FEDERAL COURT OF AUSTRALIA

Millar v Commissioner of Taxation [2015] FCA 1104

Citation:	Millar v Commissioner of Taxation [2015] FCA 1104
Appeal from:	Morrison and Commissioner of Taxation [2015] AATA 114
Parties:	**GAYE MILLAR and GRAHAM MILLAR v COMMISSIONER OF TAXATION**
File numbers:	NSD 276 of 2015
Judge:	**GRIFFITHS J**
Date of judgment:	19 October 2015
Catchwords:	**TAXATION** – appeal from a decision of the Administrative Appeals Tribunal ('AAT') affirming the respondent's decision to disallow the applicants' objections against amended assessments and notices of assessment of shortfall penalty – where the AAT found the existence of sham – whether the AAT erred in not confining its assessment of whether sham existed to an inquiry into the applicants' subjective intentions – whether the AAT erred in determining, under s 170 of the *Income Tax Assessment Act 1936* (Cth), whether there had been 'fraud or evasion' instead of whether it was of the opinion there had been 'fraud or evasion' – whether the AAT failed to provide adequate reasons pursuant to s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) – whether the AAT denied the applicants procedural fairness
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) ss 43(2B), 44 *Income Tax Assessment Act 1936* (Cth) ss 26AFB, 26AFB(3), 26AFB(4), 170, 221YK(3) *Income Tax Assessment Act 1997* (Cth) s 26-25 *Superannuation Industry (Supervision)Regulations 1994* (Cth) Pt 6 *Supervision Industry (Supervision) Act 1993* (Cth) ss 19, 62 *Tax Administration Act 1953* (Cth) ss 14ZZK, 14ZZK(b)(iii), Sch 1, 11-5, 2-254, 12-245, 12-250, 12-255, 26-25, 298-20, Div 12
Cases cited:	*3D Scaffolding Pty Limited v Commissioner of Taxation*

[2009] FCAFC 75

3D Scaffolding Pty Limited v FCT [2008] FCA 1477

AG Securities Limited v Vaughan & Ors [1990] 1 AC 417

Allsene Pty Limited v Commissioner of Taxation 89 ATC 5333

Australasian Jam Co Pty Limited v Federal Commissioner of Taxation [1953] HCA 52; (1953) 88 CLR 23

Bennett & Ors v FCT [2015] ATC 10-397

Blatch v Archer (1774) 98 ER 969; (1774) 1 Cowp 63

Calvista Australia Pty Ltd v Administrative Appeals Tribunal [2013] FCA 860; (2013) 216 FCR 32

Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378

Civil Aviation Safety Authority v Central Aviation Pty Ltd [2009] FCAFC 137; (2009) 179 FCR 554

Clyne v Federal Commissioner of Taxation 83 ATC 4508

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd [1994] FCA 293; (1994) 49 FCR 576

Commissioner of Stamp Duties (Qld) v Jolliffe [1920] HCA 45; (1920) 28 CLR 178

Coppleson v Commissioner of Taxation (Cth) (1981) 52 FLR 95

Denver Chemical Manufacturing Company v Commissioner of Taxation (NSW) [1949] HCA 25; (1949) 79 CLR 296

Dornan v Riordan [1990] FCA 383; (1990) 24 FCR 564

Ekinci v Civil Aviation Safety Authority [2014] FCAFC 180; (2014) 227 FCR 459

Emanuele & Anor v ASC & Ors [1997] HCA 20; (1997) 188 CLR 114

Fitzroy Services Pty Ltd v Commissioner of Taxation [2013] FCA 471

Garry Kelly v Australian Postal Corporation [2015] FCA 1064

Hadjiloucas v Crean [1988] 1 WLR 1006

Haritos v Commissioner of Taxation [2015] FCAFC 92; (2015) 322 ALR 254

Hope v Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1

Jagelman v Federal Commissioner of Taxation 96 ATC 4055 at 4060

Kennedy v Australian Fisheries Management Authority [2009] FCA 1485

Manly Council v Byrne & Anor [2004] NSWCA 12

Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2000) 206 CLR 323

Moreau v Federal Commissioner of Taxation [1926] HCA 28; (1926) 39 CLR 65

MWJ v The Queen [2005] HCA 74; (2005) 222 ALR 436

Pacific Exchange Corporation Pty Limited v FCT [2009] FCA 1155; (2009) 180 FCR 300

R v Birks (1990) 19 NSWLR 677

R v Dickson (No. 18) [2015] NSWSC 268

Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation [2008] HCA 21; (2008) 238 CLR 516

Re Minister for Immigration, Multicultural and Indigenous Affairs; Ex Parte Palme [2003] HCA 56; (2003) 216 CLR 212

Re Ruddock; Ex parte Applicant S154/2002 [2003] HCA 60; (2003) 201 ALR 437

Repatriation Commission v Holden [2014] FCA 605; (2014) 142 ALD 267

Repatriation Commission v O'Brien [1985] HCA 10; (1985) 155 CLR 422

Richard Walter Pty Limited v Commissioner of Taxation [1996] FCA 454; (1996) 67 FCR 243

Sharrment Pty Ltd v Official Trustee in Bankruptcy [1988] FCA 179; (1988) 18 FCR 449

Snook v London & West Riding Investments [1967] 2 QB 786; [1967] All ER 518

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93; (2014) 226 FCR 555

The Insurance Commissioner v Joyce [1948] HCA 17; (1948) 77 CLR 39;

Vetter v Lake Macquarie City Council [2001] HCA 12; (2001) 202 CLR 439

White Industries (Qld) Pty Ltd v Flower & Hart [1998] FCA 806; (1998) 156 ALR 169

Willis v Repatriation Commission [2012] FCA 399; (2012) 202 FCR 323

Date of hearing:	7 September 2015
Place:	Sydney
Division:	GENERAL DIVISION

Category:	Catchwords
Number of paragraphs:	184
Counsel for the Applicants:	Mr J Hyde Page with Mr T Bagley
Solicitor for the Applicants:	LS Law
Counsel for the Respondent:	Mr D McGovern SC
Solicitor for the Respondent:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 276 of 2015**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN:	**GAYE MILLAR** **First Applicant**
	GRAHAM MILLAR **Second Applicant**
AND:	**COMMISSIONER OF TAXATION** **Respondent**

JUDGE:	**GRIFFITHS J**
DATE OF ORDER:	**19 OCTOBER 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The notice of contention dated 16 April 2015 be dismissed.
3. The notice of objection to competency dated 28 May 2015 be dismissed.
4. The applicants pay the respondent's costs of the proceedings as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

Introduction

1 This "appeal" under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (***AAT Act***) is against a decision dated 27 February 2015 of the Administrative Appeals Tribunal (**AAT**). Such an "appeal" is confined to a decision on a question of law. The AAT proceeding was a review of a decision of the Commissioner which disallowed the applicants' objections against amended assessments and notices of assessment of shortfall penalty for the taxation years ended 30 June 2001 to 30 June 2008 inclusively. The AAT concluded that money which had been placed on deposit with a Samoan bank (Hua Wang Bank Berhad (**HWBB**)) by an Australian superannuation fund which was controlled by the applicants, together with a relatively contemporaneous loan agreement by which the bank loaned money back to the applicants in their personal capacity, was a sham. The concept of "sham" is at the core of this "appeal".

2 In substance, the AAT upheld the Commissioner's view that the applicants impermissibly had early access to their superannuation benefits after using their superannuation fund to deposit $600,000 with the HWBB, which was then "loaned" back to them, contrary to the payment standards contained in Pt 6 of the *Superannuation Industry*

(Supervision) Regulations 1994 (Cth). This attracted the operation of s 26AFB of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***) so as to include an amount in the assessable income of a person who receives a benefit as a result of a breach of those standards.

3 Leave was granted for the applicants to file and rely on a further amended notice of appeal (**notice of appeal**). The following alleged questions of law were raised in the notice of appeal:

Sham

1. Whether the existence of sham, and in particular 'common intention' for a transaction to be a sham, is an inquiry solely into the subjective intentions of the parties to the transaction?

2. If s.26AFB will only apply to a transaction if the transaction is a sham, and the factual finding is that a party to the transaction did not intend the transaction to be something other than what it purported to be, are the facts necessarily outside s.26AFB?

3. In determining whether a transaction is a sham is it mandatory for the AAT to take into account that the parties intended the transaction to take effect in accordance with its terms? In the alternative, was it an error of law for the AAT to omit to do this in the present case?

'Fraud or evasion'

4. When the AAT reviews a determination of 'fraud or evasion' under s.170 does the AAT apply an erroneous legal test by considering whether the applicant has negatived 'fraud or evasion', rather than considering whether the applicant has negatived 'the opinion there is fraud or evasion'?

Inadequate reasons/Failure to exercise jurisdiction

5. Does the AAT provide adequate written reasons in respect of its exercise of the s.26AFB(4) discretion by stating: "*I have had regard to the matters specified in s.26AFB(4) but I am not satisfied that it would be unreasonable for s.26AFB(3) to apply*', with no further elaboration? In the alternative, does the AAT fail to exercise its jurisdiction in these circumstances?

6. Does the AAT provide adequate written reasons for declining to remit penalties if the AAT states: '*Even though I accept* [the applicants'] *propositions I do not consider that the circumstances of this case warrant the remission',* with no elaboration? In the alternative, does the AAT fail to exercise its jurisdiction in these circumstances?

Breach of procedural fairness

7. Whether the AAT denied the Applicants procedural fairness by finding (at [61]-[66] the transfer of $720,000 from Hua Wang Bank to the superannuation fund in January 2011 was not necessarily a repayment of the deposit (as the Applicants said it was) when:

   (i) It was not put to the Applicants in cross-examination that the payment of $720,000 was something other than repayment of the deposit;

   (ii) It was not put to the Applicants that the amount of the deposit (including accrued interest) was $900,000 rather than $720,000; and

(iii) It was not put to the Applicants, or their legal representatives, that the written statement from the Hua Wang Bank (T19-714) was inaccurate, or something other than when it purported to be.

4 The grounds of appeal relied on by the applicants were expressed as follows:

Questions 1, 2 and 3 - sham

4. A transaction is a sham when the parties to the transaction have a common intention the transaction will be something other than what it purports to be. In the present case the AAT said (at [59]) the Applicants' subjective intention is '*probably not even relevant*' and the AAT proceeded to find there was a sham. In doing this the AAT erred in law by mis-directing itself, because sham is an inquiry into the subjective intention of parties to the impugned transaction. In the alternative the AAT erred because, on the AAT's finding the parties intended the legal arrangements to be what they purported to be, it was impossible for the transaction to be a sham. In the further alternative, and at the very least, the subjective intention of the parties to a transaction is something it was mandatory for the AAT to take into account or the AAT erred in law by not taking it into account.

Question 4 – fraud or evasion

5. At [81], [84] and [86] the AAT posed the legal test as being whether the Appellant had disproved fraud or evasion. Section 170 does not apply based on 'fraud or evasion' but rather 'the opinion there has been fraud or evasion'. The existence of a subjective opinion that 'fraud or evasion' exists is a different test to 'fraud or evasion' simpliciter: *Moreau v FCT* [1926] HCA 28, and the correct test was not applied. Accordingly the AAT erred in law.

Question 5 and 6 – Inadequate reasons / exercise of jurisdiction

6. The AAT has a duty under s.43(2B) to provide reasons that include references to the evidence, and a further duty to attend to evidence that is probative of the questions under review. In relation to the s.26AFB(4) discretion as well as the remission of penalties the AAT written reasons consisted of little more than a single sentence that was conclusory in nature. In these circumstances the AAT erred in law by omitting to provide adequate reasons and omitting to fully perform its statutory function of reviewing the decision on the evidence adduced.

Question 7 – Denial of procedural fairness

7. At [61] - [66] the AAT found that the HWBB's performance of its ostensible contractual obligation to the superannuation fund, by payment of $720,000 to the superannuation fund in January 2011, should be given no weight in determining the question of sham. The AAT said the payment may not have related to discharge of the deposit, that there was no documentary evidence to explain the payment, and the payment could not have fully discharged the liability to the superannuation fund. None of these matters were put to the Applicants in cross-examination and there was, in fact, documentary evidence that explained the $720,000 payment (T19-714). In these circumstances the AAT erred by denying the Applicants procedural fairness before it discounted the value of highly probative evidence.

5 The respondent filed a notice of objection to competency, as well as a notice of contention.

Summary of background facts

6 The parties substantially agreed with the AAT's description of the background facts, which may be summarised as follows.

7 In mid-June 2000, the applicants wanted to buy an apartment on the Queensland Sunshine Coast for $1.1m. To finance the purchase they borrowed $600,000 from the St George Bank. A further $600,000 came to them by way of a "loan" from the HWBB. One of the key issues in dispute in the proceedings is whether there truly was a loan. The dispute arises from the circumstances in which the loan was obtained. The taxpayers asked their trusted long-term accountant and financial advisor, Mr Vanda Gould, as to whether he could recommend any further funding sources to provide funds in addition to the loan from St George Bank to enable the apartment to be purchased. Mr Gould had previously arranged for them to obtain a loan from HWBB. Mr Gould advised the applicants that they should be able to borrow a total of $600,000 from HWBB and at a lower interest rate than was then available from local Australian banks. Mr Gould told the applicants that a condition of the loan was that they had to place an equivalent amount of $600,000 on deposit with HWBB. He told them that such a deposit would earn 5 percent simple interest per annum. Significantly, he also told them that they could use money from their Australian superannuation fund to make the deposit. Mr Gould further advised that they would not need to provide any security in respect of the loan but they would need to give a personal guarantee to secure the loan.

8 On 11 October 2000, $600,000 was transferred from the applicants' Australian superannuation fund to HWBB. Shortly thereafter, on 14 October 2000, HWBB transferred $600,000 to the trust account of the solicitors who were acting for the applicants on the property purchase.

9 The applicants did not deal directly with anyone at HWBB in relation to these arrangements. All their dealings were through Mr Gould.

10 The loan from HWBB was said to be recorded in a Loan Facility Agreement (**Agreement**) between HWBB and the applicants as Borrower. The Agreement was said to be effective from 1 July 2000. It provided a Facility Limit of $750,000. Under cl 5.1, the applicants were required to pay interest on each Interest Payment Date, which fell on 30 June after the payment of any advance by HWBB. However, under cl 5.4, HWBB could capitalize any part of interest not paid on the due date. In fact, that is what occurred because no interest

was in fact paid. It was all capitalized over the life of the loan. As at the AAT hearing date, the outstanding balance was about $1.5m.

11 On 1 June 2005, which was shortly before the nominated Repayment Date under the loan, the applicants were supplied with a letter on HWBB letterhead which informed them that the bank was prepared to roll-over the existing loan and increase the facility amount to $1m, with the new loan repayable on 30 June 2010. That offer was accepted.

12 In their evidence in the AAT, the applicants said that they regarded the matter as a simple loan arrangement. Mr Millar described the ability to make a deposit from the superannuation fund as a "sweetener" which enabled them to obtain the loan. The AAT noted at [29] of its reasons that, while it was not unusual for a prospective lender to require a borrower to put money on deposit as a sign of good faith, what was unusual here was that the lender required the borrower to deposit the entire amount of the proposed loan.

13 Mr Gould did not give evidence in the AAT. The evidence revealed, however, that he had a close connection with HWBB, which had been incorporated in Samoa in 1994. Under HWBB's banking licences, it was authorised to deal only with clients of Mr Gould.

14 The Commissioner's position was that, while it was accepted that on 14 October 2000 HWBB paid an amount of $600,000 to the applicants, the Commissioner denied that the payment was made conformably with the Agreement, having regard to the following matters:

- there was no evidence of the applicants providing HWBB with an insurance policy or certificate, as required under that Agreement;
- there was no evidence of any searches, enquiries or requisitions having been made before the payment occurred;
- there was no evidence that any financial statements were supplied before the payment was made;
- there was no evidence that the applicants provided any statement of assets or liabilities before the payment occurred;
- there was no evidence that the applicants provided income tax returns to HWBB before payment occurred, as required under the Agreement;
- there was no evidence that the applicants signed and dated asset and liability statements before payment occurred;

- the applicants never provided an effective guarantee;
- there was no evidence that the interest rate was calculable having regard to the definition of LIBOR (the London Inter-Bank Offered Rate) as required under the Agreement;
- there was no evidence that any establishment fee was calculated before the payment occurred;
- there was no evidence of any drawdown notice being given before the payment occurred; and
- there was no evidence of HWBB's costs associated with the negotiation, preparation, execution, stamping and registration of either the Agreement or the Guarantee Agreement, nor any evidence of such costs having been paid.

15 In short, the Commission's position was that the loan documentation was a sham and that the documents disguised the truth of the matter, which was that the applicants had impermissibly accessed their Australian superannuation fund to purchase their apartment.

AAT's reasons summarised

16 In determining whether or not the applicants had discharged their burden in the appeal of establishing that the arrangement was not a sham, the AAT referred at [34] to the following various formulations of the concept of "sham" in *Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation* [2008] HCA 21; (2008) 238 CLR 516 (***Raftland***):

- the term "sham" denotes "an objective of deliberate deception of third parties";
- the idea that the parties "do not *intend* to give effect to the legal arrangements set out in their apparent agreement, understood only according to its terms. In Australia this has become essential to the notion of sham, which contemplates a disparity between the ostensible and the real *intentions* of the parties"; and
- "sham" is an expression which has a well-understood legal meaning and refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.

(Original emphasis).

17 In determining whether there was ever an intention to be bound by the terms of the loan documents, the AAT said that it was also relevant to examine subsequent behaviour to

see how it aligned with the terms of the documentation. Significantly, the AAT concluded at [37] that the material available to it was "riddled with gaps and inconsistencies". It also found that some of the attempted explanations of those matters were implausible and, in other cases, the applicants were "simply incapable of providing an explanation at all". It found that the main reason for this was that the applicants "were more or less passive, compliant participants in an arrangement presented to them by their trusted advisor, Vanda Gould", and that he was the only person they dealt with regarding the arrangements.

18 As noted above, Mr Gould did not give evidence in the AAT. After noting that Mr Gould was facing criminal charges of conspiracy to cause a loss, or a risk of a loss, to the Commonwealth and conspiracy to deal with property intended to become an instrument of crime, the AAT concluded at [48] that that was "no explanation at all" for Mr Gould's non-appearance as a witness. It identified numerous matters which Mr Gould might have been able to explain, such as:

- why all the applicants' dealings with HWBB were through him, rather than direct with the bank;
- why the condition that the applicants place an equivalent amount of the loan on deposit was not reflected in the letter of offer;
- whether Mr Gould or his staff provided HWBB with the applicants' income tax returns as required by special condition 6 of the loan;
- whether he or his staff provided HWBB with a signed and dated asset and liability statement for the applicants, as required by special condition 7 of the loan; and
- whether interest invoices were issued to the taxpayers for each income year from 2001 onwards.

19 The AAT concluded that Mr Gould was uniquely placed to throw light on these and other relevant matters. This was not only because he was very familiar with the applicants' affairs (having acted for them for several decades), but he was also "intimately familiar" with HWBB's affairs in circumstances where:

(i) HWBB's licences only authorised it to deal with Mr Gould's clients; and

(ii) an email in evidence (which was sent by an employed accountant at the applicants' accountancy firm (Gould Ralph) which sought information as to the HWBB loan balance as at 30 June 2003, and the interest and facility fee charged for the 2003

financial year), was not directed to HWBB, as might have been expected, but rather to Mr Gould's personal assistant. This led the AAT to conclude at [53] that the staff at Gould Ralph "knew full well that the way to get information about HWBB was to ask Mr Gould".

20 The AAT's ultimate conclusions are reflected in the following paragraphs from its reasons for decision:

> 67 The taxpayers have not satisfied me that the documents taken at face value represent the real agreement between the parties. In particular, they have not satisfied me that the loan documents are anything other than a façade to disguise the reality of the arrangements, which is that the $600,000 is a distribution to them of money from their superannuation fund, with HWBB an intermediary. In summary, the taxpayers have not disproved sham.
>
> 68 I conclude, therefore, that in 2000 the taxpayers improperly accessed their superannuation funds to purchase the Sunshine Coast apartment. The documents that were created at the time were created for the purpose of providing a smokescreen to disguise the true position. The taxpayers did not truly place the $600,000 on deposit with HWBB and HWBB did not truly lend the $600,000 to the taxpayers. The money was transferred to Samoa to make it look as though it was being put on deposit, in the name of the superannuation fund, for the purpose of earning interest. The subsequent transfer of the identical amount to Australia was not an advance of loan funds but a return of the money sent over only three days before. The purported placing of funds on deposit with HWBB and the loan documentation are mere window dressing.
>
> 69 Having said that, I accept that the taxpayers themselves were unaware, at the time, that what was being created around them was a fiction. They believed what Mr Gould told them: that they were putting funds on deposit with HWBB, and that they were borrowing money from HWBB. That is despite the fact that, if they had taken a step back from what was taking place, they may well have realised that what Mr Gould was offering them was too good to be true. And as time passed, with no receipt of interest on the alleged deposited funds, and with HWBB not calling on them to make actual interest payments on their "borrowings", surely there must have come a time when the reality started to dawn on them. If it did, they did nothing about it. And if it did not, then it must be because of their unwavering faith in Vanda Gould, their trusted adviser for over 40 years.

Applicants' submissions on the appeal summarised

21 It is convenient to summarise the applicants' submissions by reference to the questions of law in the notice of appeal (noting, however, that these questions of law were erroneously referred to by the applicants in their written submissions as "appeal grounds"). Given the large number of matters raised by the applicants, this summary is necessarily longer than is ideal.

Sham: questions of law 1, 2 and 3

22 The applicants' core contention in the AAT was that they believed they were entering into a normal borrowing arrangement, and accordingly that the documents they executed in July 2000 were legally binding. The applicants submitted that it was unnecessary for the AAT to make a conclusion about the HWBB itself. What is significant, they submitted, is that the AAT accepted the factual propositions on which their core contention was based. The AAT found (at [27]): "The [applicants] see nothing unusual in what they did in 2000. In their view they entered into a simple loan arrangement", and "[the applicants] believed what Mr Gould told them: that they were putting funds on deposit with HWBB, and that they were borrowing money from HWBB" (at [59]). These statements can only be read as a finding the applicants did not intend the deposit and loan to be a cloak or façade to conceal some other transaction, so submitted the applicants.

23 Against this background, the AAT ruled against the applicants relying on its conclusions that Mr Gould was the designer of the arrangements (or the "puppet master" at [59]), and its view that Mr Gould's intention was relevant to sham. The AAT member said "I have no idea what that intention was" (i.e. what Mr Gould's intention was). The AAT considered and rejected the applicants' submission that the subjective intention of the parties should be determinative of the question of sham. The AAT said at [59] "not only is the intention of the [applicants] not determinative, it is probably not even relevant".

24 The applicants submitted that the AAT's treatment of the sham issue contained the following legal errors:

(a) *Question of law 1*: The determination of whether a transaction or a document is a sham is an inquiry into the subjective intentions of the people who were parties to the transaction or document. This remains the case, notwithstanding that the parties have been misled by some other person (as the AAT said might have happened in the instant case). If one of the parties to a transaction is misled then the law says: "No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived": *Snook v London & West Riding Investments* [1967] 2 QB 786; [1967] All ER 518 (***Snook***) at 528 per Diplock LJ. An inquiry into sham that proceeded from a view that the intentions of the applicants were not determinative was misdirected in law;

(b) *Question of law 3*: As an extension of the previous paragraph, when a court or tribunal investigates whether a transaction is a sham it is mandatory to take into account the

subjective intentions of the parties: *R v Dickson (No. 18*) [2015] NSWSC 268 at [46] and *Raftland* at [47]-[48] and [57]. The AAT's statement (at [59]) that the applicants' subjective intentions were "probably not even relevant" constituted a failure to take this mandatory consideration into account; and

(c) *Question of law 2*: The facts as found by the AAT were necessarily outside the statutory criteria posed by s 26AFB because it was impossible for the October 2000 transactions to be a sham if the applicants (as parties) did not have a shamming intention. This category of legal error was recently re-affirmed in *Haritos v Commissioner of Taxation* [2015] FCAFC 92; (2015) 322 ALR 254 (***Haritos***) at [196].

25 The applicants cited *Raftland* in relation to questions of law 1 and 3. *Raftland* was a case where the parties had entered into a tax arrangement designed by a professional advisor, which the parties were unlikely to have fully understood. Nevertheless the High Court said the relevant intentions were those of the parties, even though the parties may have simply been doing what their professional advisor told them to do. This, so contended the applicants, is inconsistent at a level of principle with the approach taken by the AAT. The AAT found the applicants had only a limited understanding of the arrangements being put in place by Mr Gould. Yet the AAT held in [59] (contrary to *Raftland*) that "the relevant intention is that of the puppet master, not the puppets". The AAT erred by not taking the same approach as in *Raftland*, and further erred by not treating the applicants' intentions as relevant.

26 The applicants accepted that in some circumstances an inquiry into the subjective intention of a party may result in a conclusion that the party shared the intention of a third person, such as a professional advisor. In these circumstances a properly directed inquiry may conclude that the subjective intention of a party to the transaction was interchangeable with that of the professional advisor. However, the present is not such a case.

27 In this case the AAT made a finding the applicants believed the transactions were what they purported to be. The AAT made a finding that if Mr Gould did not intend the transaction documents to take effect in accordance with their terms (and it will be recalled the AAT drew no final conclusions about Mr Gould's intention), Mr Gould did not communicate this to the applicants, but rather told them they were entering into an orthodox deposit and a loan. The applicants intended, and believed, the transactions were what they purported to be.

Thus a properly directed inquiry would not have resulted in a conclusion that the applicants' intention was for the deposit and the loan to be a deceitful façade.

28 The applicants further submitted that, on the findings made by the AAT, it would be a perverse outcome for the agreements for a deposit and loan to be treated as a sham, and therefore unenforceable. The applicants were looking for debt financing and believed they had found it. The applicants signed contractual documents in good faith. If the AAT's reasoning is taken to its logical conclusion then the applicants, after signing the loan documents, had no entitlement to require HWBB to perform the contract by advancing loan monies to them. On the AAT's view of the law, the applicants' contractual rights were unenforceable because of unspecified, unexpressed intentions of Mr Gould. This is contrary to the ruling in *Snook* that an innocent party's rights will not be affected by the intentions of a person who deceived that party.

29 Question of law 2 is whether the facts found by the AAT were necessarily outside the statutory criteria posed by s 26AFB of the *ITAA 1936*. The AAT's finding that the applicants intended the transactions to have ordinary effect necessarily meant the $600,000 transfer on 14 October 2000 was a loan from HWBB to them. Once this point is reached any benefit derived by the applicants from the loan was not "out of, or attributable to assets of" the Australian fund within s 26AFB, and s 26AFB did not tax the benefit in the applicants' hands.

30 The applicants contended that no further fact-finding is necessary for the Court to finally resolve whether the $600,000 was assessable. It is not uncommon for the Court, in allowing an appeal on a question of law, to give final resolution to an issue based on facts already found by the AAT. Here, none of the AAT findings were on matters of degree: there were either intermediate contracts or there were not, the applicants either intended the contracts to take effect or they did not. These questions were resolved in the applicants' favour.

Repayment of the deposit – breach of procedural fairness: question of law 7

31 The applicants' case was that in 2011 the HWBB owed $720,000 to the Australian superannuation fund in respect of the deposit of $600,000 that had been made in October 2000. In January 2011 the applicants requested that the $720,000 be remitted to the fund (this contention is not supported by Mrs Millar's evidence in the AAT that these events

occurred, not in January 2011, but in March 2011 – see further [143] below). This duly occurred and at a time when the applicants had not repaid their loan to HWBB.

32 The AAT concluded at [61]-[66] of its reasons that: "The payment of $720,000 to the superannuation fund does not assist the [applicants'] claim that the arrangements are as they appear to be". The principal stated reason for ascribing the payment no weight was that the AAT was not satisfied the payment was in discharge of the HWBB's obligation to the fund, rather than something else. The AAT said (at [63]) "it might have nothing at all to do with the original $600,000". The AAT also said it could not tell what proportion of the $720,000 was interest and what proportion was principal, because the evidence did not include a HWBB document explaining the composition of the $720,000. In any event, a payment of $720,000 would have left the HWBB owing to the fund an amount of between $68,000-$188,000. The reason for this latter conclusion, the AAT said, was that the indebtedness of HWBB to the fund was greater than $720,000.

33 The applicants relied on the following facts:

(a) Their testimony was that in 2011 they wanted to terminate the deposit with the HWBB held by the Australian superannuation fund, and for the principal of the deposit and the accrued interest to be repaid to the fund. They placed a request to this effect with Mr Gould.

(b) On 28 January 2011, the HWBB transferred $720,000 to the Australian fund.

(c) Contrary to the AAT's assertion (at [63]), the HWBB did provide the fund with a closing statement, which explained the payment. The document said the $720,000 payment comprised $600,000 principal and $120,000 interest and constituted the entire outstanding liability of HWBB to the fund. This document was in evidence and the AAT was taken to it during submissions.

(d) In cross-examination, it was not put to the applicants that the payment of the $720,000 to the fund related to something other than HWBB's obligation to repay the deposit, along with accrued interest. It was not put to the applicants that the outstanding liability of HWBB to the fund was more than $720,000. Nor were the applicants cross-examined on the closing statement they received from HWBB.

34 The applicants submitted that the omission to put to them that the $720,000 transfer was something other than a repayment of the deposit was a major breach of procedural

fairness. In opening submissions it had been submitted to the AAT on behalf of the applicants that the $720,000 repayment by HWBB was a "decisive" piece of evidence. The reason for its importance was, as pointed out in *Clyne v Federal Commissioner of Taxation* 83 ATC 4508 at [4517] per Yeldham J, that the subsequent acts of parties is the best evidence of their intentions as at the formation of a contract.

35 Logically, the only basis on which the AAT could treat the entire payment of $720,000 as having no probative weight (or "not assisting" the applicants on the question of sham) is if the payment had nothing to do with the HWBB's obligation to the fund dating from October 2000. The other comments made by the AAT at [61]-[66] could not justify complete disregard of the payment. For example: if the true indebtedness of HWBB to the fund was $68,000-$188,000 more than $720,000, this did not change the fact that $720,000 discharged the overwhelming majority of the HWBB's contractual obligation. Nor could the AAT's doubt about what proportion of the $720,000 was principal and what part interest logically change the fact that a large amount of money (considerably more than the original $600,000 deposit) had been paid to the fund.

36 The applicants submitted that if the $720,000 had nothing to do with a discharge of the HWBB's obligation to the fund, they would have known this and their testimony about the $720,000 was not truthful. The applicants, as the directors and members of the fund, could be expected to know the reason why the fund received a payment of $720,000 on 28 January 2011. If the AAT proposed to reject the applicants' key piece of evidence on the basis the $720,000 may not have been what the applicants said it was, there was "manifestly" a *Browne v Dunn* requirement for this proposition to be put to the applicants in cross-examination. However no such proposition was put.

37 The applicants contended that, if the AAT rejects important evidence for reasons that deny procedural fairness to an applicant, and which constitutes an error of law, it is only necessary that the AAT's rejection of the evidence potentially influenced the outcome in the AAT. Ordinarily, if $900,000 (or $720,000) is owing pursuant to a contract, and $720,000 from that amount is paid, this would be treated as highly significant in a properly directed inquiry into whether the contract is a sham. The AAT's refusal to ascribe the repayment of $720,000 any weight should be regarded as something that, at the very minimum, potentially affected the conclusion in the AAT, so submitted the applicants.

Fraud or evasion: question of law 4

38 The amended assessments were out of time unless the "fraud or evasion" test was satisfied for the 2001-2008 income years. The applicants submitted that the AAT misdirected itself as to the applicable test.

39 In reviewing the 2001-2008 amended assessments, the AAT was obliged to review the opinion that there had been fraud or evasion, not to review whether or not there was fraud or evasion as a matter of historical fact. The two inquiries are "quite distinct", citing *Moreau v Federal Commissioner of Taxation* [1926] HCA 28; (1926) 39 CLR 65 (***Moreau***).

40 The AAT member purported to inquire into whether there had been evasion as an historical fact, rather than to form an opinion. The AAT said: "All I have to decide, in relation to the 2001-2004 years, is whether the taxpayers have established that the avoidance of tax was not 'due to…evasion'…. The taxpayers have failed to prove that the avoidance of tax was not due to evasion." (at [84] and [86]).

41 This could have affected the outcome in the AAT because a decision-maker who was not prepared to find an absence of evasion may nevertheless have felt there was sufficient material to form an opinion there had been no evasion.

Inadequate reasons: questions of law 5 and 6

42 The applicants submitted that *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCAFC 137; (2009) 179 FCR 554 (***CASA***) at [49] and [55] is authority that failure to provide adequate reasons is an error of law that can lead to an AAT decision being set aside in full, rather than being simply remitted so that more comprehensive reasons can be prepared. Under s 43(2B) of the *AAT Act* the reasons must address the evidence on which findings are based. More generally, written reasons are inadequate if they do not expose the process by which a decision was reached or if they make it impossible to ascertain whether there was an error in the reasoning process.

43 The AAT's comments (at [92]) for determining the question under s 26AFB(4) adversely to the applicants, and (at [133]-[134]) for determining that penalties should not be remitted, are conclusory in nature. They say nothing about why the conclusions were reached.

44 An explanation for the AAT's conclusions on these points would not be superfluous. The applicants were assessed to penalties for intentional disregard of the law by themselves

or their agent, yet on the AAT's factual findings the applicants were innocent of any wrongdoing. If Mr Gould perpetrated any wrongdoing (a matter on which the AAT expressly made no finding, except that the onus was not discharged), the applicants were not aware of it. This is a scenario in which a relieving provision such as s 298-20 might very well be used to mitigate the strict application of the penalty provisions. The applicants made the same submission in relation to s 26AFB, which looks to the circumstances under which an assessable benefit is received. The fact that the $600,000 deposit was ultimately repaid by HWBB to the Australian fund along with interest, as if the $600,000 had at all times been invested in the ordinary way, would also be relevant, so they submitted.

Commissioner's submissions summarised

Sham: questions of law 1, 2 and 3

45 The AAT concluded that the applicants had not disproved sham, and that the loan documents were created to disguise the true position which was that the applicants did not place the $600,000 on deposit with HWBB and HWBB did not truly lend the $600,000 to the applicants ([67]-[68] of the AAT's reasons). The AAT was correct in making these findings, which were findings of fact and not susceptible to appellate review under s 44 of the *AAT Act*.

46 The Commissioner submitted that the AAT correctly identified the relevant test for sham by reference to *Raftland*. The AAT also correctly identified at [36] the relevant enquiry as involving an examination of subsequent behaviour to see how it aligns with the terms of the loan documentation. That approach is supported by *Raftland*, where Kirby J said at [145]-[146]:

> 145 The key to a finding of sham is the demonstration, by evidence or available inference, of a disparity between the transaction evidenced in the documentation (and related conduct of the parties) and the reality disclosed elsewhere in the evidence. Where, for example, the evidence shows a discordance between the parties' legal rights or obligations as described in the documents and the actual intentions which those parties are shown to have had as to their legal rights and obligations, a conclusion of sham will be warranted (footnote omitted).
>
> 146 The test as to the parties' intentions is subjective. In essence, the parties must have intended to create rights and obligations different from those described in their documents. Such documents must have been intended to mislead third parties in respect of such rights and obligations.

47 See also *Allsene Pty Limited v Commissioner of Taxation* 89 ATC 5333 at 5345-5346; *AG Securities Limited v Vaughan & Ors* [1990] 1 AC 417 at 475.

48 The AAT stated at [54] that "I need to consider whether the taxpayers have satisfied me that the arrangement is not a sham". This is the correct approach: see *Richard Walter Pty Limited v Commissioner of Taxation* [1996] FCA 454; (1996) 67 FCR 243 (***Richard Walter***) at 258G-259C per Hill J.

49 The AAT's starting point was to examine the subsequent behaviour of the parties to see how that behaviour aligned with the terms of the documents. It found at [37] and [60] that there was a real disparity between the terms of the documents and that subsequent behaviour.

50 The AAT properly took into account the absence of any records relating to the alleged deposit of $600,000 with HWBB as well as the inconsistencies around interest allegedly earned on the deposit. The AAT was entitled to conclude at [45] that the disparities were consistent with the absence of any real transaction. It was also open to the AAT to find, therefore, that the arrangement between the parties was never intended to create any legally enforceable obligations, and not to be satisfied that the arrangements were intended to create any legally enforceable obligation: *Hadjiloucas v Crean* [1988] 1 WLR 1006; *Pacific Exchange Corporation Pty Limited v FCT* [2009] FCA 1155; (2009) 180 FCR 300 at [29]; *Raftland* at [33]-[36].

51 The AAT found at [14] that the applicants did not deal with anyone at HWBB and all dealings were through Mr Gould. The AAT found that the applicants were more or less passive compliant participants in an arrangement presented to them by their trusted advisor, Mr Gould. The AAT also found at [53] that relevant dealings with HWBB were conducted by Mr Gould and the way to get information about HWBB was to ask Mr Gould and whenever this was done, the strong likelihood was that asking Mr Gould was asking HWBB. In effect, any "common intention" reposed with Mr Gould, or put another way, the relevant intention was that of Mr Gould (see [59]).

52 Because Mr Gould was not called as a witness many crucial matters were left unexplained. The AAT dealt with these matters at [46] and following before explaining that Mr Gould's position was as a participant on both sides of the transactions ([50]-[58]). It was open to the AAT to draw a *Jones v Dunkel* inference, to conclude both that Mr Gould would not have assisted the applicants and to enable the AAT to draw, with greater confidence, inferences unfavourable to the applicants: see *Manly Council v Byrne & Anor* [2004] NSWCA 123 at [51] per Campbell J; *The Insurance Commissioner v Joyce* [1948] HCA 17;

(1948) 77 CLR 39 at 49 per Rich J; *Blatch v Archer* (1774) 98 ER 969; (1774) 1 Cowp 63 at 65.

53 It was open to the AAT to find that the relevant intention in the arrangement was that of Mr Gould. The subjective intention of the applicants was not determinative, particularly as they knew nothing about the detail of the documents. It was also open to the AAT to reach this conclusion as a matter of fact.

54 Contrary to the applicants' submissions on the three issues raised concerning sham:

(a) the determination of whether a transaction or document is a sham involves an enquiry into the subjective intention of the relevant actors who were participants in the transaction or parties to the document, but subjective intention can also be imputed from an examination of surrounding circumstances which may reveal a disparity between the documents and the actuality of the situation;

(b) in this area of jurisprudence there is no concept of mandatory considerations being required to be taken into account. The AAT did take into account the subjective intentions of the applicants in any event, and found these subjective intentions were of limited utility, having regard to the role of Mr Gould and an examination of the surrounding circumstances; and

(c) on the facts as found by the AAT, the arrangements constituted a sham. The facts as found did not invariably and necessarily lead to an alternative conclusion. There was no error in fact-finding such as to constitute an error of law.

Repayment of the deposit – procedural fairness: question of law 7

55 The rule in *Browne v Dunn* is to secure fairness in the conduct of proceedings: *R v Birks* (1990) 19 NSWLR 677 at 688-689 per Gleeson CJ. The rule does not require that there be put to the witness every point upon which his or her evidence might be used against him or her or against the party who calls the witness: *White Industries (Qld) Pty Ltd v Flower & Hart* [1998] FCA 806; (1998) 156 ALR 169 at 217. In essence the rule requires a party to give appropriate notice to the other party of any imputation that the former intends to make against either the latter about his or her conduct relevant to the case, or a party's or a witness' credit: *MWJ v The Queen* [2005] HCA 74; (2005) 222 ALR 436 at 448. Cross-examination is not the only way a witness or a party can be put on notice. Where the issues are such that it would be readily apparent to a party that a particular imputation has been made, there is no

necessity to put the imputation to a witness: see *Jagelman v Federal Commissioner of Taxation* 96 ATC 4055 at 4060; *3D Scaffolding Pty Limited v FCT* [2008] FCA 1477 at [18]-[23] per Edmonds J; on appeal *3D Scaffolding Pty Limited v Commissioner of Taxation* [2009] FCAFC 75 at [30]-[32].

56 The applicants were squarely on notice of the Commissioner's sham case which disputed that the applicants had deposited $600,000 with HWBB on true interest bearing terms. The circumstances relating to the payment of $720,000 was fully explored with Mrs Millar and she was challenged on [28]-[29] of her witness statement dated 18 March 2014 in the AAT. Specifically, she was asked about a telegraphic transfer of $722,000 from Normandy Finance to a UK company named Vycrown Investments Limited (**Vycrown**) where that money was then paid to Hua Wang Finance. The same $722,000 was then transferred to HWBB. Eventually $720,000 was transferred to the Millars' fund on 28 January 2011. Mrs Millar answered "I don't know anything about that". Mrs Millar then said "I don't know who Normandy are and I have no idea about any of that". When asked "Why it was that Vycrown transferred $722,000 to Hua Wang Finance, that would be a matter for Mr Gould would it?", Mrs Millar replied "I would – yes, I have no idea what that's all about to be quite honest".

57 As to the $722,000 received back by the superannuation fund (being an amount equivalent to the initial $600,000 plus $122,000 transferred on 18 January 2007), Mrs Millar answered the question "You can't help us with that either – no".

58 The Commissioner submitted that the AUSTRAC records (which were in evidence) showed that on 24 January 2011, Vycrown received $722,000 from Normandy Finance and $722,000 was transferred to Hua Wang Finance. On 28 January 2011, $720,019.74 was withdrawn from Hua Wang Finance and telegraphically transferred to G & G Millar Pty Limited. Hua Wang Finance ordered an electronic funds transfer in favour of G & G Millar Pty Limited. When Mr Millar was asked about the $720,000 coming back to the fund from Hua Wang Finance he answered "all I know is the money came back".

59 In relation to the amount of $720,000, the AAT correctly commented at [63] of its reasons that the figure should have been over $900,000. The AAT drew attention to the problem that no interest was accounted for in the period October 2000-30 June 2001 (at [65]). Mrs Millar acknowledged that if there was a genuine investment of money on deposit, there should have been an entitlement to interest in that

period. There was evidence also of an extra $120,000 transferred to the superannuation fund by Mrs Millar as well as an amount of $600,000 being deposited to the superannuation fund from the proceeds of sale of a property at Hawkes Nest.

60 Accordingly, the AAT was correct to conclude that $720,000 did not represent the entirety of principal and accrued interest if the applicants' case was to be believed. Also, as the funds transfer emanated from Hua Wang Finance, it was also correct to say that the amount might have had nothing to do with the original $600,000. It was also correct for the AAT to say at [63] of its reasons for decision there was no HWBB document "to tell me what the money is" since the transfer was made by Hua Wang Finance. The letter dated 7 March 2011 from HWBB to Gould Ralph is inaccurate if the applicants' case was true – it does not deal with years prior to 30 June 2007.

61 Alternatively, if there was any error by the AAT, it was an error of fact which could not amount to a denial of procedural fairness, could not have made any difference to the outcome of the proceedings, and which did not affect the conclusion of the AAT.

Fraud or evasion: question of law 4

62 The AAT dealt with the issue of fraud or evasion at [71]-[88] of its reasons. The AAT posed the question for itself at [81] whether the applicants "have satisfied me that the avoidance of tax was not due to fraud or evasion". It concluded at [86] that the applicants had not proved that the avoidance of tax was not due to evasion.

63 The Commissioner contended that the short answer to the applicants' submission (that the AAT applied the wrong test because it was obliged to review the opinion that there had been fraud or evasion and not to review whether there had been fraud or evasion) is that the AAT, for the purposes of reviewing a decision of the Commissioner, may exercise all of the powers and discretions of the Commissioner by reason of the operation of s 43 of the *AAT Act*. In other words, the AAT stands in the shoes of the Commissioner and is entitled to reconsider the decision of the Commissioner afresh. It is entitled to make a decision affirming, varying or setting aside the decision under review.

64 By contrast, a court cannot interfere with the opinion formed by the Commissioner or one substituted by the AAT unless it finds that it was formed contrary to legal principles or was formed "capriciously or arbitrarily or upon irrelevant considerations": see *Denver*

Chemical Manufacturing Company v Commissioner of Taxation (NSW) [1949] HCA 25; (1949) 79 CLR 296 at 317 per Williams J.

65 *Moreau* turned on the question whether the Commissioner had power to make increased alterations to assessments notwithstanding the expiration of a three year time limit or whether he had the power only if he had "reason to believe" that there had been avoidance of tax owing to fraud or an attempted evasion. This was because s 37(1) of the *Income Tax Assessment Act 1922-1925* (Cth) had as a proviso that:

> …an alteration or addition shall not be made in or to an assessment…unless the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion.

66 Justice Isaacs considered that the Commissioner was the person entrusted by the legislature and charged with the duty of forming a belief and accordingly (at 68):

> …unless the ground or material on which his belief is based is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden.

67 *Moreau* concerned an examination of the belief of the Commissioner by a court and did not touch or concern the position in relation to the role of the AAT, which is able to substitute its opinion for that of the Commissioner. Accordingly, the correct test for the AAT standing in the shoes of the Commissioner is to consider for itself whether or not there has been fraud or evasion, rather than to examine the administrative opinion of the Commissioner in a process of judicial review. The position of the AAT is to be contrasted with an appeal to the Federal Court, where the Court's role is limited to the ordinary grounds of judicial review and it cannot stand in the shoes of the Commissioner and do again that which the Commissioner has done: cf. *Australasian Jam Co Pty Limited v Federal Commissioner of Taxation* [1953] HCA 52; (1953) 88 CLR 23 at 37 per Fullagar J.

68 In *Bennett & Ors v FCT* [2015] ATC 10-397, Tamberlin QC (Deputy President) observed at [16]:

> It is well settled that under the AAT Act the Tribunal is placed in the same position as the administrative decision-maker at first instance under s 43(6)….

69 Having examined the authorities and the issue of the onus of proof, the Deputy President concluded as follows at [29]-[30]:

29 On these authorities I am satisfied on a review of the objection decisions in this case that the onus of proof imposed by s 14ZZK and its predecessor provisions apply where the Commissioner has found that there has been "fraud or evasion". The Applicants bear the onus of disproving the finding.

30 For the above reasons, I consider that on the present applications there is no obligation or onus, formal or otherwise, on the Respondent on a merits review before this Tribunal to prove that in the relevant matters there has been fraud or evasion within the meaning of s 170 of the Act. It is for the Applicant to disprove fraud or evasion.

Inadequate reasons: questions of law 5 and 6

70 The AAT considered s 26AFB of the *ITAA 1936* at [89]-[92] of its reasons. It did so in the context of a finding that there was no loan between the applicants and HWBB and that the applicants received a benefit "out of or attributable to" the assets of the superannuation fund. At the relevant time, s 26AFB provided:

26AFB Assessable income to include certain benefits

(1) In this section:

exempt fund means:

(a) a fund to which section 23FC, as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 2) 1989*, has applied in relation to any year of income; or

(b) a fund that is or has been a complying superannuation fund, within the meaning of Part IX, in relation to any year of income.

(2) Where:

(a) in a year of income and on or after the proclaimed superannuation standards day, a taxpayer receives or obtains a benefit of any kind out of, or attributable to assets of, an exempt fund;

(b) at the time when the benefit was provided, there were in force regulations for the purposes of subsection 31(1) of the *Superannuation Industry (Supervision) Act 1993* prescribing standards applicable to the fund; and

(c) the provision of the benefit resulted in a failure of the fund to comply with such of those standards as are prescribed for the purposes of this section by regulations made under this Act;

the assessable income of the taxpayer of the year of income shall include the amount or value of that benefit.

(3) Where:

(a) in a year of income and on or after the proclaimed superannuation standards day, a taxpayer receives or obtains a benefit of any kind out of, or attributable to assets of, an exempt fund; and

(b) at the time when the benefit was provided:

(i) the fund was not a regulated superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993*; or

(ii) both:

(A) the fund was a regulated superannuation fund within the meaning of that Act; and

(B) the fund was not maintained as required by section 62 of that Act;

the assessable income of the taxpayer of the year of income shall include the amount or value of that benefit.

(4) Where:

(a) subsection (2) or (3) would, but for this subsection, apply to the amount or value of a benefit received or obtained by a taxpayer out of, or attributable to assets of, an exempt fund; and

(b) the Commissioner, having regard to:

(i) the nature of the fund; and

(ii) such other matters relating to the receiving or obtaining of the benefit by the taxpayer as the Commissioner considers relevant;

is satisfied that it would be unreasonable for subsection (2) or (3) to apply to the whole or a part of the benefit;

that subsection does not apply to the benefit, or to that part of the benefit, as the case may be.

(4A) If, in a year of income, a taxpayer receives or obtains a benefit of any kind out of, or attributable to, an RSA and the benefit is provided in breach of the *Retirement Savings Accounts Act 1997* or regulations under that Act, the assessable income of the taxpayer of the year of income is to include the amount or value of that benefit.

(4B) Subsection (4A) does not apply to a benefit, or to a part of a benefit, if the Commissioner, having regard to any matters relating to the receiving or obtaining of the benefit by the taxpayer as the Commissioner considers relevant, is satisfied that it would be unreasonable for that subsection to apply to the whole or to that part of the benefit.

(5) Where, in a year of income, a taxpayer receives valuable consideration in respect of the transfer by the taxpayer to another person (whether by assignment, by declaration of trust or by any other means) of a right (whether vested or contingent) to receive a benefit from an exempt fund, the assessable income of the taxpayer of the year of income shall include the amount or value of that consideration.

71 There was no evidence that the applicants met any of the conditions for release set out in the *Superannuation Industry (Supervision) Act 1993* (Cth) (***SIS Act***). They had not

reached the preservation age, were earning income and not retired, were not incapacitated or terminally ill, were not experiencing financial hardship and had not applied for release on compassionate grounds.

72 The superannuation fund was a complying fund in the financial year ended 30 June 2001 for the purposes of Pt IX of the *ITAA 1936*, and was therefore an exempted fund under s 26AFB(1) of the *ITAA 1936*. The fund had a trustee which was a constitutional corporation; its governing rules provided that the sole purpose of the fund was to provide an old-age pension; it had made an election to be regulated by the *SIS Act*. Therefore, the fund was a regulated superannuation fund under s 19 of the *SIS Act*. In accordance with the conditions set out in s 26AFB(3) of the *ITAA 1936* the applicants received a benefit paid out from an exempt superannuation fund that was a regulated superannuation fund but was not maintained in accordance with the requirements of s 62 of the *SIS Act*. In failing to comply with the regulations governing the release of benefits the trustee of the superannuation fund contravened ss 34 and 62 of the *SIS Act*. Each of the applicants was therefore assessable on $300,000 (being their respective 50 percent shares of the benefit of $600,000 received in the financial year ended 30 June 2001).

73 The AAT concluded at [92] that it had had regard to the matters specified in s 26AFB(4) but was not satisfied that it would be unreasonable for s 26AFB(3) to apply. Accordingly, it gave reasons and, in the context of its findings at [91], the AAT's reasons were not inadequate. The only submission put to the AAT by the applicants on the application of s 26AFB(4) was that:

> the discretionary power arising under s 26AFB(4) should be exercised in the Applicants' favour because they were not aware of any nexus between the Millar Super Fund and their receipt of the loan.

The issue was not addressed orally by the applicants in the AAT. Given the factual findings made by the AAT at [68], the AAT has provided sufficient reasons.

74 The Commissioner contended that the authorities are still unclear as to whether a failure to provide adequate reasons gives rise to an error of law which would render the AAT's decision liable to be set aside by a court. On the one hand, there is obiter dictum by Brennan J (dissenting but not on this point) in *Repatriation Commission v O'Brien* [1985] HCA 10; (1985) 155 CLR 422 (***O'Brien***) at 446 which takes the view that a mere failure to provide adequate reasons does not, by itself, invalidate a tribunal's decision or warrant its

being set aside, and the proper remedy is a mandatory order requiring adequate reasons to be provided. On the other hand, the Full Court held in *Dornan v Riordan* [1990] FCA 383; (1990) 24 FCR 564 (***Dornan***) at 573 per Sweeney, Davies and Burchett JJ, that a substantial failure by the AAT to give adequate reasons in a situation where reasons are a requirement of the exercise of the AAT's decision making power amounts to an error of law, and that the proper remedy is an order setting aside the decision. *Dornan* has been criticised multiple times.

75 In *Kennedy v Australian Fisheries Management Authority* [2009] FCA 1485 Tracey J held that *Dornan* was no longer good law in the light of the High Court's decision in *Re Minister for Immigration, Multicultural and Indigenous Affairs; Ex Parte Palme* [2003] HCA 56; (2003) 216 CLR 212 per Gleeson CJ, Gummow and Heydon JJ at [43]-[48]. Tracey J considered that an order in the nature of mandamus is the appropriate remedy if a tribunal fails to comply with the statutory requirement to provide adequate reasons.

76 The Full Court in *CASA* sought to reconcile the decisions in *O'Brien* and *Dornan*, and stated that there was no single inevitable rule requiring either an order setting aside the decision or an order requiring reasons to be provided. The Full Court said at [55]:

> Notwithstanding the divergence in authority, a failure to comply with s 43(2) of the AAT Act should not inevitably lead to an order pursuant to s 44(5) that the Tribunal's decision should be set aside in its entirety or, alternatively, lead to the reasons alone being set aside and an order being made for reasons to be provided. The appropriate order to be made pursuant to s 44 will depend upon the facts and circumstances of each individual case and the exercise of the discretion thereby conferred.

77 The Commissioner submitted that it is only in circumstances where reasons are inadequate and which have the additional feature of revealing other errors of law that a decision of the AAT would be vitiated: see *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2000) 206 CLR 323 (***Yusuf***) at [9]-[10] per Gleeson CJ, [33]-[34] per Gaudron J; [68]-[69] per McHugh, Gummow and Hayne JJ; and most recently *Repatriation Commission v Holden* [2014] FCA 605; (2014) 142 ALD 267 (***Holden***) at [74] per Mortimer J.

78 In summary, the adequacy of the reasons must be assessed in the context of the nature of the decision: *IFTC Broking Services Limited v Commissioner of Taxation* [2010] FCAFC 22 at [4]. In context, the AAT's reasons here correctly identified the legal issues and

dealt with the matter in the context of the submissions. Its reasons are not inadequate, let alone so inadequate as to invalidate the exercise of power and amount to an error of law. Even if there was a failure to comply with s 43(2B) of the *AAT Act* there is no warrant for setting the decision aside or making an order for reasons to be provided.

Commissioner's notice of objection to competency

79 The Commissioner objected to the competency of questions of law 2, 3 4, 5, 6, and 7 as identified in the notice of appeal. In his oral address, Mr McGovern SC (who appeared for the Commissioner) conceded that question of law 1 was competent. He also conceded that question of law 4 "is probably a question of law". He submitted that questions of law 2, 3 and 7 were factual matters and that questions 5 and 6 did not involve questions of law in the circumstances of this case.

80 Mr Hyde Page (who appeared with Mr Bagley for the applicants) submitted that question of law 2 was competent. He cited *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 (***Hope***) and *Haritos* for the proposition that a question of law is raised when the issue is whether or not facts necessarily fall within or outside a statutory definition. Otherwise Mr Hyde Page did not in his oral address respond to the competency of the other questions of law challenged by the Commissioner, nor were those matters addressed in either his written submissions in chief or in reply.

Commissioner's notice of contention

81 In light of the finding that the loan documents were a sham, the Commissioner contended that it was unnecessary for the AAT to consider the applicants' claims for interest deductions or the interest withholding tax issue (AAT reasons [70]). The withholding tax issue is the subject of the notice of contention and is predicated on the assumption that the loan documents are not a sham.

82 In support of his notice of contention the Commissioner made the following submissions. For payments made after 30 June 2000, ss 2-245, 12-250 and 12-255 of Subdiv 12-F of Sch 1 of the *Taxation Administration Act 1953* (Cth) (***TAA 1953***) require a person to withhold amounts from payments of interest. Section 11-5(1) of Sch 1 of the *TAA 1953* deems an amount to have been paid when the paying entity applies or deals with the amount in any way on the other's behalf or as the other directs.

83 The Commissioner submitted that this latter provision expresses the same idea as former s 221YK(3) of the *ITAA 1936*, which deemed interest to be paid or payable when it is:

> reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on behalf of the other person or as the other person directs.

If both provisions express the same idea, the Commissioner submitted that the Court would be reluctant to infer some new or changed obligation arising from the rewritten legislation: cf. *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [23]-[25] per French CJ and Hayne J; and *Emanuele & Anor v ASC & Ors* [1997] HCA 20; (1997) 188 CLR 114.

84 Under s 221YK(3), the requirement to withhold tax from interest did not require the actual payment of interest; it was enough if the interest liability arose and any of the actions outlined in the s 221YK(3) occurred. The current provision should be construed in like manner, submitted the Commissioner.

85 Broadly, s 26-25 of the *Income Tax Assessment Act 1997* (Cth) (***ITAA 1997***) prohibits a taxpayer from deducting a payment of interest unless the taxpayer has complied with the requirements of the PAYG withholding system. Specifically, a taxpayer cannot deduct a payment of interest if the taxpayer is required to withhold an amount from the payment under the *TAA 1953* Sch 1, Div 12 and fails to do so, or fails to pay any amount so withheld to the Commissioner: s 26-25(1) of the *ITAA 1997*.

86 Division 12 applies to interest payments to entities with an address outside of Australia. HWBB gave its address as outside of Australia and, accordingly, withholding tax was required to be deducted even though the interest was capitalized and not physically paid. This is because of the deeming in s 11-5(1) of Sch 1 of the *TAA 1953*.

87 In response, the applicants submitted that the Commissioner's notice of contention relates only to the deductibility of the interest liabilities claimed by them. It could not affect whether they were properly assessable on their receipt of monies from HWBB in October 2000.

88 The applicants made the following two additional submissions. First, the provisions that applied during the 2001-2008 income years were ss 12-245 and 26-35 of *TAA 1953*. It is not in dispute that the predecessor provision, s 221YK(3) of the *ITAA 1936*, required the

payment of withholding tax on capitalized amounts of interest; s 221YK expressly deemed interest to be paid if it was "capitalized". Section 12-245 is in different terms. In contradistinction with s 221YK(3), s 12-245 (and its coordinate provision s 11-5) do not deem capitalized interest to be "paid" for withholding tax purposes.

89 Secondly, s 26-25(3) causes an interest liability to become deductible retrospectively once withholding tax is paid. Accordingly, if the Commissioner's submission is accepted, and withholding tax was payable by the applicants, the appropriate relief is an order that, if the applicants were otherwise entitled to deduct the interest liabilities, the applicants' appeals should be allowed in respect of the interest deductions conditional upon their payment of the associated interest withholding tax. Mr Hyde Page handed up proposed orders which he requested be made in the event that these contentions were accepted.

Resolution of the appeal

Sham: questions of law 1, 2 and 3

90 At the core of these matters is the applicants' proposition that the AAT erred in not confining its assessment of whether or not the loan transaction was a sham to an inquiry into the subjective intentions of Mr and Mrs Millar, as parties to the transaction. It was submitted that only their intentions were relevant and that the AAT erred in taking into account Mr Gould's role in the transaction. The applicants submitted that the true legal position where one of the parties to a transaction is misled is as expressed in *Snook* at [528], namely that "no unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived".

91 The applicants submitted that in assessing whether a transaction is a sham it is mandatory to take into account the subjective intention of the parties, citing inter alia *Raftland* at [47]-[48] and [57]. They submitted that the erroneous approach taken by the AAT is reflected in its observation at [59] that the Millars' subjective intentions were "probably not even relevant".

92 The applicants also submitted that Edmonds J's recent decision in *Fitzroy Services Pty Ltd v Commissioner of Taxation* [2013] FCA 471 (***Fitzroy Services***) supported their case.

93 In defending the AAT's decision, the Commissioner placed particular reliance on the Full Court's decision in *Richard Walter*, with heavy emphasis on the significance of the onus carried by the applicants under s 14ZZK of the *TAA 1953*.

94 In view of the parties' prominent reliance on these four authorities, it is appropriate to consider the relevance of each of them closely.

95 *Snook*: The applicants' reliance upon the passage from Diplock LJ's judgment in *Snook* is misplaced. As is invariably the case, it is important to evaluate any such passage in its context and not in isolation. (See generally the observations of Leeming JA in *Mainteck Services Pty Ltd v Stein Hurtey SA* [2014] NSWCA 184 at [73]).

96 In common with many cases involving claims of "sham" the facts in *Snook* were complicated. The plaintiff bought a car, which was financed in part by a genuine hire purchase agreement between the plaintiff and Totley Investments Ltd (**Totley**) (**the first hire purchase agreement**). Before the first hire purchase agreement terminated, the plaintiff refinanced with Auto Finance (Hallamshire) Ltd (**Auto Finance**) with the aim of obtaining extra credit. Auto Finance required the plaintiff to enter into a second hire purchase agreement with the defendants. Auto Finance paid to Totley the outstanding amount owing under the first hire purchase agreement. The plaintiff subsequently defaulted under the second hire purchase agreement. Auto Finance, acting as the defendant's agent, seized possession of the car and sold it, paying some of the proceeds to the defendants and retaining the balance of the sale amount for itself. The plaintiff sued the defendants in conversion and claimed that the refinancing transaction was a sham because the plaintiff had never sold his rights in the car to Auto Finance. He asserted that many of the statements in the documentation were untrue. He claimed that the transaction was a sham because it was nothing more than a loan of money on the security of goods and was illegal under the *Bills of Sales Act*, 1878 and 1882. The plaintiff's claims succeeded before the trial judge.

97 On appeal to the Court of Appeal, the plaintiff's claim in conversion failed (Lord Denning MR dissenting). The majority (Diplock and Russell LJJ) held that the defendants had established their title to the car, there was a transfer of value by the plaintiff and the refinancing transaction was enforceable. The majority held that the plaintiff was estopped by his conduct from denying the defendants' title to the car. They held that the defendants were entirely innocent and it was the plaintiff who intended the sham in order to mask what in substance was a loan on the security of the car.

98 After describing the word "sham" as "popular and pejorative", Diplock LJ said at 528-529 in a passage which is frequently cited (citations omitted):

> I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities, that for acts or documents to be a "sham", with whatever legal consequences follow from this, **all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating**. **No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.** There is an express finding in this case that the defendants were not parties to the alleged "sham". So this contention fails.
>
> (Emphasis added).

99 In dissent in *Snook*, Lord Denning MR held that the defendants were affected by the sham transaction because, even though they were not parties to the sham, their agents (i.e. Auto Finance) were, and every "principal is answerable for the conduct of his agent in the course of his agency" (at 527). The majority disagreed. Russell LJ stated at 532 that it was not open to conclude that Auto Finance was the agent of the defendants because no such finding had been made by the trial judge (Diplock LJ agreed with Russell LJ's reasoning on this point).

100 Accordingly, unlike the position here, a majority of the Court of Appeal concluded that there was no proper evidentiary basis upon which to find that Auto Finance was the defendants' agent. The passage from Diplock LJ's judgment set out in [98] above, upon which the applicants relied, which referred to the necessity that the parties have "a common intention" to create a sham, does not accommodate the potential relevance, in an appropriate case, of the intention of an agent or third party. That is particularly so in a case such as the present where Mr Gould's role was so predominant. His failure to give evidence was critical to the AAT's conclusion that the applicants had failed to discharge their burden under s 14ZZK of the *TAA 1953*.

101 *Raftland*: In my view, the applicants' reliance on *Raftland* is also misplaced. It is notable that, unlike the circumstances here, the professional advisor there (Mr Tobin) gave evidence and was cross-examined. The High Court observed that the cross-examination was unsuccessful in establishing that Mr Tobin's intention cast any doubt on the subjective intentions of the parties to the transaction (see further below). Another significant feature of *Raftland* is that the relevant transaction there involved the creation of an express trust, which has important implications for the requisite intention (see further below).

102 I do not accept the applicants' submission that *Raftland* establishes an absolute proposition that, in a case where parties enter into a tax arrangement which is designed by a professional advisor which the parties are unlikely to have fully understood, the relevant intention in determining whether or not the transaction is a sham is limited to those of the parties and does not take into account the intention of their advisor.

103 In [43] of *Raftland*, the plurality identified the relevant intentions in establishing the Raftland Trust as those of the parties to the transaction, namely the Heran brothers on the one hand and Mr and Mrs Thomasz on the other hand (see [57]). The plurality also considered whether the intention of the settlor of the Raftland Trust (Ms Sommerville) had any legal relevance, but their Honours found that she had no intention independent of those of the Heran brothers, who were her employer's clients (see at [44]).

104 Consideration was also given at [45] of *Raftland* to the legal relevance of the intention of Mr Tobin, upon whose advice the Raftland Trust was established. In [45], the plurality commented that the legal relevance of Mr Tobin's intentions was a matter of dispute but, significantly, their Honours also found that an attempt at the trial to elicit clear evidence from Mr Tobin on this subject was unsuccessful. That is to be contrasted with the position here. Although Mr Gould did not give evidence before the AAT, the AAT found that the applicants did not understand the loan documentation or other relevant aspects of the arrangements they had entered into and, in effect, simply did what Mr Gould told them to do. It is in that context that the AAT made the findings that it did in [58] and [59] of its reasons, which culminated in its finding that the relevant intention was that of Mr Gould, whom the AAT described as "the puppet master" and the AAT had no idea what that intention was because he had not given evidence. This has significance for the burden carried by the applicants (see further below).

105 The comments of the plurality in *Raftland* concerning whose intention is relevant also have to be assessed in the context of the facts of that case. In particular, it is important to note that in [47] their Honours emphasised that the case involved the creation of an express trust. As the plurality stated there, the creation of such a trust depends "upon the intention of the person alleged to have created it": citing *Commissioner of Stamp Duties (Qld) v Jolliffe* [1920] HCA 45; (1920) 28 CLR 178 (***Jolliffe***).

106 In *Jolliffe*, Knox CJ and Gavan Duffy J stated the relevant principle at 181 as follows:

> We know of no authority, and none was cited, which would justify us in deciding that by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it. In our opinion the law is accurately stated in *Lewin on Trusts*, 11th ed., at p. 85: "It is obviously essential to the creation of a trust, that there should be the intention of creating a trust, that there should be the *intention* of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean to create a trust, the Court will not impute a trust where none in fact was contemplated.

107 Necessarily, therefore, there was a focus upon the intention of the persons who created the Raftland Trust, who were identified in [47] as the Heran brothers (who were the directors of Raftland). The plurality observed in [47] that it "is the intention of the Heran brothers that is specifically relevant to a question whether the trusts apparently created by the Raftland trust deed were wholly or partly a pretence".

108 In the following paragraph, the plurality in *Raftland* observed that the Heran brothers were business people, not lawyers and that it was unlikely that they applied their minds with care to the detail of the documents that were prepared by their solicitor, Mr Tobin. It was in this context that the plurality then said: "That does not mean, however, that their intentions were irrelevant". Rather, their Honours added that it may give rise to a factual inference that the Heran brothers had no intentions which were inconsistent with the documents prepared by their solicitor, with the consequence that the documents were to be taken at their face value. If, however, the Heran brothers had a common intention that was inconsistent with the creation and enforcement of the entitlement of the E & M Unit Trust as a beneficiary of the Raftland Trust, that would be significant. The primary judge had held that it was the intention of the brothers, together with Mr and Mrs Thomasz, that the Thomasz interests were to receive only the $250,000 as the "price" for the accumulated tax losses of that Trust, and **no more.** This issue was at the heart of the issue whether aspects of the arrangements were a sham.

109 The plurality in *Raftland* returned to consider the issue of whose intentions were relevant in [56]. Reference was made to Edmonds J's leading judgment in the Full Court below, where his Honour found that the nomination of the E & M Unit Trust as a tertiary beneficiary of the Raftland Trust "was at the forefront of the intentions of those charged with responsibility for establishing the Raftland Trust". The plurality observed at [57] that Edmond J's reference to the intentions of those charged with responsibility for establishing the Raftland Trust appeared to be a reference to the intentions of the Heran brothers' solicitor, Mr Tobin, who drafted the relevant documents. The plurality repeated, however, that the

relevant intentions were those of the Heran brothers, and Mr and Mrs Thomasz. Their Honours added at [57] that Edmond J's reasoning did not reflect "the complexity of Mr Tobin's position", as reflected in extracts from his cross-examination which indicated that Mr Tobin's intentions were "more subtle than those of his clients, but he was unable to give a direct answer to the suggestion that it was the intention of the parties that the Thomasz interests, and the E & M Unit Trust, were to receive $250,000 and nothing more".

110 The important point to note is that the reason why the plurality in the High Court focused on the intentions of the Heran brothers and Mr and Mrs Thomasz, as opposed to Mr Tobin, is because an express trust was involved and, in accordance with authority, the creation of such a trust depends upon the intention of the person who is alleged to have created it (and not any advisor).

111 In the present appeal, there is no issue of the creation of an express trust. Accordingly, the principle which was at the heart of *Raftland* has no direct application here. I see no reason why in the different circumstances here the AAT fell into error in concluding that the subjective intentions of the Millars (who plainly had little understanding of the relevant legal documentation or the arrangements generally) were not determinative. Moreover, considering Mr Gould's dominating involvement (possibly on both sides of the loan transaction) it was not incorrect of the AAT to highlight the legal relevance of his intentions, together with the difficulties created for the taxpayers (who carried the burden of establishing that the assessments were excessive) by Mr Gould's absence as a witness in their case.

112 I do not accept the applicants' submission that Mr Gould's knowledge or intention could not be imputed to the applicants who were his principal because of his fraud which was not disclosed to them. The applicants relied on the following statement of principle by Buckley J in *Re David Payne & Co Ltd* [1904] 2 Ch 608 at 611:

> …if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose, and which he did not disclose.

113 This principle is relevant where a third party knows that an agent will not disclose particular information to the principal because it is not in the agent's interest to do so, such as where a third party makes a misrepresentation to the agent which both know to be fraudulent

or otherwise not in the interests of the agent to disclose to his or her principal. The principle has no application to the circumstances here.

114 *Fitzroy Services*: The applicants also relied on *Fitzroy Services.* It will be recalled that in [79] of its reasons for decision, the AAT described that decision as "a distraction" and "a different case". The AAT added that, apart from what was revealed in the reasons for judgment there, the AAT knew nothing about the arrangements. I consider that these findings were open to be made by the AAT and no appellable error has been established.

115 From one viewpoint, the applicants' reliance on *Fitzroy Services* is perhaps understandable, not the least because that case also involved a series of transactions which were entered into on the advice of Mr Gould and which all also involved HWBB. In simple terms (and as best can be divined considering the significant deficiencies in the evidence in that case), the arrangements included the establishment of a superannuation fund (**the Fund**) in Western Samoa by the Heasman brothers; funds then being transmitted to that Fund by Australian companies which were owned and controlled by the Heasman brothers (including Heasman Sales and Fitzroy Services); those funds then finding their way to the HWBB in a manner which was not explained by the evidence; and the funds then being remitted back to a bank account in Australia by way of a "loan" from HWBB to Heasman Sales.

116 Various companies owned and controlled by the Heasman brothers (including Fitzroy Services) claimed tax deductions in respect of interest payments which were said to have been made in respect of the loan from HWBB, as well as bank fees and management fees which were also said to relate to the loan. The Commissioner disallowed all these deductions. He asserted that the loan was a sham.

117 The key findings made by Edmonds J may be summarised as follows:

(a) after commenting at [7] that the case "was notable for the lack of issue-specific evidence called on behalf of the applicant", his Honour concluded at [20] that the evidence specifically relating to the management fees was "unsatisfactory, generalised and unsupported by primary records", with the consequence that the appeal on that issue failed;

(b) the Commissioner did not contend that the apparent loan transactions were a disguise for some other transaction which was the real transaction and this was not a case where there was no transaction at all in the sense that the payments were not intended

to be recoverable. There was some evidence to support the claim that the loan was genuine. Accordingly, the sham assertion was rejected (see [30]-[34]); and

(c) interest and bank fees for some taxation years were not allowable deductions under ss 8-1 or 25-25 of the *ITAA 1997* for reasons given by his Honour which are unrelated to the unsuccessful allegation of sham (see [46] and [50]).

118 It is important to note that the proceeding before Edmonds J was in the nature of an appeal to the Court under s 14ZZ of the *TAA 1953*, as an alternative to review by the AAT. Accordingly, the Court was required to find the relevant facts in *Fitzroy Services*. This task was handicapped by the many deficiencies in the evidence, which were specifically commented on by Edmonds J.

119 The current appeal proceeding is of a fundamentally different nature. The Court has a more limited role under s 44 of the *AAT Act*. The AAT's role is to find the facts and the Court's jurisdiction in an "appeal" under that provision is confined to a review of questions of law. No reviewable error of law has been established in respect of the AAT's finding here that *Fitzroy Services* had no relevance to the different facts and circumstances presented by the evidence before it.

120 *Richard Walter*: *Richard Walter* involved a series of complex arrangements which were implemented on the advice of tax accountants and lawyers and were designed to minimise the liability to income tax of the proceeds of a large pathology practice, of which Dr Wenkart was the principal. The arrangements included a series of loans or trusts which the Commissioner claimed to be a sham. At first instance, Tamberlin J accepted the Commissioner's submission that the loan arrangements were a sham. His Honour pointed to various features of the arrangements which he considered supported his conclusion that the purported loans were simply a false label masking the real transaction intended by the parties, which was identified as the transfer of the beneficial ownership of proceeds from the pathology practice to the company, Richard Walter, free of any obligation to repay.

121 On appeal to the Full Court, Hill J acknowledged that some criticisms could be made in respect of various of the individual factors cited by the primary judge as supporting that conclusion. Hill J emphasised at 256-257, however, that there were two additional matters which were of greater significance to the primary judge's conclusion, namely:

(a) his Honour's finding that the only witness called to give evidence on behalf of the taxpayer (a Mr Holden, who was the financial controller of various companies in the group of which Richard Walter formed a part) was not a reliable witness, with the consequence that the primary judge's finding that there was no intention on the part of the relevant parties that the loans be repaid necessarily involved not accepting Mr Holden's evidence; and

(b) the failure of the taxpayer to call Dr Wenkart and the accounting advisors concerned with the arrangements, which enabled a *Jones v Dunkel* inference to be drawn that their evidence would not have assisted Richard Walter's case.

122 As Hill J explained, these matters were significant because of their relevance to the burden of proof carried by the taxpayer, a matter to which I will return below.

123 Justice Hill cited approvingly the passage from Diplock LJ's judgment in *Snook* (which is set out in [98] above), as well as Lockhart J's comments on the meaning of "sham" in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* [1988] FCA 179; (1988) 18 FCR 449 (***Sharrment***) at 454. At 257-258, Hill J added a gloss to Lockhart J's definition of a sham transaction by describing such a transaction as one which involves:

> A common intention between the parties to the apparent transaction that it be a disguise for some other and real transaction **or for no transaction at all.**
>
> (Emphasis added).

124 Justice Hill described the relevant transactions in *Richard Walter* as not being a disguise for something which was not a transaction at all, but rather being a disguise for some real transaction largely because some payments had been made and recorded as loans in the relevant accounting books.

125 Justice Hill emphasised, however, the importance of approaching a case involving an allegation by the Commissioner of sham in the context of the wider legislative scheme of taxation legislation, which his Honour summarised as follows at 258-259:

- the Commissioner is obliged to make an assessment of the taxable income of a taxpayer and the tax payable thereon, which notice of assessment must be given to the taxpayer;
- the taxpayer may then lodge an objection to the assessment under Pt IVC of the *TAA 1953*;

- the Commissioner then considers the objection and determines whether to disallow it or allow it in whole or in part;
- a taxpayer who is dissatisfied with the Commissioner's objection decision may then appeal to either the AAT or to the Court;
- the Commissioner will generally tender a copy of the assessment which, under s 177, effectively prevents a challenge to the validity of the assessment or its due making and the issue then becomes one of the excessiveness of the assessment; and
- the taxpayer carries the burden of proving the assessment to be excessive, which requires the taxpayer to demonstrate not merely that the assessment is wrong.

126 Applied to the particular circumstances presented in *Richard Walter* itself, Hill J stated at 259:

> The Commissioner alleges that the payments from Morlea to Richard Walter are income. In order to show that the assessment is excessive Richard Walter must thus show on the balance of probabilities that the payments are not income. It seeks to do that in the present case by making a case that the payments were loans. If this case is accepted, Richard Walter will, but subject to the s 260 issue, be entitled to succeed. In the present case it sought to show the amounts in question were loans through the evidence of Mr Holden who swore that they were and that the accounts reflecting them were correct. His Honour did not believe Mr Holden, finding that there was no intention that the loans would be repaid. This being the case, the payments in question were not loans. Whether they had some other character may have relevance to the question of sham, but that can for the moment be put to one side. It can not be correct to say that the onus lay upon the Commissioner to establish what the payments in question were. If they were not loans it will be for the taxpayer then to show that they are something else which does not have the character of income. If the taxpayer does not do this it will not have satisfied the onus of showing that the assessment is excessive.

127 Significantly for the present appeal, Hill J then emphasised that in a case in which the Commissioner alleged sham, the Commissioner did not carry an onus of persuading the Court that there was a sham; rather the taxpayer carried the burden of proving that the assessment was excessive. The Commissioner did not have the burden of establishing the sham, nor was he obliged to show what the genuine transaction was which was obscured by the sham. This meant that if Richard Walter wished to assert that the relevant amounts which were the subject of the assessments should not be treated as profits of the company, it carried the burden of demonstrating, on the balance of probabilities, that the payments to it were not assessable income with the consequence that the taxation assessment was excessive. Justice Hill acknowledged, however, at 259 that once the Commissioner alleges a sham, a factual

obligation may arise for the Commissioner to identify the real transaction for which it is contended that the apparent transaction is but a disguise: citing *Coppleson v Commissioner of Taxation (Cth)* (1981) 52 FLR 95 (***Coppleson***).

128 In [12] of his written outline of submissions in the present appeal, after noting that there was "a real disparity between the terms of the documents and subsequent behaviour", the Commissioner made the following submission:

> The Tribunal was entitled to consider that the disparities were consistent with the absence of any real transaction (Reasons [45]).

129 This might suggest that the Commissioner's position was that there was no real transaction at all. But that is not how the Commissioner's case was presented either in the AAT or in the appeal. Rather, the Commissioner contended (and the AAT accepted at [33] of its reasons for decision) that the true arrangement was different from that presented by the loan documentation between the applicants and HWBB. The real arrangement, as identified by the Commissioner and accepted by the AAT, was that the taxpayers impermissibly accessed their superannuation funds to purchase the Sunshine Coast apartment. In this respect, the Commissioner discharged the factual obligation to identify the real transaction as referred to by Hill J in *Richard Walter* at 259. This also puts this case into a different category from that in *Coppleson*, where Hunt J observed at 101 that the absence of identification of any specific motive or purpose of benefitting one or other of the parties by way of some other and different transaction makes it unlikely that a common intention existed to disguise the true nature of a transaction.

130 In *Richard Walter*, Lockhart J substantially agreed with Hill J's approach. After noting the importance of the burden carried by the taxpayer to prove that an assessment is excessive, Lockhart J agreed that Richard Walter failed to discharge that burden there, particularly in the light of the primary judge's rejection of Mr Holden as a credible witness and the taxpayer's failure to call other persons who could have given evidence regarding the true nature of the transactions.

131 The applicants relied on another aspect of *Coppleson*. In that case, the Commissioner argued that, even if the Court accepted the taxpayer's evidence that he intended to make a gift of shares to a hospital, the Court would nevertheless find at 102 that the transaction was a sham "because the taxpayer is to be identified with the motives and intentions" of his accountant and financial advisor (Mr Joye). Mr Joye implemented the taxpayer's desire to

make a gift to the hospital by setting up a special company for that purpose and have it issue preference shares to the hospital which would earn a dividend. The evidence established that the taxpayer was totally reliant upon Mr Joye in relation to his financial affairs. The Commissioner effectively argued that the taxpayer did no more than instruct Mr Joye to obtain for him a taxation benefit in making the gift and that the taxpayer was prepared to ratify whatever Mr Joye did to achieve that result. In rejecting that contention, Hunt J emphasised at 103 that it was inconsistent with his core finding that the taxpayer genuinely intended to make a gift to the hospital but he left it to Mr Joye to work out the details of how the gift was to be made. His Honour held that this did not amount to the taxpayer "placing himself in the hands of Mr Joye so as to identify himself with whatever may have been Mr Joye's motives and intentions".

132 It is to be noted that the taxpayer and Mr Joye gave evidence in *Coppleson* and that the taxpayer's evidence was accepted in its entirety. Indeed, the taxpayer was described by his Honour at 101 as "a man of pellucid probity and sincerity". That is to be contrasted with the findings made by the AAT here regarding the evidence of the applicants, the significant gaps in the evidence generally and, most importantly, Mr Gould's role and his absence from the witness box.

133 It seems to me that the core of this appeal essentially relates to the applicants' burden under s 14ZZK of the *TAA 1953*. To discharge this burden the applicants had to defeat the Commissioner's claim that the loan was a sham. In the particular circumstances of this case it was insufficient for them simply to persuade the AAT (as they did) that they genuinely believed and intended that the transaction was a loan. The difficulty the applicants faced was that, as the AAT found, they placed their total trust and faith in Mr Gould ([83] of the AAT's reasons for decision), such that Mr Gould's actions were "properly imputed to the taxpayers" (at [84]). Once that point was reached, and given all the unanswered questions regarding the transaction which the AAT found Mr Gould could probably answer because of his prominent role in implementing and administering the arrangements (see [46]-[50]), it was a short and legitimate further step for the AAT to find that, because the evidence left unclear what Mr Gould's intention was, the applicants failed to discharge their burden of demonstrating that the assessments were excessive. It may well be that, in a different set of circumstances, the taxpayers' subjective intentions would carry more if not decisive weight. In my view, however, the applicants have failed to establish any legal error in the AAT's approach in the particular circumstances here.

134 For all these reasons, question of law 1 should be rejected.

135 Question of law 2 turns on the question whether the facts found by the AAT were necessarily outside the statutory criteria posed by s 26AFB of the *ITAA 1936*. The applicants contended that once the AAT had found that they intended the transactions to have ordinary effect this necessarily meant that the $600,000 transferred to them on 14 October 2000 was a loan from HWBB. Consequently, any benefit derived by them from the loan was not "out of, or attributable to assets of" the Australian fund within s 26AFB and that provision could not tax the benefit in their hands.

136 The applicants' contention should be rejected. It is predicated on the proposition which has already been rejected in relation to question of law 1, namely that the applicants' subjective intention is determinative on the issue of sham and that no account can be taken of the role played by Mr Gould and the knowledge which he apparently had (which was relevant to his intention), yet he was not called as a witness.

137 Question of law 3 should be rejected for similar reasons. In the particular circumstances of this case and having regard to the AAT's findings concerning the applicants' lack of knowledge of many aspects of the transaction and that they were passive and compliant participants in an arrangement presented to them by Mr Gould, it was open to the AAT to find at [59] that the applicants' intention was not determinative and was "probably not even relevant". It is significant to note the express reference by the AAT in [59] of its reasons for decision that these findings were made **in the circumstances** of the particular case.

Repayment of the deposit – procedural fairness: question of law 7

138 The alleged procedural unfairness relates to the AAT's finding at [63] that the payment of $720,000 to the applicant's superannuation fund in early 2011 may have had nothing to do with the original $600,000 and may not, therefore, have constituted a repayment of the deposit. The applicant's contentions on this matter placed heavy reliance upon the contention that the rule in *Browne v Dunn* applied to the AAT proceeding, with the consequence that it had to be put to the applicants in cross-examination that the $720,000 may not have been what they said it was.

139 There are several difficulties with these contentions. The first is that the rule in *Browne v Dunn* is a rule of evidence. In circumstances where the AAT is not bound by the

rules of evidence, the Full Court has held in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 226 FCR 555 (***Sullivan***) at [149]-[151] that the observations of Gummow and Heydon JJ in *Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60; (2003) 201 ALR 437 at 450 (to the effect that that rule has no application to proceedings in the Refugee Review Tribunal) also applies to AAT proceedings. In *Sullivan,* the Full Court approved the observations of Robertson J in *Calvista Australia Pty Ltd v Administrative Appeals Tribunal* [2013] FCA 860; (2013) 216 FCR 32 at [118] that:

> …in light of the origins of the rule…it is apt to mislead and to give proceedings in the tribunal an unwarranted curial gloss to refer to principles of procedural fairness as they operate in the tribunal by reference to *Browne v Dunn*.

140 Secondly, even if the applicants' heavy reliance on *Browne v Dunn* is put to one side, no procedural unfairness has been established. The applicants were plainly on notice at the time of the AAT hearing that the Commissioner considered that the loan transaction was a sham, as was abundantly clear from the Commissioner's reasons for decision concerning the applicants' objections. Furthermore, Mrs Millar was cross-examined as to the circumstances relating to the payment of the $720,000 in the context of her evidence in [28]-[29] of her second written statement in the AAT proceeding.

141 Thirdly, acceptance of the applicants' argument that there was procedural unfairness in the way the AAT dealt with the issue of the transfer of the $720,000 in [63]-[65] of its reasons for decision would have the effect of imposing an obligation on the AAT to give a running commentary on its deliberative processes, contrary to well-known authority, including the Full Court's decision in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 293; (1994) 49 FCR 576. All the more so when it is evident from a fair reading of these parts of the AAT's reasons that the AAT was not making findings of fact as such regarding the circumstances surrounding that payment, but rather was responding at a higher level of reasoned analysis to the applicants' submissions concerning the significance of that payment to the question whether the transaction was a sham. It is indisputable that the applicants carried the burden of persuading the AAT that there was no sham. The matters contained in [63]-[65] do not constitute findings of fact. They are an explanation of why the AAT did not accept that the applicants had discharged their burden, which was largely because of the significant shortcomings in the evidence as identified by the AAT in those paragraphs.

142 Fourthly, the factual foundation for the applicants' procedural unfairness claim is also flawed. As is evident from the summary set out in [33] above, part of that case relies on a claim that the AAT erred in finding at [63] of its reasons for decision that "there is no HWBB document to tell me what the money [i.e. $720,000] is". The applicants contended this was incorrect and ignored a letter dated 7 March 2011 which was written on HWBB letterhead and was sent to Gould Ralph. The letter, which was in evidence below, stated that, as at 30 June 2010, the applicants' superannuation fund had a deposit of $720,000 with the bank comprising principal of $600,000 and accrued interest for the years 30 June 2007 to 2010 at 5 percent totalling $120,000. The letter then stated:

> We further confirm that the principal an interest totalling A$720,000 was repaid to the G & G Millar Pty Ltd Superannuation Fund in **January 2011**.
>
> (Emphasis added).

143 It is perhaps unsurprising that the AAT apparently gave no weight to this document, nor even referred to it. The date of the payment according to that letter contradicted the evidence of Mrs Millar. In her second witness statement in the AAT proceeding Mrs Millar claimed that she spoke with Mr Gould in or about **March 2011** and asked for the $600,000, including interest, to be withdrawn from the HWBB. She further stated that it was "[s]hortly after the conversation $720,000 was deposited in the bank account of our Australian superannuation fund". There is a clear discrepancy between Mrs Millar's evidence and the date recorded in the HWBB letter. Furthermore, and in any event, as the Commissioner pointed out, the AAT's statement in [63] of its reasons for decision is not inaccurate as the payment came not from HWBB, but from Hua Wang Finance.

144 It was a matter for the AAT to decide the facts based on the evidence before it (which included the evidence summarised in [56]-[59] above) and its obligation under s 43(2B) of the *AAT Act* was inter alia to include in its written reasons for decision **its** findings on material facts.

145 Question of law 7 is rejected.

Fraud or evasion: question of law 4

146 The applicants' essential complaint is that, instead of determining whether it was of the **opinion** that there had been fraud or evasion, the AAT erroneously decided whether **as a matter of historical fact** there had been fraud or evasion. They relied on *Moreau* in support

of this contention. They maintained that this distinction was important and could have affected the outcome because, if the AAT had addressed the correct question, it may have not been prepared to find an absence of evasion but could nevertheless have concluded that it was of the opinion that there had been no evasion.

147 The argument has no substance or merit. The issue of fraud or evasion was dealt with by the AAT at [71]-[88] of its reasons for decision. The AAT identified the correct test at [72]-[73] by focusing upon the importance of the Commissioner's power to amend an assessment at any time if the Commissioner "is of the opinion" that the avoidance of tax is due to fraud or evasion (for the income years prior to 2005), or is of the opinion "there has been fraud or evasion" (for the income years from 2005 onwards). The AAT plainly understood that it stood in the shoes of the Commissioner for the purposes of its review. The AAT posed the relevant question in [81] as whether the applicants had satisfied it that the avoidance of tax was not due to fraud or evasion. The AAT then concluded at [86] that the taxpayers failed to prove that the avoidance of tax was not due to evasion or that there had not been evasion.

148 I accept the Commissioner's submissions on this issue. In particular, I accept that the applicants' reliance on *Moreau* is misplaced. That case concerned an examination of the Commissioner's belief by a court as to whether there was "'reason to believe' that there had been an avoidance of tax owing to fraud or attempted evasion" (at 67). The position is different when the review is by an administrative tribunal such as the AAT, which is reviewing a decision on its merits.

149 Having regard to the nature of a merits review by the AAT and the burden imposed upon the applicants by s 14ZZK of the *TAA 1953*, the applicants had to disprove fraud or evasion against the background of the Commissioner having formed a contrary opinion. On a fair reading of the AAT's reasons, in finding that the applicants failed to discharge that burden, the AAT was, in effect, adopting the Commissioner's opinion as its own. It was entitled to do so.

150 Question of law 4 is rejected.

Inadequate reasons: questions of law 5 and 6

151 There are essentially three issues raised by questions of law 5 and 6. The first is whether the AAT complied with its obligation under s 43(2B) of the *AAT Act* in relation to its

finding that s 26AFB(4) of the *ITAA 1936* did not apply (see [92] of the reasons for decision) and also in relation to its findings at [133]-[134] not to remit the administrative penalties under s 298-20 of Sch 1 to the *TAA 1953*.

152 The second issue arises only if the AAT failed to comply with this obligation. The issue which would then arise is whether such a failure involves an error on a question of law.

153 The third issue which would further arise if an error on a question of law is found, is what, if any, is the appropriate relief? In particular, should that failure invalidate the AAT's decision in its entirety or is it appropriate merely to set aside the reasons and order that the AAT provide reasons in compliance with s 43(2B)?

154 Section 43(2B) of the *AAT Act* provides:

> **43 Tribunal's decision on review**
>
> …
>
> (2B) Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.
>
> …

155 I recently identified and discussed some of the relevant principles relating to this obligation in *Garry Kelly v Australian Postal Corporation* [2015] FCA 1064 at [40]-[44]. It is unnecessary to repeat those matters here, save to emphasise that two of the central purposes for which reasons are required to be given are:

(a) to assist the parties to understand the result; and

(b) to enable an aggrieved party to consider whether to take advantage of any right of appeal or review.

156 As Mortimer J acknowledged in *Holden* at [77], the AAT is a busy administrative tribunal, and:

> …the content of the obligation in s 43(2B) must be approached with due appreciation of the circumstances in which the obligation must be discharged, including the obligations contained in s 33 of the AAT Act.

I also respectfully agree with her Honour's additional observation that the obligation must be applied "with a view to the materiality and significance of particular findings on material questions of fact in each review": citing *Willis v Repatriation Commission* [2012] FCA 399;

(2012) 202 FCR 323 at [17]-[18] per Bromberg J. In *Holden* at [78], Mortimer J added the following relevant observations:

> Where findings on material questions of fact are in issue, or are significant, it has been held that s 43(2B) requires the Tribunal to explain what evidence it has accepted or rejected in making those findings: *TelePacific Pty Ltd v Commissioner of Taxation* (2005) 218 ALR 85; [2005] FCA 158 at [50] per Sackville J, and the authorities there cited. The text of s 43(2B) requires the Tribunal to "refer" to the evidence or other material on which its material findings of fact were made, but this element is no more than an inclusive aspect of the general reasons obligation in s 43(2), rather than exhaustive of it. I accept that, at least on matters which are centrally in issue or significant, some level of explanation by the Tribunal in the manner suggested by Sackville J will usually be required for compliance with s 43(2B).

157 As to the second issue, the Full Court held in *Ekinci v Civil Aviation Safety Authority* [2014] FCAFC 180; (2014) 227 FCR 459 at [116] and [119] that a failure to provide reasons as required by the relevant provisions of the *AAT Act* involves an error on a question of law, at least where the failure is substantial (see *Dornan* at 573 and *CASA* at [49]). That approach should be applied here.

158 As to the third issue, namely what relief, if any, should be given if there is non-compliance with s 43(2B), the relevant principle is that stated by the Full Court in *CASA* at [55]:

> Notwithstanding the divergence in authority, a failure to comply with s 43(2) of the AAT Act should not inevitably lead to an order pursuant to s 44(5) that the Tribunal's decision should be set aside in its entirety or, alternatively, lead to the reasons alone being set aside and an order being made for reasons to be provided. The appropriate order to be made pursuant to s 44 will depend upon the facts and circumstances of each individual case and the exercise of the discretion thereby conferred.

159 Applying those general principles to the circumstances here, I make the following findings. The applicants' first complaint regarding the adequacy of the AAT's reasons is directed to [92] of those reasons and the AAT's finding that s 26AFB(4) of the *ITAA 1936* did not apply so as to exempt from the applicants' assessable income any or all of the "benefit" obtained by them from their Australian superannuation fund. The AAT had concluded at this point that the applicants had each received $300,000 as a "benefit" for the purposes of s 26AFB(3) and that this benefit was of a kind out of, or attributable to assets of, their superannuation fund, which was an "exempt fund" and a "regulated fund" for the purposes of s 26AFB (see [90]-[91]). The AAT had also concluded in [91] that there was no

evidence that the applicants met any of the conditions for the lawful release of amounts from their fund.

160 Section 26AFB(4) provided:

> **26AFB Assessable income to include certain benefits**
>
> …
>
> (4) Where:
>
> (a) subsection (2) or (3) would, but for this subsection, apply to the amount or value of a benefit received or obtained by a taxpayer out of, or attributable to assets of, an exempt fund; and
>
> (b) the Commissioner, having regard to:
>
> (i) the nature of the fund;
>
> (ii) such other matters relating to the receiving or obtaining of the benefit by the taxpayer as the Commissioner considers relevant;
>
> is satisfied that it would be unreasonable for subsection (2) or (3) to apply to the whole or a part of the benefit;
>
> that subsection does not apply to the benefit, or to that part of the benefit, as the case may be.

161 It may be accepted that the AAT's reasoning on this issue is brief. But that does not mean that, taking into account the particular circumstances of the case, this constitutes non-compliance with s 43(2B) of the *AAT Act*. It is important to have regard to the nature and extent of the applicants' submissions to the AAT on the potential application of s 26AFB(4), as well as relevant aspects of other parts of the AAT's reasoning. In their written outline of submissions in the AAT, the applicants contended that the discretion under that provision should be exercised in their favour "because they were not aware of any nexus between the Millar Super Fund and their receipt of the loan". The applicants' written closing submissions in the AAT also contained contentions that it would be unreasonable to assess them on the amount of $600,000 because:

(a) as a matter of general principle, a loan does not have the character of income in the hands of a borrower;

(b) their Australian fund was in no way disadvantaged by the transactions and in fact made a significant profit;

(c) they genuinely and reasonably believed it was possible to deposit money with HWBB without breaching any rules;

(d) they were simply following the advice of Mr Gould, their professional advisor;

(e) there was no judicial guidance concerning s 26AFB to enable them to ascertain the status of the $600,000 under that provision; and

(f) they obtained only temporary use of the $600,000.

162 The applicants acknowledged in their oral address in the appeal that the contention which is summarised in (a) immediately above was addressed in [91]-[92] of the AAT's reasons for decision.

163 For the following reasons, I consider that the applicants have failed to establish that there is some legal deficiency in the AAT's reasons for decision in respect of the applicants' other contentions as outlined above:

(a) the proposition that the applicants were not aware of any nexus between their superannuation fund and their receipt of the loan is simply untenable and flies in the face of their own evidence, to which the AAT made express reference in [12] and [28] of its reasons for decision (and see also [13] and [37]);

(b) as to the contentions which are summarised in (b)-(f) above, it is important to recall that the AAT's obligation under s 43(2B) requires it to set out in its reasons **its** findings on material questions of fact (and to refer to the evidence or material upon which those findings are based). The AAT is not obliged to set out findings which a party urges it to make, but which ultimately it does not make: see *Yusuf* at [67]-[68] per McHugh, Gummow and Hayne JJ. The applicants did not complain that the AAT had failed to deal with a submission made by them. Rather their complaint was directed exclusively to a failure to comply with s 43(2B) of the *AAT Act*; and

(c) the nature of the obligation imposed by s 43(2B) of the *AAT Act* as discussed immediately above is reinforced in this particular case by the wording of s 26AFB(4). The power created by that provision is limited inter alia to consideration of such matters as the Commissioner (or the AAT standing in his shoes) considers to be relevant, **not** the taxpayer's views of what is relevant. The applicants' argument effectively boils down to an assertion that the AAT should have shared their view as to what were relevant matters in the exercise of the power under s 26AFB(4). That assertion is inconsistent with the clear terms of that provision.

164 I reject the applicants' first complaint relating to compliance with s 43(2B). Accordingly, it is unnecessary to resolve the second and third issues described above which would have arisen if a contrary view had been taken. I can indicate, however, that if I had been satisfied that there was non-compliance with s 43(2B), I would not have set aside the AAT's entire decision because, in the overall scheme of things, any such error would be peripheral.

165 The applicants' second complaint concerning the adequacy of the AAT's reasoning is directed to [133]-[134] of its reasons, which are as follows:

> 133 I have considered the question of remission of penalty under s 298-20 in Schedule 1 to the TAA. This is a different question from the one dealing with imposition, where excessiveness of the penalty assessment is the test: s 14ZZK(b)(i) of the TAA. With regard to remission, and by reference to the Commissioner's original decision not to remit the penalty to any extent, the test is whether the decision not to remit "should not have been made or should have been made differently": s 14ZZK(b)(iii).
>
> 134 The taxpayers submit that at least there should be remission of the s 284-220 uplift since, even though it is authorised by *Gashi*, there is no "recidivism" in the taxpayers' behaviour and they had no prior notice of the Commissioner's concerns about the HWBB deduction claims. Even though I accept those two propositions, I do not consider that the circumstances of this case warrant the remission of the s 284-220 uplift element.

166 The applicants complained that s 298-20 "might very well be used to mitigate the strict application of the penalty provisions" in a case such as this where the AAT found that they were innocent of any wrongdoing and, if Mr Gould perpetrated any wrongdoing, they were not aware of it.

167 On the materials before me in the appeal, it is entirely unclear whether the applicants put these specific matters to the AAT in respect of the discretion to remit penalty under s 298-20. It is evident from the terms of [134] of the AAT's reasons for decision (as set out above) that the applicants advanced other submissions which were considered and rejected by the AAT. If the other matters were expressly put to the AAT on behalf of the applicants it would reasonably be expected that this would have been appropriately established in the appeal. The AAT can scarcely be criticised for not dealing with a matter which may well never have been put to it.

168 In any event, the AAT's reasoning in [133]-[134] should not be read in isolation from the balance of the AAT's reasons for decision or, indeed, the background to the AAT's review. That background included the fact that the Commissioner had turned his mind to

whether there should be a remission under that provision. He declined to do so, and he set out his reasons for that in [220]-[231] of his reasons for decision on the applicants' objections. Those reasons included a reference to the Commissioner's finding that the applicants had:

> …not provided any grounds that would make it fair and reasonable to remit the penalty, and there are no exceptional circumstances that make the application of the penalty unfair or unjust.

169 As the AAT correctly observed at [133] of its reasons for decision, where express reference is made to the Commissioner's original decision not to remit the penalty, the test under s 14ZZK(b)(iii) of the *TAA 1953* is whether the decision not to remit "should not have been made or should have been made differently". Having regard to the way in which the applicants apparently put their case to the AAT, I consider that the reasons provided by the AAT on this issue were not inadequate. Accordingly, I also reject the applicants' second complaint. For completeness, I also reiterate what is set out in [164] above.

Resolution of notice of objection to competency

170 The matters requiring determination are whether questions of law 2, 3, 5, 6 and 7 in the notice of appeal raise questions of law (see [79]-[80] above).

171 Question of law 2 is competent. The question whether or not facts as found **necessarily** fall within a statutory definition is generally a question of law: see, for example, *Hope* at 8 per Mason J; *Vetter v Lake Macquarie City Council* [2001] HCA 12; (2001) 202 CLR 439 at [24] per Gleeson CJ, Gummow and Callinan JJ; and *Haritos* at [172]-[174], [182] and [192]-[202] per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ, noting in particular the different circumstances described in [195].

172 Question of law 3 is also competent. Whether or not the AAT was obliged at law to take into account the subjective intentions of the parties to a transaction in circumstances such as those presented in this case in determining whether or not a transaction is a sham necessarily involves a question of law.

173 Questions of law 5 and 6 both relate to the AAT's obligation to provide reasons. They require an examination of the nature and extent of the AAT's statutory duty under s 43(2B) of the *AAT Act* and also whether the AAT failed to exercise its jurisdiction in providing the reasons which it did on relevant matters. Even though the determination of

these claims may involve the Court having to determine for itself some facts, such as what in fact were the relevant reasons given by the AAT in respect of the matters complained of, that does not require the Court to usurp the AAT's own primary fact-finding role: see *Haritos* at [191]-[194]. Both questions are competent.

174 The claim of procedural fairness raised by question of law 7 is plainly a competent question of law.

175 For these reasons the notice of objection to competency should be dismissed.

Resolution of notice of contention

176 Strictly speaking it is unnecessary to determine the notice of contention because, as pointed out above, it only arises in the event that the applicants succeeded in challenging the AAT's findings and approach relating to sham.

177 I can indicate, however, that if it had been necessary to determine the matter, I would have upheld the Commissioner's notice of contention for the following reasons.

178 The fundamental issue is whether the relevant provisions of the *TAA 1953* relating to withholding tax are narrower in scope than the previous provisions dealing with that subject under the *ITAA 1936*. Under the earlier legislation, s 221YK(3) relevantly provided:

> **221YK Interpretation**
>
> …
>
> (3) For the purposes of this Division:
>
> (a) interest or a royalty shall be deemed to have been paid by a person to another person although it is not actually paid over to the other person but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on behalf of the other person or as the other person directs; and
>
> …

179 The relevant provisions in the *TAA 1953* are as follows. Section 11-5 of Sch 1 provides:

> **11-5 Constructive payment**
>
> (1) In working out whether an entity has paid an amount to another entity, and the payment is made, the amount is taken to have been paid to the other entity when the first entity applies or deals with the amount in any way on the other's behalf or as the other directs.
>
> (2) An amount is taken to be payable by an entity to another entity if the

> first entity is required to apply or deal with it in any way on the other's behalf or as the other directs.

180 The obligation to withhold an amount from an interest payment to an overseas person is to be found in s 12-245 of Sch 1, which provides:

> **12-245 Interest payment to overseas person**
>
> An entity must withhold an amount from interest (within the meaning of Division 11A of Part III of the *Income Tax Assessment Act 1936*) it pays to an entity, or to entities jointly, if:
>
> (a) the recipient or any of the recipients has an address outside Australia according to any record that is in the payer's possession, or is kept or maintained on the payer's behalf, about the transaction to which the interest relates; or
>
> …

181 Under the relevant provisions of the *ITAA 1936*, it was made unambiguously clear that interest was deemed to have been paid (even though no actual payment was made if the interest was capitalized. That is because the capitalization was one of several individual matters which were expressly identified in s 221YK(3)). It is notable, however, that the individual matters so particularised were also accompanied in s 221YK(3) by a catch-all clause which was expressed in terms of "or otherwise dealt with on behalf of the other person or as the other person directs".

182 It is evident that under s 11-5 of the *TAA 1953*, the particular matters or instances were omitted in the provision relating to whether or not a constructive payment has been made. The legislation simply talks in terms of an amount being taken to have been paid "when the first entity applies or deals with the amount in any way to the other's behalf or as the other directs". That terminology is substantially similar to the catch-all clause in s 221YK(3)(a). The drafting of this aspect of the legislation dealing with withholding tax has been simplified by omitting particular instances or matters and simply relying upon the more high level expression of the concept of an entity applying or dealing with an amount in any way on another entity's behalf or as the other entity directs. That broader concept encompasses the particular instances which were identified in the earlier legislation.

183 There is nothing in the Explanatory Memorandum to suggest an intention to change the substance of s 221YK(3). Despite the change in terminology, I would be satisfied that the legal position has not relevantly altered under the relevant provisions of the *TAA 1953*.

Conclusion

184 The appeal and the notice of contention should be both dismissed. The notice of objection to competency should also be dismissed. The notice of objection to competency occupied little time in the proceeding and does not justify an order for costs other than that the applicants should pay the Commissioner's costs of the proceedings as agreed or assessed. Orders will be made accordingly.

I certify that the preceding one hundred and eighty-four (184) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths.

Associate:

Dated: 19 October 2015