional democracy the role of judicial review is to guard the rights of the individual against the abuse of official power.”<sup>13</sup>

[30] The “liability for land tax” referred to in s 7 of the *Land Tax Act* 2010 which is said to arise at midnight on 30 June immediately preceding the financial year, is a liability that exposes the taxpayer to the exercise of the Commissioner’s power. That power, which is coupled with the duty to exercise it, arises if “the Commissioner is satisfied a taxpayer has a liability for tax”. Upon exercise of the power to make an assessment, there are created new rights and duties. In particular, a debt arises which the taxpayer owes to the State. That is to say, the taxpayer

---

<sup>7</sup> *Howley Park Coal and Cannel Company v London and North Western Railway Company* [1913] AC 11 at 25, 27.

<sup>8</sup> See Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as applied in Judicial Reasoning’, (1913) 23(1) *Yale Law Journal* 16 at 44 – 59.

<sup>9</sup> *Ibid* at 44.

<sup>10</sup> *Booth v Commonwealth* (1861) 16 Grat. 519 at 525.

<sup>11</sup> Sweet and Maxwell 2007.

<sup>12</sup> *supra* at 1 – 006.

<sup>13</sup> *supra* at 1 – 010.

comes under a duty to the State to pay the tax. The State, by its functionary the Commissioner, has a corresponding right to recover that debt by action.

- [31] The exercise of the power to make a reassessment is likewise a power rendering the taxpayer liable to an alteration to the taxpayer's legal relationship with the State, by altering the duty to pay tax by a reduction. That the power is one to make a decision by the application of legal criteria to facts as found is characteristic, but not distinctive, of the judicial functions. It is also characteristic of many administrative functions.<sup>14</sup>
- [32] As McHugh J said in *Luton v Lessels*<sup>15</sup> the assessment is the factum by reference to which the statute creates rights for the future which are then to be enforced by resort to the courts.
- [33] There is nothing new in any of this. The character of the powers exercised by Commissioners of Taxation was established as long ago as the decision in *Federal Commissioner of Taxation v Munro*.<sup>16</sup> I therefore respectfully agree with Bond J's conclusion that it is the Commissioner's decision that creates a new liability, namely the debt to the State.<sup>17</sup>
- [34] The appellant has also sought leave to amend its notice of appeal by adding a fresh ground as follows:
- “Section 69(1)(b) is invalid because it confers on the Supreme Court a function that is incompatible with the institutional integrity of the Court, in that it confers a right of appeal which is only available to those with the means to pay the disputed tax and other amounts within 60 days of the Commissioner's decision”<sup>18</sup>
- [35] This was a matter of law that was not argued below. The respondent opposes leave being granted. This ground proceeds upon the assumption that the Commissioner's power to reassess does not involve an exercise of judicial power.<sup>19</sup> It is submitted that although no avenue of appeal to a court from a reassessment has to be provided by the legislature, any avenue of appeal that *is* provided must be one that does not have the effect that “the impecunious and the less well-resourced are denied access to justice” because the result would be that the “Supreme Court is thereby denied one of its defining characteristics, namely that all are equal before it and all have an equal opportunity to invoke its jurisdiction”.<sup>20</sup> It is said that s 69(1)(b), by requiring payment of the tax as a condition to the right of appeal, is invalid “on that basis alone”.<sup>21</sup>
- [36] The appellant cites no authority to support this argument. In *Harvey v Commissioner of State Revenue*<sup>22</sup> this Court considered and rejected a similar argument, albeit in *obiter dicta*. In a similar way, Commonwealth legislation validly

---

<sup>14</sup> *Luton v Lessels* (2002) 210 CLR 333, 345 at [21] per Gleeson CJ.

<sup>15</sup> *supra* at [76].

<sup>16</sup> (1926) 38 CLR 153 at 212; see also *Shelco of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 545.

<sup>17</sup> *WB Rural Pty Limited v Commissioner of State Revenue* [2017] QSC 141 at [39].

<sup>18</sup> Appellant's outline para [32].

<sup>19</sup> Para [40] of the appellant's outline.

<sup>20</sup> Paragraph [42] of the appellant's outline.

<sup>21</sup> *ibid.*

<sup>22</sup> [2015] QCA 258 at [80].

provides that a corporate taxpayer's action to dispute a tax debt in court does not constitute a dispute sufficient to resist an application to wind up on the ground that the debt is disputed.<sup>23</sup> Instead, a court is obliged to proceed upon the fictional footing that the debt, one that is actually disputed, is to be treated as if it were not disputed.<sup>24</sup>

- [37] There is no authority for the proposition that a statutory right of appeal from an administrative decision cannot be conditioned upon the fulfilment of the duty created by that decision. What is more, notwithstanding such a condition limiting a general right of appeal, a person's right to resort to the Supreme Court to challenge a decision made in excess of jurisdiction is preserved in any event.<sup>25</sup> In any case, the equality of treatment that is a characteristic of a State Supreme Court is its equality of treatment of persons in its exercise of judicial power when that power is validly invoked.<sup>26</sup>
- [38] Leave to amend should be refused because the proposed ground has no merit.
- [39] I would refuse leave to amend the notice of appeal and I would dismiss the appeal. I would order that the appellant pay the respondents' costs.
- [40] **PHILIPPIDES JA:** I agree with the orders proposed by Sofronoff P for the reasons given by his Honour, which I have had the advantage of reading.
- [41] **DOUGLAS J:** I agree. The learned primary judge's conclusions on the judicial power issue also put the position succinctly.<sup>27</sup> His Honour pointed out that, if the *Land Tax Act 2010 (Qld)* and the *Taxation Administration Act 2001 (Qld)* are read as a whole it is plain that it is the assessment by the Commissioner under the *Taxation 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 constituted the factum on which s45(2) of the *Taxation Administration Act* operated,<sup>28</sup> creating new rights and obligations which were to govern the future, namely the debt payable to the State, which the Commissioner may recover for the State. As his Honour decided: "This factor strongly supports the conclusion that the power to make an assessment decision is not judicial power."

---

<sup>23</sup> *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at [44] – [50].

<sup>24</sup> *ibid.* at [45].

<sup>25</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

<sup>26</sup> *Nicholas v The Queen* (1998) 193 CLR 173 at [74] per Gaudron J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 67 per Dawson J citing *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487 per Deane and Toohey JJ.

<sup>27</sup> *WB Rural Pty Ltd v Commissioner of State Revenue* [2018] 1 Qd R 526, 535 at [39] (footnote omitted).

<sup>28</sup> The text refers to the *Assessment Act* but it seems clear that his Honour meant to refer to the *Taxation Administration Act*.