

SUPREME COURT OF QUEENSLAND

CITATION: *Comstead Pty Ltd v Commission of State Revenue* [2011] QSC 110

PARTIES: **COMSTEAD PTY LTD as agent for the COMSTEAD PARTNERSHIP**
ACN 132 530 780
(appellant)
v
COMMISSIONER OF STATE REVENUE
(respondent)

FILE NO: SC No 10771 of 2010

DIVISION: Trial Division

PROCEEDING: Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 May 2011

DELIVERED AT: Brisbane

HEARING DATE: 4 May 2011

JUDGE: Chief Justice

ORDER: **Appeal dismissed with costs to be assessed on the standard basis**

CATCHWORDS: TAXES AND DUTIES – LAND TAX – WHO ARE LIABLE AND IN RESPECT OF WHAT LAND – OWNERS – IN GENERAL – where appellant company was registered proprietor and collected rent from property – where appellant company was assessed for land tax on that land – where appellant company contends that its only interest in the land was as manager on behalf of a partnership as its agent as regulated by a management agreement – where partnership had provided funds for the purchase of property – where appellant company had a duty to collect rent and profits on behalf of the partners – whether appellant company was an owner within the meaning of s3B *Land Tax Act 1915 (Qld)* – whether appellant company was a trustee within the meaning of s2 *Land Tax Act 1915 (Qld)*

Land Tax Act 1915 (Qld), s 2, s 3B, s 8, s 11, s 26A
Taxation Administration Act 2001 (Qld), s 70

Calverley v Green (1984) 155 CLR 242, cited
Chief Commissioner of Land Tax v Macary Manufacturing Pty Ltd (1999) 48 NSWLR 299, cited

Glenn v Federal Commissioner of Land Tax (1915) 20 CLR 490, cited

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, cited

Last v Rosenfeld [1972] 2 NSWLR 923, cited

COUNSEL: K Wilson SC for the appellant
B O'Donnell QC with M Brennan for the respondent

SOLICITORS: Cleary Hoare Solicitors for the appellant
Queensland Treasury Legal Services for the respondent

CHIEF JUSTICE:

Introduction

- [1] The appellant (Comstead) appeals under s 70 of the *Taxation Administration Act* 2001 (Qld), against the respondent Commissioner's disallowance of Comstead's objection to the Commissioner's assessment of land tax dated 1 April 2011. That assessment concerned the financial year ended 30 June 2010.
- [2] The circumstances giving rise to the assessment were uncontroversial, although the legal conclusions to be drawn are those which give rise to the appeal. The assessment relates to premises at 11 Commercial Road, Newstead.
- [3] Under the *Land Tax Act* 1915 (Qld), land tax is levied on the unimproved value of land (s 8), and is payable by the owner (s 11). Although that Act was repealed by s87 *Land Tax Act* 2010 (Qld), it continues to apply in relation to this appeal by virtue of s89 of the 2010 Act.
- [4] The term "owner" is defined by s 3B to include a person entitled to the land "for an estate of freehold in possession" (sub-s (1)(a)(i)); or a person entitled "to receive...the rents...from the land" (sub-s (1)(a)(ii)); or someone "taken to be the owner" (sub-s (1)(b)), being someone "receiving the rents...even though that person may have made some disposition of the land".
- [5] A trustee is also taken to be an owner (s 26A). As relevant here, a trustee is a person who becomes a trustee "by operation of law", or because "acting in any fiduciary capacity" (s 2 definition).
- [6] At all relevant times, Comstead was the registered proprietor of the land. Comstead purchased the land on 7 August 2008, taking an assignment upon settlement of a registered lease to CH Sydney Pty Ltd. Comstead thereafter collected the rent from the lessee. It accounted for that rent, less expenses, to the four members of the Comstead Partnership. Comstead's position is that its only interest was as manager on behalf of that partnership as its agent, the terms of which were and are regulated by a management agreement of 7 August 2008.

The issues and the parties' essential contentions

- [7] The first question is whether Comstead was at the relevant time the "owner", or an owner, of the land, within the meaning of s 3B. Mr O'Donnell QC, who appeared for the respondent, submitted that Comstead was, because Comstead was entitled to

an estate of freehold in possession (s 3B(1)(a)(i)), or was entitled to receive the rent (sub-s (1)(a)(ii)). Mr O'Donnell submitted that followed from Comstead's legal ownership of the land, regardless of the beneficial ownership and entitlements of the four partners.

- [8] Mr Wilson SC, for the appellant, sought to differentiate the concept of "ownership" under s 3B from registered indefeasible title, submitting that the true "owners" of this land, for the purposes of s 3B, are the four partners – they are the entities ultimately entitled to the rent, and as acknowledged by cl 8.2 of the management agreement, entitled to possession of the land.
- [9] As to whether Comstead was a "trustee" under s 2, Mr Wilson submitted that because the relationship between Comstead and the partners was regulated by the management agreement, there was no need for any trust "by operation of law" (s 2), and Comstead did not "act" in a fiduciary capacity – it "acted" pursuant to the contract. On the other hand, Mr O'Donnell submitted that because the partners put up the purchase monies for the land purchased through Comstead, Comstead must be regarded as trustee; and that even though it acted pursuant to the management agreement, in doing so it discharged fiduciary responsibilities.

Whether Comstead was an owner?

- [10] The first issue is whether Comstead was entitled to an estate of freehold in possession (s 3B(1)(a)(i)). Prima facie, Comstead's position as registered proprietor would entitle Comstead to that.
- [11] Mr Wilson pointed to cl 8.2 of the management agreement, which confirmed the partners' "right to possession and title". On the other hand, cl 3.1 affirmed Comstead's right to "hold title" to the property, whereas cl 4.1 spoke of Comstead's "possession and control but not ownership". The appropriate resolution of those provisions is that Comstead held legal although not beneficial ownership, so that cl 8.2 should be read as referring to beneficial rights.
- [12] In any case, it is the legislation, not the agreement, which defined the relevant scope of ownership. Comstead was entitled to freehold in possession because legal owner, and notwithstanding the existence of the lease. See *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 497, 498, 500, 501, applied in *Chief Commissioner of Land Tax v Macary Manufacturing Pty Ltd* (1999) 48 NSWLR 299, 309-311. (I have had regard to Mr Wilson's further submissions in relation to *Macary*.)
- [13] As a separate consideration, Comstead was the "owner" under s 3B because entitled to receive the rent. That entitlement arose upon the assignment of the registered lease. The entitlement was not negated by the partners' ultimate entitlement to the money. It would, for example, be the right of Comstead, not the partners, to recover the rent from the lessee in the event of default. Whatever the lawful destination of the money received as rent, it was Comstead, not the partners, which was "entitled to...receive...the rents" in terms of s 3B(1)(a)(ii).

Whether Comstead was a trustee?

- [14] Mr Wilson's submission must confront two basic positions: first, that because the partners put up the purchase monies for the property (on the evidence of Mr Collie) which was then registered in Comstead's name, Comstead's ownership was therefore subject to a resulting trust in favour of the partners (*Calverley v Green* (1984) 155 CLR 242, 246); and second, that having purchased as agent for the partners, Comstead was ipso facto trustee for them (*Last v Rosenfeld* [1972] 2 NSWLR 923, 930).
- [15] Mr Wilson essentially submitted that no trust arose because the management agreement obviated any need for one, and because Comstead acted under that management agreement and not as a fiduciary. He referred to the possible coexistence of contractual and fiduciary responsibilities (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97), and submitted that the operative relationship here was contractual. I do not however consider that those circumstances are sufficient to exclude the position primarily arising.
- [16] The management agreement itself confirmed the existence of fiduciary obligations. See cl 4.4.1 and 4.4.6. In discharging its obligations under that agreement, Comstead acted in a fiduciary capacity (s 2 definition). Clause 15, to which Mr Wilson referred, provides that "nothing contained in this agreement" gives rise to a "partnership or joint venture or...any trust or fiduciary obligations". But it is matters outside the agreement which led to the creation of the trust and the existence of a fiduciary relationship, namely, Comstead's acquisition of legal title to the property which was purchased with funds provided by the partners.

Conclusion

- [17] The Commissioner's assessment is correct. There will be orders that the appeal is dismissed, with costs, the costs to be assessed on the standard basis.