FEDERAL COURT OF AUSTRALIA

Ward v Commissioner of Taxation [2016] FCAFC 132

Appeal from:	*Ward and Commissioner of Taxation* [2015] AATA 919
File number:	ACD 141 of 2015
Judges:	**ROBERTSON, DAVIES AND WIGNEY JJ**
Date of judgment:	5 October 2016
Catchwords:	**ADMINISTRATIVE LAW** – appeal under s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) on a question of law – whether Tribunal misconstrued the scope of the expression "special circumstances" in s 292-465 of the *Income Tax Assessment Act 1997* (Cth) – whether Tribunal erred in considering that making the determination was consistent with the object of Div 292 of the *Income Tax Assessment Act 1997* (Cth) **TAXATION** – non-concessional contributions to superannuation fund – application to Commissioner for a written determination the non-concessional contributions be disregarded or allocated instead for the purposes of another financial year specified in the determination – whether Tribunal erred in considering there were no special circumstances – whether Tribunal erred in considering that making the determination was consistent with the object of Div 292 of the *Income Tax Assessment Act 1997* (Cth) **PRACTICE AND PROCEDURE** – whether leave should be granted to the applicant to rely on grounds not advanced before the Tribunal
Legislation:	*Acts Interpretation Act 1901* (Cth) s 15AC *Administrative Appeals Tribunal Act 1975* (Cth) s 44 *Income Tax Assessment Act 1997* (Cth) Div 292, ss 292-5, 292-465
Cases cited:	*Commissioner of Taxation v Dowling* [2014] FCA 252 *Commissioner of Taxation v Rozman* [2010] FCA 324; 186 FCR 1 *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315

	Liwszyc v Commissioner of Taxation [2014] FCA 112; 218 FCR 334 *Lynton and Commissioner of Taxation* [2012] AATA 667; 90 ATR 950 *Perpetual Trustee Company (Canberra) Ltd v Commissioner for Australian Capital Territory Revenue* (1994) 50 FCR 405 *Player v Commissioner of Taxation* [2011] FCA 869; 84 ATR 541 *Quality Publications Australia Pty Ltd v Federal Commissioner of Taxation* [2012] FCA 256; 202 FCR 574 *Repatriation Commission v Warren* [2008] FCAFC 64; 167 FCR 511
Date of hearing:	11 August 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	50
Counsel for the Applicant:	Mr CJ Bevan with Mr S Spadijer
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ORDERS

ACD 141 of 2015

BETWEEN:	**COLIN WARD** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

JUDGES: **ROBERTSON, DAVIES AND WIGNEY JJ**

DATE OF ORDER: **5 OCTOBER 2016**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The notice of contention be upheld.
3. The decision of the Administrative Appeals Tribunal made on 30 November 2015 be set aside.
4. The case be remitted to the Administrative Appeals Tribunal to be heard and decided again according to law.
5. Subject to order 6, there be no order for costs of the proceedings in this Court.
6. If either party wishes to be heard in relation to order 5, they should notify the other side and the Court within 14 days, whereupon orders will be made for the exchange of submissions and the consideration of those submissions by the Court.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 This is an appeal from the Administrative Appeals Tribunal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). The appeal is on and limited to a question of law. The respondent Commissioner has also filed a notice of contention.

2 The decision of the Tribunal was made on 30 November 2015 and was that the decision under review be affirmed. The decision was not to disregard Mr Ward's excess non-concessional contributions of $450,000 or to allocate them to another financial year.

The statutory provision

3 The statutory provision under consideration by the Tribunal was s 292-465 of the *Income Tax Assessment Act 1997* (Cth) (the ***ITAA 1997***). That provision was, relevantly, in the following terms:

> **292-465 Commissioner's discretion to disregard contributions etc. in relation to a financial year**
>
> (1) If you make an application in accordance with subsection (2), the Commissioner may make a written determination that, for the purposes of this Division:
>
> (a) all or part of your *concessional contributions for a *financial year is to be disregarded, or allocated instead for the purposes of another financial year specified in the determination; and
>
> (b) all or part of your *non-concessional contributions for a financial year is to be disregarded, or allocated instead for the purposes of another financial year specified in the determination.
>
> (2) You may apply to the Commissioner in the *approved form for a determination under subsection (1). The application can only be made:
>
> (a) after all of the contributions sought to be disregarded or reallocated have been made; and
>
> (b) if you receive an *excess contributions tax assessment for the *financial year—before the end of:
>
> (i) the period of 60 days starting on the day you receive the assessment; or
>
> (ii) if the Commissioner allows a longer period—that longer period.
>
> (3) The Commissioner may make a determination only if he or she considers

that:

(a) there are special circumstances; and

(b) making the determination is consistent with the object of this Division.

(4) In making the determination the Commissioner may have regard to the matters in subsections (5) and (6) and any other relevant matters.

(5) The Commissioner may have regard to whether a contribution made in the relevant *financial year would more appropriately be allocated towards another financial year instead.

(6) The Commissioner may have regard to whether it was reasonably foreseeable, when a relevant contribution was made, that you would have *excess concessional contributions or *excess non-concessional contributions for the relevant * financial year, and in particular:

(a) if the relevant contribution is made in respect of you by another person—the terms of any agreement or arrangement between you and that person as to the amount and timing of the contribution; and

(b) the extent to which you had control over the making of the contribution.

...

4 The applicant submitted that the Tribunal erred in concluding that it did not consider that there were special circumstances. Thus, the applicant's appeal centred on s 292-465(3)(a). The Commissioner's notice of contention centred on s 292-465(3)(b) and is to the effect that the Tribunal erred in considering that the making of the determination sought by the applicant was consistent with the object of Div 292.

The facts found by the Tribunal

In relation to the appeal

5 The Tribunal found the following facts. At [43], the Tribunal referred to the final statement from BT Super for Life to Mr Ward and said that apparently only the first page of a four page document was supplied to Mr Ward's advisor, Ms Smith, by Mr Ward. At [44], the Tribunal found that Mr Ward did not make a conscious and informed decision to breach the bring forward rule. Even if he had some basic understanding of the bring forward rule, which might have suggested that he could not put more money into his superannuation account at that time, that understanding was readily displaced by the firm and authoritative advice proffered by Wholistic Financial Solutions (**Wholistic**). Neither Ms Smith of Wholistic nor Mr Ward acted with the intention of avoiding the cap on superannuation contributions or of obtaining some tax advantage for Mr and Mrs Ward. At [46], the Tribunal held that the incorrect advice

given by Ms Smith to Mr Ward was induced by the misleading notice provided by BT Super for Life. At [49], the Tribunal said the imposition of excess contributions tax on Mr Ward was the natural and foreseeable consequence of the decisions he and his advisers made, albeit in ignorance. At [50], the Tribunal found that the excess contributions tax levied here, $209,250, wiped out the entirety of Mr Ward's superannuation savings at retirement. At [54], the Tribunal said that the strict application of the law to Mr Ward's situation produced an outcome which was harsh and unfair. At [46] and [47], the Tribunal said the effect of the amount of the excess contributions tax on Mr Ward was oppressive or had catastrophic consequences.

In relation to the notice of contention

6 At [32], the Tribunal rejected the Commissioner's argument that the contribution of $450,000 made by Mr Ward to the Parr Post Fund in September 2010 did not represent superannuation contributions made by him over the course of his working life. The Tribunal found that Mr Ward cashed in his benefits in his two superannuation schemes, APSS and CSS, in early 2008, invested them in BT Super for Life for a period and later deposited them into term deposit accounts. The Tribunal found that the $450,000 invested in the Parr Post Fund in September 2010 was essentially the proceeds of Mr and Mrs Ward's superannuation accounts, plus the proceeds of the sale of a former home in Perth. This corpus of funds passed through several superannuation and term deposit accounts before being deposited in the self-managed superannuation fund. They were, clearly, the Tribunal said, the same funds Mr Ward had withdrawn in early 2008. The fact that Mr Ward deposited and withdrew his superannuation assets several times, in desperate attempts to maintain their value, did not detract from the reality that these were the same assets, more or less, from start to finish.

The reasoning of the Tribunal in relation to special circumstances

7 At [48], the Tribunal applied *Lynton and Commissioner of Taxation* [2012] AATA 667; 90 ATR 954 for the proposition that special circumstances could not be made out unless the circumstances were inconsistent with the natural and foreseeable sequence of events.

8 At [49], the Tribunal reasoned that the imposition of excess contributions tax on Mr Ward was the natural and foreseeable consequence of the decisions he and his advisers made, albeit in ignorance.

9 The Tribunal, at [49], said "... the character of a taxpayer's intention with respect to tax implications does not appear to be an element in the imposition of excess contributions tax under the legislation."

10 The Tribunal then referred to what Kiefel J had said in *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 and concluded that whether there was something unintended had a bearing on how the test should be applied. The Tribunal then applied this view at [52], and concluded that the harshness of the impact of the tax upon Mr Ward was an outcome that was reasonably foreseeable and therefore the legislative provisions imposing the tax operated as they were intended to. The Tribunal said that the fact that Mr Ward had not proceeded deliberately and consciously to build up his superannuation in defiance of the cap did not transform the tax into something unintended.

The reasoning of the Tribunal in relation to consistency with the object of the Division

11 The Tribunal said, at [53], that it was satisfied that the funds so deposited were the same monies and did represent superannuation contributions made gradually over the course of Mr Ward's life. Therefore, if the Tribunal were to make the determination under s 292-465 sought by Mr Ward, it would be "consistent with the object of this Division" (see s 292-465(3)(b)).

The notice of appeal as proposed to be amended

12 The applicant sought leave to amend his notice of appeal as indicated by the underlined parts of that notice:

> **Questions of law**
>
> 1. Whether the Tribunal erred when if (sic) concluded that the amounts deposited into the *BT Super for Life* fund in the 2008/2009 financial year were non-concessional contributions of the Applicant and, therefore, constituted excess non-concessional contributions by him within the meaning of s. 292-85 of the *Income Tax Assessment Act* 1997 (**ITAA97**)?
>
> 2. Whether the Tribunal erred when it found that the Commissioner had correctly calculated the excess contributions tax under Subdiv. 292-B of the ITAA97 for the relevant year?
>
> 3. Whether the Tribunal erred, when it applied s. 292-465(3)(b) of the ITAA97 (requiring the Commissioner to make a determination under s. 292-465(1) consistently with the object of Division 292) to the facts of the Applicant's case, as found by the Tribunal, by relying upon the object of Div. 292 specified in s 292-5 at the date of the hearing in the Tribunal in 2015 (with effect from 29 June 2013) rather than upon the materially different terms of s. 292-5 during the 2011 income year (when the assessment under review was issued)?

4. Whether the Tribunal erred in characterising (in the sense of interpreting) the term "special circumstances" in s. 292-465(3)(a) of the ITAA97?

5. Whether the factual findings of the Tribunal fell within the correct characterisation, as a matter of law, of the term "special circumstances" in s. 292-465(3)(a) of the ITAA97?

6. Whether inferences properly arose from the factual findings made by the Tribunal that supported the conclusion that "special circumstances" existed within the meaning of s. 292-465(3)(a) of the ITAA97 in the Applicant's case which the Tribunal failed to draw?

13 The orders sought by the applicant in the proposed amended notice of appeal were as follows:

Orders sought

1. The decision of the Tribunal dated 30 November 2015 be set aside.

2. Notice of assessment dated 23 November 2012 for the 2011 income year be set aside.

3. Alternatively, the application for review be remitted to the Tribunal constituted by Dep. Pres. Gary Humphries for redetermination in accordance with the reasons of this Court.

4. The Respondent pay the costs of the appeal to this Court.

14 The Commissioner's notice of contention was as follows:

Grounds relied on

In addition to the grounds relied on by the Tribunal, the decision should be affirmed on the following grounds:

1. The Tribunal erred in finding that the making of a determination under s 292-465(1)(b) of the *Income Tax Assessment Act 1997* (Cth) (ITAA 97) to disregard the Applicant's non-concessional contributions for the financial year ended 30 June 2011 (**determination**) would have been consistent with the object of Div 292 of the ITAA 97.

2. The Tribunal should have concluded that the making of a determination would not have been consistent with the object of Div 292 of the ITAA 97, that object being that the superannuation benefits the Applicant receives results from superannuation contributions made gradually over the course of the Applicant's lifetime.

The parties' submissions

The application for leave to amend

15 The applicant accepted that questions 1 to 3 were raised for the first time on appeal to this Court. The applicant submitted that leave to rely on those grounds should be granted.

16 The applicant accepted that questions 1 and 2 were conceded in the Tribunal. The applicant submitted that both parties and the Tribunal merely assumed a liability for excess

contributions tax: "[t]hat common misapprehension, in turn, had its genesis in the applicant's own assumption that s. 292-465(2) was his *only* answer to the Commissioner's assessment of excess contributions tax for the 2011 income year." The applicant submitted that the common misapprehension in questions 1 and 2 was compounded by reliance on a statement of statutory object which commenced two income years after the 2011 year, so the misapprehension in question 3 was made by both parties and the Tribunal. The applicant submitted that the new questions sought to be raised on appeal could not have been answered by further evidence in the Tribunal because the questions took the facts as found by the Tribunal.

17 The applicant submitted that the Tribunal cannot decide a case on an artificial factual (or legal) basis and referred to *Perpetual Trustee Company (Canberra) Ltd v Commissioner for Australian Capital Territory Revenue* (1994) 50 FCR 405 (***Perpetual Trustee Company***).

18 The Commissioner submitted that leave to rely on question 1, and its corollary in question 2, should be refused. The reasons were, first, that there was no merit in the argument. It ignored the fact that funds were paid to and from Mr Ward's Community CPS account and the term deposits held by Mrs Ward and that neither of those accounts was a "complying superannuation plan" for the purpose of s 306-10(c)(i) and (d)(i) of the *ITAA 1997*. Secondly, there was no misapprehension, much less any "common misapprehensions" in the proceedings below. The Commissioner did not assume a liability on the part of Mr Ward to excess contributions tax, he assessed one. Of course the Tribunal focused upon Mr Ward's only ground of objection against that assessment: it was not the duty of the Tribunal to do otherwise. Had Mr Ward wished to raise this question in the Tribunal he would have required leave to do so: s 14ZZK(a) of the *Taxation Administration Act 1953* (Cth). Thirdly, the Commissioner submitted, Mr Ward was represented by solicitor and counsel before the Tribunal and he was bound by the way in which his case was conducted. No satisfactory explanation had been offered as to why those questions were not maintained in the Tribunal. The principle of finality ought to be respected. Fourthly, the questions necessarily raised new factual issues not considered by the parties or the Tribunal. Had Mr Ward contended in the Tribunal that the contributions made to BT Super for Life were in fact a "roll-over superannuation benefit" it would have been necessary to consider the character of the APSS, CSS, Community CPS and Westpac accounts. Fifthly, the questions were questions of mixed fact and law of the kind described in *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [169] and stood outside s 44 of the *Administrative Appeals Tribunal Act*. The

Tribunal had made no findings at all about these questions. The question which was now sought to be raised could not be resolved without first making findings as to the accounts through which the funds passed.

19 In his written reply, the applicant submitted that the parties and the Tribunal failed to appreciate that there was, on the facts as found, a de jure rollover and not merely a de facto rollover as the applicant urged in his application to the Tribunal. The applicant submitted that either his notice of objection was sufficient or the Tribunal could have permitted the grounds to be expanded, as could this Court. The applicant submitted that the Commissioner's first reason for opposing a grant of leave to raise questions 1 and 2 on appeal should not be accepted as it ignored the tracing of funds findings flowing from the rejection of the same argument by the Tribunal at [31]-[33]. The applicant referred to *Player v Commissioner of Taxation* [2011] FCA 869; 84 ATR 541 at [17]; *Quality Publications Australia Pty Ltd v Federal Commissioner of Taxation* [2012] FCA 256; 202 FCR 574; and *Commissioner of Taxation v Rozman* [2010] FCA 324; 186 FCR 1. The applicant submitted there was no dispute over the facts nor new factual issues.

20 As to leave to amend to add question 3, the applicant submitted that the misapprehension of the statement of statutory object was one made by both parties and the Tribunal. The Commissioner accepted that question 3 may give rise to a question of law and appeared not to resist leave being granted: he did not in his written submissions expressly state that leave to rely on question 3 should be refused.

The appeal

21 In relation to question 3 the applicant relied on the differences between the object of Div 292 as stated in s 292-5 in the form it took until 29 June 2013 and the object of Div 292 in the post-29 June 2013 version of s 292-5. The correct form was as follows:

> The object of this Division is to ensure that the amount of concessionally taxed *superannuation benefits that a person receives results from superannuation contributions that have been made gradually over the course of the person's life.

The later and incorrect form, because it was not in force at the relevant time, was as follows:

> The object of this Division is to ensure, in relation to non-concessional contributions to superannuation, that the amount of concessionally taxed *superannuation benefits that an individual receives results from contributions that have been made gradually over the course of the individual's life.

22 The applicant submitted that the Tribunal set out the incorrect version at [29] of its reasons.

23 The applicant submitted that "special circumstances" was to be construed by reference to the statutory object, and that its correct identification must inform the proper interpretation of "special circumstances". The applicant submitted that the two versions of s 292-5 stated materially different statutory objects. The applicant submitted, in relation to the materiality of the amendment, interpreting the wrong provision, without more, constituted error of law and Parliament was presumed not to make inconsequential legislative amendments. The applicant submitted that if ground 3 was upheld, the Tribunal's decision must be set aside and the review application remitted for redetermination according to law.

24 The Commissioner submitted that the error alleged in question 3 did not vitiate the Tribunal's decision in relation to "special circumstances". Also, it was submitted the error alleged was either "harmless" or one which did not affect the exercise of the Tribunal's powers of review. There was no basis at all upon which it may be concluded that the 2013 amending Act intended to make any material change. In oral submissions, the Commissioner submitted that the present case was concerned with excess non-concessional contributions so the change to s 292-5 was utterly inconsequential on the facts of this case. The change reflected the fact that the excess non-concessional contributions provisions were no longer in Div 292.

25 In his written reply, the applicant submitted that the changes to s 292-5 established two classes of amendments: first, a change from focusing on what is concessionally taxed to what is not concessionally taxed; and secondly, a change from "person" to "individual". As to the first of these, the applicant submitted the concept of what constituted "special circumstances" for the purposes of making, and disregarding, contributions necessarily changed. Whilst the former was concerned only with ensuring the making of concessionally taxed contributions, the latter sought to view what was contributed concessionally in the new context of what was contributed non-concessionally. The applicant submitted that the error of law was anything but "harmless".

The notice of contention

26 The Commissioner submitted that there was no basis upon which it could have been concluded by the Tribunal that the personal (non-concessional) contributions made by Mr Ward to the Parr Post Fund "represented superannuation contributions made gradually over the course of Mr Ward's life." The Commissioner submitted that those contributions were sourced not only from his own cashed in benefits in APSS and CSS but also those of his wife, together with some savings. That left Mrs Ward free herself to make a $450,000 non-

concessional contribution using the sale proceeds from the Watson property. The Commissioner submitted that the difficulty with the reasoning of the Tribunal in [32] was that it determined the statutory question by pooling Mr and Mrs Ward's superannuation benefits together and treating them as one and the same. While the Tribunal repeatedly referred to the "same money", the question was: *whose* same money. The Commissioner submitted the object of Div 292 was not served for two reasons. First, the majority of the funds used by Mr Ward to make non-concessional contributions of $450,000 to the Parr Post Fund were originally derived from benefits that Mrs Ward had cashed in with APSS, and from savings. The Commissioner relied on *Commissioner of Taxation v Dowling* [2014] FCA 252 at [115]-[116] (***Dowling***). Secondly, the Commissioner submitted, it could not be said that a "lump-sum" personal (non-concessional) contribution of the kind made by Mr Ward represented contributions made over the course of his lifetime.

27 In oral submissions, the Commissioner contended that the same submission was put squarely to the Tribunal. The Tribunal's reasons at [31] and [32] dealt directly with this issue. The Commissioner submitted there were two possibilities here. One was that the Tribunal had completely misunderstood what the object of the Division was. The Tribunal may have understood that the reference to the object of the Division was to something that should be something less than necessary. It was perverse to suggest that the finding that the proceeds paid into the Parr Post Fund, being his superannuation, his wife's superannuation and the proceeds of sale of a home in Perth, if put into superannuation would produce an income stream that could be said to be the result of superannuation contributions made by Mr Ward over the course of his lifetime. The Commissioner submitted it would hardly accord with the object of the Division to treat this $450,000 in that way. The second possibility, the Commissioner submitted, was that the Tribunal had understood the relevant inquiry to be whether or not the funds going into the Parr Post Fund were the same as the funds that went into BT Super for Life.

28 The applicant submitted, first that the notice of contention could not be a "no evidence" contention and must be an "insufficient evidence" contention, which was not enough. Secondly, the applicant submitted, the Commissioner's focus upon Mrs Ward's ability to make a concessional contribution in 2011 was an invitation to answer the wrong question on appeal as Mrs Ward was not the taxpayer and her taxation affairs were not legitimate contention issues. Thirdly, the applicant submitted that the notice of contention raised a new case as the Commissioner before the Tribunal had placed no weight on any part of the

$450,000 being the money of Mrs Ward. Fourthly, the applicant submitted that the reference to s 292-465(3)(b) in *Dowling* at [115] was obiter dicta and appeared not to have been argued. Fifthly, the applicant submitted the Commissioner could not overcome the ultimate factual finding at [32] in the Tribunal's decision that the $450,000 invested in the Parr Post Fund in September 2010 "were, clearly, the same funds he had withdrawn in early 2008." Sixthly, the applicant submitted, the Commissioner apparently wished to contend that the second person pronouns used in s 292-85 created a limitation on the source of the superannuation funds within a marital context where both partners were working and contributing for superannuation. The applicant submitted that the Tribunal's conclusion at [33], on the satisfaction of the requirement of compliance with the statutory object, ought not be disturbed on appeal.

29 In oral submissions, the applicant submitted that the case propounded by the Commissioner in the Tribunal was recited in the decision at [31]-[32] at length. The applicant submitted it was a factual case, and it had been rejected in every aspect. Part of the basis for its rejection was an acceptance of the Commissioner's flow of funds diagram as annotated by Ms Smith. Its rejection was unsurprising as it was effectively an agreed fact. The case before the Tribunal focused on Mr Ward as the only relevant taxpayer and on the statutory quality of his superannuation entitlements. The attempt to introduce Mrs Ward as a relevant taxpayer in the notice of contention was a new case on appeal. It was also a factual case because it turned on the ownership of money. It was submitted that such a case had to be put to Mrs Ward but was not. Furthermore, the Tribunal had to be asked to make findings of fact about this new case and it was not asked. The applicant submitted that *Dowling* was as factually far removed from this case as was possible to imagine. A further distinguishing feature of *Dowling* was that the finding made by Greenwood J at [115], that much of that Tribunal's conclusionary findings were based on mere assumption of the facts about who contributed what, when and why, stood in contradistinction to the affirmative findings made here by the Tribunal in the decision at [43]-[46] which the notice of contention sought to reverse. Here the findings of fact were made on black and white documents, much of it the subject of agreement or concessions, and evidence in cross-examination. The applicant also submitted that there had also been a no evidence finding made by Greenwood J in [116] in *Dowling*, and the Commissioner had made no "no evidence" complaint in his notice of contention in this Court.

Consideration

The application for leave to amend

30 In *Repatriation Commission v Warren* [2008] FCAFC 64; 167 FCR 511 (***Warren***), Lindgren and Bennett JJ (with whom Logan J agreed on this point) outlined at [78] the relevant principles, as follows:

- The general rule that a litigant is bound by, and accordingly is entitled to act on, admissions and concessions does not automatically apply, although cases concerned with the exercise of judicial power may be of assistance (*Kuswardana* 54 FLR at 342; 35 ALR at 194 per Bowen CJ).
- A party to the proceeding is not necessarily precluded from arguing on "appeal" matters that were conceded before the tribunal. Whether the party is so precluded depends on the nature of the matter conceded, its conduct of its case, whether the concession represented an agreement by the parties as to the facts to be decided and other relevant circumstances (*Kuswardana* 54 FLR at 343; 35 ALR at 195 per Bowen CJ and at 348; 199 per Fox J).
- Where a concession is made, there must be some difficulty in finding an "error of law" when the contrary of the concession is raised for the first time in this Court (*Federal Commissioner of Taxation v Raptis* (1989) 20 ATR 1262 at 1267 per Gummow J).
- A tribunal does not err in law in failing to regard as material a fact which counsel failed in submissions to contend was material (*Federal Commissioner of Taxation v Perkins* (1993) 26 ATR 8 at 10 per Davies J).
- There is a difference between factual matters not canvassed before the tribunal and a new issue relating to the validity of a regulation (*Tefonu Pty Ltd v Insurance and Superannuation Commissioner* (1993) 44 FCR 361 at 367 per Beazley J).
- Even though the parties may be "able, in practical terms, to narrow the issues by concession ... even a concession does not permit the [t]ribunal to avoid its duty as an administrative decision-maker to make the correct or preferable decision ... on all relevant aspects of the matter before it" (*Peacock v Repatriation Commission* (2007) 161 FCR 256 at [23]);
- A concession "does, however, permit the decision-maker to reach the correct or preferable decision by reference to the concession as well as to its findings on disputed questions" (*Peacock* 161 FCR 256 at [23]; and see *Comcare v Fiedler* (2001) 115 FCR 328 at 337–338).
- The Court will more readily permit a matter to be raised for the first time in this Court on an appeal from a tribunal where:

  (a) the matter is a pure question of law, such as a question as to the validity of a regulation (*Kuswardana* 54 FLR at 343; 35 ALR at 195; *Tefonu* 44 FCR at 367) or a question as to whether the tribunal had applied the correct standard of proof on the true construction and application of legislation: *Ferriday* 69 FCR at 527–528 per Lee J);

  (b) the matter goes to a misapprehension that was shared by the parties before the tribunal and therefore by the tribunal itself (*Perpetual*

Trustee Company (Canberra) Ltd v Commissioner for Revenue (ACT) (1994) 50 FCR 405 at 418–419 per Wilcox J) such as a shared misapprehension as to the applicable law (cf *Thomas* 50 FCR at 120 per Beazley J); or

(c) the matter goes to a condition precedent to the availability of a power, the exercise of which will have a serious impact on the individual (*Kuswardana* 54 FLR 334; 35 ALR 186).

31 We would refuse leave to amend to add grounds 1 and 2. In our opinion, the issue sought to be raised is not a pure question of law and the applicant's reference to *Player* at [17] illustrates that the point of funds coming out of one account and into another for the purposes of s 306-10 may be a matter of fact and degree. We do not accept the applicant's contention that there is no dispute over the facts. It seems to us that if these proposed grounds had been in issue before the Tribunal the parties may well have had to put further evidence before the Tribunal as to the character of the accounts and the Tribunal would have had to make findings as to those accounts. In particular, the Tribunal would have had to make findings as to whether the applicant received the funds both legally and beneficially as they went from one account to another. The Tribunal's findings at [31]-[33], on which the applicant heavily relied, were findings in respect of a related but different issue. It should not be taken as a finding of fact by the Tribunal that the benefits were paid from a complying superannuation plan and paid to a complying superannuation plan. The point then raised, and with which the Tribunal was dealing at those paragraphs, was the source of the funds. The Tribunal did not make findings as to the accounts through which the funds passed.

32 In our opinion, *Perpetual Trustee Company* is distinguishable as the Court was there referring to an artificial or inadequate factual basis in a statement of agreed facts, the Court being of the view that the statement did not extend to all material facts. That was the basis on which the Court held that the matter should be remitted to the Tribunal to be heard and decided again.

33 We would grant leave to amend to add ground 3, as that is a matter of shared misapprehension as to the applicable law: see the last bullet point paragraph (b) in *Warren* at [78] which we have set out at [30] above.

The appeal

34 We turn first to question 3. In our opinion, the amendments made to the objects of the Division as set out in s 292-5, which was misquoted by the Tribunal, were, for present purposes, immaterial. We do not accept the applicant's submission that any difference in

language means that there has been an error of law if that change is not noticed or understood by a tribunal. For example, s 15AC of the *Acts Interpretation Act 1901* (Cth) provides that where an Act has expressed an idea in a particular form of words, and a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style, the idea shall not be taken to be different merely because different forms of words were used.

35 There is no significance in the change of the words "a person" to "an individual" or in the change from "person's life" to "individual's life". Plainly the applicant is both "a person" and "an individual". As to the addition of the words "in relation to non-concessional contributions to superannuation" that has no materiality in a case such as this which involves non-concessional contributions to superannuation. In our opinion, it does no more than reflect the fact that concessional contributions are no longer dealt with in Div 292.

36 Question 3 should be answered "There was no material error". Ground 3 fails.

37 We turn to questions 4, 5 and 6. Question 6 restates question 5 and the corresponding ground 6 restates ground 5.

38 Plainly s 292-465 confers a discretion on the Commissioner. The Commissioner *may* make a written determination that all or part of the person's non-concessional contributions for a financial year is to be disregarded or allocated instead for the purposes of another financial year specified in the determination. That discretion may only be exercised if the Commissioner or, on review, the Tribunal considers that there are special circumstances and making the determination is consistent with the object of Div 292.

39 As to "special circumstances" the question is what, if anything, takes this case out of the usual or ordinary case. As Kiefel J said in *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 at 545, if a tribunal were to conclude that something unfair, unintended or unjust had occurred there must be some feature out of the ordinary.

40 In our opinion, the Tribunal erred at [49] and following in proceeding on the basis that because the imposition of the tax was the natural and foreseeable consequence of the decisions of Mr Ward and his advisers, it was necessarily outside the scope of "special circumstances". This misconception also pervades the following paragraph, [50], leading the Tribunal to interpret what Kiefel J had said in *Groth* as meaning that there could not be "special circumstances" unless something unintended had occurred, that is, on the Tribunal's

approach, something other than the natural and foreseeable consequence of the decisions Mr Ward and his advisers made. Then, at [52], the notion of "unintended" is given a further application by the Tribunal in its statement that the legislative provisions operated as they were intended to. On those bases, the Tribunal found it could not exercise the discretion because special circumstances were absent.

41 In our opinion, it was open to the Tribunal to find that there were "special circumstances" if it found that the provisions operated on Mr Ward, in his individual circumstances, in an unfair or unjust way because, through a misunderstanding of an adviser by virtue of the misleading notice provided by BT Super for Life, Mr Ward, acting honestly and carefully, accidentally breached the bring forward rule which had consequences disproportionate to the intended operation of the statute.

42 Contrary to the applicant's submissions, it is not to the point, or within the Commissioner's notice of contention, that the Tribunal's finding that the notice provided by BT Super for Life was misleading may have been contestable. We also note that at the forefront of the submissions in reply on behalf of Mr Ward was an attempt, later abandoned, to contend that BT Super for Life "had misled Mr Ward and his advisor, Ms Smith, by providing one page of a four page account statement for the super retirement account, thereby denying them any useful information about the true statutory character of the $450,000 *before* it was contributed to a new fund." (Emphasis in original.) The Tribunal did not proceed on this basis, as is made clear at [43] of its reasons. It also appears that the applicant's case was not put before the Tribunal on this basis.

43 In our opinion, the Tribunal erred in law by taking too narrow a view of what may constitute "special circumstances" within the meaning of the statute. This may have been caused by unnecessarily considering factors in isolation before focusing on the entirety of the circumstances said by the applicant to be special. It was certainly caused, in our opinion, by looking at expressions in other decisions and taking those expressions out of their factual and legal context.

44 For example, the present Tribunal placed substantial reliance on what had been said by an earlier Tribunal in *Lynton and Commissioner of Taxation* [2012] AATA 667; 90 ATR 950. But in that case, the applicant contended that special circumstances existed for the purposes of s 292-465(3) based primarily on the financial hardship which he was experiencing in supporting two adult children and five grandchildren; a commitment to provide for his wife

who was significantly younger in years; the impact of the global financial crisis on his personal finances; and, specifically, the consequences of a failed investment opportunity. Against those facts, the Tribunal in *Lynton* said, at [15]:

> The applicant's difficult personal situation is not one which, in an unusual or uncommon way, would have directly affected his ability to manage his financial affairs. In this regard, it is important to emphasise that the tribunal is not unsympathetic towards the personal challenges confronting the applicant in his daily life — but put simply, such circumstances are not what the legislation contemplates when it refers to "special circumstances". The legislation contemplates circumstances which are inconsistent with a natural and foreseeable sequence of events. It does not contemplate circumstances which are of special significance to the taxpayer but not unique to an individual in the taxpayer's position.

Whether or not that is a useful way of considering "special circumstances" in the context of personal challenges, which we doubt, in our opinion, it does not transpose to another context so as to reason, as did the present Tribunal, that the imposition of an excess contributions tax on Mr Ward was the natural and foreseeable consequence of the decisions he and his advisers made, albeit in ignorance, and then to reason that special circumstances were not made out because something unintended had not occurred.

45 Similarly, the present Tribunal reproduced dicta from *Liwszyc v Commissioner of Taxation* [2014] FCA 112; 218 FCR 334 at [77] where the Court was considering a submission that a BPay transfer initiated on one day and received the next was a "special circumstance", or the fact that a subordinate bookkeeper made an error in making the contribution on 27 May 2010 was a "special circumstance". McKerracher J said about that latter submission:

> As submitted by the Commissioner, simple errors of this nature do not constitute special circumstances: see *Tran and Commissioner of Taxation* (2012) 87 ATR 322 at [15]. An innocent mistake or ignorance of the law does not in itself constitute a "special circumstance" nor do simple errors, albeit innocent errors or other mistakes which are made in good faith. Equally, the fact that an error was made by another person does not in itself constitute "special circumstances". Although Mr Liwszyc was unaware of the precise details and timings of the payment, he had left it to the bookkeeper to arrange the payments. However, she was his subordinate, susceptible to his discretion and control as a matter of law and reality. He did not take steps sufficient to ensure that the payments she made were the right amounts at the right times.

The present Tribunal did not advert to the submissions with which McKerracher J was dealing and, in our opinion, took out of context what was meant by simple errors or an error that was made by another person.

The notice of contention

46 We turn then to the Commissioner's notice of contention that the Tribunal erred in law in concluding that making the determination was consistent with the object of the Division.

47 In our opinion, the notice of contention does not raise a case that was not put to the Tribunal. Therefore, the Commissioner does not need leave to rely on his notice of contention. The written submissions made by the Commissioner to the Tribunal were made available to the Court and the point raised in the notice of contention was put in those submissions. Secondly, in our opinion, there is a question of law, which is whether it could be said on the facts found by the Tribunal that the lump sum contribution represented contributions made gradually over the course of Mr Ward's lifetime: compare *Dowling* at [115] per Greenwood J. Thirdly, in our opinion, the reasoning of the Tribunal at [32] shows that the Tribunal must have misunderstood that legal question as, at the least, the Tribunal found that the $450,000 included the proceeds of the sale of a former home in Perth. It does not give a complete picture of the Tribunal's findings to focus, as the applicant did, only on the statement that the $450,000 invested in the Parr Post Fund in September 2010 was the same funds as Mr Ward had withdrawn in early 2008. That is to take what the Tribunal said, as a matter of conclusion in that sentence, out of its context in [32] of the Tribunal's reasons. Fourthly, although the facts in *Dowling* were indeed different to the present facts, we would not regard what was said in [115] and [117] as obiter dicta as the matters were remitted to the Tribunal to be heard and determined according to law, which meant both in relation to special circumstances and in relation to consistency with the object of Div 292. We accept, however, that questions of fact and degree are involved and it could not be said that there is only one possible answer. The Tribunal would have to address, in our view, who was the legal and beneficial owner from time to time, and in what circumstances, of the funds which made up the amount of $450,000.

Conclusion and orders

48 For these reasons both grounds 4, 5 and 6 of the appeal and also the notice of contention should be upheld. The matter should be remitted to the Tribunal. We would not make any direction as to by whom the Tribunal should be constituted or as to the scope of the further hearing in the Tribunal.

49 Our preliminary view is that there should be no order as to the costs of the appeal given the equal and mixed success of the parties.

50 If either party wishes to be heard in relation to costs, they should notify the other side and the Court within 14 days.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Robertson, Davies and Wigney.

Associate: 

Dated: 5 October 2016