

HIGH COURT OF AUSTRALIA

GAGELER, GORDON, EDELMAN, STEWARD AND GLEESON JJ

COMMISSIONER OF TAXATION

APPELLANT

AND

NATALIE CARTER & ORS

RESPONDENTS

Commissioner of Taxation v Carter

[2022] HCA 10

Date of Hearing: 9 November 2021

Date of Judgment: 6 April 2022

S62/2021

ORDER

- 1. Appeal allowed.*
- 2. Set aside orders 1 and 2 made by the Full Court of the Federal Court of Australia on 10 September 2020 and, in their place, order that the appeal be dismissed.*

On appeal from the Federal Court of Australia

Representation

M J O'Meara SC with D P Hume for the appellant (instructed by Australian Government Solicitor)

B W Walker SC with J L Evans QC and D R Lewis for the respondents (instructed by O'Loughlin Westhoff)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commissioner of Taxation v Carter

Income Tax (Cth) – Trusts – Where s 97(1) of *Income Tax Assessment Act 1936* (Cth) provides that where beneficiary of trust estate not under any legal disability is presently entitled to share of income of trust estate, assessable income of beneficiary shall include so much of that share of net income of trust estate as is attributable to period when beneficiary was resident – Where trust deed provided that, if trustee made no effective determination to pay, apply, set aside or accumulate any part of trust income in given accounting period, income held on trust for specified beneficiaries – Where trustee failed to pay, apply, set aside or accumulate income in income year – Where share of trust income in income year held on trust for beneficiaries – Where Commissioner of Taxation assessed each beneficiary on basis that beneficiaries "presently entitled" to share of income within meaning of s 97(1) – Where beneficiaries subsequently disclaimed interest in share of income – Whether present entitlement under s 97(1) determined immediately prior to end of income year – Whether disclaimers operated retrospectively so as to disapply s 97(1) in respect of income year.

Words and phrases – "default distribution", "disclaimer", "end of the year of income", "presently entitled", "presumption of assent", "retrospectively disapply", "right to demand and receive payment", "trust estate", "vested in interest and vested in possession".

Income Tax Assessment Act 1936 (Cth), ss 95A, 96, 97, 98, 99, 99A.

1 GAGELER, GORDON, STEWARD AND GLEESON JJ. This appeal concerns Div 6 of Pt III of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act"), headed "Trust income". The primary provision in Div 6, s 96¹, states: "Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate". Section 96 reflects that, in Div 6, the basic income tax treatment of the net income of a trust estate is to assess the beneficiaries on a share of the net income of the trust estate based on their *present entitlement* to a share of the income of the trust estate². The trust is the mere conduit through which the beneficiaries under the trust receive income and are assessed³.

2 That basic income tax treatment, from the perspective of the beneficiary, is addressed in s 97(1), which relevantly states:

"Subject to Division 6D, *where a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate:*

- (a) the assessable income of the beneficiary shall include:
 - (i) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and
 - (ii) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia ..." (emphasis added)

3 A criterion on which s 97(1) operates is that a beneficiary "*is presently entitled* to a share of the income of the trust estate" (emphasis added). For the purposes of that sub-section, a beneficiary is presently entitled to a share of the income of a trust estate "if, but only if: (a) the beneficiary has an interest in the income which is both vested in interest and vested in possession; and (b) the beneficiary has a present legal right to demand and receive payment of the income,

1 See *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 502 [22].

2 1936 Act, s 95AAA.

3 *Bamford* (2010) 240 CLR 481 at 502 [20], quoting Ford, "Income and Estate Taxation Affecting Trusts" (1958) 1 *Melbourne University Law Review* 419 at 420.

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whether or not the precise entitlement can be ascertained before the end of the relevant year of income and whether or not the trustee has the funds available for immediate payment"⁴.

4 The issue in this appeal is one of timing. Specifically, is a beneficiary's present entitlement under s 97(1) – the present legal *right* to demand and receive payment of a share of the income of a trust estate – to be determined immediately prior to the end of a year of income by reference to the legal relationships then in existence, or can events after the end of the year of income, which may affect or alter those legal relationships, be considered?

5 That issue arises in the following circumstances.

6 The Whitby Trust was settled on 27 July 2005. Mr Allen Bruce Caratti and his daughter Alisha were joint Guardians. The power to appoint income, contained in cl 3.1 of the Trust Deed for the Whitby Trust, provided that:

"At any time before the expiration of any Accounting Period, the Trustee may, with respect to all or any part of the net income of the Trust Fund for that Accounting Period, determine:

- (1) to pay, apply or set aside all or any part of the income to or for any one or more of the Beneficiaries living or existing at the time of the determination; or
- (2) to accumulate all or any part of the income."

"Accounting Period" was relevantly defined as each period of 12 months ending on 30 June. In the Accounting Period ended 30 June 2014, the income year in issue in this appeal, the Trustee failed to appoint or accumulate any of the income of the Trust Fund.

7 Clause 3.7 of the Trust Deed then provided for the default distribution of income if the Trustee failed to make a determination under cl 3.1. Clause 3.7 stated:

"If in relation to any Accounting Period, the Trustee has made no *effective determination* pursuant to the preceding provisions of this clause in respect to any part of the income of that Accounting Period *immediately prior to*

4 *Harmer v Federal Commissioner of Taxation* (1991) 173 CLR 264 at 271, quoted in *Bamford* (2010) 240 CLR 481 at 505 [37].

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the end of the last day of that Accounting Period, then the Trustee shall hold that income in trust successively for the persons who are living or existing on the last day of that Accounting Period and who are successively described in clauses 4.1 to 4.5 (inclusive) as though that last day of the relevant Accounting Period were the Vesting Day." (emphasis added)

8 As is self-evident, the purpose and effect of the default distribution clause was to ensure that in each Accounting Period the whole of the income of the Whitby Trust was distributed, if not otherwise dealt with. No income remained with the Trustee. Clause 3.7 operated "immediately prior to the end of the last day of [the] Accounting Period" and distributed all of the income of the Whitby Trust successively to the persons identified in cll 4.1 to 4.5.

9 Clause 4 relevantly provided:

"As from the Vesting Day, the Trustee shall hold the Trust Fund:

4.1 in trust for such one or more of the *General Beneficiaries* for such interests and in such proportions and for one to the exclusion of the others as the Trustee may subject to clause 16 appoint by deed before the Vesting Day and the appointment may be either revocable or irrevocable (but if revocable shall be revocable only until the end of the day preceding the Vesting Day when it shall become irrevocable);

4.2 *in default of appointment and subject to any partial appointment under the preceding paragraph*, in trust for such of the *Primary Beneficiaries* as shall be living at the Vesting Day as tenants in common in equal shares BUT if any Primary Beneficiary dies before the Vesting Day leaving issue living at the Vesting Day, that issue shall take as tenants in common in equal shares per stirpes the share which the deceased Primary Beneficiary would have received had he or she survived to the Vesting Day ..." (emphasis added)

10 The Trustee having failed to appoint or accumulate the income of the Whitby Trust in the 2014 income year, the income of the Trust was distributed to the Primary Beneficiaries of the Trust, who were Mr Caratti's children – Natalie, Alisha, Nicole, Christina and Benjamin⁵. As a result, consistently with cl 4.2, one-fifth of the income of the Trust was distributed to each of Mr Caratti's children. Thus, the combined operation of cll 3.1, 3.7 and 4.2 was such that "immediately

5 Natalie, Alisha and Nicole are the respondents in this appeal.

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prior to the end of the last day" of the 2014 income year, one-fifth of the income of the Whitby Trust was held on trust for each of Mr Caratti's children.

11 On 27 October 2015, the Commissioner of Taxation ("the Commissioner") issued an amended assessment to each respondent for the 2014 income year which included as assessable income one-fifth of the income of the Whitby Trust on the basis that the respondents were "presently entitled" to that income within the meaning of s 97(1) ("the 2014 Assessments").

12 On 3 and 4 November 2015, the respondents executed deeds of disclaimer in respect of their default distributions under cl 3.7 for the 2014 income year. Those disclaimers were ineffective. On 30 September 2016, the respondents executed further disclaimers ("the Third Disclaimers") disclaiming any and all right title and interest conferred by the Trust Deed to any income and, without limiting the generality of that disclaimer, disclaiming any and all right title and interest conferred by cl 3.7 of the Trust Deed.

13 The respondents objected to the 2014 Assessments, contending, among other grounds, that each had validly disclaimed the relevant cl 3.7 distribution by the Third Disclaimers.

14 The Administrative Appeals Tribunal held that the Third Disclaimers were ineffective because they were made after the respondents, with knowledge, had failed to disclaim and had accepted the gifts.

15 The respondents appealed to the Federal Court of Australia on a question of law against, among other things, the Tribunal's finding that the Third Disclaimers were ineffective. By notice of contention, the Commissioner relevantly contended that the Third Disclaimers, even if effective at general law, did not retrospectively disapply s 97(1) of the 1936 Act.

16 The Full Court of the Federal Court held that the Third Disclaimers were effective and dismissed the Commissioner's notice of contention. Relevantly, the Full Court held that there was nothing in s 97(1) of the 1936 Act to indicate that a beneficiary's liability was to be determined once and for all at the end of the income year by reference to the legal relationships then in existence. The Commissioner appealed to this Court on the sole ground that the Full Court erred in finding that the Third Disclaimers operated retrospectively so as to disapply s 97(1) in respect of the 2014 income year.

5.

17 The appeal turns on the proper construction of Div 6 of Pt III of the 1936 Act and, in particular, s 97(1)⁶. The basic income tax treatment of the net income of a trust estate under Div 6 has been stated above – to assess the beneficiaries on a share of the net income of the trust estate based on their *present entitlement* to a share of the income of the trust estate.

18 Consistently with that stated object, s 97(1) provides that, where a beneficiary "*is presently entitled* to a share of the income of the trust estate", the "assessable income"⁷ of the beneficiary shall include, relevantly, so much of that share of the "net income"⁸ of the trust estate as is attributable to a period when the beneficiary was a resident.

19 The phrase "*is presently entitled* to a share of the income of the trust estate" in s 97(1) is expressed in the present tense⁹. It is directed to the position existing immediately before the end of the income year for the stated purpose of identifying the beneficiaries who are to be assessed with the income of the trust – namely, those beneficiaries of the trust who, as well as having an interest in the income of the trust which is vested both in interest and in possession¹⁰, have a present legal right to demand and receive payment of the income.

6 *Bamford* (2010) 240 CLR 481 at 501 [17]. See, eg, *Harmer* (1991) 173 CLR 264 at 271. See also *Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd* (2017) 106 ATR 151 at 172-173 [103]-[108].

7 1936 Act, s 6(1) definition of "assessable income", incorporating definition of "assessable income" in *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act"), s 995-1(1), which provides that "assessable income" has the meaning given by ss 6-5, 6-10, 6-15, 17-10 and 17-30 of the 1997 Act. Relevantly, s 6-5(2) provides that, in the case of an Australian resident, assessable income includes "ordinary income ... derived directly or indirectly from all sources ... *during the income year*" (emphasis added).

8 1936 Act, s 95(1) definition of "net income".

9 cf *Smeaton Grange* (2017) 106 ATR 151 at 179 [136].

10 See *Dwight v Commissioner of Taxation* (1992) 37 FCR 178 at 192, citing *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 496, 501. See also *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 607.

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20 In some cases, the two limbs of "presently entitled" recognised in *Federal Commissioner of Taxation v Bamford*¹¹ will overlap¹². For present purposes, the relevant criterion in s 97(1) is the present legal *right* of the beneficiary to demand and receive payment of a share of the distributable income of a trust estate. The criterion for liability looks to the *right* to receive an amount of distributable income, not the receipt¹³. That position is expressly reinforced in s 95A(1) – enacted in response to the decision of this Court in *Union-Fidelity Trustee Co of Australia Ltd v Federal Commissioner of Taxation*¹⁴ – which makes clear that a present entitlement of a beneficiary under s 97(1) does not depend upon receipt of the income. Section 95A(1) was enacted to ensure that a present entitlement retains its character as such even if the income has been "paid to, or applied for the benefit of, the beneficiary". Indeed, there may be a right to demand payment even though the trustee does not have funds available to pay it¹⁵.

21 The fact that s 97(1) is directed to identifying the legal right of the beneficiary immediately prior to the end of the year of income is important. In relation to each trust estate, once the beneficiaries with those rights are identified, it permits the balance of s 97(1) to operate and, consistently with the stated purpose of Div 6, provides for those beneficiaries to be assessed on a share of the net income of the trust estate based on their *present entitlement* to a share of the income of the trust estate. As this Court recognised in *Bamford*, the beneficiaries may be presently entitled immediately before the end of the income year "whether or not the precise entitlement can be ascertained before the

11 (2010) 240 CLR 481 at 505 [37].

12 cf *Taylor v Federal Commissioner of Taxation* (1970) 119 CLR 444 at 451-452.

13 *Federal Commissioner of Taxation v Whiting* (1943) 68 CLR 199 at 215-216, 219; *Tindal v Federal Commissioner of Taxation* (1946) 72 CLR 608 at 618; see also 1936 Act, s 95A.

14 (1969) 119 CLR 177 at 182. See *Commissioner of Taxation v Harmer* (1990) 24 FCR 237 at 248-249; *Hart v Federal Commissioner of Taxation* (2018) 261 FCR 406 at 434 [53].

15 *Bamford* (2010) 240 CLR 481 at 505 [37], quoting *Harmer* (1991) 173 CLR 264 at 271.

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end of the relevant year of income and whether or not the trustee has the funds available for immediate payment"¹⁶.

22 Put in different terms, the taxation liability of the beneficiaries is determined by ascertaining the proportion of the distributable income of the trust estate to which each beneficiary is presently entitled at that point in time – just prior to midnight at the end of the year of income – and then applying that proportion to the "net income of the trust estate". That has practical significance. The stepped process in s 97(1) identifies the beneficiaries who are to be assessed at the end of the income year, permits the "net income of the trust estate" to be determined for that income year in the usual way and then enables the quantum of tax payable by the beneficiary to be calculated and subsequently assessed¹⁷.

23 The other relevant criteria in s 97(1) – that a beneficiary is not under any legal disability and is a resident – reinforce the conclusion that a beneficiary's present entitlement is determined immediately before the end of the income year. Those criteria, ascertained during and at the end of the income year, are conditions or circumstances which cannot be altered by facts and matters subsequent to the relevant income year. Moreover, ss 98, 99 and 99A also operate by reference to facts, events and legal relationships in existence at the end of the income year¹⁸, which cannot be altered after the end of the income year.

24 The respondents' contention that the phrase "is presently entitled" should be construed to mean "*really* is" presently entitled (emphasis added) for that income year, such that, for "a reasonable period" after the end of the income year, later events could subsequently disentitle a beneficiary who was presently entitled immediately before the end of the income year, is rejected. The respondents' construction is contrary to the text of s 97(1) and the object and purpose of Div 6 identified above. It would give rise to uncertainty in the identification of the beneficiaries presently entitled to a share of the income of a trust estate and the subsequent assessment of those beneficiaries. On the respondents' construction,

16 (2010) 240 CLR 481 at 505 [37], quoting *Harmer* (1991) 173 CLR 264 at 271.

17 *Income Tax Act 1986* (Cth), ss 5 and 7. See *Bamford* (2010) 240 CLR 481 at 507-508 [45], quoting *Zeta Force Pty Ltd v Commissioner of Taxation* (1998) 84 FCR 70 at 74-75.

18 The same approach applies for the purposes of taxing the net income of a partnership under Div 5 of Pt III of the 1936 Act: *Federal Commissioner of Taxation v Galland* (1986) 162 CLR 408 at 414-415, 418-419, 422, 424.

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whether a beneficiary was presently entitled to a share of the income of a trust estate may not be resolved for a substantial period of time and, in some cases, such as the present, for years¹⁹. The uncertainties that would arise, and which would apply with equal force to the Commissioner, trustees, beneficiaries and perhaps even settlors, would also not be fair, convenient or efficient²⁰.

25 For those reasons, the question of the "present entitlement" of a beneficiary to income of a trust must be tested and examined "at the close of the taxation year"²¹, not some reasonable period of time after the end of the taxation year.

26 This Court recognised in *Bamford*²² that in competing constructions of Div 6 examples can readily be given of apparent unfairness in the resulting administration of the legislation. Thus, in addressing the fact that a beneficiary might ultimately not receive the trust income to which they were entitled, the Court in *Bamford*²³ recognised that any such insufficiency arises because the beneficiary's tax liability under s 97(1) is determined by reference to the "net income" of the trust estate, not the distributable income. Similarly, here, the construction which has been adopted means that a beneficiary might be presently entitled at the end of an income year but be unaware of it. That unfairness arises because Div 6, and s 97(1) in particular, is drafted to tax a beneficiary by reference to present entitlement, not receipt²⁴.

Presumption of assent

27 Given the construction of s 97(1) which has been adopted, it is unnecessary to address the content and effect of the Third Disclaimers. Whether or not they

19 cf *Smeaton Grange* (2017) 106 ATR 151 at 157 [22].

20 cf Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 4th ed (1850), bk v, ch ii at 371-372.

21 *Union-Fidelity* (1969) 119 CLR 177 at 182; see also 183.

22 (2010) 240 CLR 481 at 500 [17].

23 (2010) 240 CLR 481 at 507-508 [45], quoting *Zeta Force* (1998) 84 FCR 70 at 74-75.

24 *Bamford* (2010) 240 CLR 481 at 505 [37], quoting *Harmer* (1991) 173 CLR 264 at 271.

were effective to vary the rights and obligations of the Trustee and the respondents, they were not effective to "retrospectively expunge[]"²⁵ the rights of the Commissioner against the respondents which were in existence at midnight on 30 June 2014 and which gave rise to the 2014 Assessments²⁶.

28 It is appropriate, however, to address and reject the respondents' contention that they were not presently entitled to the income within the meaning of s 97(1) because the presumption of assent – that the donee (the beneficiary) assents to a gift – is an evidentiary presumption or inference that may be rebutted and that the Third Disclaimers were evidence of the rebuttal. The respondents' contention was that, when the "evidentiary presumption" is rebutted, the result is that "one of the elements necessary for an effective gift is, and at all times has been, missing".

29 There is a distinction between legal and evidentiary presumptions. In *Masson v Parsons*²⁷, six members of the Court said:

"A presumption of fact, or evidentiary presumption, is a traditional inference, based on logic and common sense, which a tribunal of fact ordinarily draws from basic facts, particularly circumstantial evidence. By contrast, a presumption of law is a legal rule that gives *additional* force to some basic facts in the proof of the presumed fact, by permitting or requiring an inference from the former to the latter. If a presumption of the latter kind is rebuttable and so merely facilitates proof of the presumed fact, it is properly to be conceived of as a rule of law 'relating to evidence'". (emphasis in original)

30 The presumption of assent – that when there is a transfer of property to a person, the donee assents even before they know of the transfer – is a "strong

25 *Smeaton Grange* (2017) 106 ATR 151 at 181 [146].

26 See *Federal Commissioner of Taxation v H* (2010) 188 FCR 440 at 448 [39].

27 (2019) 266 CLR 554 at 575-576 [32] (footnotes omitted). See also *R v Falconer* (1990) 171 CLR 30 at 83; *Weissensteiner v The Queen* (1993) 178 CLR 217 at 242-243; *Phipson on Evidence*, 19th ed (2018) at 172 [6-19]; *Cross on Evidence*, 13th Aust ed (2021) at 383-384 [7255]-[7260].

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presumption of law"²⁸. Recognising that a gift "requires the assent of both minds"²⁹ and that the subject matter of a gift can vest in a donee before the donee actually assents³⁰, the law supplies that assent based "on fundamental attributes of human nature"³¹. It "presumes a donee's assent until disclaimer"³². That presumption takes a basic fact – a transfer of property – and gives additional force to that basic fact by supplying the assent to the transfer of that property. It is not an evidentiary presumption in the sense of an inference drawn from basic facts. It is a presumption of law, and Div 6 – and, in particular, the criterion of "is presently entitled" in s 97(1) – is consistent with, and operates on, the presumption of law of assent. On the facts in this appeal, that presumption applied immediately before the end of the 2014 income year to the operation at law of cl 3.7 of the Trust Deed.

31 The argument made by the respondents about assent is met by the presumption of law described in *Matthews v Matthews*³³. The premise of the respondents' argument, that assent to distribution is necessary, was not disputed by the Commissioner. Argument proceeding as it did, this is not the case to examine whether any wider questions arise about distributions or disclaimers.

28 *Matthews v Matthews* (1913) 17 CLR 8 at 44; see also 20, 43.

29 *Hill v Wilson* (1873) LR 8 Ch App 888 at 896, quoted in *Matthews* (1913) 17 CLR 8 at 20.

30 *Federal Commissioner of Taxation v Cornell* (1946) 73 CLR 394 at 401-402. See also *Thompson v Leach* (1690) 2 Vent 198 at 202-203 [86 ER 391 at 393-394]; *Siggers v Evans* (1855) 5 El & Bl 367 at 382 [119 ER 518 at 524]; *Standing v Bowring* (1885) 31 Ch D 282 at 290; *London and County Banking Co Ltd v London and River Plate Bank Ltd* (1888) 21 QBD 535 at 541; *Mallott v Wilson* [1903] 2 Ch 494 at 502; *Matthews* (1913) 17 CLR 8 at 20; *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80 at 86; *Vegners v Federal Commissioner of Taxation* (1991) 21 ATR 1347 at 1349.

31 *Matthews* (1913) 17 CLR 8 at 44.

32 Crago, "Principles of Disclaimer of Gifts" (1999) 28 *University of Western Australia Law Review* 65 at 65. See also *Thompson* (1690) 2 Vent 198 at 206 [86 ER 391 at 396]; *Townson v Tickell* (1819) 3 B & A 31 at 38, 39 [106 ER 575 at 577, 578]; *Petrie v Bury* (1824) 3 B & C 353 at 355 [107 ER 764 at 765]; *Cornell* (1946) 73 CLR 394 at 401.

33 (1913) 17 CLR 8 at 44; see also 20, 43.

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Conclusions and orders

32

The appeal should be allowed. Orders 1 and 2 of the Full Court of the Federal Court of 10 September 2020 should be set aside and, in their place, it be ordered that the appeal is dismissed.

EDELMAN J.

Two connected issues

33 I have had the considerable benefit of reading the joint reasons of Gageler, Gordon, Steward and Gleeson JJ. I agree entirely with their reasons concerning the interpretation of "is presently entitled" in s 97(1) of the *Income Tax Assessment Act 1936* (Cth)³⁴. A "present entitlement" to a share of the income of the trust estate in s 97(1) is an entitlement at the "present" time of the determination, being the end of the relevant financial year, whether or not that entitlement is later the subject of defeasance by a disclaimer.

34 The resolution of this issue of interpretation is logically anterior, although necessarily connected, to the issues raised by the parties concerning the content and effect of the Third Disclaimers. The interpretation adopted by the joint reasons answers the issue of how a disclaimer operates under s 97(1). But the submissions of the parties concerning the operation of the Third Disclaimers, including the references in those submissions to "presumptions" and "assent", cannot be addressed without dealing with an error in an assumption of the parties about the operation of disclaimers in equity. That assumption was made by the parties in this Court as well as in the Full Court of the Federal Court of Australia and in the Administrative Appeals Tribunal.

35 The assumption of the parties was that the creation or increase in value of equitable rights is incomplete until affirmed by the beneficiary. That is, until affirmed, a declaration of trust, or an event increasing the value of the subject matter of a trust, would be inchoate, resting only upon a "presumed" assent by the beneficiary. This assumption was applied to the operation of the default distribution clause in the Trust Deed for the Whitby Trust, where income from the Trust was "distributed" in the sense that it was held on a separate trust for the Primary Beneficiaries. Thus, the parties assumed that the validity of the creation of the separate trust, or (if the separate trust already existed) the validity of the increase in the value of the subject matter of any existing trust for the Primary Beneficiaries, depended upon a "presumption", in each case, that the Primary Beneficiaries had assented to that creation or increase.

36 The assumption that there is a "presumption" of assent in such circumstances was thought to be supported by the notion that a disclaimer operates to rebut a "presumption" of assent. In making the assumption in his submissions,

34 See reasons of Gageler, Gordon, Steward and Gleeson JJ at [1]-[26].

the Commissioner of Taxation drew from remarks in cases concerning gifts of common law rights³⁵ and made the following submission in this Court:

"the key conclusions are these. A disclaimer operates to refute the legal presumption of assent to a gift. It thereby operates to prevent the perfection of the transfer of title contemplated by the gift."

37 The assumption is based upon two faulty premises. The first premise is that there is a role for the assent of a beneficiary in the creation of a trust or the increase in the value of equitable rights. The second premise is that a "gift" of common law rights operates according to the same principles as a "gift" of rights in equity. The flaws in these premises aside, there are also serious difficulties even with the concept of a "presumption" of donee assent as a universal principle at common law. None of these faulty premises or difficulties is required by the doctrine of disclaimer, the effect of which will depend upon the reason that it is being invoked.

Assent of a beneficiary is unnecessary for the creation of a trust or increase in the value of equitable rights

38 As to the first faulty premise, the assent of a beneficiary is irrelevant to the creation of equitable rights by an unconditional declaration of trust. A fortiori, the assent of a beneficiary is irrelevant to the notional allocation of income, increasing the value of equitable rights of a beneficiary, under a default distribution clause such as cl 3.7 of the Trust Deed for the Whitby Trust. Assent need not be proved by any evidence nor by any "presumption": a "declaration of trust would be fully effective even though it did not come to the notice of the beneficiary"³⁶. Indeed, neither a declaration of trust nor the increase in value of an entitlement under the trust requires the existence of a beneficiary. Trusts can be validly declared for charitable purposes or in favour of unborn persons³⁷. It would be a nonsense to speak of the assent of a charitable purpose or the assent of an unborn child either to the creation of a trust or to the increase in the value of rights under a trust.

39 The irrelevance of the assent of a beneficiary to the formation of a perfect trust was the subject of the decision of the House of Lords in *Lady Naas v*

35 See, eg, *In re Parsons; Parsons v Attorney-General* [1943] Ch 12; *In re Stratton's Disclaimer* [1958] Ch 42.

36 *Rose v Rose* (1986) 7 NSWLR 679 at 686.

37 *Mansell v Mansell* (1732) 2 P Wms 678 at 679-680 [24 ER 913 at 914]; *Savage v Taylor* (1736) Cas temp Talbot 234 at 239 [25 ER 753 at 755]. See also Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 4 [1-07].

*Westminster Bank Ltd*³⁸. That case concerned a trust settlement in favour of Lady Naas and an infant. The settlement was contained in a deed of covenant which provided for execution by the settlor, by the respondent bank as trustee, and by Lady Naas. The settlor and the bank executed the deed but, following delays, Lady Naas did not execute it. Lord Wright said that the "crucial issue" was whether the beneficial interest had vested "immediately on execution" of the deed without execution or any other action by Lady Naas³⁹.

40 The House of Lords unanimously held that a trust had been perfectly constituted upon execution by the settlor. Lord Russell of Killowen (with whom Lord Romer agreed) rejected the approach taken by Scott and Clauson LJJ in the Court of Appeal as one that erroneously appeared "to have dealt with the matter as if it lay in contract and was governed by the rules as to offer and acceptance"⁴⁰. Lord Wright also rejected the notion that the covenant containing a trust settlement "was to be construed as a consensual document requiring for its operation that [Lady Naas] should concur in it by executing it"⁴¹. His Lordship added that the deed had not been expressed to be conditional and that "the declaration of trust [was] absolute and unconditional in terms"⁴².

A trust is not the equivalent of a common law gift

41 The second faulty premise underlying the assumption about the role of assent in the creation of a trust or the increase in the value of equitable rights echoes the view, derived from a mistaken understanding of the writing of Sir Arthur Underhill⁴³, that "a trust [is] the equitable equivalent of a common-law gift"⁴⁴. That premise ignores a fundamental difference between common law property rights and equitable rights under a trust. A gift at common law, such as a gift of a chattel,

38 [1940] AC 366. See also *Mirzikian v Tom & Bill Waterhouse Pty Ltd* [2009] NSWCA 296 at [51].

39 [1940] AC 366 at 398.

40 [1940] AC 366 at 389.

41 [1940] AC 366 at 402.

42 [1940] AC 366 at 403.

43 *Lewin on Trusts*, 20th ed (2020), vol 1 at 7 [1-005]. See Underhill, *A Practical and Concise Manual of the Law Relating to Private Trusts and Trustees*, 3rd ed (1888) at 1-2.

44 *Lewin on Trusts*, 20th ed (2020), vol 1 at 7 [1-005].

will involve a transfer of rights. But a declaration of trust involves a *creation* of equitable rights and obligations, not a *transfer* of rights⁴⁵: "it is fundamental that the creation of a trust involves the creation of new equitable obligations, which are 'annexed to the trust property' or 'engrafted' or 'impressed upon it'"⁴⁶. As Maitland explained more than a century ago, it is because the creation of equitable rights does not involve the transfer of any property rights that the law of trusts does not contradict basic principles of the common law of property⁴⁷. Thus, as Professor Hyland observed of the difference between a gift of common law rights and the creation of equitable rights, under the general law the creation of equitable rights can occur "by a gratuitous declaration of trust without delivery, deed, writing, notice to the donee, or acceptance"⁴⁸.

Even at common law, a "presumption" of assent is problematic

42 There would be further problems with the assumption of the parties – that a declaration of trust or the increase in value of equitable rights under a trust is incomplete without the assent of the beneficiary – even if a gift of common law rights were to be equated with the creation, or increase in value, of equitable rights. It is true that many common law cases have spoken of a "presumption" of assent by a donee to a gift of common law rights⁴⁹. But there is no sense in treating a gift

45 *Commissioner of State Revenue (WA) v Rojoda Pty Ltd* (2020) 268 CLR 281 at 315 [65].

46 *Commissioner of State Revenue (WA) v Rojoda Pty Ltd* (2020) 268 CLR 281 at 307 [44], citing *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 243 [38]; *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 606 [30]; *DCLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 519; on appeal (1982) 149 CLR 431 at 474; *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 311.

47 Maitland, *Equity: also The Forms of Action at Common Law* (1909) at 17-18; Maitland, *Equity: A Course of Lectures*, 2nd ed (1936) at 17.

48 Hyland, *Gifts: A Study in Comparative Law* (2009) at 454.

49 *Thompson v Leach* (1690) 2 Ventris 198 at 202, 207-208 [86 ER 391 at 393-394, 396-397]; *Siggers v Evans* (1855) 5 El & Bl 367 at 380 [119 ER 518 at 523]; *Hill v Wilson* (1873) LR 8 Ch App 888 at 896; *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535 at 541-542; *Matthews v Matthews* (1913) 17 CLR 8 at 31, 43-44.

of common law rights as subject to any "presumption" of assent, whether the "presumption" is described loosely as one of "fact" or described as one of "law"⁵⁰.

43 Some of the leading cases attempt to justify the "presumption" as founded on a standardised inference that the donee has assented to the gift. In this sense the "presumption ... arises where common experience is that the existence of one fact means that another fact also exists"⁵¹. Hence, the "presumption" has been said to be "founded on human nature", based upon an expectation that "in all probability" a gift would attract assent⁵². It has thus also been said that "the assent of a person to that which is obviously for [their] benefit may be inferred on slighter evidence than would be required to show that [they] assented to something, eg, a contract, which may be to [their] prejudice"⁵³.

44 One problem with this reasoning is the combination of the premise of subjectivity of donee assent and the assumption that a gift of common law rights "requires the assent of both minds to make a gift as it does to make a contract"⁵⁴. Although it would be coherent to draw a standardised inference founded on human nature that persons subjectively assent to gifts for their benefit, the objective theory of contract law, which is now "in command of the field"⁵⁵, means that a binding contract does not depend upon the subjective assent of either party, and it is anachronistic to speak of a "presumption" of intention⁵⁶.

50 See Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 339; Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3533 §2491.

51 *Thorne v Kennedy* (2017) 263 CLR 85 at 101 [34], citing *Calverley v Green* (1984) 155 CLR 242 at 264.

52 *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535 at 542.

53 *Matthews v Matthews* (1913) 17 CLR 8 at 20. See also *Townson v Tickell* (1819) 3 B & Ald 31 [106 ER 575].

54 *Matthews v Matthews* (1913) 17 CLR 8 at 20, quoting *Hill v Wilson* (1873) LR 8 Ch App 888 at 896.

55 *Taylor v Johnson* (1983) 151 CLR 422 at 429, cited in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179-180 [41].

56 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 106 [26].

45 This problem cannot be resolved by shifting the "presumed fact" from one of the subjective assent of the donee to one of the objective or outward manifestations of assent by the donee. Why would it be presumed that a donee, who might not even know of the gift of common law rights, has acted in a manner which shows assent to the gift? And the underlying inference of fact, which must be rebuttable, would mean that a donor could revoke a gift by objectively demonstrating a change of mind before any act of objective assent by the donee. That is not the law⁵⁷. Indeed, it could create serious disruptions in the financial system if deposits into the account of a donee were to be subject to reversal by the donor at any time before the donee manifested assent to the receipt.

46 Perhaps most fundamentally, there is no rationale for any "presumed fact", still less for any rule of law that "facilitates proof of the presumed fact"⁵⁸. The rationale for a "presumption" may have arisen from a mistaken⁵⁹ belief that title at common law could not pass without the assent of the donee⁶⁰, with the language of "presumption" as a shorthand for the legal rule that a donee "must be taken to give an implied assent"⁶¹. But that legal rule of deemed assent was a fiction, as can be seen by its operation even when it was known that the donee had no knowledge of the gift⁶², and even when it was known that the donee accepted the gift only as a loan⁶³. Since it is now recognised that title can pass without assent of the donee, the "presumption" of implied assent is a fiction without any purpose at common law. There would be no basis to extend the "presumption" to equity, even if an analogy between common law and equitable rights could be drawn.

The operation of a disclaimer depends on the reason it is invoked

47 The short point for the purposes of this appeal is that, at least in relation to equitable rights, issues of disclaimer are separate and distinct from the creation of,

57 *Standing v Bowring* (1885) 31 Ch D 282.

58 *Masson v Parsons* (2019) 266 CLR 554 at 575-576 [32].

59 See *Siggers v Evans* (1855) 5 El & Bl 367 at 380 [119 ER 518 at 523]; *Standing v Bowring* (1885) 31 Ch D 282 at 288, 290.

60 *Butler and Baker's Case* (1591) 3 Co Rep 25a at 26b, fn E [76 ER 684 at 688].

61 *Townson v Tickell* (1819) 3 B & Ald 31 at 37 [106 ER 575 at 577].

62 *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535 at 541-542.

63 *Dewar v Dewar* [1975] 1 WLR 1532 at 1538; [1975] 2 All ER 728 at 733.

or increase in the value of, a beneficiary's rights or entitlements in relation to the subject matter of a trust. Although the unilateral vesting of equitable rights and entitlements can occur without a beneficiary's assent, such unilateral vesting can often be unwound by a later disclaimer by a beneficiary. As Lord Wright said in *Lady Naas v Westminster Bank Ltd*⁶⁴:

"The declaration of trust by the settlor depended not on the other party's consent any more than on mutual consideration. It depended on the act of the settlor in executing the settlement. The beneficiary might, it is true, disclaim, but her acceptance was immaterial except perhaps as ruling out disclaimer."

48 At general law, the effect of a disclaimer is generally retrospective, thus preserving the important principle of liberty that rights or liabilities are not generally to be conferred or imposed upon a person independently of that person's actions. But when considering questions about the retrospective effect of a disclaimer, whether of rights at common law or in equity, it is always necessary to appreciate why the question is being asked. In this case, where the question as to the effect of a disclaimer is being asked for the purpose of defeating the operation of a vested and "present entitlement" under s 97(1), the question is answered by the interpretation of that provision.

Conclusion

49 The appeal should be allowed and orders made as proposed in the joint reasons.

64 [1940] AC 366 at 403.

