

SUPREME COURT OF QUEENSLAND

CITATION: *Radiology Partners Pty Ltd ACN 165 655 883 as Trustee for the Radiology Partners Unit Trust v Commissioner of State Revenue (Qld)* [2019] QSC 192

PARTIES: **RADIOLOGY PARTNERS PTY LTD ACN 165 655 883
AS TRUSTEE FOR THE RADIOLOGY PARTNERS
UNIT TRUST**
(appellant)
v
COMMISSIONER OF STATE REVENUE
(respondent)

FILE NO: SC No 11563 of 2016

DIVISION: Trial Division

PROCEEDING: Appeal

DELIVERED ON: 9 August 2019

DELIVERED AT: Brisbane

HEARING DATE: 31 May 2019
Supplementary submissions received from the applicant on 4 June 2019; supplementary submissions received from the respondent on 11 June 2019

JUDGE: Wilson J

ORDERS: **The orders of the Court are:**
1. The appeal is dismissed.
2. The appellant is to pay the respondent's costs of the appeal, including reserved costs.

CATCHWORDS: TAXES AND DUTIES – STAMP DUTIES – APPEAL, CASE STATED ETC – QUEENSLAND – where the appellant held dutiable property and had six unitholders each of whom held 1,000 units – where the appellant redeemed all units and superannuation funds acquired the units – where the respondent aggregated the redemptions and issued an assessment for transfer duty on the basis that section 30 of the *Duties Act* 2001 (Qld) applied – where the respondent aggregated the acquisitions and issued an assessment for transfer duty on the basis that section 30 of the *Duties Act* 2001 (Qld) applied – where the appellant objected to both assessments – where the respondent issued a decision with respect of the appellant's objection – where the appellant appeals the objection decision made by the respondent under section 67 of the *Taxation Administration Act* 2001 (Qld) – what is the nature of an appeal to the Supreme Court under

section 69 of the *Taxation Administration Act 2001* (Qld)

TAXES AND DUTIES – STAMP DUTIES – ASSESSMENT AND AMOUNT PAYABLE INCLUDING FINES – GENERALLY – QUEENSLAND – where the respondent aggregated the redemptions and issued an assessment for transfer duty on the basis that section 30 of the *Duties Act 2001* (Qld) applied – where the respondent aggregated the acquisitions and issued an assessment for transfer duty on the basis that section 30 of the *Duties Act 2001* (Qld) applied – whether the redemptions and acquisitions constitute substantially one transaction for the purposes of determining whether aggregation pursuant to section 30 of the *Duties Act 2001* (Qld) should apply to the redemptions and acquisitions – whether the redemptions and acquisitions should be aggregated pursuant to section 30 of the *Duties Act 2001* (Qld) and if so, on what basis ought the aggregation occur

Duties Act 2001 (Qld) s 9, 17, 30, 55, 56, 61, 62, 63, 67
Taxation Administration Act 2001 (Qld) s 67, 69, 70A, 70B
Superannuation Industry (Supervision) Act 1993 (Cth) s 66

Attorney-General v Cohen [1937] 1 KB 478, cited
Blood Properties Pty Ltd and Commissioner of State Revenue (2005) 59 ATR 234; [2005] VCAT 754, cited
Brianco Nominees Pty Ltd v Commissioner of State Revenue (2008) 73 ATR 67, cited
Camp Seabee Properties Pty Ltd v Commissioner of State Revenue [2014] QCAT 258, cited
Jeffrey v Commissioner of Stamps (1980) 23 SASR 398, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Khoury v Chief Commissioner of State Revenue (2010) 78 ATR 81; [2010] NSWADT 13, cited
Old Reynella Village Pty Ltd v Commissioner of Stamps (SA) (1989) 51 SASR 378, cited
Rawlings & Ors v Commissioner of State Revenue [2015] QCAT 10, cited
State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd [2004] NSWADTAP 51; (2004) 58 ATR 7, cited
Wakefield & Ors v Commissioner of State Revenue [2019] QSC 85, applied

COUNSEL: K Stoyle for the appellant
 V Brennan for the respondent

SOLICITORS: New Era Lawyers for the appellant
 McInnes Wilson Lawyers for the respondent

- [1] The present appeal arises pursuant to section 69(2)(a) of the *Taxation Administration Act* 2001 (Qld) (“the TAA”). It is an appeal by the Radiology Partners Pty Ltd ACN 142 655 883 (“Radiology Partners”) from an objection decision made by the Commissioner of State Revenue (“the respondent”) under section 67 of the TAA.
- [2] Radiology Partners acts in the capacity of trustee for Radiology Partners Unit Trust (“the Trust”).¹
- [3] The Trust was established in Queensland on 18 March 2010.²
- [4] As at 15 May 2015, the Trust:³
1. held dutiable property (including land, plant and equipment fixtures), with a total value of \$2,016,030.97; and
 2. had the following unitholders (and only the following unitholders) (“existing unitholders”), each of whom held 1,000 units in the Trust:
 - a. Ellsia Pty Ltd ATF Es’haghi Family Trust No.2;
 - b. Danshabren Pty Ltd ATF The GJ & LM Clark Family Trust;
 - c. McSommertosh Pty Ltd ATF Delicia Family Trust;
 - d. Wakefield Family Holdings Pty Ltd ATF Wakefield Family Trust;
 - e. Mantou Republic Pty Ltd ATF Chan Family Trust; and
 - f. Nesthaven Pty Ltd ATF JCNB Trust.
- [5] On 15 May 2015, the appellant held a meeting, comprised of a quorum of representatives of the six existing unitholders.⁴
- [6] The purpose of the meeting was to organise and bring to fruition the existing unitholders in the Trust to all be Self-Managed Superannuation Funds (“SMSF”).⁵
- [7] The Minutes of the Meeting record the following business:⁶
- “It was noted that all Unit Holders had given notice in writing requesting that the Trustee redeem all of their Units. It was voted unanimously that all Units be redeemed effective of 15th May 2015
- Allotment Application and Application moneys being received it was resolved to approve and register the following allotment of Ordinary Units in the Trust,

¹ Respondent’s SFIC filed 10 July 2017, p 1, [1].

² Appellant’s SFIC filed 26 June 2017, p 1, [1].

³ Appellant’s SFIC filed 26 June 2017, p 1-2, [6].

⁴ Documents produced pursuant to rule 784(3) UCPR (Qld), no 6, p 56; no 8, p 82, [2].

⁵ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 82, [2]. See also Appellant’s SFIC filed 26 June 2017, p 2, [8]-[9].

⁶ Documents produced pursuant to rule 784(3) UCPR (Qld), no 6, p 56.

Name	Number
Siavash Es'haghi & Elham Es'haghi ATF Elisia Super Fund	1,000
G & L Clark Investments Pty Ltd A.C.N. 604 078 864 The Clark Super Fund	1,000
Aurelia Super Pty Ltd A.C.N. 169 662 819 ATF Aurelia Superannuation Fund	1,000
Wakefiled Shiawase Pty Ltd A.C.N. 605 722 263 ATF Shiawase Super Fund	1,000
Mochi Mochi Pty Ltd A.C.N. 604 926 767 ATF Chantai Super Fund	1,000
Nesthaven 2 Pty Ltd A.C.N. 605 823 201 ATF Challen Super Fund	1,000
Seka Capital Pty Ltd A.C.N. 603 621 674 ATF Seka Super Fund	1,000
RS Larsen SMSF Pty Ltd A.C.N. 604 430 060 ATF RS Larsen SMSF	1,000
Thomas Radiology 2 Pty Ltd A.C.N. 605 834 259 ATF Thomas Super Fund	1,000

[8] The appellant submits that each existing unitholder had determined that its beneficiaries should hold their units in the Trust via a SMSF, rather than in a family trust, as the SMSF would be taxed on income received from Trust distributions at concessional rates.⁷

[9] In essence, the appellant submits that the purpose of the transactions on 15 May 2015 was:⁸

1. in the case of the acquisitions by the Seventh, Eighth and Ninth SMSF, was for those parties to acquire an interest in the Trust;
2. otherwise, was for the beneficiaries of each existing unitholder to individually improve their tax positions.

[10] On 9 June 2016, the respondent:⁹

1. aggregated the six notices of redemption of units (“redemptions”) and issued an assessment for transfer duty under transaction number 512 012 915 on the basis

⁷ Appellant’s SFIC filed 26 June 2017, p 2, [8]; Appellant’s outline of submissions filed 23 May 2019, p 1.

⁸ Appellant’s SFIC filed 26 June 2017, p 2, [9].

⁹ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 83, [5]. See also the Appellant’s SFIC filed 26 June 2017, p 5, [22].

that section 30 of the *Duties Act* 2001 (Qld) (“the Act”) applied to the transactions; and

2. aggregated the nine applications for units (“acquisitions”) and issued a separate assessment for transfer duty under transaction number 512 012 923 also on the basis that section 30 of the Act applied to the transactions.

[11] The appellant objected to the assessments and submitted that the redemptions and acquisitions should not be aggregated because:¹⁰

1. each acquisition was effected under a separate trust instrument, being an application of units form;
2. each surrender was effected under a separate trust instrument, being a request for redemption of units;
3. the acquisitions and surrenders were not conditional upon entry into or completion of any other transactions;
4. the six family trusts are related to six corresponding superannuation funds, but each family trust and superannuation fund is not related to other family trusts and superannuation funds; and
5. the transactions for the redemption of units for family trusts and issue of units for superannuation funds are independent except for the transactions involving the six family trusts and their corresponding superannuation funds.

[12] The respondent issued a decision in respect of the appellant’s objection on 12 September 2018 (“the Decision”).¹¹

[13] The Decision considered the appellant’s submissions and stated, relevantly:¹²

“29. On review of the transactions the following circumstances are taken into account:

- a. The redemptions and acquisitions were made on separate instruments.
- b. The redemptions and acquisitions were not conditional upon each other.
- c. Each family trust and SMSF was not related to other family trusts and SMSFs in the Trust.
- d. Each of the six family trusts is related to its corresponding SMSF.
- e. The redemptions and acquisitions were not conditional upon one another.

¹⁰ Documents produced pursuant to rule 784(3) UCPR (Qld), no 4, p 49. See also no 7, p 84, [16].

¹¹ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 81-96.

¹² Documents produced pursuant to rule 784(3) UCPR (QLD), no 7, p 86-87, [29]-[32] (footnotes omitted).

f. The minutes specify the desired outcomes of the Trust and list all transactions to be executed.

g. The redemptions and acquisitions were all executed on the same day as the date of the minutes (15 May 2015).

h. The redemptions and acquisitions were effected to facilitate issues of units to SMSF's due to restrictions contained in the *SIS Act*, i.e. the units could not be transferred from family trusts to SMSF's.

30. I consider that factors which reinforce the Commissioner's decision to aggregate the transactions (points (d) to (h) above) outweigh points (a) to (c) (which would support your submission that the transactions should not be aggregated).

31. I acknowledge your submissions that:

a. the trust acquisitions and trust surrenders were all effected by separate instruments and that each is not conditional upon entry or completion of any of any other transactions.

b. The family trusts and SMSFs are unrelated and that the transactions are independent from each other, except for the relationships that exist for each of the six instances where corresponding SMSFs are substituted into the Trust as unitholders in place of the family trusts.

c. In the alternative, due to the relationship you describe (in terms of s. 61 of the Duties Act) your view is that the Commissioner could have aggregated each related trust surrender with its corresponding trust acquisition; that the trust surrender by each family trust and the trust acquisition by the corresponding SMSF gave effect in one transaction, the purpose of which was to 'transfer' the family trust's units in the Trust to the related SMSF.

32. You have advised that the transactions were structured together to effect the 'transfer' of units from family trusts to SMSFs, that due to restrictions contained in the *SIS Act*, it was not possible to transfer the units directly from a related party to a related SMSF. Consequently I am of the view that the overarching purpose of the transactions was to restructure the unitholders in the Trust, which together form evidence give effect to or arise from what is substantially one arrangement."

[14] The Decision ultimately found there was a unity of purpose in the subject transactions and on balance the transactions (redemptions and acquisitions) together form, evidence, give effect to or arise from what is substantially one arrangement for the purposes of section 30 of the Act.¹³

[15] The Decision assessed duty accordingly:¹⁴

¹³ Documents produced pursuant to rule 784(3) UCPR (QLD), no 7, p 87, [33].

¹⁴ Documents produced pursuant to rule 784(3) UCPR (QLD), no 7, p 88, [36].

1. acquisitions of the issues by the SMSF's on the basis of a 9/15 interest in the total dutiable value of the Trust;
2. for the redemptions, on the basis of a 6/15 interest in the total dutiable value of the Trust.

[16] The appellant's grounds of appeal (as amended by leave) are:¹⁵

1. Having regard to the facts in the section above and the terms of section 30 of the Act, the respondent erred in fact (or alternatively in law) in its application of section 30 of the Act, in that:
 - a. the Acquisitions did not together form, evidence, give effect to or arise from substantially one transaction and therefore should not have been aggregated;
 - b. the Redemptions did not together form, evidence, give effect to or arise from substantially one transaction and therefore should not have been aggregated; and
 - c. the Transactions did not together form, evidence, give effect to or arise from substantially one transaction and therefore should not have been aggregated, save in the manner set forth below.
2. Rather, on a proper application of section 30 of the Act, the respondent should have found that only the following of the Transactions were (in each case) substantially one transaction and validly subject to aggregation for the purposes of section 30 of the Act (Arrangements):
 - a. the redemption by the First Trust and the acquisition by the First SMSF (First Arrangement);
 - b. separately, the redemption by the Second Trust and the acquisition by the Second SMSF (Second Arrangement);
 - c. separately, the redemption by the Third Trust and the acquisition by the Third SMSF (Third Arrangement);
 - d. separately, the redemption by the Fourth Trust and the acquisition by the Fourth SMSF (Fourth Arrangement);
 - e. separately, the redemption by the Fifth Trust and the acquisition by the Fifth SMSF (Fifth Arrangement); and
 - f. separately, the redemption by the Sixth Trust and the acquisition by the Sixth SMSF (Sixth Arrangement),

with each Arrangement representing 2/15 of the value of the Trust for the purposes of assessing duty, and each of the remaining three Transactions representing 1/15 of the value of the Trust, so that the correct amount of duty

¹⁵ Amended Notice of Appeal filed by leave, p 2, 3(b), 3(c).

payable was \$56,416.50 and the correct amount of resulting unpaid tax interest to 28 September 2016 was \$6,332.68, composed as follows:

- (i) in respect of the First Arrangement, duty of \$7,836.50 and unpaid tax interest of \$879.64;
- (ii) in respect of the Second Arrangement, duty of \$7,836.50 and unpaid tax interest of \$879.64;
- (iii) in respect of the Third Arrangement, duty of \$7,836.50 and unpaid tax interest of \$879.64;
- (iv) in respect of the Fourth Arrangement, duty of \$7,836.50 and unpaid tax interest of \$879.64;
- (v) in respect of the Fifth Arrangement, duty of \$7,836.50 and unpaid tax interest of \$879.64;
- (vi) in respect of the Sixth Arrangement, duty of \$7,836.50 and unpaid tax interest of \$879.64;
- (vii) in respect of the Acquisition by the Seventh SMSF, duty of \$3,132.50 and unpaid tax interest of \$351.62;
- (viii) in respect of the Acquisition by the Eighth SMSF, duty of \$3,132.50 and unpaid tax interest of \$351.62; and
- (ix) in respect of the Acquisition by the Ninth SMSF, duty of \$3,132.50 and unpaid tax interest of \$351.62.

[17] The joint list of issues in this appeal are:¹⁶

1. what is the nature of an appeal under section 69 of the TAA?
2. the proper construction of section 30 of the Act including (but not limited to):
3. whether the redemptions and acquisitions constitute substantially one transaction for the purposes of determining whether aggregation pursuant to section 30 of the Act should apply to the redemptions and acquisitions;
4. whether the redemptions and acquisitions should be aggregated pursuant to section 30 of the Act; and
5. in the event that the redemptions and acquisitions should be aggregated, on what basis ought the aggregation occur?

The nature of an appeal under section 69 of the TAA

[18] Both parties proceeded on the basis as set forth in *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85 (“*Wakefield*”).¹⁷

¹⁶ Joint List of Issues filed 20 December 2018, p 1, [1].

¹⁷ Transcript of the hearing on 31 May 2019, p 9, line 36-40.

[19] In *Wakefield*, Bowskill J stated:¹⁸

“[29] In my respectful view, to describe the appeal as a “new hearing on fresh materials” does not accurately reflect the statutory provisions.

[30] The nature of an appeal to the Supreme Court under s 69 of the *Taxation Administration Act* is a rehearing (more aptly, a fresh hearing, as no hearing has previously taken place), conducted by the Supreme Court in its original jurisdiction, on the materials that were before the Commissioner, subject to the power of the Court to admit new evidence under s 70B(1).

[31] Where the Court is prepared to admit new evidence, it must first give the Commissioner the opportunity to reconsider the objection having regard to all of the evidence, including the new evidence (s 70B(2)). But the Court can proceed to hear the appeal, if the Commissioner declines that opportunity (s 70B(3)).

[32] The Supreme Court does not stand in the shoes of the Commissioner, but exercises its original jurisdiction to make such judgment as it considers ought to have been given, on the facts and the law, at the time of the hearing of the appeal. The appeal is in that sense a hearing de novo.

[33] The distinction identified by Wilson J in *Feez Ruthning v Commissioner of Pay-roll Tax* at [19] and [20] remains relevant in the context of the *Duties Act* 2001. As will be further discussed below, the present objection decision is one involving the application of law to objective conclusions of fact. However the *Duties Act* 2001 does make provision for decisions involving the exercise of discretion on the part of the Commissioner, in terms of whether the Commissioner is “satisfied” a particular state of affairs exists. Accordingly, care will need to be taken, depending on the nature of the decision which is being appealed, to determine the scope of the Court’s powers on the appeal.

[34] Where, as in this case, the appeal is from a decision involving the application of the law to objective conclusions of fact, which are not dependent upon the Commissioner’s state of satisfaction, it is open for the Court to give such judgment on the appeal as it considers ought to have been given, on the law and facts as they are at the time of the hearing of the appeal. The exercise of the Court’s powers in this regard are not dependent upon the demonstration of some legal, factual or discretionary error by the decision-maker.

[35] However, where the decision appealed is one which depended upon the Commissioner being satisfied of a particular fact or matter, the appellant does need to demonstrate an error of principle in the Commissioner reaching, or not reaching, that state of satisfaction, before the Court would intervene. As observed by Wilson J in the *Feez Ruthning* case, where that is shown, the next question would be whether the Court can or should re-

¹⁸ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85 [29]-[35] (footnotes omitted).

exercise the discretion, or whether the matter should be sent back to the decision maker. I would not construe ss 69-70C of the *Taxation Administration Act* as conferring a power on the Supreme Court to stand in the shoes of the Commissioner, and re-exercise any discretionary power conferred on the Commissioner. In that respect, the nature of an appeal to the Supreme Court may be distinguished from the alternative option which is available to a taxpayer, of seeking review of an objection decision by QCAT. A matter referred for review to QCAT invokes the powers and functions of QCAT under the Queensland Civil and Administrative Tribunal Act, including as that does the power to perform the functions of the decision maker (s 19), which effectively puts the Tribunal into the shoes of the Commissioner and, amongst other things, permits the Tribunal to re-exercise for itself any discretion which had otherwise been given to the Commissioner. But as this is not an issue that arises for determination in this case, given the different nature of the decision the subject of the appeal, it is unnecessary to address this further”.

- [20] Pursuant to section 70A of the TAA, the appellant has the onus of proving the appellant’s case on appeal.

The statutory framework

- [21] Chapter 2 of the Act imposes an obligation to pay duty (transfer duty) on the dutiable value of a dutiable transaction.¹⁹

- [22] Subsection 9(1)(i) of the Act relevantly provides:

“9 What is a dutiable transaction

(1) Each of the following is a *dutiable transaction* –

...

(i) a trust acquisition or trust surrender.”

- [23] Section 30 of the Act provides:

“30 Aggregation of dutiable transactions

(1) This section applies to dutiable transactions that together form, evidence, give effect to or arise from what is, substantially 1 arrangement.

(2) For assessing transfer duty on each of the dutiable transactions, the transactions must be aggregated and treated as a single dutiable transaction.

Example for subsection (2)—

A conducts a business of manufacturing bullbars. A agrees to sell the business to B as a going concern for \$50,000,000. The property included in the agreement comprises land, plant and equipment, goodwill and the business name.

¹⁹ *Duties Act 2001 (Qld)* s 8.

The land is dutiable property being land in Queensland and each of the other assets are dutiable property being Queensland business assets.

The agreement, so far as it relates to the sale of the land, is a dutiable transaction being an agreement to transfer land in Queensland and, so far as it relates to the agreement to sell each of the business assets, is a dutiable transaction being an agreement to transfer dutiable property that is a Queensland business asset. Accordingly, there are 4 dutiable transactions under the agreement.

Because the dutiable transactions together form 1 arrangement, they must be aggregated under this section for imposing transfer duty.

(3) For subsection (1), all relevant circumstances relating to the dutiable transactions must be taken into account in deciding whether they together form, evidence, give effect to or arise from what is, substantially 1 arrangement.

(4) For subsection (3), relevant circumstances include the following—

- (a) whether the transactions are contained in 1 instrument;
- (b) whether any of the transactions are conditional on entry into, or completion of, any of the other transactions;
- (c) whether the parties to any of the transactions are the same;
- (d) whether any party to a transaction is a related person of another party to any of the other transactions;
- (e) the time over which the transactions take place;
- (f) whether, before the transactions take place, the dutiable property the subject of the transactions was used together, or dependently with one another, by the transferor or transferors;
- (g) whether, after the transactions take place, the dutiable property the subject of the transactions will be used together, or dependently with one another, by the transferee or transferees.

(5) Transfer duty imposed on the dutiable transaction aggregated under this section must—

- (a) be assessed on the total of the dutiable values of the transactions when the liability for transfer duty for each of the transactions arose; and
- (b) be apportioned between the transactions as decided by the commissioner.

Example for subsection (5)—

Under 4 agreements between a builder and a developer, the builder agrees to purchase 4 lots of land from the developer for \$100,000 each. The lots are dutiable

property being land in Queensland and each of the agreements is a dutiable transaction being an agreement to transfer land in Queensland.

Even though the sale of the 4 lots was negotiated at the same time, the agreements were signed on different dates over a 10 month period, had different settlement dates and were not conditional on each other.

Under section 24 (Rates of transfer duty) and schedule 3 (Rates of duty on dutiable transactions and relevant acquisitions for landholder and corporate trustee duty), the agreements for lots 1 to 3 have been separately stamped for \$2,350 transfer duty. When the agreement for lot 4 is lodged for stamping, the commissioner decides this section applies because the transactions together formed 1 arrangement.

Accordingly, the transactions must be aggregated under this section for imposing transfer duty and the duty apportioned between them.

Under subsection (5)(a), the total of the dutiable values of the dutiable transactions on which transfer duty is imposed is \$400,000, being the value of each of the lots when the liability for transfer duty arose for each of the transactions, regardless of a variation in the values since the liability arose.

Under section 24 and schedule 3, transfer duty imposed on the aggregated transaction is \$12,475.

If the commissioner decides to apportion the transfer duty equally between the dutiable transactions, the amount of transfer duty payable is \$3,118.75 for each transaction.

Under the Administration Act, part 3, the commissioner will make a reassessment for the transactions for lots 1 to 3. The assessment notice must state the matters mentioned in section 26(2) of that Act.

(6) Each party to each of the dutiable transactions must, when lodging the instrument, ELN transaction document or transfer duty statement relating to the transaction, give notice to the commissioner stating details known to the party about—

(a) all of the dutiable property included or to be included in the arrangement mentioned in subsection (1); and

(b) the dutiable value of each dutiable transaction.

Note—

Under the Administration Act, the requirement under this subsection is a lodgement requirement for which a failure to comply is an offence under section 121 of that Act.

(7) This section does not apply to a dutiable transaction to the extent that it relates to an exchange of dutiable property.”

[24] Section 55 of the Act provides:

“55 What is a *trust acquisition*

A person makes a *trust acquisition* if the person acquires a trust interest in a trust that –

- (a) holds dutiable property; or
- (b) has an indirect interest in dutiable property.”

[25] Section 56 of the Act provides:

“56 What is a *trust surrender*

A person makes a *trust surrender* if the person surrenders a trust interest in a trust that holds dutiable property or has an indirect interest in dutiable property.”

[26] The expression “related person” has a wide definition under the Act. Section 61 relevantly provides:

“61 Who is a related person

(1) A person is a *related person* of another person if—

- (a) for individuals—they are members of the same family; or
- (b) for an individual and a corporation—the person or a member of the person’s family is a majority shareholder, director or secretary of the corporation or a related body corporate of the corporation, or has an interest of 50% or more in it; or
- (c) for an individual and a trustee—the person or a related person under another provision of this section is a beneficiary of the trust; or
- (d) for corporations—they are related bodies corporate; or
- (e) for a corporation and a trustee—the corporation or a related person under another provision of this section is a beneficiary of the trust; or
- (f) for trustees—
 - (i) there is a person who is a beneficiary of both trusts; or
 - (ii) a person is beneficiary of 1 trust and a related person under another provision of this section is a beneficiary of the other trust.

(2) Also, a person is a *related person* of another person if the persons acquire trust interests in a land holding trust and the acquisitions form, evidence, give effect to or arise from what is substantially 1 arrangement.

(3) However, a person is not a *related person* of another person under subsection (1), other than subsection (1)(d), if the commissioner is satisfied the trust interests of the persons in a land holding trust—

- (a) were acquired, and will be used, independently; and
- (b) were not acquired, and will not be used, for a common purpose.”

- [27] Sections 62 and 63 of the Act deals with the value and the dutiable value of a trust acquisition or surrender. Those sections provide:

“62 What is the dutiable value of a trust acquisition or trust surrender

The dutiable value of a trust acquisition or trust surrender is the greater of the following—

- (a) the consideration for the acquisition or surrender so far as the consideration relates to dutiable property, or an indirect interest in dutiable property, held by the trust;
- (b) the value of the acquisition or surrender worked out under section 63.

63 What is the value of a trust acquisition or trust surrender

(1) Subject to subsections (6) to (8), the value of a trust acquisition or trust surrender is the total of the amounts worked out by applying the beneficiary’s trust interest to the unencumbered value, when the liability for transfer duty arises, of—

- (a) the dutiable property held by the trust (the relevant trust); and
- (b) any indirect interest in dutiable property held by the relevant trust.

Note—

Under section 52(1), dutiable property includes contracted property. Also, under section 52(1A), the relevant trust may be taken to hold an indirect interest in dutiable property through a trust interest that is the subject of a purchase or sale agreement.

(2) For subsection (1), the beneficiary’s trust interest for a trust surrender is the beneficiary’s trust interest immediately before the surrender.

(3) For subsection (1)(b), the unencumbered value of an indirect interest under section 58(a) of the relevant trust is the amount worked out by applying to the unencumbered value of the dutiable property held by the entity in which the relevant trust has a trust or partnership interest, the trust or partnership interest of the relevant trust in that entity.

(4) For subsection (1)(b), the unencumbered value of an indirect interest under section 58(b) of the relevant trust is the amount worked out by—

- (a) first applying to the unencumbered value of the dutiable property held by the ultimate entity, the trust or partnership interest of the trust or partnership (the *last beneficiary or partner*) that is a beneficiary or partner of the ultimate entity; and
- (b) applying to the amount worked out under paragraph (a), and the unencumbered value of any dutiable property held by the last beneficiary or partner, the trust or partnership interest of the next trust

or partnership in the series of trusts or partnerships that is a beneficiary or partner of the last beneficiary or partner; and

(c) applying the calculation in paragraph (b) for each of the other trusts or partnerships in the series until the first entity's trust interest or partnership interest is used in the calculation; and

(d) applying to the amount last worked out under paragraph (c) and the unencumbered value of any dutiable property held by the first entity, the trust or partnership interest of the relevant trust.

(5) Schedule 4 contains an example of how the value of a trust acquisition is worked out.

(6) For determining the value of a beneficiary's trust acquisition that is an increase in the beneficiary's trust interest, other than a majority trust acquisition, the beneficiary's trust interest is taken to be the increase in the beneficiary's trust interest.

(7) Subsection (8) applies to a majority trust acquisition that is an increase in a beneficiary's trust interest (the *relevant trust acquisition*) that has happened in the following circumstances—

(a) the trust interest of the beneficiary and related persons of the beneficiary was 50% or more immediately before the relevant trust acquisition;

(b) transfer duty was previously paid for a majority trust acquisition in the trust made by the beneficiary or related persons;

(c) since the majority trust acquisition mentioned in paragraph (b), no other related person of the beneficiary has made a trust acquisition in the trust.

(8) For determining the value of the beneficiary's trust acquisition that is the relevant trust acquisition, the beneficiary's trust interest is taken to be the increase in the beneficiary's trust interest.”

[28] The liability for the trust acquisition or trust surrender is governed by sections 17 and 67 of the Act. Those sections provide:

“17 Who is liable to pay transfer duty

(1) Transfer duty imposed on a statutory dutiable transaction must be paid by the statutory entity under the transaction.

(2) Transfer duty imposed on another dutiable transaction must be paid by the parties to the transaction.

67 Parties to trust acquisition and trust surrender

(1) For a trust acquisition, the beneficiary acquiring the trust interest is the party to the dutiable transaction.

(2) For a trust surrender, the trustee and the beneficiary whose trust interest is surrendered are the parties to the dutiable transaction.

Note—

Under section 17, the parties to a dutiable transaction are liable to pay transfer duty imposed on the transaction.”

[29] It is a curiosity that Radiology Partners is the only appellant, especially having regard to the terms of section 67 of the Act.

The proper construction of section 30 of the Act

[30] Section 30 of the Act provides that, for “dutiable transactions that together form, evidence, give effect to or arise from what is, substantially [one] arrangement”, the dutiable transactions are to be aggregated and treated as a single dutiable transaction.

[31] Whether the transactions do in fact “form, evidence, give effect to or arise from” substantially a single arrangement is to be considered with regard to all relevant matters, including those enumerated at section 30(4) of the Act.

[32] The following principles provide some guidance as to the Court’s approach to the question of whether the redemptions and acquisitions should be aggregated pursuant to section 30 of the Act:²⁰

1. it is a question of law as to whether the transactions satisfy section 30.²¹
2. the factors considered by the respondent involve a consideration of the conduct of the parties. The transferee(s)’ conduct will, therefore, be of primary significance.²²
3. in deciding whether the circumstances amount substantially to one arrangement, the respondent is required “to have regard to all relevant factors”²³ and there will be “questions of degree involved”.²⁴
4. one must look at the whole facts of the situation,²⁵ and the enquiry is not limited to the circumstances of the transactions themselves.²⁶

²⁰ Respondent’s SFIC filed 10 July 2017, p 16-17, [45].

²¹ *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)* (1989) 51 SASR 378 at 378.

²² *State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd* [2004] ADTAP 51; (2004) 58 ATR 7 at 25, [46]-[47].

²³ *Duties Act 2001 (Qld) s 30(3); State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd* [2004] ADTAP 51; (2004) 58 ATR 7 at 23, [36].

²⁴ *State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd* [2004] ADTAP 51; (2004) 58 ATR 7 at 25, [47].

²⁵ *Blood Properties Pty Ltd and Commissioner of State Revenue* (2005) 59 ATR 234; [2005] VCAT 754 at 239 (ATR), [31].

²⁶ *Camp Seabee Properties Pty Ltd v Commissioner of State Revenue* [2014] QCAT 258 at 12, [50]-[52].

5. the substance of the transaction or transactions must be examined in order to determine whether they are “in substance” one transaction.²⁷ Which is to say that the subject transactions need not be one arrangement, they only need to be substantially so.²⁸
6. there must be an “integral and not [merely] fortuitous” relationship between the transactions before they will be viewed as being substantially the same.²⁹ Looked at in the negative, to avoid aggregation, the transactions must be “separate and independent [and] unconnected with the others”.³⁰

[33] The proper construction of section 30 of the Act was recently considered by Bowskill J in *Wakefield*.

[34] Bowskill J considered the text of section 30 of the Act, traced its legislative history and had regard to authorities in other States which considered provisions analogous to section 30 of the Act and concluded that:

1. the section does not involve the respondent exercising a statutory discretion;³¹
2. the application of the section is not premised on the respondent being satisfied of particular circumstances;³²
3. section 30(1) identifies criteria, to be applied to the facts of a given case, in determining whether duty is to be assessed under section 30(2);³³
4. this is a case of the application of the law (section 30(1), as properly construed) to the objective facts of the case;³⁴
5. the operation of section 30 is not limited to intentional avoidance measures;³⁵
6. it is not necessary for there to be a tax avoidance purpose for an arrangement to be captured by the section; and the section is not limited to what might be called “transaction splitting”;³⁶ and
7. the meaning of expression “dutiabale transactions that together form, evidence, give effect to or arise from what is, substantially 1 arrangement” is informed, at least to some degree, by decisions which consider equivalent legislation in other jurisdictions.³⁷

²⁷ *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 3987 at 406.

²⁸ *Brianco Nominees Pty Ltd v Commissioner of State Revenue* (2008) 73 ATR 67 at 74, [29].

²⁹ *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)* (1989) 51 SASR 378 at 382 (Mohr J) citing *Attorney-General v Cohen* [1937] 1 KB 478 at 490-91 (however, the Lord Justice was specifically speaking of a “series of transactions”).

³⁰ *Brianco Nominees Pty Ltd v Commissioner of State Revenue* (2008) 73 ATR 67 at 74-75, [30], [36] citing *Attorney-General v Cohen* [1937] 1 KB 478 at 490-91.

³¹ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [44].

³² *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [44].

³³ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [44].

³⁴ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [44].

³⁵ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [48].

³⁶ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [48].

³⁷ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [52].

- [35] Bowskill J had regard to the context and words of section 30 and the various authorities and set out five relevant principles.

1. There must be some unifying feature

- [36] In order for section 30 to apply, there must be “some unifying factor” that brings the dutiable transactions within the section which may be the purpose or objective of either (or both) the transferor(s) or the transferee(s) (a unity of purpose) or it may be some other relationship, connection or interdependence between the transactions.³⁸
- [37] It is necessary to take into account “all relevant circumstances relating to the dutiable transactions”, including having regard to the specific circumstances identified in section 30(4), to invite consideration of circumstances which connect the dutiable transactions in some way.³⁹

2. The meaning of arrangement

- [38] “Arrangement” is a word of wide, but not unlimited meaning. It was described, albeit in the context of a different provision of the previous Stamp Act, as “a comprehensive word which extends to embrace all kinds of concerted action by which persons may arrange their affairs for a particular purpose or to produce a particular result”.⁴⁰
- [39] An arrangement is something less than a legally enforceable contract or agreement; it may be an understanding or a plan which is not enforceable.⁴¹
- [40] It may be inferred from the circumstances. The arrangement need not be bilateral, as between the transferor(s) and the transferee(s), but may be unilateral, having regard to the objectives of the party(ies) on either side of the transactions. But in either case, an arrangement, in its ordinary meaning, connotes a plan, with a purpose or objective, of some kind.⁴²

3. The meaning of “substantially”

- [41] The use of the word “substantially”, in the phrase “what is, substantially 1 arrangement”, invites consideration of the substance of the dutiable transactions, looked at together, as opposed to the form, to determine whether the transactions, together, form etc what is, substantially (or really or essentially), one arrangement, although as a matter of form they may appear as separate transactions.⁴³

4. A question of fact

³⁸ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

³⁹ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

⁴⁰ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

⁴¹ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

⁴² *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

⁴³ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

- [42] The determination to be made under s 30(1) is a question of fact, involving matters of degree, taking into account all relevant circumstances relating to the dutiable transactions (s 30(3)) including, but not limited to, the factors identified in s 30(4).⁴⁴
- [43] The circumstances that are relevant will depend on the individual case, but the phrase “relating to” is broad enough to encompass circumstances surrounding the dutiable transactions, not merely the transactions themselves.⁴⁵

5. The objectives, actions and conduct of both the transferor(s) and transferee(s) are potentially relevant

- [44] Under the Act the obligation to pay transfer duty falls on all parties to a dutiable transaction. There is nothing in the words of s 30, particularly s 30(3) and (4), which supports a construction that the primary focus is on the objectives, actions or conduct of the transferee(s).⁴⁶

The appellant’s position

Withdrawal of paragraphs of the Statement of Facts, Issues and Contentions

- [45] The appellant’s Statement of Facts, Issues and Contentions (“SFIC”) states:⁴⁷

“3. The Trust was established to hold real property which was leased to various subsidiary entities which are wholly owned by Imaging Queensland Pty Ltd ACN 151 834 061 (**Imaging Qld Group**).

4. The Imaging Qld Group carries on a business of providing radiology and medical imaging services from the real property owned by the Trust.

5. The Imaging Qld Group is operated by seven practicing radiologists. Entities controlled by the radiologists own the Trust and hold shares in Imaging Queensland Pty Ltd.”

- [46] The respondent did not admit the matters at paragraphs 3 to 5 of the appellant’s SFIC, and indeed went so far as to say that they are “contentious until supported by evidence,”⁴⁸ and “uncertain and, with respect, confusing”.⁴⁹

- [47] The respondent, at the hearing, referred to these paragraphs and submitted that the purpose of the Trust was a commercial endeavour:

“We’ve got another purpose, though, which is revealed by my learned friend’s many statement of facts, issues and contentions. There is no

⁴⁴ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

⁴⁵ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

⁴⁶ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53] (footnotes omitted, headings added).

⁴⁷ Appellant’s SFIC filed 26 June 2017, p 1, [2]-[5].

⁴⁸ Respondent’s SFIC filed 10 July 2017 p 3, [9].

⁴⁹ Respondent’s SFIC filed 10 July 2017 p 3, [57].

evidence about this, but it's the very opening of the statement of facts, issues and contentions. And I'd ask your Honour to read paragraphs 1 to 5.

HER HONOUR: Yes.

MR BRENNAN: So the purpose of the trust is to hold the property. And your Honour will see that the entities in paragraph 5 – the entities controlled by the radiologists own the trust and hold shares in Imaging Queensland Proprietary Limited, which is the company which carries on the business of radiology and medical imaging services. Your Honour, this is a commercial trust which carries on a commercial endeavour and the unit holders have some sort of relationship to the carrying on of that base by way of the radiologists.

That is a fundamental difference to Wakefield, where the property was originally a farm, subdivided and then given to people's children. This is a commercial enterprise, which was a commercial enterprise before what we call the restructure and it was carried on – it must have been, by inference from these facts – after the transfer of the units. If I could return to the chronology, though, your Honour. What we have then is – if your Honour goes back to the very first document in that book of documents.”⁵⁰

[48] The appellant's written submissions, by this stage, had withdrawn paragraphs 3 to 5 of the appellant's SFIC:⁵¹

“The respondent seeks to draw an inference about the use of the dutiable property. There is no proper factual predicate for drawing such an inference. In her SFIC, the respondent refers to but does not admit the matters at paragraphs 3 to 5 of the appellant's SFIC, and indeed goes so far as to say that they are (i) “*contentious until supported by evidence,*” and (ii) “*uncertain and, with respect, confusing.*” So as to preclude any belated (and tactical) admission by the respondent of the matters at paragraphs 3 to 5 of the appellant's SFIC, those allegations hereby are expressly withdrawn.”

The appellant's contentions

[49] The appellant contends:⁵²

1. the transactions did not amount to “substantially one arrangement” for the purposes of section 30 of the Act for the following reasons:
 - a. in carrying out an assessment of whether a series of transactions from “substantially one arrangement”, the respondent is required to “look at the substance of the transactions and determine whether they are, ‘in substance’, one transaction, although masquerading as several”.⁵³ The inverse is true with respect to the transactions; the transactions (save for the

⁵⁰ Transcript of the hearing on 31 May 2019, p 25, line 20-40.

⁵¹ Appellant's outline of submissions filed 23 May 2019, p 7, [26], footnotes omitted.

⁵² Appellant's SFIC filed 26 June 2017, p 7-8, [31]-[32].

⁵³ *Jeffrey v Commissioner of Stamps (SA)* (1980) 23 SASR 398 at 406.

Related Party Transactions), were, in substance, several, independent transactions masquerading as one;

- b. in carrying out an assessment of whether a series of transactions form “substantially one arrangement”, it must be established that there is the presence of an “integral relationship” between the transactions.⁵⁴ That is the relationship between the transactions must be an “integral and not a fortuitous one”.⁵⁵ The relationship between the transactions (save for the Related Party Transactions) was not integral, but merely fortuitous; and
 - c. aggregation pursuant to section 30 of the Act should not occur where, despite “many common factors, the actual entry into the transactions is not subject to commonalty” and there is no common purpose.⁵⁶ In this case there was no common purpose, each transaction was taken independently;
2. the respondent erred in fact (or alternatively in law) in its application of section 30 of the Act, in that:
 - a. the acquisitions were not substantially one transaction and therefore should not have been aggregated; and
 - b. the redemptions were not substantially one transaction and therefore should not have been aggregated.

[50] The position taken by the respondent in the Decision (and in this appeal) is that the six redemptions (on the one hand) and the nine acquisitions (on the other) should be aggregated.

[51] The appellant contends that this is the wrong approach.⁵⁷

[52] The appellant submits that twelve of the fifteen transactions are explained as follows:⁵⁸

1. six existing unitholders simply took the necessary steps to cause their units to be held (in each case) through a SMSF rather than through the existing family trusts;
2. this involved, in each case, a redemption of the party’s units, and an acquisition of those units by a related party;
3. the relevant redemption and its counterpart acquisition were dependent upon each other, but not on any other transaction; and
4. each redemption is to be aggregated with its counterpart acquisition, but not with any other transaction.

⁵⁴ *Attorney-General v Cohen and Another* [1937] 1 KB 478 at 490-91.

⁵⁵ *Attorney-General v Cohen and Another* [1937] 1 KB 478 at 491; *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)* (1989) 51 SASR 378 at 382; *Khoury v Chief Commissioner of State Revenue* (2010) 78 ATR 81; [2010] NSWADT 13 at 24.

⁵⁶ *Rawlings & Ors v Commissioner of State Revenue* [2015] QCAT 10 at 18.

⁵⁷ Appellant’s outline of submissions filed 23 May 2019, p 2.

⁵⁸ Appellant’s outline of submissions filed 23 May 2019, p 2.

- [53] The appellant submits that at the highest, then, the three outstanding acquisitions might be aggregated with each other (but not any of the twelve aforementioned transactions).⁵⁹
- [54] Ultimately, however the appellant submits that no such aggregation is warranted as these three transactions would have proceeded irrespective of the completion of any other transaction, such that they are not an exercise in “contract splitting”.⁶⁰
- [55] The appellant’s primary position is that:⁶¹
1. each of the six redemptions is to be aggregated with its corresponding acquisition (being in each case an acquisition by a related party of the relevant redeeming party); and
 2. there is to be no further or other aggregation.

The respondent’s position

- [56] The respondent submits that the redemptions and acquisitions form part of an arrangement to restructure the unit trust.⁶²
- [57] The purpose of that arrangement was two-fold:⁶³
1. to indirectly transfer units from corporate or natural persons into SMSFs associated with those corporate or natural persons; and
 2. to introduce into the unit trust (three) new unitholders who did not, before the redemption, have any indirect interest in the old unitholders.
- [58] The respondent submits that the appellant has not placed before the Court any evidence whatsoever as to how (or why) these three unitholders came to purchase their units in the Trust.⁶⁴
- [59] The natural and ordinary inference from the present evidence is that those three unitholders had entered into some agreement with the other six new unitholders for the purchase of their units and thereby to carry on the business of the Trust.⁶⁵
- [60] The dutiable property was used both before and after the relevant transactions to conduct a single business of leasing the properties to Imaging Queensland Group Pty Ltd for the purpose of that company or its subsidiaries providing radiology services.⁶⁶
- [61] The radiologists are said to “own the Trust and hold shares in Imaging Queensland Pty Ltd”.⁶⁷

⁵⁹ Appellant’s outline of submissions filed 23 May 2019, p 2.

⁶⁰ Appellant’s outline of submissions filed 23 May 2019, p 2.

⁶¹ Appellant’s outline of submissions filed 23 May 2019, p 2.

⁶² Respondent’s outline of submissions filed 24 May 2019, p 6, [21].

⁶³ Respondent’s outline of submissions filed 24 May 2019, p 6, [21].

⁶⁴ Respondent’s outline of submissions filed 24 May 2019, p 6, [21].

⁶⁵ Respondent’s outline of submissions filed 24 May 2019, p 6, [21].

⁶⁶ Respondent’s outline of submissions filed 24 May 2019, p 6, [22].

⁶⁷ Appellant’s SFIC filed 26 June 2017, p 1, [5].

- [62] In relation to the appellant’s submission that assessing each individual Redemption should be assessed with each Acquisition – the respondent submits that such a submissions fails to take into account that the purpose of the arrangement was for the new unitholders to carry on business together using the dutiable property in a way which does not distinguish between the dutiable property, the business and the individual trust interest of the new unitholders.⁶⁸

Section 30 of the Act

- [63] The ultimate question for determination is whether a number of dutiable transactions in relation to the Trust ought to be aggregated pursuant to section 30 of the Act because “together they form, evidence, give effect to or arise from what is, substantially 1 arrangement”.
- [64] Section 30(4) sets out the “relevant circumstances” to a determination of the question in section 30(1) in a non-exclusive way. The presence or (non-presence) of any one or more of the factors set out in section 30(4) is not determinative in and of itself of whether the dutiable transactions should be aggregated; there will be questions of degree involved.⁶⁹
- [65] Any question of the aggregation question must, therefore, commence with those listed circumstances.

Section 30(4)(a): whether the transactions are contained in one instrument

The appellant’s position

- [66] The dictionary in Schedule 6 of the Act defines “instrument” as “a written document in hard copy form”. The relevant test in section 30(4)(a) of the Act is whether the transactions (and not merely a record of them) are contained in a single instrument.
- [67] No single instrument contains more than one of the transactions.
- [68] The Minutes of the Meeting does not contain the transactions as required by section 30(4)(a), but only refers to them.⁷⁰
- [69] It is a separate matter whether a document, such as a set of minutes, refers to multiple transactions. This is not a criterion on which the Court is specifically required to place any weight, though it might choose to do so.⁷¹
- [70] The reference to multiple transactions in a single set of minutes does not tell the Court much more than already follows from the fact that the transactions all occurred within a short span of time.⁷²

⁶⁸ Respondent’s SFIC filed 10 July 2017, p 21, [68].

⁶⁹ *State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd* [2004] ADTAP 51; (2004) 58 ATR 7 at 52, [47].

⁷⁰ Reply to respondent’s SFIC filed 31 May 2018, p 13, [74].

⁷¹ Reply to respondent’s SFIC filed 31 May 2018, p 13, [75].

⁷² Reply to respondent’s SFIC filed 31 May 2018, p 13, [75].

[71] Section 30(4)(a) is concerned with a minor temporal matter.

The respondent's position

[72] The respondent submits:⁷³

1. each Redemption is made pursuant to a form styled "Notice of Redemption of Units" and each Aggregation is made pursuant to a form styled "Application for Units" (collectively, "the Notices");
2. the Notices are in identical terms save the identity, address and unit certificate numbers of the original unitholders (in the case of redemptions) and the new unitholders (in the case of the acquisitions);
3. all of the Notices are dated 15 May 2015;
4. whilst it is technically true that the Redemption notices and the Acquisition notices were different instruments evidencing separate transactions, it is equally true as a matter of substance that the transactions were subject to a resolution of the original unitholders having passed;
5. that is to say, the resolution and the minute evidencing that resolution is the instrument which effected the transactions and, without which, the Notices would merely be evidence of an aspiration on the part of the original and the new unitholders;
6. the aggregation of, at least, the redemptions and, separately, the acquisitions also finds some support from the completion of two single (D2.2) forms in respect of each; and
7. it is also notable that the Forms are dated 15 May 2015.

Section 30(4)(b): whether any of the transactions are conditional upon other transactions

The appellant's position

[73] Each redemption of units is conditional upon the corresponding acquisition by a related person (and vice versa).⁷⁴

The respondent's position

[74] On the inference available to the respondent, the redemptions and acquisitions were likely part of a wider arrangement between existing radiologists and new radiologists.⁷⁵

[75] The details of the "wider arrangement" have not been disclosed by the appellant.⁷⁶

Section 30(4)(c): whether any of the parties are the same

⁷³ Respondent's SFIC filed 10 July 2017, p 18, [47]-[49].

⁷⁴ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 86, [29.b], [29.d] as modified by p 87, [31.b].

⁷⁵ Respondent's SFIC filed 10 July 2017, p 19, [52].

⁷⁶ Respondent's SFIC filed 10 July 2017, p 19, [52].

The appellant's position

- [76] Aside from the Trust being the notional transferee in the case of the redemptions, none of the parties are the same.⁷⁷

The respondent's position

- [77] In respect of the redemptions, the Trust as the (notional) transferee is the same party to all six transactions. The transferees in respect of the acquisitions are different.⁷⁸

Section 30(4)(d): whether any of the parties are related persons*The appellant's position*

- [78] Each redeeming party is related to an acquiring party (different in each case).⁷⁹
- [79] This position is consistent with the appellant's case theory, that each surrendering party (a family trust) wished to transfer its assets to the relevant acquiring party (a SMSF), as the tax position of a SMSF is superior, and that it was necessary to effect such a transfer by way of surrender and acquisition rather than direct transfer to avoid the effects of section 66 of the *Superannuation Industry (Supervision) Act 1993* (Cth).⁸⁰
- [80] The appellant submits that such a position does not advance the respondent's case theory that the arrangement was an exercise in contract splitting.⁸¹
- [81] In any event, if some but not all of the parties are related and the Court is obliged to consider that information, then it nevertheless remains for the Court to decide what use to make of it.⁸²
- [82] The Court should have regard to the relatedness of the parties only to the extent that the relationships are consistent with the contract-splitting arrangement. The only contract-splitting arrangements that are consistent with the facts of section 30(4)(d) in the present case are those arrangements between, in each case, a given family trust and its counterparty SMSF.⁸³

The respondent's position

- [83] The appellant concedes (without evidence) that, at least, all six of the original unitholders have a direct "related party relationship" with six of the new unitholders.

⁷⁷ Reply to respondent's SFIC filed 31 May 2018, p 14, [81].

⁷⁸ Respondent's SFIC filed 10 July 2017, p 19, [52].

⁷⁹ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 86, [29.d].

⁸⁰ Reply to respondent's SFIC filed 31 May 2018, p 14, [84].

⁸¹ Reply to respondent's SFIC filed 31 May 2018, p 14, [84].

⁸² Reply to respondent's SFIC filed 31 May 2018, p 14-15, [85].

⁸³ Reply to respondent's SFIC filed 31 May 2018, p 14-15, [85].

The relationship between the (three) new unitholders and the (six) original unitholders is unclear.⁸⁴

- [84] The acquisitions were made by nine entities. The relationship between the seven practicing radiologists, the six original unitholders and the nine entities which acquired the trust units is uncertain and, with respect, confusing.⁸⁵
- [85] In any event, section 30(4) of the Act does not require all of the transacting parties be related persons.
- [86] The provision speaks in a more general way about any party being a related person to any other party, relevantly, to “any of the other transactions”. It specifically contemplates, therefore, that not all the parties will be related, in the relevant sense, across all of the transactions.⁸⁶

Section 30(4)(e): the time over which the transactions took place

The appellant’s position

- [87] The transactions took place contemporaneously with one another. However, this is a minor temporal matter of the type addressed in *Attorney-General v Cohen* (“*Cohen*”),⁸⁷ and is of limited significance.
- [88] In *Cohen*, the UK Court of Appeal was concerned with whether a transaction “form[ed] part of a larger transaction or of a series of transactions in respect of which the amount of value, or the aggregate amount or value, of the consideration exceeded five hundred pounds”.⁸⁸

“The learned [trial] judge has come to the conclusion that though the parties are the same, the times of transaction close and the places, the subject-matter of the various conveyances, contiguous, these are casual matters which do not make it proper to say that they constitute parts of a series within the meaning of the section and that there was no evidence of any interdependence. In my view, the conclusion at which the learned judge has arrived is correct.

...

It cannot be because some third person, looking at the matter objectively, can discover by casual coincidence some serial incident that a series of transactions inter-partes can be said to arise. I think that the preceding words relating to a ‘larger transaction’ point to the order of series mentioned in the later limb which was in the minds of the Legislature. The mischief to be considered was that persons in reality conveying for more than five hundred pounds should not evade their liability to double duty

⁸⁴ Respondent’s SFIC filed 10 July 2017, p 19, [55].

⁸⁵ Respondent’s SFIC filed 10 July 2017, p 19, [57].

⁸⁶ Respondent’s SFIC filed 10 July 2017, p 19, [58].

⁸⁷ [1937] 1 KB 478 at 481-2 (Slessor LJ).

⁸⁸ *Attorney-General v Cohen* [1937] 1 KB 478 per Slessor LJ at 478, 481-2.

merely by breaking up that large transaction into a number of smaller transactions each of less than five hundred pounds.”

- [89] The effect of the authorities, in the appellant’s submission, is that only limited weight can be put on the section 30(4)(e) criterion in the absence of corroborating criteria, and especially where other criteria favour the appellant.⁸⁹

The respondent’s position

- [90] All of the transactions took place on the one day, 15 May 2015.
- [91] In the wider factual context, Radiology Partners’ shareholding was changed to reflect the New unitholders’ unit holdings in the Trust within a very short time, on 17 July 2015.⁹⁰

Sections 30(4)(f) and (g): the use of dutiable property

The appellant’s position

- [92] The nature of the arrangement was to secure tax advantages and that there was no collateral outcome for the Trust (with reference to paragraph 29(e) and (g) of the Decision which provides “the redemptions and acquisitions were not conditional upon one another ... the redemptions and acquisitions were all executed on the same day as the date of the minutes (15 May 2015)”.⁹¹
- [93] In any event, six of the acquiring parties (or their ultimate beneficiaries) already owned⁹² units in the Trust and transacted so as to hold the same units in a different way, namely through a SMSF rather than a family trust, for their individual tax purposes.⁹³
- [94] Given such a purpose, the identity of the dutiable property and its uses is immaterial, as the relevant parties with the ultimate beneficial interest own the property already. The relevant use of the property is factored into the existing ownership. It is not germane to the purpose of the transactions. Any shared use is already factored into the ownership. It is therefore not germane to the purpose of the transactions.⁹⁴

The respondent’s position

- [95] The relationship between the Radiology Partners, the original unitholders, Imaging Queensland Pty Ltd and “various subsidiary entities” is unclear.⁹⁵ The respondent submits that “the identity of the “seven practicing [sic] radiologists” and their relationship to either the (six) Original Unit Holders or the (nine) New Unit Holders remains a mystery”.⁹⁶

Other matters

⁸⁹ Reply to respondent’s SFIC filed 31 May 2018, p 15, [88].

⁹⁰ Respondent’s SFIC filed 10 July 2017, p 20, [60]-[61].

⁹¹ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 86, [29.e]-[29.g].

⁹² “Ownership” here refers to the ultimate beneficial ownership.

⁹³ Reply to respondent’s SFIC filed 31 May 2018, p 16, [93].

⁹⁴ Reply to respondent’s SFIC filed 31 May 2018, p 16, [93].

⁹⁵ Respondent’s SFIC filed 10 July 2017, p 20, [62].

⁹⁶ Respondent’s SFIC filed 10 July 2017, p 3, [9.(e)].

Other matters that the appellant relies upon

- [96] The appellant rejects any analogy between these circumstances and the land development scenario as submitted by the respondent.⁹⁷
- [97] Because each of the parties hoped to avoid the effect of section 66 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“the *SIS Act*”) does not point to a shared purpose. This objective was in each case individual and could have been carried out regardless of how (or for that matter whether) each other family trust with an interest in the Unit Trust transferred that interest to a SMSF. Nothing in the objective suggests the existence of an arrangement that would more naturally be structured as a single transaction.⁹⁸
- [98] The further circumstance that the transacting parties used the same accountants and lawyers is a minor temporal or casual matter of the type described in *Cohen*.⁹⁹

The respondent’s contentions

- [99] In the present case, the transferee entities which used dutiable property in concert for the purposes of carrying on a business are analogous to land developers who join together to purchase adjoining land for the purposes of reconfiguring the land and developing it.¹⁰⁰ Or two companies controlled by the same person purchase different parts of a business, both comprising dutiable property for the purpose of carrying on a business.¹⁰¹ The requirement for the redemptions were a necessary and – more likely than not – a pre-condition to the conduct of that business with the original and introduced (New) unitholders or their related parties.¹⁰²
- [100] There are other, minor, circumstances which favour the respondent. These include:¹⁰³
1. all of the original unitholders and the new unitholders were represented by the same accountants and lawyers; and
 2. there was a collateral reason for structuring the arrangement in terms of redemptions and acquisitions; to avoid the effect of section 66 of the *SIS Act*. That collateral reason appears to have been shared by all of the parties to all of the transactions.
- [101] Section 66 of the *SIS Act* did not prohibit the direct transfer of interests. What that section did, in combination with other sections, was to impose statutory consequences on the transferee. It appears, by their actions, the appellant wished to avoid such consequences.

Consideration

⁹⁷ Appellant’s outline of submissions filed 23 May 2019, p 7.

⁹⁸ Appellant’s outline of submissions filed 23 May 2019, p 8.

⁹⁹ [1937] 1 KB 478 per Slesser LJ at 481-2.

¹⁰⁰ E.g. *State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd* [2004] ADTAP 51; (2004) 58 ATR 7; *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)* (1989) 51 SASR 378; *Brianco Nominees Pty Ltd v Commissioner of State Revenue* (2008) 73 ATR 67.

¹⁰¹ See *Blood Properties Pty Ltd v Cmr of State Revenue* [2005] VCAT 754; (2005) 59 ATR 234.

¹⁰² cf *Rawlings v Commissioner of State Revenue* [2015] QCAT 10.

¹⁰³ Respondent’s SFIC filed 10 July 2017, p 21, [66].

- [102] The application of section 30 is not premised on the respondent being satisfied of particular circumstances.¹⁰⁴ Rather, section 30 identifies criteria to be applied to the facts of a given case.
- [103] What must be done is to apply the law (section 30(1), as properly construed) to the objective facts of the case.¹⁰⁵
- [104] Whether the transactions do in fact “form, evidence, give effect to or arise from” substantially a single arrangement is to be considered with regard to all relevant matters, including those enumerated at section 30(4) of the Act.
- [105] In relation to section 30 of the Act and the material before me, I regard the following circumstances as relevant:
1. the redemptions and acquisitions were made on separate instruments;
 2. the transactions were subject to a resolution of the original unitholders having passed;
 3. the Minutes specify the desired outcomes of the Trust and list all the transactions to be executed;
 4. the redemptions and acquisitions were not conditional upon each other, save that the Redemption was conditional on the counterpart Acquisition;
 5. the parties to the transactions are not the same, save that the appellant was the notional transferee in the case of the redemptions;
 6. each family trust and SMSF was not related to other family trusts and SMSFs in the Trust;
 7. each of the six family trusts is related to its corresponding SMSF;
 8. the redemptions and acquisitions were all executed on the same day (15 May 2015) as the date of the Minutes of the Meeting; and
 9. the corresponding redemptions and acquisitions were effected to facilitate issues of units to SMSF’s due to restrictions contained in the *SIS* Act.
- [106] I have had regard to these circumstances although not all can be accorded the same weight. In any assessment as to whether there is “substantially one arrangement” there will be questions of degree involved.¹⁰⁶ Each case turns on its own individual circumstances; the presence or absence of a similar example either in the Act or in other cases, is not determinative one way or the other of whether the section applies. The nature of the arrangement for the purposes of section 30 of the Act can be proven either by direct evidence or by inference.

¹⁰⁴ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [44].

¹⁰⁵ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [44].

¹⁰⁶ *State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd* [2004] ADTAP 51; (2004) 58 ATR 7 at 52, [47].

[107] As a matter of form, the acquisitions and redemptions may appear as separate transactions:

1. the redemptions and acquisitions were made on separate instruments;
2. the redemptions and acquisitions were not conditional upon each other, save that the Redemption was conditional upon its counterpart Acquisition;
3. the parties to the transactions are not the same, save that the appellant was the notional transferee in the case of the redemptions;
4. each family trust and SMSF was not related to other family trusts and SMSFs in the Trust; and
5. each of the six family trusts is related to its corresponding SMSF.

[108] However, the substance of the arrangement as evidenced by the Minutes of the Meeting shows there was some essential unity, some “oneness”, some “unifying factor” that brings the several transactions within section 30 of the Act, i.e.:¹⁰⁷

1. the Minutes specify the desired outcomes of the Trust and list all the transactions to be executed;
2. the transactions were subject to a resolution of the original unitholders having passed;
3. the redemptions and acquisitions were all executed on the same day (15 May 2015) as the date of the Minutes; and
4. the redemptions and counterpart acquisitions were effected to facilitate issues of units to SMSF’s due to restrictions contained in the *SIS* Act.

[109] The respondent was of the view that the overarching purpose of the transactions was to restructure the unitholders in the Trust, which together form evidence, give effect to or arise from what is substantially one arrangement.¹⁰⁸ I agree.

[110] The Minutes evidence an arrangement between the parties. The appellant underplays the significance of the Minutes.¹⁰⁹ In my view the Minutes tell the Court much more than simply that all of the transactions occurred within a short frame of mind. The Minutes specify the desired outcomes of the Trust and list all of the transactions to be executed.

[111] The Minutes “connote[s] a plan, with a purpose or objective”¹¹⁰ for the original unitholders to redeem their units and the new unitholders to acquire their units.

[112] It is immaterial, for the plan to be carried out, whether the redemptions or acquisitions occurred first. The objective of the plan was for the Trust to be expanded to 15 unitholders, with the original unitholders to transfer’ units from family trusts to

¹⁰⁷ *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 3987 at 405.

¹⁰⁸ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 86, [32].

¹⁰⁹ Reply to respondent’s SFIC filed 31 May 2018, p 13, [74].

¹¹⁰ *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [53.2].

SMSFs.¹¹¹ I am satisfied on the evidence that there was some arrangement to substitute all of the old unitholders with the new unitholders (thereby changing the beneficial ownership of the trust from one group to another).¹¹²

[113] Whilst the redemptions and acquisitions were not conditional upon each other, save that the redemption was conditional on the counterpart acquisition, that fact does not take away from a wider arrangement between the existing unitholders and the new unitholders.

[114] These matters go beyond casual coincidence. On the present state of the evidence there is an “integral and not merely fortuitous”¹¹³ relationship between the redemptions and acquisitions (and each of them as the case may be).

[115] I accept that the redemptions and acquisitions form part of an arrangement to restructure the unit trust. I accept that the purpose of that arrangement was twofold:

1. to indirectly transfer units from corporate or natural persons into SMSF associated with those corporate or natural persons; and
2. to introduce into the unit trust (three) new unitholders who did not, before the redemption, have any indirect interest in the old unitholders.

[116] The restructure was effected by a single resolution of Radiology Partners as trustee of the trust (dated 15 May 2015) and this reflects a unity of purpose. On the same day, six redemptions and nine acquisitions were signed by the old unitholders and new unitholders respectively and the arrangement was thereby carried into effect.

[117] I agree with the respondent’s conclusion that there is a unity of purpose in the subject transactions.

[118] On balance, I consider that the transactions (redemptions and acquisitions) together form, evidence, give effect to or arise from what is substantially one arrangement for the purposes of section 30 of the Act.¹¹⁴

Orders

[119] It is appropriate to make the orders sought by the respondent, that:

1. The appeal is dismissed.
2. The appellant is to pay the respondent’s costs of the appeal, including reserved costs.

¹¹¹ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 86, [32].

¹¹² Respondent’s supplementary written submissions dated 7 June 2019, p 1, [2].

¹¹³ *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)* (1989) 51 SASR 378 at 382 (Mohr J) citing *Attorney-General v Cohen* [1937] 1 KB 478 at 490-491 (however, the Lord Justice was specifically speaking of a “series of transactions”).

¹¹⁴ Documents produced pursuant to rule 784(3) UCPR (Qld), no 7, p 87, [33].