

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE COURT OF APPEAL (WA)

**CITATION** : CARATTI -v- COMMISSIONER OF STATE  
REVENUE [2017] WASCA 128

**CORAM** : MARTIN CJ  
MURPHY JA  
BEECH JA

**HEARD** : 12 MAY 2017

**DELIVERED** : 12 MAY 2017

**PUBLISHED** : 7 JULY 2017

**FILE NO/S** : CACV 69 of 2016

**BETWEEN** : JOHN MICHAEL CARATTI  
Appellant

AND

COMMISSIONER OF STATE REVENUE  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : STATE ADMINISTRATIVE TRIBUNAL OF  
WESTERN AUSTRALIA

**Coram** : JUDGE T SHARP (DEPUTY PRESIDENT)

**Citation** : CARATTI and COMMISSIONER OF STATE  
REVENUE [2016] WASAT 85

**File No** : DR 229 of 2015

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*Catchwords:*

Land tax - Exemption - Right under the will to use the property as a place of residence

*Legislation:*

*Administration Act 1903 (WA)*, s 11

*Land Tax Assessment Act 2002 (WA)*, s 5, s 17, s 20, s 22

*Trustees Act 1962 (WA)*, s 24

*Result:*

Appeal dismissed

*Category:* B

**Representation:**

*Counsel:*

Appellant : Mr J A Davies  
Respondent : Mr C S Bydder & Ms L J Dias

*Solicitors:*

Appellant : Michael Caratti Barrister & Solicitor  
Respondent : State Solicitor for Western Australia

**Case(s) referred to in judgment(s):**

Caratti and Commissioner of State Revenue [2016] WASAT 85

1     **REASONS OF THE COURT:**     This appeal was brought by the  
appellant, Mr John Caratti, pursuant to s 43A of the *Taxation  
Administration Act 2003* (WA), against the decision of Sharp DCJ in the  
State Administrative Tribunal (Tribunal): *Caratti and Commissioner of  
State Revenue*<sup>1</sup> (primary reasons).

2             At the conclusion of argument on the hearing of the appeal, we  
dismissed the appeal and said we would later publish reasons. These are  
our reasons.

### **Background facts**

3             The facts were not in issue.<sup>2</sup>

4             In 1988, Mrs Loretta Caratti became the registered proprietor of a  
suburban property in Perth. In 1990 she became the registered proprietor  
of an adjoining property. The two lots were treated as a single parcel by  
the Commissioner of State Revenue (Commissioner), and will be referred  
to together in this appeal as 'the Property'. The Commissioner exempted  
the Property from land tax on the basis that the properties were being used  
by Mrs Caratti as her primary residence.<sup>3</sup>

5             Mrs Caratti passed away on 12 May 2012. Since then, in the  
relevant period, the appellant, who is the late Mrs Caratti's widower, and  
one of their children, Mr Michael Caratti, have both continued to occupy  
the Property as their primary residence.<sup>4</sup>

6             In her Will, which was executed on 1 April 1996, Mrs Caratti had  
left the Property to the appellant as trustee to establish a fund for the  
benefit of her four children. On 19 June 2012, probate of the Will in  
common form was granted.<sup>5</sup> The Will provided, relevantly:<sup>6</sup>

3             I GIVE DEVISE AND BEQUEATH all my property both real and  
personal of whatsoever kind and wheresoever situate and not  
hereinbefore otherwise disposed of to my Trustee UPON TRUST  
to sell call in and convert into money and to pay my just debts  
funeral and all estate and succession duties whether state or federal  
upon the whole of my dutiable estate and the residue (hereinafter  
referred to as 'my residual estate') to my Trustee UPON TRUST as  
follows:

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<sup>1</sup> *Caratti and Commissioner of State Revenue* [2016] WASAT 85.

<sup>2</sup> Respondent's amended submissions, par 5; WB 16.

<sup>3</sup> Primary reasons [1] - [2], [12] - [14].

<sup>4</sup> Primary reasons [3], [38].

<sup>5</sup> Primary reasons [3], [17].

<sup>6</sup> Primary reasons [15]; GB 37 - 40.

- (i) To establish a fund ('the Fund') to consist of:
  - (a) all my shares in any company of which I am a shareholder;
  - (b) all my units in any Trust of which I am a unitholder;
  - (c) the proceeds of any life insurance/assurance policy or superannuation fund in which I have an interest;
  - (d) all and any interest I have in any real property;
  - (e) all income earning investments of whatsoever nature;
  - (f) any income or capital added to the Fund from time to time;

and to invest the Fund as authorised by law or any clause in this Will and to pay all or part of the income, capital and capital accretions of the Fund to my children during the subsistence of the Fund and upon the younger of my children attaining the age of eighteen (18) years to pay the balance (if any) of the Fund to my children as tenants in common in equal shares.

- (ii) As to the remainder of my residual estate not hereinbefore otherwise disposed of to my Trustee UPON TRUST for such of my children as shall survive me and attain the age of eighteen (18) years as tenants in common in equal shares.

...

8 I EMPOWER my Trustee in his absolute discretion:-

- (i) Notwithstanding the trusts for sale hereinbefore mentioned to retain for so long as my Trustee shall in his absolute discretion think fit any real or leasehold property owned by me at the date of my death.

7 The residential exemption continued to be applied to the properties by the Commissioner until January 2015, when, following an audit that had commenced in late 2014, the Commissioner learned that Mrs Caratti had passed away. Later that month, the appellant, as executor, then

applied for an exemption from land tax pursuant to s 22 of the *Land Tax Assessment Act 2002* (WA) (Land Tax Act).<sup>7</sup>

8 In February 2015, the Commissioner disallowed the exemption and reassessed land tax in relation to the 2013/2014 assessment year. The Commissioner also issued an original assessment for the 2014/2015 assessment year.<sup>8</sup>

9 In April 2015, the appellant objected to the Commissioner's decision of February 2015. The objection was supported by a statutory declaration of the appellant dated 1 April 2015. The basis of the objection was, according to the appellant, that it was Mrs Caratti's wish that he, and their child, Mr Michael Caratti, should live at the Property for 'as long as we wish', and that under the Land Tax Act, the exemption should therefore continue to apply.<sup>9</sup>

10 On 22 May 2015, the objection was disallowed by the Commissioner.<sup>10</sup>

11 On 10 July 2015, the appellant applied to the Tribunal under s 40 of the *Taxation Administration Act 2003* (WA) for a review of the Commissioner's decision to disallow the objection.<sup>11</sup> A review of the Commissioner's decision was sought on the ground that the Commissioner erred in law in finding that the Property did not qualify for an exemption under s 22 or s 23A of the Land Tax Act.<sup>12</sup> The appellant sought orders, relevantly, to the effect that the Commissioner's assessment of land tax with respect to the Property be set aside, and that the Property be exempt from land tax under s 22 or, alternatively, s 23A of the Land Tax Act.<sup>13</sup>

12 The Tribunal found, relevantly and in effect, that Mr Michael Caratti had no 'right' under the Will to use the Property as a place of residence within the meaning of s 22(b)(ii) of the Land Tax Act.<sup>14</sup> The Tribunal also said that even if there were a right under the Will, it would not be a right to use the Property indefinitely, given the trustee's duty to sell the Property within a reasonable time.<sup>15</sup>

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<sup>7</sup> Primary reasons [4], [19] - [22].

<sup>8</sup> Primary reasons [5], [23], [26].

<sup>9</sup> Primary reasons [6], [24] - [25].

<sup>10</sup> Primary reasons [26].

<sup>11</sup> Primary reasons [7].

<sup>12</sup> BB 6.

<sup>13</sup> BB 5.

<sup>14</sup> Primary reasons [67] - [76].

<sup>15</sup> Primary reasons [74].

13 It is the Tribunal's dismissal of that application to which this appeal relates.<sup>16</sup>

**Grounds of appeal and appellant's submissions**

14 There is a single ground of appeal, which is in the following terms:

The [Tribunal] erred in fact and law in holding that the [Property], owned by the Trustee of the Will, was not exempt from Land Tax pursuant to s 22 of the [Land Tax Act] during the relevant assessment years, by virtue of its use by Michael Caratti, a beneficiary identified in the Will, as his place of residence.

15 The ground of appeal is accompanied by the following three particulars:

- i. The [Tribunal] erred in fact and law in failing to hold that the Trustee of the Will had granted a right to Michael Caratti to use the said property as his residence for as long as he wished, within the meaning of s22(b)(ii)(I) of the [Land Tax Act].
- ii. The Trustee of the Will had granted that right by means of the exercise of the powers vested in the Trustee:
  - a) under s 24 of the Trustees Act 1962, to retain the said property a residence for Michael Caratti for as long as Michael Caratti wished, and
  - b) under clause 8(i) of the Will, to postpone the sale of the said property.
- iii. The [Tribunal] erred in law in failing to hold that the right granted to Michael Caratti by the Trustee to use the said property as his residence was for as long as he wished was a right under the Will within the meaning of s22(b)(ii) of the [Land Tax Act].

16 The appellant submitted, in effect, that the Tribunal should have found that:<sup>17</sup>

- (a) the appellant, in his capacity as trustee under the Will, as at the date of Mrs Caratti's death, had put into effect an earlier arrangement with Mrs Caratti under which, relevantly, it was intended or agreed that Mr Michael Caratti would reside in the Property for as long as he wished (Arrangement);

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<sup>16</sup> The Tribunal also rejected the appellant's argument based upon s 23A of the Land Tax Act, but its reasons in that regard are not challenged in this appeal.

<sup>17</sup> Appellant's submissions, pars 7, 27, 41; WB 7, 9 - 11.

- (b) by virtue of the Arrangement, Mr Michael Caratti, as a child of Mrs Caratti and thereby a beneficiary under the Will, had the right to use the Property as a residence for as long as he wished under s 24(1)(b) of the Trustees Act;
- (c) the appellant had, for the purpose of the Arrangement, indefinitely postponed the sale of the Property, as he was empowered to do under cl 8(i) of the Will;
- (d) the appellant, for the purpose of the Arrangement, had under s 24(2) of the Trustees Act, retained the Property;
- (e) the words 'right under the will' in s 22(b)(ii) of the Land Tax Act, meant and included the right of use of the Property as a residence granted to Mr Michael Caratti under s 24(1)(b) of the Trustees Act by means of the Arrangement;
- (f) rights granted by a trustee of a will under s 24 of the Trustees Act are rights under the Will for the purposes of s 22 of the Land Tax Act; and
- (g) therefore, the Property was exempt from land tax under s 22(b)(ii)(I) of the Land Tax Act for the two years 2013/2014 and 2014/2015.

17 The appellant also submitted that the Tribunal erred in holding that even if a right for Mr Michael Caratti to use the Property as a residence were created, it would not be a right to use the Property indefinitely because of the appellant's duty to sell the Property within a reasonable time.<sup>18</sup> It is contended that the power of postponement of sale in cl 8(i) of the Will is unlimited so long as it is exercised in good faith and carefully with reference to relevant considerations.<sup>19</sup>

### **Legislative provisions**

18 The following legislative provisions are of most material relevance to this appeal.

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<sup>18</sup> Appellant's submissions, par 42; WB 11, referring to primary reasons [74].

<sup>19</sup> Appellant's submissions, pars 43 - 44; WB 11.

19 Section 11 of the *Administration Act 1903* (WA) provides:

**11. Subject as aforesaid real estate to vest according to will**

Subject as aforesaid, the real estate of every deceased person shall be held by the executor to whom probate has been granted or the administrator with the will annexed according to the trusts and dispositions of such will.

20 Section 24 of the *Trustees Act 1962* (WA) (Trustees Act) provides, relevantly:

**24. Residence for beneficiary, power to invest in etc.**

- (1) Subject to the instrument creating the trust, *a trustee may* -
  - (a) invest any trust funds in the purchase of a dwelling-house for a beneficiary to use as a residence; or
  - (b) *enter into any other agreement or arrangement to secure for a beneficiary a right to use a dwelling-house as a residence.*
- (2) Despite the terms of the instrument creating the trust, *a trustee may*, if to do so would not unfairly prejudice the interests of the other beneficiaries, *retain as part of the trust property a dwelling-house for a beneficiary to use as a residence.* (emphasis added)

21 Section 5 of the Land Tax Act provides:

**5. Taxable land**

Land tax is payable, in accordance with the land tax Acts, for each financial year for all land in the State except land that is exempt under section 17.

22 Section 17 of the Land Tax Act relevantly provides:

**17. Exempt land**

- (1) Land is exempt from land tax for an assessment year if -
  - (a) the Commissioner grants an exemption for the assessment year under section 20[.]

23 Section 20 of the Land Tax Act provides, relevantly:

**20. Commissioner's power to exempt land**

- (1) A taxpayer may apply to the Commissioner for an exemption, concession or further concession for any of the following land -
  - (a) any proportion of private residential property that is used by an individual for a purpose that is not an exempt purpose, where the private residential property is exempt to some extent under section 21, 22 or 23 because of its use by the individual as his or her primary residence as provided in the respective section[.]

24 Section 22 of the Land Tax Act provides:

**22. Residence owned by executor etc., exemption for if beneficiary in will exercising right to reside**

*Private residential property is exempt for an assessment year if, at midnight on 30 June in the previous financial year -*

- (a) *it is owned by an executor or administrator of a will as trustee; and*
  - (b) *an individual identified in the will -*
    - (i) *is entitled under the will to the property as a tenant for life; or*
    - (ii) *has a right under the will to use the property as a place of residence -*
      - (I) *for as long as he or she wishes; or*
      - (II) *for a fixed or ascertainable period,*
- whether or not the individual is or may become entitled under the will to ownership of all or part of the property at some future time;

and

- (c) *the individual uses the property as his or her primary residence. (emphasis added)*

**Disposition**

25           The fundamental issue in the appeal is the proper construction and application of s 22(b)(ii) of the Land Tax Act. Counsel for the appellant accepted, correctly, that the appeal could not succeed unless it were established that Mr Michael Caratti had a right under the terms of the Will to use the Property as his place of residence.<sup>20</sup> Accordingly, attention is directed to the terms of the Will. The Will gives no right of residence to Mr Michael Caratti. He plainly has no such right under the terms of that instrument. Pre-testamentary arrangements of the kind referred to by the appellant are irrelevant to the application of s 22(b)(ii) of the Land Tax Act on its proper construction.

26           Equally irrelevant is any post-testamentary decision by the appellant as trustee appointed under the Will to allow Mr Michael Caratti to reside at the Property. Insofar as it is alleged that Mr Michael Caratti has a right to reside at the Property pursuant to some agreement entered into with the appellant as trustee in the exercise of the appellant's powers under s 24 of the Trustees Act, the right (if it be a right) derives from the post-testamentary agreement, or, perhaps, from the appellant's exercise of power under s 24 of the Trustees Act. It is not a right given by the terms of the Will, ie, a 'right under the will' given to 'an individual identified in the will' within the meaning of s 22(b)(ii) of the Land Tax Act.

27           It is unnecessary to deal with the appellant's second contention about whether the appellant had a duty to sell the Property within a reasonable time, as that contention only arose in the event that the appellant established that Mr Michael Caratti had a relevant right under the Will.

28           For these reasons, the appeal was dismissed.

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<sup>20</sup> Appeal ts 3.