

# Continuity of the trust estate: FC of T v Clark

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Trust law practitioners have been keenly awaiting the judgment in FC of T v Clark. In the decision handed down on 21 January 2011, the Full Court endorsed the application of the principles outlined by the High Court in Commercial Nominees to trust estates for the purposes of Div 6 of Pt III of the ITAA36 and the ITAA97.

One of the many dangers faced by practitioners when dealing with trust estates is the potential to inadvertently create a new trust by undertaking a variation or amendment to the trust deed or by entering into an arrangement concerning the trusts, beneficiaries or control over the trust estate. More recently, many practitioners have been concerned about the potential to “resettle” a trust estate when varying the trust deed to modernise its provisions concerning income, capital and the manner in which amounts comprising either are distributed.

## Consequences of the creation of a new trust

Practitioners have reason to be concerned. The consequences of inadvertently creating a new trust are great. A number of tax consequences may arise if the original trust is terminated and a new trust is created, including triggering liabilities to stamp duty, the imposition of capital gains tax and/or income tax, or the loss of beneficial tax characteristics such as carried-forward tax losses. Further, the taxation liabilities may be incurred at a time when the gain is only realised for tax purposes. As far as the parties are concerned, the underlying assets and any inherent gain remain unrealised such that there are either insufficient funds available to meet the tax liability or the gain that is triggered for tax purposes is illusory and ultimately never truly realised.<sup>2</sup>

## Current state of the law

The state of the law is a principal difficulty for tax practitioners when advising clients as to whether certain activity is likely to trigger a resettlement of a trust. As noted in the judgment of Edmonds and Gordon JJ in FC of T v Clark:<sup>3</sup>

“In *Commercial Nominees* both the Full Court, at [49] of its reasons, and the High Court, at [35] of its reasons, pointed out that there was nothing in Pt IX, nor in the 1936 Act generally, which imposed some statutory requirement of continuity for determining when there is a sufficient identity of the trusts involved. With respect, the same applies in the case of Div 6 of Pt III of the 1936 Act.”

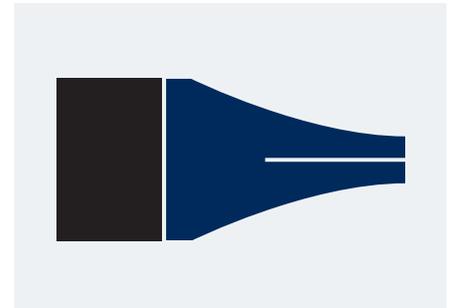
As such, practitioners have been faced with either considering older stamp duty case law, considering concepts such as the substratum of a trust,<sup>4</sup> following the approach adopted by the High Court in *Commercial Nominees*,<sup>5</sup> or adopting the approach outlined by the Federal Commissioner of Taxation (the Commissioner) in his Statement of Principles.

## ATO Statement of Principles

The Australian Taxation Office (ATO) originally released the “Creation of a New Trust — Statement of Principles” (Statement of Principles) on 9 June 1999 setting out the Commissioner’s views on resettlements as a guide for taxpayers, advisers and ATO officers. The Statement of Principles was subsequently updated in light of the High Court’s decision in *Commercial Nominees* in August 2001.<sup>6</sup> The Commissioner’s view expressed in the Statement of Principles was that the decision in *Commercial Nominees* provided guidance in respect of changes made to superannuation entities only. He stated that:<sup>7</sup>

“... nothing that the High Court said is contrary to the principles stated here and the Commissioner will continue to apply this Statement of Principles in relation to changes made to other categories of trust estates.”

In the Statement of Principles, the Commissioner outlines his view that



reference to “trust estate” in Div 6 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) is not limited to the trust property. When considering the issues, the Commissioner states:<sup>7</sup>

“Court authorities suggest that ‘trust estate’ may mean the trust property, but the structure of the legislation indicates that if so, it must be the property which is the subject matter of a particular trust relationship or ‘trust’.”

On the basis of that argument, the Commissioner considers that, if the changes are such that a new trust relationship arises, there is also a new trust estate for the purposes of Div 6 ITAA36. In effect, the trustee is considered to have disposed of the trust property on behalf of one trust estate and reacquired it as trustee of another trust estate.

In support of the Commissioner’s position, he refers to a number of stamp duty cases (*Davidson v Armytage*,<sup>8</sup> *Davidson v Chirnside*,<sup>9</sup> *CSD (NSW) v Perpetual Trustee Company Ltd* (Quigley’s case),<sup>10</sup> *Wedge v CS (Vic)*,<sup>11</sup> *Buzza v CS (Vic)*,<sup>12</sup> and *CSD (NSW) v Buckle*<sup>13</sup>) and uses those decisions as authority for the proposition that:<sup>7</sup>

“... a new settlement arises when the changes amount to a ‘new charter of rights and obligations’, or there are ‘created in the trust fund as a whole different equitable interests to those which had existed under the pre-existing trust’.”

The Commissioner also draws support from United Kingdom capital gains tax cases but, to the extent of any discrepancy between those cases and the Commissioner’s findings, he distinguishes those cases as relating to settlements, not to funds held on distinct trusts. However, in so doing, the Commissioner also outlines his view that it is generally funds held on distinct trusts that constitute trusts pursuant to Div 6 ITAA36 in any event. He

considers that settlements may comprise more than one trust estate, therefore making them more fluid than a reference to a single trust estate.

The Commissioner's view is that a new trust arises when there is a "fundamental change to the trust relationship".<sup>7</sup> It is a change in "the essential nature and character of the original trust relationship that creates a new trust".<sup>7</sup> It may mean that the original trust ceases to exist and a new trust arises, or that a new trust may arise that exists independently of the original trust.

The Commissioner considers that the changes that could trigger the creation of a new trust need not arise solely as a result of variations under a power in the deed but could also be made by agreement among the beneficiaries.

The Commissioner lists some of the changes which may raise the question as to whether a new trust has been created, including:

- any change in beneficial interests in trust property;
- a new class of beneficial interest (whether introduced or altered);
- a possible redefinition of the beneficiary class;
- changes in the terms of the trust or the rights or obligations of the trustee;
- changes in the nature or features of trust property;
- additions of property which could amount to a new and separate settlement;
- depletion of the trust property;
- a change in the termination date of the trust;
- a change to the trust that is not contemplated by the terms of the original trust;
- a change in the essential nature and purpose of the trust; and/or
- a merger of two or more trusts or a splitting of a trust into two or more trusts.<sup>7</sup>

The Commissioner concedes that the changes of the kind outlined above "may amount to the mere variation of a continuing trust".<sup>7</sup> In addressing the list, the Commissioner states:<sup>7</sup>

"Whether a new trust is created will depend, among other things, on the terms of the original trust, and on the powers of the trustee. The original intentions of the settlor must be considered in determining whether a new trust has been

created. There may be different trigger points/tests for different types of trusts.

The answer to whether alterations to trusts, taken together, result in terminations and creations of trust estates will generally flow from establishing whether the essential nature and character of the original trust relationship has fundamentally changed ..."

The position adopted by the Commissioner in the Statement of Principles has been the subject of significant criticism by commentators.<sup>14</sup> By the extent of the

property,<sup>18</sup> both the majority and the dissenting judgment in *FC of T v Clark* considered and analysed how the general principles from *Commercial Nominees* could be applied to the particular fact scenario in that case.

### Facts in FC of T v Clark

This article is not intended to be a detailed analysis of the actual decision in *FC of T v Clark* but rather an examination of the relevant principles. As such, the article will only outline the facts.

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## "Compared with the confusing selection of trust law concepts adopted by the Commissioner in the Statement of Principles, the decision of the Full Court in Clark has provided significant assistance to tax practitioners ..."

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criticism of the Statement of Principles, it is clear that a strong alternative view to that outlined by the Commissioner may be possible. In addition to the narrow interpretation of the decision of the High Court in *Commercial Nominees* and the disregard for the broader statements made by the Full Court in that case, another of the difficulties with the Statement of Principles is its reliance on stamp duty cases for authority of the propositions espoused.<sup>15</sup>

### Significance of FC of T v Clark

Compared with the confusing selection of trust law concepts adopted by the Commissioner in the Statement of Principles, the decision of the Full Court in *FC of T v Clark* has provided significant assistance to tax practitioners in the following respects:

- (1) the judgment applies the principles outlined in the High Court's decision in *Commercial Nominees* to trust estates other than mere superannuation funds;<sup>16</sup>
- (2) contrary to the position adopted by the Commissioner, the majority decision of Edmonds and Gordon JJ stated that the reasons of the High Court in *Commercial Nominees* clearly endorsed the framing of the criteria to be used when determining continuity of a trust estate outlined in the reasons of the Full Court; and<sup>17</sup>
- (3) although disagreeing on the application of the indicia of continuity of trust

The case essentially relates to the Commissioner's concern that an arrangement entered into by two families involving a unit trust with carried-forward losses (the CU Trust) amounted to loss trafficking.<sup>19</sup>

In summary, the CU Trust, while controlled by the first family (the Denoon family), incurred losses in the 1991, 1992 and 1993 income years of \$375,995, \$72,000 and \$2,492,653.50, respectively. In June 1993, an arrangement was entered into between the Denoon family and a second family (the Clark family) that comprised a series of instruments referred to as the Joint Venture Deed, the Unit Transfer Deed, the Certificates of Transfer, the Appointment Deed, the Release and Discharge Deed, and the Consultancy Agreement.<sup>20</sup> The effect of these documents was outlined in the decision in *FC of T v Clark* when summarising the Commissioner's arguments as follows:<sup>21</sup>

"... changing the trustee of the CU Trust; altering the ownership of the units of that trust; extinguishing liabilities of the trust; extinguishing the former trustee's right of indemnity out of trust assets; altering the corpus of the trust; and changing the activity of the trust from being dormant to a vehicle used by Mr David Clark to take advantage of accumulated losses in the CU Trust ..."

While, as at 30 June 1992, the balance sheet of the CU Trust indicated that total liabilities exceeded total assets by \$3,910,870.00, the effect of the

arrangement outlined above is a final net asset position of \$10.00.<sup>22</sup> That \$10.00 is represented by the settlement sum of the trust.<sup>22</sup>

There were further transactions in relation to the CU Trust after June 1993. One event was the failure of the Denoon family to make a capital contribution to the trust contemplated in the Joint Venture Deed such that its 50% unit holding in the CU Trust (remaining after the June 1993 transactions) had to be transferred to the Clark family for nominal value.<sup>23</sup>

The Commissioner's concern over the loss trafficking aspects of the arrangement were triggered in respect of the 2001 income year when the CU Trust sought to apply those carried-forward losses referred to above against an assessable capital gain of \$1,932,006 derived from the sale by the CU Trust of two properties that it held in Gladstone, Queensland.<sup>24</sup> The Commissioner contended that there was a lack of continuity between the trust estate that incurred the losses in the 1991, 1992 and 1993 income years and the trust estate that derived the capital gain in the 2001 income year, such that those earlier year capital losses could not be applied against the capital gain.<sup>25</sup>

### Federal Court decision

At first instance, Greenwood J declared that the elements evidencing continuity identified by the High Court in *Commercial Nominees* also applied to trust estates for purposes of Div 6 of Pt III ITAA36 and the *Income Tax Assessment Act 1997* (Cth) (ITAA97).<sup>26</sup> After analysing those indicia of continuity, he found that there had been continuity of the trust estate such that the losses could be carried forward and applied against the 2001 income year capital gain.<sup>27</sup>

### Full Court of the Federal Court

On 21 January 2011, the Full Court delivered its judgment. In that decision, Edmonds and Gordon JJ delivered the joint majority judgment in favour of the taxpayer, and Dowsett J dissented, delivering a judgment in favour of the Commissioner. However, despite the judges having differing views as to who was the successful party in the case, all of the judges applied the principles outlined by the High Court in *Commercial Nominees* to the trust estate despite it not being a superannuation fund.<sup>16</sup>

The three significant aspects of *FC of T v Clark* in relation to variations of trusts outlined above are worthy of further consideration.

### 1. Application to trust estates other than superannuation funds

The principles outlined by the High Court in *Commercial Nominees* and the path by which they were arrived at were outlined by Edmonds and Gordon JJ as follows:

"77 ... The case came up to the High Court via the Administrative Appeals Tribunal and a Full Court of this Court, and after considering the resettlement analysis considered and rejected by the Full Court as 'not to the point' ((1999) 167 ALR 147 at [47]), Gleeson CJ, Gaudron, McHugh, Kirby and Callinan JJ said at [36]:

'As the Full Court, and the Administrative Appeals Tribunal held, the question is one of continuity, to be considered in the context of a superannuation fund which, of its nature, may be expected to undergo change. The question is whether the eligible entity which derived the taxable income in the year ended 30 June 1995 is a different entity from the eligible entity that incurred losses in the earlier years. If, as the appellant contends, it is a different entity, there is a question as to what happened to the original entity. The three main indicia of continuity for the purposes of Pt IX are *the constitution of the trusts under which the fund (if a trust fund) operated, the trust property, and membership. Changes in one or more of those matters must be such as to terminate the existence of the eligible entity, or to produce the result that it does not derive the income in question, to destroy the necessary continuity. The trusts under which the fund operated in 1994–95 were constituted by the original trust deed in 1988 as varied by the exercise, in 1993, of a power of amendment. The property the subject of the trusts did not alter at the time the amendments took effect. Persons who were members of the fund before the amendments remained members of the fund after the amendments. The fund, both before and after the amendments, was administered as a single fund, and treated in that way by the regulatory authority.*' (emphasis added)

As noted above, the judgment in *FC of T v Clark* applies those principles to trust estates other than mere superannuation funds.<sup>16</sup> Edmonds and Gordon JJ further expand on this in their conclusion, stating:<sup>28</sup>

"Such an approach is consistent with the position at general law in relation to the four essential indicia of the existence of a trust: the trustee, trust property, the beneficiary and an equitable obligation annexed to the trust property: JD

Heydon & MJ Leeming: *Jacobs' Law of Trusts in Australia* (2006) 7th ed, at [104] – [110]. In *Commercial Nominees* both the Full Court, at [49] of its reasons, and the High Court, at [35] of its reasons, pointed out that there was nothing in Pt IX, nor in the 1936 Act generally, which imposed some statutory requirement of continuity for determining when there is a sufficient identity of the trusts involved. With respect, the same applies in the case of Div 6 of Pt III of the 1936 Act."

It is worthwhile noting that, while the comments above relate to general principles, in his judgment, Dowsett J did make specific reference to the nature of the particular trust involved. He noted that, in the facts of *FC of T v Clark*, the trust deed of the unit trust did contemplate the possibility of change. However, he stated that it was not clear to him that "inevitable and on-going change will necessarily be a characteristic of the operation of a unit trust with a small number of unit holders and a finite life expectancy".<sup>29</sup> This statement highlights the importance of always reviewing the terms of the relevant trust deed.

### 2. Full Court framing of criteria endorsed by High Court

As noted above, the majority decision of Edmonds and Gordon JJ stated that the reasons of the High Court in *Commercial Nominees* clearly endorsed the framing of the criteria to be used when determining continuity of a trust estate outlined in the reasons of the Full Court.<sup>30</sup> They state that, despite the Commissioner disputing the matter, it was clear to them that the High Court endorsed the passage at paras 48 to 57 inclusive of the reasons of the Full Court.<sup>30</sup>

In addressing the Commissioner's arguments, Edmonds and Gordon JJ highlight that the Commissioner has misinterpreted statements about a particular set of circumstances (where there could be no doubt concerning the conclusion that there was a continuing trust estate) as somehow indicating that anything other than that set of circumstances could result in a break in the necessary continuum. Edmonds and Gordon JJ state that this conclusion simply doesn't follow and that the statements were "no more than the High Court illustrating that there could be no doubt" as to the position in relation to the particular circumstances described.<sup>30</sup>

The conclusion that the High Court endorsed the framing of the relevant

principles by the Full Court in *Commercial Nominees* is particularly relevant to the variations contemplated to modernise deeds in light of income and capital issues. Critical to those variations are

property. He considered that the resolving of all of the liabilities of the CU Trust such that it went from a position where, as at 30 June 1992, total liabilities exceeded total assets by \$3,910,870.00 to a position

present case, the Commissioner never contended, nor on the evidence could he, that there was a severance in the continuum of trust property and objects of the CU Trust. Their identity changed from time to time, but not their continuum. [emphasis added]

“Modern Australian case law has provided us with a consistent approach to the determination of the relevant principles to be considered when addressing issues concerning the creation of a new trust.”

concerns regarding the continuity of the relevant trust obligations. In addressing this issue, paras 55 and 56 of the Full Court’s decision in *Commercial Nominees* states as follows:

[55] Thus, in order to determine whether losses of particular trust property are allowable as a deduction from income accruing to that trust property in a subsequent income year, *it will be necessary to establish some degree of continuity of the trust property* or corpus that earns the income from the income year of loss to the year of income. *It will also be necessary to establish continuity of the regime of trust obligations* affecting the property in the sense that, while amendment of those obligations might occur, any amendment must be in accordance with the terms of the original trust.

[56] *So long as any amendment of the trust obligations relating to such trust property is made in accordance with any power conferred by the instrument creating the obligations, and continuity of the property that is the subject of trust obligation is established, there will be identity of the “taxpayer” for the purposes of s 278 and ss 79E(3) and 80(2), notwithstanding any amendment of the trust obligation and any change in the property itself.* [emphasis is that added by Edmonds and Gordon JJ when citing these paragraphs in *FC of T v Clark*]

### 3. Application of the general principles to a particular fact scenario

Although a detailed analysis of the application of the principles from *Commercial Nominees* to the particular facts of this case is beyond the scope of this article,<sup>31</sup> there are some issues that should be further considered.

#### Continuity in trust property

In his dissenting judgment, Dowsett J focused on the indicia of continuity of trust

where, after the relevant arrangement was entered into, the net assets of the trust were recorded as simply the \$10.00 settlement sum indicated that “the affairs of a trust have been effectively wound up”.<sup>32</sup> He considered that continuity of the trust estate could not be established merely by showing that property was held on the terms of certain trusts during the 1990–1993 period and that other property was held on the same trusts at some later time. He concluded:<sup>32</sup>

“Changes in the ownership of units were clearly contemplated by the trust deed. Changes in the terms of the trust were also contemplated, as was augmentation of the fund. But where a trust has been effectively deprived of all assets and re-endowed, I see no way in which it can be said that the original trust estate has continued.”

In addressing the indicia of trust property, Edmonds and Gordon JJ considered it significant that there was no argument that there was a point in time where there was no actual trust property and, indeed, based on the evidence, they considered that such an argument was not possible.<sup>33</sup> After analysing the issue in relation to the terms of the trust deed itself, Edmonds and Gordon JJ addressed both the issue of continuity in trust property and membership in one paragraph, stating:<sup>34</sup>

“We cannot accept the Commissioner’s contention. When the High Court in *Commercial Nominees* spoke of trust property and membership as providing two of the indicia for the continued existence of the eligible entity or trust estate, the Court was *not suggesting that there had to be a strict or even partial identity* of property for the first and objects for the second. It was *speaking more generally: that there had to be a continuum of property and membership, which could be identified at any time, even if different from time to time; and without severance of one or both leading to the termination of the trust in question.* In the

#### Continuity in membership

As noted above, all of the judges in *FC of T v Clark* concluded that there had been continuity in membership.<sup>35</sup> Relevant to that conclusion was an analysis of the trust relationship and acknowledgment that the trust deed of the CU Trust contemplated changes in the beneficial ownership of the trust estate. Indeed, Edmonds and Gordon JJ concluded that the trust deed of the CU Trust specifically contemplated greater changes to the beneficial ownership than “might be encountered in a superannuation fund”.<sup>36</sup>

#### Continuity in trust obligations

Again, as noted above, all of the judges in *FC of T v Clark* concluded that there had been continuity in the trust obligations.<sup>37</sup> In considering the issue, Edmonds and Gordon JJ noted that it was “not without significance” to the issue of continuity of the trust estate that the June 1993 arrangements were effected without a variation to the actual trust deed.<sup>38</sup> It is important to note that those comments related to the impact of those June 1993 arrangements in relation to beneficial interests in the trust estate more so than the administrative provisions of the trust. In the judgment, Edmonds and Gordon JJ cite with approval the Full Court’s comments concerning variations to trust obligations not impacting on the continuity of the trust estate where those variations are “made in accordance with any power conferred by the instrument creating the obligations”.<sup>39,40</sup> Interestingly, in *FC of T v Clark*, there appears to have been several variations to the trust deed between the time that the losses were incurred and the time that the capital gain was derived. However, these variations appear to have either been simply dismissed by the Full Court or not argued by the Commissioner. Dowsett J refers to the variations in his judgment, noting that:<sup>41</sup>

“On 8 September 1998, the trust deed was amended to create a new class of ‘discretionary units’. Other changes were made dealing with the identification of capital and income. On 10 September 1998 16 discretionary units were issued.”

Dowsett J concluded that the variations to the deed were “effected in accordance with the constitution of the Trust” and “none of those events was such as to bring the Trust to an end”.<sup>42</sup>

The statements of Edmonds and Gordon JJ concerning the significance of there being no variation to the trust deed related to the extinguishment of beneficial interests. They considered that, even if the effect of the waiver of rights of indemnity against the trust assets by the former trustee resulted in the extinguishment of an interest in the trust estate, the interests of the beneficiaries of the trust were not in “some way altered by the extinguishment”. All that has happened was that an interest that ranked in priority to that of the beneficiaries has been extinguished.<sup>43</sup> Dowsett J was similarly not concerned by the waiver of the right of indemnity in relation to the continuity of the trust estate.<sup>44</sup>

## Conclusion

At the time of writing this article, we are yet to see whether the Commissioner will seek to appeal the decision to the High Court and, if so, whether the High Court will grant the Commissioner leave to appeal the decision. Similarly, the Commissioner has not as yet issued a decision impact statement in relation to the decision.

Modern Australian case law has provided us with a consistent approach to the determination of the relevant principles to be considered when addressing issues concerning the creation of a new trust. We now have a High Court decision, two Full Court of the Federal Court decisions, and the judgment of the Federal Court at first instance in this case adopting a similar approach to identifying the fundamental principles to be examined.

It is hoped that the Commissioner takes the opportunity to afford practitioners greater clarity as to the manner in which ATO officers will approach these issues by revising the Statement of Principles to reflect the criteria to be used when determining continuity of a trust estate as outlined in the reasons of the Full Court in *Commercial Nominees*.

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## References

1 While this article is focused on the income tax consequences relating to the creation of a new trust estate rather than the state duty implications concerning settlements of trusts, the common

term “resettlement” will be used interchangeably throughout this article to describe the process of the creation of a new trust estate.

2 For example, consider the circumstance where, at the time of the eventual realisation of the asset by sale to an independent third party, the value of the asset has decreased from the valuation used when determining the taxation consequences of the earlier resettlement.

3 *FC of T v Clark* [2011] FCAFC 5 at [88].

4 *Kearns v Hill* (1990) 21 NSWLR 107.

5 *FC of T v Commercial Nominees* [2001] HCA 33.

6 In this decision, the High Court found that changes made in respect of a superannuation fund did not amount to the creation of a new trust estate. This is explained further in this article.

7 Available at [www.ato.gov.au/businesses/content.asp?doc=/content/14283.htm](http://www.ato.gov.au/businesses/content.asp?doc=/content/14283.htm).

8 (1906) 4 CLR 205.

9 (1908) 7 CLR 325.

10 (1926) 38 CLR 272.

11 (1940) 64 CLR 75.

12 (1951) 83 CLR 286.

13 98 ATC 4097.

14 See D Raphael, “Settlements at common law and for certain statutory purposes”, Tax Institute paper presented on 7 April 2004, p 21, para 63; M Robertson, “Changes to trusts leading to the creation of a new trust estate: principles to be applied by the ATO”, paper presented at The Tax Institute Trusts Intensive Seminar on 6 December 2006, p 27; A Moshinsky QC, “Trust Resettlements” (1999) 3(3) *The Tax Specialist* 130; and Harrison QC, “Trust Resettlements”, Tax Institute seminar paper presented on 26 August 1999, p 24.

15 See comments in A Moshinsky QC, “Trust Resettlements” (1999) 3(3) *The Tax Specialist* 130.

16 See the comments of Dowsett J in *Clark* [2011] at [36] and [44] and Edmonds and Gordon JJ at [79] and [88] which follow the decision at first instance of Greenwood J in *Clark v FC of T* [2009] FCA 1401 at [103].

17 *Clark* [2011] at [79], and *Clark* [2009] at [97] to [103].

18 Dowsett J finding that there was no continuity of the property of the trust estate (at [45]) and Edmonds and Gordon JJ finding that there was such continuity (at [87]).

19 See case update in “ATO Capital gains tax update 2009-10 income year”, available at [www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00213027.htm&page=7&H7](http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00213027.htm&page=7&H7).

20 *Clark* [2009] at [63] to [76].

21 *Clark* [2011] at [52].

22 *Clark* [2011] at [75].

23 *Clark* [2011] at [74].

24 *Clark* [2011] at [49].

25 *Clark* [2011] at [52].

26 *Clark* [2009] at [103].

27 *Clark* [2009] at [118], [120] and [140].

28 *Clark* [2011] at [88].

29 *Clark* [2011] at [32].

30 *Clark* [2011] at [79].

31 Such analysis being better suited to a strict case summary rather than this article addressing resettlement issues more generally. Similarly, this article does not address the issue concerning substantiation of the capital losses argued both at first instance and before the Full Court.

32 *Clark* [2011] at [45].

33 *Clark* [2011] at [53].

34 *Clark* [2011] at [87].

35 *Clark* [2011] at [45], [86] and [87].

36 *Clark* [2011] at [86].

37 *Clark* [2011] at [45] and [83].

38 *Clark* [2011] at [76].

39 *Commercial Nominees* at [56].

40 *Clark* [2011] at [78] and [79].

41 *Clark* [2011] at [18].

42 *Clark* [2011] at [38].

43 *Clark* [2011] at [82].

44 *Clark* [2011] at [41].