

FEDERAL COURT OF AUSTRALIA

Minerva Financial Group Pty Ltd v Commissioner of Taxation [2024]

FCAFC 28

Appeal from:	<i>Minerva Financial Group Pty Ltd v Commissioner of Taxation</i> [2022] FCA 1092
File number:	VID 662 of 2022
Judgment of:	BESANKO, COLVIN AND HESPE JJ
Date of judgment:	8 March 2024
Catchwords:	TAXATION – <i>Income Tax Assessment Act 1936</i> (Cth) Part IVA – where gist of the scheme was failure by a trustee to exercise a discretion to make a distribution – whether a reasonable person would conclude that the applicant entered into or carried out one or more of the schemes for the dominant purpose of enabling it to obtain a tax benefit in connection with the scheme within the meaning of s 177D of the <i>Income Tax Assessment Act 1936</i> (Cth)
Legislation:	<i>Income Tax Assessment Act 1936</i> (Cth) ss 177A, 177C, 177D, Part IVA
Cases cited:	<i>British American Tobacco Australia Services Ltd v Commissioner of Taxation</i> [2010] FCAFC 130; (2010) 189 FCR 151 <i>Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd</i> [2011] FCAFC 49; (2011) 192 FCR 325 <i>Commissioner of Taxation v Citigroup Pty Ltd</i> [2011] FCAFC 61; (2011) 193 FCR 380 <i>Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust</i> [2023] FCAFC 3 <i>Commissioner of Taxation (Cth) v Hart</i> [2004] HCA 26; (2004) 217 CLR 216 <i>Commissioner of Taxation v Macquarie Bank Limited</i> [2013] FCAFC 13; (2013) 210 FCR 164 <i>Commissioner of Taxation v Spotless Services Ltd</i> [1996] HCA 34; (1996) 186 CLR 404 <i>Macquarie Finance Ltd v Commissioner of Taxation</i> [2005] FCAFC 205; (2005) 146 FCR 77 <i>Metal Manufactures v Commissioner of Taxation</i> [1999] FCA 1712 <i>Noza Holdings Pty Ltd v Commissioner of Taxation</i> [2011]

FCA 46

Division:	General Division
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Dates of hearing:	28, 29 August 2023
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Solicitors for the Appellant	Arnold Bloch Leibler
Counsel for the Respondent	Ms M Baker KC and Ms A Wilson
Solicitors for the Respondent	Australian Government Solicitor

ORDERS

VID 662 of 2022

BETWEEN: **MINERVA FINANCIAL GROUP PTY LTD**
Appellant

AND: **THE COMMISSIONER OF TAXATION OF THE**
COMMONWEALTH OF AUSTRALIA
Respondent

ORDER MADE BY: **BESANKO, COLVIN AND HESPE JJ**

DATE OF ORDER: **8 MARCH 2024**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the primary judge made on 10 October 2022 and 14 November 2022 be set aside.
3. In lieu thereof, it be ordered that the appeal against the respondent's objection decisions be allowed and the matter remitted to the respondent for re-assessment according to law.
4. The respondent is to pay the appellant's costs of the appeal and of the proceedings at first instance.

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

REASONS FOR JUDGMENT

THE COURT:

- 1 Under the general anti-avoidance rules provided for in Australia’s income tax legislation, the Commissioner of Taxation has a power to cancel a tax benefit that has been obtained in connection with a scheme that has been entered into or carried out by a person for the dominant purpose of enabling a taxpayer to obtain that tax benefit. The term “scheme” is broadly defined in terms that extend well beyond its natural meaning. As well as encompassing notions of agreement, arrangement and understanding, it includes an “action” or “course of action” taken by one party without the involvement of any other party.
- 2 The appellant (Minerva Financial Group Pty Ltd) appeals from a judgment of this Court by which it was concluded that the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**), applied to enable the respondent (**Commissioner**) to make a determination to include amounts in the appellant’s assessable income in each of the 2012 to 2015 income years (the **relevant years**).
- 3 Although described in the primary judge’s reasons as a “second scheme” and “third scheme”, the ‘true gist’ of the schemes to which Part IVA was found to apply was the appellant’s failure to exercise its discretion as trustee of a unit trust to make distributions to the holder of special units in the unit trust: PJ [498].

FACTS

- 4 The facts are set out at PJ [1] to [251]. For the purposes of this appeal the relevant facts may be summarised as follows.
- 5 The appellant is a member of the group of companies and trusts known as the **Liberty group**. The parent of the Liberty group was **Jupiter** Holdings BV up to 12 April 2013 and, thereafter, **Vesta** Funding BV, both incorporated in the Netherlands.
- 6 As a “non-bank” provider of financial services, the Liberty group obtained its funds to make loans through a process called securitisation of its loan receivables and related securities (usually mortgages). The securitisation process involved the establishment of special purpose securitisation trusts. The trustee of the securitisation trusts issued notes to third party noteholders and units to a related entity in the form of a residual income unit (**RIU**) and a residual capital unit (**RCU**). The holder of the RIU was entitled to receive the balance of the

income of the securitisation trust remaining after interest was paid to the noteholders (and other expenses paid) and the holder of the RCU was entitled to receive the balance of any capital of the securitisation trust after the repayment of principal to the noteholders and any other financiers.

7 Liberty Financial Pty Ltd (**LF**) is a subsidiary of the appellant. It provided services and loans to other members of the Liberty group and performed a treasury and cash management function. It was also the provider of subordinated debt to the securitisation trusts. Prior to 2007 it was the holder of RIUs and RCUs in the securitisation trusts through which the Liberty group raised funds.

8 On the evidence before the primary judge, aspects of the role of LF in the operation of the Liberty group's business of providing financial services changed over time in material respects to which, in due course, it will be necessary to make further reference. At this point, it is sufficient to note that, up until 2007, LF conducted a finance business in Australia that it established in the late 1990s and it was LF that was entitled to the earnings from the operation of that business. It received the profits that were derived from the securitisation trusts, being the margin between the cost of funds contributed by external investors to those trusts and the interest paid by borrowers to those trusts. Once the external investors were repaid capital and interest, if all went according to plan there would be residual capital (which had been contributed by LF) and residual income (being the margin over and above the interests paid to external investors). LF was entitled to that capital and income as the holder of the RCUs and RIUs for each of the securitisation trusts. Distributions received by LF from its RIUs were the principal source of LF's gross income for the 2004 to 2007 income years (PJ [68]).

Proposed IPO and Restructure

9 In 2007 in anticipation of conducting an initial public offering (**IPO**) of "stapled securities", the Liberty group reorganised itself into what the primary judge described as a "trust silo" and a "corporate silo". The stapled securities were to consist of a share in the appellant (which, together with its subsidiaries, was to comprise the "corporate silo") and a unit in the Minerva Financial Group Trust (**MFGT**) (which, together with its subsidiaries, was to comprise the "trust silo"). The Liberty group had received advice over many years that an IPO of stapled securities consisting of a share in a company holding the group's active assets and a unit in a trust holding the group's passive financial assets was the optimal way to go to market.

10 MFGT was established on 31 May 2007 with two units issued to the appellant. The trustee of MFGT was and remains Liberty Fiduciary Ltd (formerly known as Minerva Fiduciary Ltd).

11 Initially, it was planned that LF would transfer the units it held in the existing securitisation trusts to a holding trust. This holding trust was to hold the units in the securitisation trusts and was to issue ordinary units to MFGT and a discretionary special unit to LF. The discretionary unit would allow the holding trust to distribute income to LF if required by LF. A board paper dated 27 April 2007 recorded:

As cash is required, the trustee of the Holding Trust would make a determination to issue a discretionary distribution to Minerva [LF] to ensure that it can meet its commercial obligations. Any cash not required will continue to be retained within the Holding Trust to meet future cash requirements of Minerva [LF] or to satisfy the Minerva Trust's [MFGT's] distribution policy.

12 In June 2007, the appellant acquired all the shares in LF from the ultimate non-resident shareholder, Jupiter.

13 In around July/August 2007, the Liberty group decided to postpone the IPO due to market conditions and other concerns.

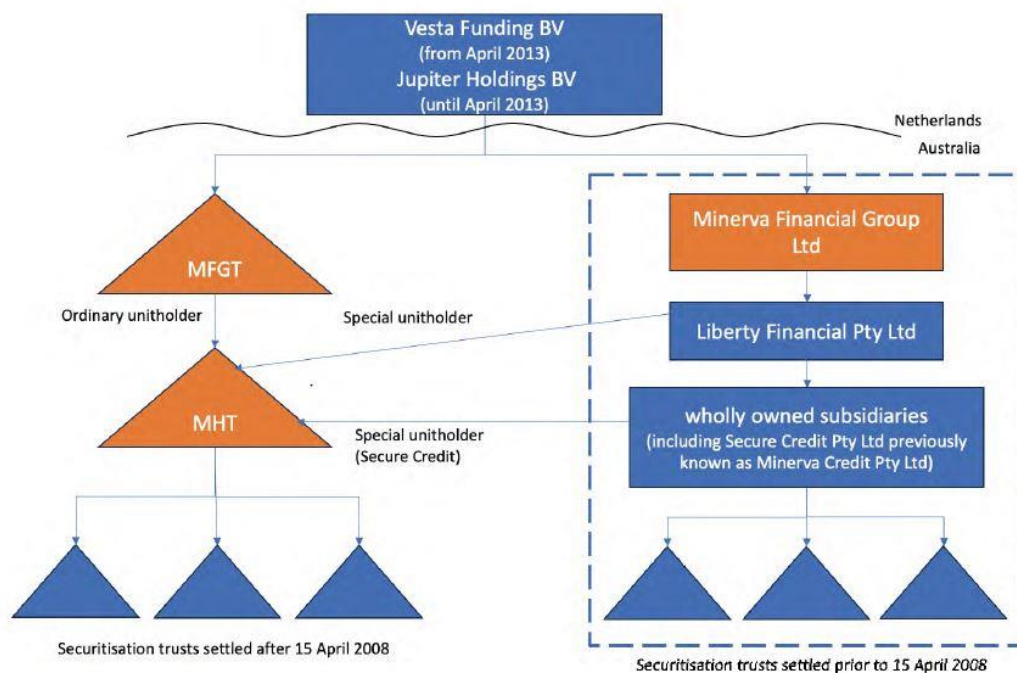
14 On 25 September 2007, the board of the appellant resolved to transfer the appellant's units in MFGT to Jupiter.

15 Following the postponement of the IPO, on 10 December 2007 the board of LF decided that to mitigate stamp duty and capital gains tax costs LF would not transfer the existing securitisation trusts to a holding trust in the trust silo. Instead, only newly formed securitisation trusts would be established under that holding trust.

16 On 14 December 2007, the appellant transferred its units in MFGT to Jupiter. By transferring the units in December 2007, the appellant's liability to stamp duty and capital gains tax was limited as there had not been an accretion in the value of MFGT since its establishment.

17 The holding trust, Minerva Holding Trust (**MHT**), was settled on 15 April 2008 with one ordinary unit issued to MFGT and one special unit issued to each of LF and Minerva Credit Pty Ltd (a subsidiary of LF, now named Secure Credit). From that date, the RIUs and RCUs in new securitisation trusts were issued to MHT. The appellant was appointed trustee of MHT.

18 A simplified diagram of the group following these steps is as follows:



- 19 On 1 July 2010, five units in MFGT were issued to Jupiter in consideration for the assignment of a promissory note that had been issued by the appellant: PJ [121].
- 20 On 10 August 2010, an application was made to deregister MFGT as a managed investment scheme: PJ [122].
- 21 On 30 June 2011, Jupiter was issued a further 199,409,253 units in MFGT: PJ [123].
- 22 On 12 April 2013, Vesta replaced Jupiter as the sole unitholder in MFGT and the sole shareholder in the appellant. Vesta was owned by the same ultimate owners as Jupiter.
- 23 In March 2015, LF commenced raising senior unsecured interest-bearing debt by issuing Medium Term Notes (**MTNs**) with an inaugural issue of \$100 million.
- 24 In mid-September 2016, the Liberty group decided to revisit an IPO. An IPO did not proceed at that time because of volatility in the share market.
- 25 The Liberty group revisited an IPO of stapled securities in late 2019. The IPO did not proceed because of the COVID-19 pandemic.
- 26 Liberty group stapled securities were listed on the ASX in December 2020.
- 27 Between 30 June 2007 and 30 June 2020, the loan portfolio of the Liberty group grew from \$3.69 billion to \$11.66 billion.

28 The restructure that occurred in 2007 was not the only change to the way in which the Australian finance business was conducted within the Liberty group. The very considerable growth in the business required new sources of funding to be secured, including by issuing the MTNs. In consequence, the role of LF changed. Arrangements were put in place for LF to be remunerated by the payment of management and administration fees for the services that it was providing in relation to the securitisation trusts and other aspects of the business, including in conducting its role as central treasury.

The Tax in Issue

29 In the tax years 2012 to 2015, considerable profits were earned in MHT. During those years, profits earned in MHT were distributed to the trustee of MFGT and then to Jupiter. The taxation consequence of those profits being distributed in that manner rather than to LF was that they were subject to a withholding tax of 10% rather than a corporate tax rate of 30%. Prior to the restructure in 2007, profits earned in MHT would have flowed to LF.

30 The Commissioner determined that there had been a tax benefit obtained in connection with a scheme for each of the years 2012 to 2015 and issued assessments. The appellant objected. The Commissioner disallowed the objection. The appellant then brought a statutory appeal. As noted above, the primary judge found that Part IVA applied to what was termed the “second” and “third” scheme.

Terms of the MHT Trust and Distributions by MHT

31 Clause 4 of the MHT constitution relevantly provided:

4 Units, Options and Financial Instruments

Nature of Units

- 4.1 The beneficial interest in the Trust is divided into Units.
- 4.2 Subject to the rights, restrictions and obligations relating to a Class of Unit, each Fully Paid Unit confers an equal undivided interest and, unless this Constitution states otherwise, a Partly Paid Unit confers an interest of the same nature which is proportionate according to the amount paid up on the Unit.
- 4.3 A Unit confers an interest in the Assets as a whole, subject to the Liabilities. It does not confer an interest in a particular Asset.

Class of Units

- 4.4 The Classes of Units will be:
 - (a) Ordinary Units; and
 - (b) Special Units.

- 4.5 Subject to the Corporations Act and the Listing Rules, the Trustee may determine to create and issue further Units of the same Class.
- 4.6 The rights of Members and holders of Units are subject to the rights, obligations and restrictions attaching to a Unit of a Class which they hold.

Ordinary Units

- 4.7 All Ordinary Units will rank equally, subject to clause 8.15.

Special Units

- 4.8 A Special Unit will confer upon the Holder of the Special Unit the right to receive:
- (a) such proportion of the Distributable Income of the Trust during each Financial Year as the Trustee may in its sole discretion determine; and
 - (b) upon Redemption of a Special Unit, the Redemption Price payable in respect of that Special Unit;
 - (c) if the Trust is wound up, the Redemption Price in respect of each Special Unit, and in priority to the Holders of all other classes of Units in the capital of the Trust,
- but not any right to any further participation in the profits or assets of the Trust.
- 4.9 All Special Units will rank equally, subject to clause 8.15.

32 Clause 13 relevantly provided:

Income Distributions to Holders of Special Units

- 13.5 The Trustee may, at its sole discretion, determine to distribute all or any proportion of Distributable Income in respect of a Distribution Period (***Special Distribution***) to Holders of Special Units.
- 13.6 Subject to the rights, obligations and restrictions attaching to any particular Special Unit, a Holder of a Special Unit is entitled to that proportion of a Special Distribution determined under clause 13.5 as is equal to the number of Special Units held by that Holder of Special Units on a date determined by the Trustee divided by the number of Special Units on the Register on that date.

Present Entitlement of Holders of Special Units

- 13.7 A person who at any time during the Financial Year is or has been a Holder of Special Units, is presently entitled as at midnight on the last day of the Financial Year to the Distributable Income of the Trust for the Financial Year in the proportion that the Special Distributions made (or allocated under clause 13.6) to the Holder of Special Units in respect of the Financial Year bear to the sum of:
- (a) the Income Distributions made (or allocated under clause 13.9) to all persons who are or have been Holders of Ordinary Units at any time during the Financial Year; and
 - (b) the Special Distributions made (or allocated under clause 13.6) to all persons who are or have been Holders of Special Units any time during the Financial Year.

Present Entitlement of Holders of Ordinary Units

13.8 A person who at any time during the Financial Year is or has been a Holder of Ordinary Units, is presently entitled as at midnight on the last day of the Financial Year to the Distributable Income of the Trust for the Financial Year in the proportion that the Income Distributions made (or allocated under clause 13.9) to the Holder of Ordinary Units in respect of the Financial Year bear to the sum of:

- (a) the Income Distributions made (or allocated under clause 13.9) to all persons who are or have been Holders of Ordinary Units at any time during the Financial Year; and
- (b) the Special Distributions made (or allocated under clause 13.6) to all persons who are or have been Holders of Special Units any time during the Financial Year.

33 In the year ended 30 June 2012, the appellant as Trustee of MHT did not exercise its discretion under cl 13.5 of the MHT constitution to make Special Distributions to the Holders of Special Units (**special unitholders**). Accordingly, MFGT as the holder of ordinary units was entitled to all of MHT's distributable income in that income year.

34 In the years ended 30 June 2013 to 30 June 2015, the appellant as Trustee of MHT exercised its discretion under cl 13.5 to make Special Distributions of nominal amounts to the special unitholders. Aside from these nominal amounts, MFGT was entitled to MHT's distributable income in those income years.

Terms of the MFGT Trust and Distributions by MFGT

35 Clauses 4.1, 4.2 and 4.3 of the MFGT constitution provided:

Nature of Units

- 4.1 The beneficial interest in the Trust is divided into Units.
- 4.2 Each Fully Paid Unit confers an equal undivided interest and, unless this Constitution states otherwise, a Partly Paid Unit confers an interest of the same nature which is proportionate according to the amount paid up on the Unit.
- 4.3 A Unit confers an interest in the Assets as a whole, subject to the Liabilities. It does not confer an interest in a particular Asset.

36 Clause 13.5 of MFGT constitution provided:

Present Entitlement

13.5 A person who at any time during the Financial Year is or has been a Member, is presently entitled as at midnight on the last day of the Financial Year to the Distributable Income of the Trust for the Financial Year, in the proportion that the Income Distributions made (or allocated under clause 13.6) to the Member in respect of the Financial Year bear to the sum of the Income Distributions made (or allocated under the clause 13.6) to all persons who are or have been

Members at any time during the Financial Year.

37 Up to 12 April 2013, all of the ordinary units in MFGT were held by Jupiter. From 12 April 2013, all the ordinary units in MFGT were held by Vesta. In the relevant years, Jupiter and Vesta (as applicable) as ordinary unitholder, received distributions of all of MFGT's distributable income.

Effecting Payments in the Liberty group

38 During the relevant years, LF performed central treasury and cash management functions for the Liberty group. Cash amounts due to entities in the Liberty group were transferred to LF (and recorded as loans to LF). LF paid expenses on behalf of entities in the Liberty group (recorded as loans from LF or as reductions in the loan to LF). Distributions made to LF were recorded as reductions in the loan to LF, thereby effecting a repayment of advances to LF.

39 Consistent with cash management being centralised in LF, distributions made between other entities in the Liberty group were recorded through intra-group loan accounts. The distributions from MHT to MFGT were paid through a series of debit and credit entries to intra-group loan accounts (referred to in the evidence somewhat inaccurately as "loan offsets"). The distributions from MFGT to Jupiter and Vesta were paid through a series of entries to intra-group loans and the issue of the units by MFGT. The effect of the entries was to reduce amounts recorded as owed by Jupiter to LF (in the years ended 30 June 2012 and 30 June 2013) and increase the amount Vesta had invested in MFGT (in the years ended 30 June 2014 and 30 June 2015). The debt owed by Jupiter had arisen because LF had earlier made cash advances to Jupiter.

40 Although LF did not receive distributions from MHT in the relevant years, LF continued to derive income from the securitisation trusts settled prior to April 2008, management fees from entities in the Liberty group (including MHT) and interest on subordinated loans it made to the securitisation trusts and on other intercompany receivables. The end of year loan balances recorded as owing by LF to MHT did not increase year on year.

STATUTORY CONTEXT

41 The relevant provisions of Part IVA as they applied in the relevant years are set out at PJ [253]–[254]. As discussed further below, for the purposes of this appeal, it is s 177D which is of critical importance. Although s 177D was amended in 2013, for present purposes, it is

sufficient to note only that the amendments resulted in a renumbering so that what was previously s 177D(b) became s 177D(2).

42 Section 177D (as amended in 2013) relevantly provides:

177D Schemes to which this Part applies

Scheme for purpose of obtaining a tax benefit

- (1) This Part applies to a scheme if it would be concluded (having regard to the matters in subsection (2)) that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of:
- (a) enabling a taxpayer (a **relevant taxpayer**) to obtain a tax benefit in connection with the scheme; or
 - (b) enabling the relevant taxpayer and another taxpayer (or other taxpayers) each to obtain a tax benefit in connection with the scheme;

whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers.

Have regard to certain matters

- (2) For the purpose of subsection (1), have regard to the following matters:
- (a) the manner in which the scheme was entered into or carried out;
 - (b) the form and substance of the scheme;
 - (c) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
 - (d) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;
 - (e) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;
 - (f) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;
 - (g) any other consequence for the relevant taxpayer, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out;
 - (h) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in paragraph (f).

Tax benefit

- (3) Despite subsection (1), this Part applies to the scheme only if the relevant

taxpayer has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme.

(notes omitted.)

43 Section 177A(5) provides:

- (5) A reference in this Part to a scheme or a part of a scheme being entered into or carried out by a person for a particular purpose shall be read as including a reference to the scheme or the part of the scheme being entered into or carried out by the person for 2 or more purposes of which that particular purpose is the dominant purpose.

THE PROCEEDINGS BELOW

44 At trial, the Commissioner relied upon three schemes in support of his Part IVA determination.

45 The first scheme related to the establishment of the trust silo in April 2008 with MHT being nominated as the RIU holder and the distribution of income from the securitisation trusts to MHT. The steps constituting that scheme are set out at PJ [284].

46 The second scheme related to the transfer of the units in MFGT from the appellant to Jupiter in December 2007. These steps are set at PJ [290]. Under this scheme, the Commissioner did not seek to impugn the establishment of MHT or MHT being the holder of the RIUs in any of the securitisation trusts. Rather, the Commissioner sought to impugn the transfer of the units in MFGT from the appellant to Jupiter and the failure by the trustee of MHT to distribute any more than nominal amounts of income to the special unitholders in MHT (being LF and Secure Credit). The second scheme comprised three steps being the transactions that resulted in Jupiter becoming entitled to all of the units in MFGT, the non-exercise of the discretion of the trustee of MHT to make distributions to the special unitholders and the lending by MHT of the amounts it received as distributions on the RIUs to LF.

47 The third scheme related to the failure by the appellant as trustee of MHT to distribute any more than nominal amounts of income to the special unitholders in MHT (being LF and Secure Credit). The steps comprising the third scheme are set out at PJ [299] and comprised the choice by the appellant as trustee of MHT to not exercise its discretion to distribute any more than a nominal amount of MHT's distributable income to the special unitholders and the lending by MHT of the amounts it received as distributions on the RIUs to LF. Under this scheme, the Commissioner did not seek to impugn the formation of the trust and corporate silos nor the transfer of the units in MFGT from the appellant to Jupiter.

48 There was no dispute that each of the schemes relied upon were a “scheme” for the purposes of Part IVA. Nor was it disputed that the appellant obtained a tax benefit as defined in s 177C in each of the relevant years in respect of each of the schemes. The proceedings before the primary judge turned on whether, based on the factors set out in s 177D, a reasonable person would conclude that a party entering into or carrying out any of the part of the scheme (in this case, the appellant) did so for the dominant purpose of enabling the appellant to obtain a tax benefit.

49 The primary judge held that Part IVA did not apply to the first scheme. There is no appeal in relation to that conclusion. In particular, the Commissioner does not seek on appeal to impugn the reorganisation of the Liberty group into trust and corporate silos. The first scheme is not considered further in these reasons.

50 The primary judge held that Part IVA applied to the second scheme. The primary judge was of the view that a reasonable person would conclude that the appellant entered into or carried out the second scheme for the dominant purpose of enabling it to obtain a tax benefit. In evaluating the first and third of the eight factors in s 177D(2) of Part IVA, the primary judge considered the first part of the scheme (involving the transfer of the units in MFGT from the appellant to Jupiter) separately from the second part of the scheme (involving the non-exercise of the discretion of the trustee of MHT to make distributions to the special unitholders and the lending by MHT of the amounts it receive as distributions on the RIUs to LF). The primary judge considered that there was no evidence from the appellant as to the commercial reasons why it only distributed nominal amounts of income from MHT to the special unitholders in the relevant years. The primary judge concluded that the first and third factors supported a conclusion that a party (namely the appellant) entered into or carried out the second scheme for the dominant purpose of enabling it to obtain a tax benefit. The remaining factors were considered by the primary judge to be neutral.

51 For similar reasons, the primary judge held that Part IVA applied to the third scheme.

THE SCHEMES ON APPEAL

52 On appeal, in addition to the second and third schemes relied upon before the primary judge the Commissioner relied upon a further formulation of the scheme. This fourth scheme consisted only of the non-exercise of the discretion of the trustee of MHT to make distributions to the special unitholders.

THE APPELLANT’S GROUNDS OF APPEAL

- 53 By its amended notice of appeal, the appellant contended that the primary judge erred in concluding that the second and third schemes were schemes to which Part IVA applied. The appellant contended that the primary judge ought to have found, having regard to the eight matters set out in s 177D, that the non-exercise by the trustee of MHT of a discretion to distribute income to the special unitholders “did not attract the operation of Part IVA”.
- 54 The appellant submitted that the primary judge erred in the consideration of the first and third factors in s 177D(2) in four principal ways:
- (1) Neither the first nor third factor (nor any other factor) permitted an enquiry into the subjective purpose or motivation of any scheme participant. The primary judge erred in searching for the reason why the appellant (as trustee of MHT) did not make distributions of MHT’s distributable income to the special unitholders.
 - (2) The primary judge erroneously regarded as irrelevant two objective facts:
 - (a) the fact the special unitholders had no entitlement to the income of MHT; and
 - (b) the fact that the power of the trustee of MHT to distribute income to the special unitholders was discretionary.
 - (3) The primary judge failed to take into account the evidence of Mr Pillai (General Manager – Group Treasury) that at the time of establishing MHT he considered that distributing income to the ordinary unitholder allowed income to be distributed to the ultimate unitholders (Jupiter and Vesta) and provided borrowing flexibility and better capital management for the Liberty group. Distributions to LF would have become encumbered by the charge held by LF’s senior lenders over LF’s assets.
 - (4) Even assuming that there was no commercial difference between distributing income to the special unitholders as opposed to the ordinary unitholders, the appellant did no more than adopt one of two alternative courses of action. The requisite conclusion as to dominant purpose is not to be drawn if no more appears than that a taxpayer adopted one of two or more alternative courses of action, being the alternative that produces a tax benefit: *Metal Manufactures v Commissioner of Taxation* [1999] FCA 1712 at [261].

THE COMMISSIONER'S NOTICE OF CONTENTION

55 By notice of contention, the Commissioner contends that the judgment of the primary judge should be affirmed on two grounds other than those relied upon by the primary judge:

- (1) If the appellant is correct and the primary judge erroneously regarded as irrelevant the two objective facts identified at [00] above, it would still be concluded for the purposes of s 177D that a person who entered into or carried out any part of the second or third scheme did so for the dominant purpose of enabling the appellant to obtain a tax benefit having regard to:
 - (a) The second factor in s 177D. The primary judge was said to have erred in concluding that there was no material difference between the form and the substance of the scheme. It was contended that the form of the second and third schemes was that “MHT’s net income flowed predominantly to MFGT and from MFGT to Jupiter and Vesta” whereas the substance of the schemes was that “the funds associated with MHT’s net income flowed predominantly to LF in the form of loans”. It was submitted that the difference between the form and substance of the schemes “was indicative of a dominant purpose of achieving the tax benefit because the funds flowed to LF...but with a reduced tax impost in comparison to that which would have arisen...[had] the cash flowed to LF as income.”
 - (b) The fourth factor in s 177D. The primary judge was said to have erred in concluding, in respect of the second and third schemes, that the result in relation to the operation of the “[ITAA 36 and the *Income Tax Assessment Act 1997* (Cth)] that, but for Part IVA of the ITAA 36, would have been achieved by the scheme was neutral”. The primary judge ought to have concluded that this factor was “indicative of a dominant purpose of achieving the tax benefit in respect of the second and/or third schemes because the schemes ensure that, but for Part IVA, income that would have otherwise have been subject to tax at 30% was instead subject to withholding tax of 10%.” It was contended that the failure by the appellant as trustee of MHT to distribute income to MHT’s special unitholders “had no benefit other than the tax consequence”.
 - (c) The fifth and sixth factors in s 177D. The primary judge was said to have erred in concluding, in respect of the third scheme, that the change in the financial position of the appellant and any person who has, or has had, any connection

with the appellant, as a result of the scheme, was neutral. It was contended that the factor was indicative of a dominant purpose of achieving a tax benefit because it was reasonably foreseeable that “the third scheme would negatively affect LF’s financial position, and therefore the Appellant’s financial position” because LF would have less retained earnings.

- (d) The eighth factor in s 177D. The primary judge was said to have erred in concluding, in respect of the second and third schemes, that the nature of any connection between LF and any person that has, or has had, any connection to LF is “neutral”. It was contended that the primary judge ought to have found that the nature of the connection between the appellant and the other entities in the Liberty group was indicative of a dominant purpose of achieving the tax benefit. It was contended that because the appellant and MFGT had the same ultimate owners, “the only difference between MFGT making distributions to its unitholder and the Appellant distributing dividends to its shareholder was the tax consequence”. The distribution of MHT’s net income to MFGT could be satisfied by loan offset because the entities were under common control.
- (2) The fact that the trustee of MHT did not exercise a discretion to distribute income to the special unitholders was sufficient to attract the operation of Part IVA:
- (a) The primary judge was said to have erred in finding at PJ [481] that “there was insufficient evidence that the loans made by MHT to LF were provided from funds related to the income received by MHT as the RIU holder in the securitisation trusts”. The residual income received by MHT on the RIUs constituted more than 96% of MHT’s income from 1 July 2008 to 30 June 2015 and MHT advanced LF more than 98% of its income in that period (PJ [138], [175]). These errors were said to relate to the application of the second factor in s 177D.
 - (b) The primary judge was said to have erred in finding at PJ [481] that the loans made by MHT to LF did not replace LF’s income stream from the securitisation trusts that “previously went to LF as the RIU holder”. This error was said to relate to the application of the second factor in s 177D.
 - (c) The primary judge was said to have erred in failing to find that the third scheme would result in LF’s retained earnings being lower than they otherwise would have been and this in turn would mean LF would have a lower capital adequacy

ratio and this would negatively affect LF's ability to maintain its investment-grade credit rating and thereby negatively affect LF's ability to sustain its MTN program. This error was said to relate to the application of the fifth and sixth factors.

SIGNIFICANT ASPECT OF THE COMMISSIONER'S CASE ON APPEAL

- 56 Significantly, much of the case advanced by the Commissioner to support the decision by the primary judge and the Commissioner's notice of contention treated the business activities of LF and its role within the Liberty group as if they were static in their operation. In particular, the Commissioner pointed to characteristics of the way in which the finance business had been conducted before the reorganisation and adopted them as the lens through which the objective purpose of subsequent conduct in the relevant tax years of 2012 to 2015 was to be understood.
- 57 There were two fundamental difficulties with the Commissioner's approach. First, the primary judge rejected the Commissioner's case that the reorganisation in 2007 was a scheme. The change in structure meant that LF was in a different position after the restructure. Second, as has been mentioned, the finance business conducted by the Liberty group grew considerably between 2007 and the last of the relevant years. Its sources of funding were changed. The manner in which LF was remunerated (by the payment of management and administration fees instead of by distributions from securitisation trusts) also changed.
- 58 The case for the Commissioner did not seek to engage with the significance of these two matters. They meant that it was not possible to reason from the characteristics of the finance business that had been conducted prior to the reorganisation in 2007 as a basis for reaching objective conclusions as to why things were done in the relevant years some 5 years and more after the reorganisation.
- 59 The significance of these matters is addressed below in dealing with the objective factors to which the Court is required to have regard in determining whether there is a scheme for the purposes of Part IVA.

CONSIDERATION

Relevant Principles

- 60 For the purposes of this appeal, it is worth restating the following principles:

- (1) For Part IVA to apply it must be shown that having regard to the eight matters “it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme” or enabling the relevant taxpayer and one or more other taxpayers to obtain a tax benefit in connection with the scheme: s 177D; *Commissioner of Taxation (Cth) v Hart* [2004] HCA 26; (2004) 217 CLR 216 at [44].
- (2) The inquiry mandated by s 177D is directed at a conclusion to be drawn in respect of the dominant purpose of a person who entered into or carried out the scheme or any part of the scheme. It is not an enquiry about the purpose of a scheme or part of a scheme: *Hart* at [63].
- (3) The inquiry required by Part IVA is an objective, not subjective inquiry: *Hart* at [37].
- (4) The fact that a particular commercial transaction is chosen from a number of possible alternative courses of action because of tax benefits associated with its adoption does not of itself mean that there must be an affirmative answer to the question posed by s 177D: *Hart* at [15]. The bare fact that a taxpayer pays less tax, if one form of transaction rather than another is made, does not demonstrate that Part IVA applies: *Hart* at [53].
- (5) Even if a particular form of transaction carries a tax benefit, it does not follow that obtaining the tax benefit is the dominant purpose of the taxpayer in entering into the transaction: *Hart* at [15]. Simply to show that a taxpayer has obtained a tax benefit does not show that Part IVA applies: *Hart* [53].
- (6) Merely because a taxpayer chooses between two forms of transaction based on taxation considerations does not mean that it is to be concluded, having regard to the factors listed in s 177D, that the dominant purpose of the taxpayer was to obtain a tax benefit: *Hart* at [15]. Part IVA does not apply merely because the Commissioner can identify another means of achieving the same or similar outcome which would have resulted in more tax being payable.
- (7) However, a transaction may take such a form that a conclusion of the kind described in s 177D is required even though the transaction also advances a wider commercial objective. There is a false dichotomy between rational commercial decisions and obtaining a tax benefit: *Hart* at [51]. The presence of a discernible commercial end does not determine the answer to the question posed by s 177D: *Hart* at [64]. The terms

of Part IVA do not reference “bona fide commercial reasons” or any equivalent expression: *Hart* at [47].

- (8) There is a distinction between a taxpayer adopting a form of transaction that is influenced by taxation considerations (where the presence of a fiscal objective does not mean that it is to be concluded, having regard to the factors listed in s 177D, that the dominant purpose of the taxpayer was to obtain a tax benefit) and a taxpayer taking steps to maximise after-tax returns in a manner objectively indicating the presence of a dominant purpose to obtain a tax benefit: *Hart* at [16]–[18]; *Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34; (1996) 186 CLR 404 at 416, 423.
- (9) Although the conclusion as to purpose may be a conclusion to be drawn in respect of a person who only entered into or carried out part of the scheme, the factors are to be applied having regard to the scheme as a whole and not to part of the scheme: *Commissioner of Taxation v Macquarie Bank Limited* [2013] FCAFC 13; (2013) 210 FCR 164 at [199] (Middleton and Robertson JJ).
- (10) Although all of the eight factors must be considered, not all the factors in s 177D(2) will have the same relevance or the same importance in every case.
- (11) Statements about why the taxpayer acted as they did or about why a party to the transaction structured the transaction the way they did are not statements which are an answer to the question posed by s 177D(2). That section requires a conclusion about purpose to be drawn from the eight objective matters; it does not require or even permit any inquiry into the subjective motives of the taxpayer or others who entered into or carried out the scheme or any part of it: *Hart* at [65].
- (12) The inquiry directed by Part IVA requires comparison between the scheme in question and an alternative postulate. To draw a conclusion about purpose from the eight matters identified in s 177D will require consideration of what other possibilities existed to achieve the same commercial end: *Hart* at [66].

61 Part IVA and in particular the conclusion to be drawn under s 177D is not drawn by looking only at the consequences of what was done or by comparing the tax consequences of what was done with the tax consequences of another possible transaction that achieved different commercial outcomes. It is a conclusion to be drawn by reference to the eight factors applied to the totality of the scheme considered in its wider context.

- 62 The question posited by s 177D is directed at the objective determination of the purpose of a party. It is not a question of causation. Part IVA does not pose a “but for” test. It is not enough, in the application of s 177D, to consider whether a taxpayer would have entered into the putative scheme “but for” the tax benefit postulated: *British American Tobacco Australia Services Ltd v Commissioner of Taxation* [2010] FCAFC 130; (2010) 189 FCR 151 at [46]; *Commissioner of Taxation v Citigroup Pty Ltd* [2011] FCAFC 61; (2011) 193 FCR 380 at [49]. The requisite dominant purpose is not to be drawn merely because, as a matter of objective fact, it is to be concluded that “but for” the tax benefit, another course of action would have been adopted. Part IVA does not require that a taxpayer choose a form of transaction which results in the most tax or more tax being payable.
- 63 The Explanatory Memorandum to the Bill which originally enacted Part IVA is set out extensively in the reasons of Callinan J in *Hart* at [86]. As the EM makes apparent, and consistent with the statutory text, it is the features of the scheme and its surrounding circumstances which are objectively examined through the s 177D factors. It is not an examination of the subjective purpose or subjective motive of any party to the scheme.
- 64 The purpose of a party is an objective conclusion to be reached from the objective assessment of the s 177D factors, each of which is directed at objective facts. The s 177D factors are directed at examining what was done (the scheme’s substance and form), how it was done (the manner in which the scheme was entered into and carried out), when it was done (timing) and the consequences of what was done. It is through an examination of those objective matters that a conclusion as to why it was done is to be drawn.
- 65 Purpose directs attention to object or aim. It is concerned with the reason why something has occurred or been allowed to occur. The objective dominant purpose of a party to a scheme (such as an action or course of action) that has enabled a person to obtain a tax benefit is determined by regard to what has happened and evaluating why it has happened. Obtaining the tax benefit is not enough. Desiring the tax benefit is not enough. The obtaining of the tax benefit must have been the main object or aim of what is said to be the scheme when viewed objectively in its surrounding context.
- 66 The eight factors set out in s 177D(2) are objective matters relating to the particular arrangement and its surrounding circumstances. The question to be determined is whether, by looking at those factors, it can be said that the transaction took the form that it did or, perhaps

more relevantly in the present case, was implemented in the way it was implemented in order to enable the taxpayer to obtain a tax benefit.

Reasoning of the Primary Judge

67 Respectfully, the difficulty with the primary judge’s reasoning appears at PJ [563]–[564] and [572]. The primary judge concluded that because the appellant did not proffer a commercial reason why the appellant only distributed nominal amounts of income from MHT to the special unitholders, both the manner in which the second and third scheme were carried out and the timing of the schemes were indicative of the dominant purpose of obtaining a tax benefit.

68 By the way in which the primary judge approached the consideration of the first and third s 177D factors, the primary judge’s reasoning elides the question posited by s 177D with an inquiry as to whether the trustee’s discretion would have been exercised differently but for the tax benefit. The question posited by s 177D is not addressed by a consideration of the subjective purpose of a party to the scheme. It is not addressed by testimony of a person as to their reasons for taking a particular action or step. The statutory question is to determine purpose by an objective assessment of objective facts. A person’s subjective understanding of a commercial reason or motive does not answer the question posited by Part IVA.

69 The consideration of each of the s 177D factors by a consideration of the objective facts and circumstances now follows. In the case as presented on appeal, and unlike the first scheme presented to the primary judge, the essence of each of the alternative schemes was the same, focussing on the exercise of the appellant’s discretion as trustee of MHT to make distributions. It is for that reason that the application of the factors to the schemes can be considered compendiously.

First factor — the manner in which the scheme was entered into or carried out

70 Objectively considered, the manner in which the appellant came to exercise its discretion does not support a conclusion that any party entered into or carried out the scheme for the dominant purpose of enabling the appellant to obtain a tax benefit, irrespective of whether the scheme is defined as including the steps by which MFGT came to own the units in MHT (the so-called second scheme) or as including the steps by which the distribution was effected (by the so-called “loan offsets”) (the so-called third scheme) or is confined to the exercise of the trustee’s discretion itself (the new fourth scheme).

- 71 The primary judge explained the manner by which Jupiter/Vesta came to be entitled to the units in MFGT. The units in MFGT were transferred to Jupiter so that when the time was considered right for an IPO, the units in MFGT could be stapled to shares in the appellant without incurring capital gains tax or stamp duty at that point. Subsequently, further units were issued to Jupiter in consideration for the transfer of a promissory note (effectively converting debt owed to Jupiter to equity): PJ [461]–[462]. The manner in which Jupiter and Vesta came to be entitled to the units in MFGT does not suggest that a party to the second scheme “entered into” that scheme for the dominant purpose of enabling the appellant to derive less assessable income than it otherwise would have.
- 72 As the primary judge also explained, there is nothing unusual in transactions within a commonly owned group being effected by entries to intra-group loan accounts rather than the transfer of cash. The distribution by MHT to MFGT was effected by entries made to the ledger account recording the loan between MHT and MFGT. The distribution by MFGT was recorded as entries in an intercompany loan account (as liabilities owed to each of Jupiter and Vesta).
- 73 The evidence was that the unpaid present entitlement of MFGT (from MHT) and of Jupiter (from MFGT) from the year ended 30 June 2012 were satisfied by “loan offsets”. The term “loan offsets” was a bit of a misnomer. In the year ended 30 June 2013, the MHT distribution owed to MFGT was discharged by a reduction in the loans owing by MFGT to LF and a reduction in the amount MHT had deposited with LF. The distribution by MFGT to Jupiter was effected by reducing the amount owed by Jupiter to LF and increasing the amount MFGT owed LF.
- 74 The primary judge found that there was nothing unorthodox about recording loans in general ledgers or about loans being repaid by set-off or by ledger entries: PJ [386]. Moreover, the ledger accounts recording the loans were recording a real liability of the debtor and a real asset of the creditor. Movements in the loan balances had a real economic and financial effect. Moreover, the loan between LF and Jupiter was interest bearing. Movements in the loan balances resulted in more or less interest expense to the debtor and more or less interest income to the creditor. The distributions by MHT to MFGT and the subsequent distributions by MFGT to Jupiter had real commercial consequences.
- 75 The ledger account entries — reflecting the manner in which each of the schemes were carried out — do not suggest that a party to any of schemes “entered into” that scheme for the dominant

purpose of enabling the appellant to derive less assessable income than it otherwise would have.

76 The features relied upon by the appellant are relevant to a consideration of the manner in which the “schemes” were carried out. The distribution resolutions were made by the appellant as trustee of MHT in accordance with the terms of the MHT constitution. The objective facts were that the special unitholders had no entitlement to the income of MHT absent of the exercise of the trustee’s discretion. The default position under the terms of the MHT constitution was that distributable income would be distributed to the ordinary unitholders. Objectively there was nothing extraordinary about distributions flowing in accordance with the terms of the trust constitution. The terms of issue of the units were the “expected features” of the units. A payment of distributions in accordance with their terms of issue is not an objective matter that points to a party carrying out the scheme for the dominant purpose of enabling the taxpayer to obtain a tax benefit.

77 Absent anything further in the surrounding circumstances, the manner in which distributions were made does not objectively support a conclusion that a party entered into or carried out any of the schemes for the dominant purpose of enabling the appellant to obtain a tax benefit.

78 On appeal, the Commissioner was asked to identify contextual matters in the surrounding circumstances that supported his contention that the manner in which the scheme was entered into, or more relevantly perhaps in this case, carried out, supported a conclusion that the party so entered or carried out the scheme for the dominant purpose of enabling the appellant to obtain a tax benefit.

79 The contextual matters identified may be summarised as:

- (1) The chronology and history of events:
 - (a) Prior to the restructure, the appellant was entitled to all of the residual income of securitisation trusts through which the Liberty group had raised funds for its lending business.
 - (b) The restructure had been undertaken in anticipation of an IPO of stapled securities. That IPO was postponed in around July or August 2007 and did not take place during the relevant years.
 - (c) The discretion to make distributions to LF as special unitholder had its genesis in the IPO. It was a way to: limit the unfranked distribution yield to be received

by stapled security holders from their units in MFGT to that marketed in the IPO prospectus; ensure that LF had sufficient cash flow to meet its short-term cash requirements given the IPO originally contemplated that all RIUs held by LF would be transferred to the holding trust; and meet LF's medium to long-term capital requirements: PJ [82]–[84].

(d) Once the IPO was postponed, LF continued to hold the existing RIUs in the existing securitisation trusts. LF continued to receive substantial distributions on those existing RIUs with MHT receiving distributions on RIUs in new securitisation trusts.

(2) The fact that the role of LF in the Liberty group did not change following the restructure. It remained the main operating entity for the group and employed all the staff necessary to manage the group's operations. It also continued to provide subordinated loans to the securitisation trusts after 2008.

(3) LF had a new source of income in the form of management fees from MHT which began to be paid in the 2012 income year.

(4) Once the IPO was postponed, the only remaining role of the special units issued by MHT was to meet LF's capital requirements. There was no evidence of what those capital requirements were or anticipated to be at the time the trustee chose not to distribute more than a nominal amount of income to LF in the relevant years.

(5) All members of the Liberty group were under common control.

80 The contextual matters relied upon by the Commissioner essentially seek to draw upon a diversion from the pre-restructure course of conduct to assert that the manner in which the schemes were carried out supported a conclusion that a party carried out each of the schemes for the dominant purpose of enabling the taxpayer to obtain a tax benefit.

81 There are a number of difficulties with the Commissioner's contextual matters.

82 First, the Commissioner on appeal has not sought to challenge the primary judge's conclusion that the restructure, which resulted in creation of separate corporate and trust silos, was undertaken for the dominant purpose of facilitating an IPO of stapled securities. There was therefore no challenge before this Court to the restructure itself.

83 Second, although LF continued to perform the same operating functions before and after the restructure, it did not bear the same risks or own the same assets. Prior to the restructure it was

the holder of residual income and capital units in the securitisation trusts. It had a residual equity interest in the securitisation trusts. It bore the risks associated with that equity interest and was entitled to the benefits of ownership. Post-restructure LF held no residual equity interest in the new securitisation trusts. It was a provider of services and subordinated lender and was entitled to interest on its subordinated debt. The management fees received by LF were calculated on a cost recovery basis. The proportion of LF's operating expenses recovered by the charging of management fees to MHT increased as MHT's revenues increased. The management fees from MHT were a source of revenue for LF. In effect, part of LF's residual distribution income stream was replaced with a management fee income stream, (PJ [106], [167]). It is too simplistic to conclude that LF ought to be entitled to the same returns post-restructure as it had been pre-restructure.

84 Third, the evidence demonstrated that the revenues derived by LF during the relevant years were sufficient to meet its expenses and generate a profit and that it did not suffer a capital deficiency. There was no evidence that there was any unfunded medium to long-term capital need of LF that resulted from the non-payment of distributions on the special units in the relevant years. In this respect, there was no factual matter in respect of which the appellant had not discharged its burden of proof.

85 As has been explained, to conclude that a party entered into or carried out a scheme for the requisite dominant purpose, it is not sufficient to show that the taxpayer would have paid more tax if something different had been done. The trustee paid distributions in accordance with the terms of issue of the ordinary notes and the trust constitution. None of the contextual matters relied upon by the Commissioner cast any different light on the manner in which the scheme was entered into.

Second factor — form and substance of the scheme

86 The primary judge concluded that there was no material difference between the form and substance of the second and third schemes as formulated before him. The substance was that MFGT benefitted from its ownership of the ordinary units in MHT. The form was the same. The same might equally be said of the additional fourth scheme.

87 By its notice of contention, the Commissioner contended (albeit conditionally for reasons which are not readily apparent) that the primary judge erred in his consideration of this factor. The Commissioner contended that the factor required “direct evaluation” of the extent to which the form of the scheme adopted matched the outcomes achieved. The primary judge was said

to have erred by dismissing the Commissioner's contention that "the result of the funds being loaned to LF rather than being received by LF as income was a reduction in LF's retained earnings such that it required capital injections to maintain its capital adequacy ratio". The primary judge was said to have erred by evaluating the form and substance of the scheme by examining the financial effects of the scheme.

88 The Commissioner's contentions on this factor focussed on what he considered to be the flow of funds as a result of the schemes. It was contended that the form of the schemes was that MHT's net income flowed predominantly to MFGT and from MFGT to Jupiter/Vesta. However the substance of the scheme, properly considered, was said to be that the funds associated with MHT's net income "flowed predominantly to LF in the form of the MHT-LF loans". The loans made by MHT to LF were provided from funds received by MHT from MHT's securitisation trusts and was said to "replace" LF's income stream.

89 The Commissioner's contentions are not accepted. They conflate the concept of cash or funds with the concept of income. Cash is a fungible asset. Given the treasury role performed by LF for the Liberty group, all cash to which MHT was entitled was deposited with (or loaned to) LF. This was the result of the centralisation of treasury and cash management. As the central treasury entity, all cash was to flow to LF. Cash is advanced; income is not.

90 From a cash perspective, as explained above, LF's income stream post-restructure included management fees from MHT. LF was entitled to receive these amounts from MHT. Periodically, LF offset the amounts it owed to MHT against amounts MHT owed it. An analysis of the year end balances of the MHT-LF loan did not show a continual increase in the balance outstanding. Any increases in LF's indebtedness to MHT as a result of MHT depositing its cash entitlements with LF was temporary. LF was not relying on the MHT loan to finance its operations. LF was not relying on the MHT loan as a permanent or long-term part of its capital structure.

91 From an income perspective, MHT distributed its income to MFGT. The making of those distributions resulted in MHT reducing its loan (deposit) to LF. MFGT distributed its income to Jupiter and Vesta which in turn applied the funds to reduce their debts to LF. In so far as distributions to Jupiter were made by MFGT, the distribution process resulted in MFGT becoming increasingly indebted to LF, and Jupiter becoming less indebted to LF. In so far as distributions to Vesta were concerned, MFGT discharged its distribution payable by the issue

of units to Vesta. As a result, Vesta increased its equity investment in MFGT. The distributions by MFGT did not increase LF's indebtedness.

92 The Commissioner's contentions relating to LF's capital adequacy are discussed further below.

93 The Commissioner's reliance on cash flows to reveal what he contends is the substance of the schemes is misplaced. The role of LF as a centralised treasury entity explains the cash flows. The flow of distributions is explained as a matter of substance and form by the fact that MFGT was the ordinary unitholder in MHT. The second factor does not support a conclusion that any party entered into or carried out the scheme for the dominant purpose of obtaining a tax benefit.

94 The primary judge did not err by considering the financial effects of the scheme in considering the substance of the scheme. As the Full Court said in *Macquarie Bank* at [263], this factor requires a direct evaluation of the extent to which the form of the scheme adopted matches the outcome achieved. Such was the evaluation carried out by the primary judge.

Third factor — the time at which the scheme was entered into and the length of the period during which the scheme was carried out

95 The time at which the discretion was exercised was at the end of each financial year.

96 Whilst the primary judge was correct to conclude that the exercise of the discretion in each of the relevant years could not, objectively, be explained by its connection with the IPO (or by reference to any distribution policy that was to take effect in the event of an IPO), the primary judge erred in concluding that in the absence of evidence of a cogent commercial reason as to why the appellant only distributed nominal amounts of income to the special unitholders, the time at which the scheme was entered into and the length of the period over which it was carried out were indicative of a party having a dominant purpose of obtaining a tax benefit. Even if it were relevant to search for evidence of a commercial reason to support the *quantum* of the distribution made to the special unitholders, it is not readily apparent how that evidence would address the time at which the discretion was exercised.

97 The time at which the decision was made not to exercise the discretion (or to exercise it only to the extent of a nominal amount) was reflective of the terms of the MHT constitution and the need for the trustee to make a resolution to distribute the income of the trust by the end of the financial year. The time of the making of the resolution tells one nothing about the dominant purpose of a party in this case. It is a "neutral" matter.

Fourth factor — the result in relation to the operation of the ITAA36 that, but for Part IVA, would be achieved by the scheme

- 98 The primary judge concluded that the fourth factor was neutral in relation to the second and third schemes as formulated before him. On appeal the Commissioner contended that this factor pointed to a dominant purpose of enabling the appellant to obtain a tax benefit because the Australian tax result of the scheme was that less tax was paid on the residual income from the securitisation trusts by distributing the income to MFGT and then to non-resident unitholders, than if those amounts had been distributed to LF.
- 99 As has been explained in *Hart* and in *Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd* [2011] FCAFC 49; (2011) 192 FCR 325, it is important to view this factor in context. To merely point to the fact that the taxpayer obtained a tax benefit, or that less tax was paid as a result of the scheme than if another form of transaction was entered into or carried out, does not support a conclusion that the dominant purpose of any of the parties to the scheme was to enable the taxpayer to obtain a tax benefit.
- 100 As was observed in *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 at [208], this factor cannot be considered in isolation from the other factors. Of itself, it says no more than a tax advantage was obtained and casts no useful light on the dominant purpose of a party entering into or carrying out the scheme. Its utility is often found in a comparison of the tax outcomes of the scheme with other outcomes achieved by the scheme. A consideration of the factors in s 177D is not to be undertaken in isolation from the commercial consequences achieved by the scheme as carried out.
- 101 In the present case, this factor is neutral. To the extent that the Commissioner was seeking to contend that the only benefit to the ultimate shareholders (Jupiter and Vesta) was attributable to the tax consequences of MHT distributing income to MFGT and in turn, MFGT distributing income to the ultimate owners, rather than MHT distributing income to LF, that submission is rejected. As explained, the distribution of income to Jupiter and Vesta had real economic and financial consequences to them that would not have flowed had the income been distributed to LF. The Commissioner's submission that LF could, in turn, have made distributions to Jupiter/Vesta is contrary to the evidence of the policy of LF to not make distributions and is contrary to the Commissioner's own submission that LF had a capital deficiency that would have been remedied by LF retaining distributions from MHT.

Fifth factor — any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme

Sixth factor — any change in the financial position of any person who has, or has had, any connection with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme

102 The primary judge concluded that the fifth and sixth factors were neutral in reaching a conclusion as to the dominant purpose of a party entering into or carrying out the second and third scheme as formulated before him.

103 On appeal the Commissioner contended that the primary judge’s conclusion in respect of the application of these factors was erroneous and ought to have concluded that these factors supported a conclusion that a party entered into or carried out the third scheme for the dominant purpose of enabling the appellant to obtain the tax benefit. The Commissioner’s submission was that it was reasonably foreseeable that at the time the trustee decided not to exercise its discretion to “direct MHT’s net income” to the special unitholders in the relevant years, LF’s “financial position” would be negatively impacted because LF would have less retained earnings and a lower capital adequacy ratio.

104 The Commissioner relied upon a need for equity injections in LF in the 2016 to 2017 income years to maintain LF’s investment-grade credit rating in support of his contention. The Commissioner identified the following equity injections by Vesta in the appellant which in turn subsequently injected equivalent equity in LF (noting that it was assumed that redeemable preference shares are properly regarded as equity capital for this purpose):

Year	Number of shares	Value
30 June 2016	25 million	\$25m
30 June 2017	25 million	\$25m
21 July 2017	10,000 redeemable preference shares	\$100m

105 The Commissioner’s submission is not accepted.

106 First, and most importantly, it discounts entirely the financial consequences to Vesta and Jupiter of the distributions made to them by MFGT which distributions would not have happened if MHT’s income had been distributed to LF. As explained further below, the distribution of income by MFGT had real economic and financial advantages to Jupiter and

Vesta by enabling the repayment of their debts owed to LF. The Commissioner's submission fails to acknowledge that any increase in the retained earnings of LF would necessarily have been at the expense of Jupiter and Vesta.

107 Second, it fails to have regard to the totality of the circumstances including the fact that the Liberty group's business was growing. Additional debt and equity capital were raised by the group from 2016 to support that growing business. LF commenced an unsecured MTN program in March 2015, raising senior unsecured debt financing for LF. These funds were used to increase its loan book, reflecting the fact that its business was growing. If LF was to maintain its investment-grade credit rating, with the issue of more debt, it needed to raise more equity. The evidence does not support a conclusion that if LF had been paid distributions as a special unitholder in the relevant years, it would have been able to fund the future growth its business came to experience without the need for further financing. The tax benefit identified by the Commissioner is the gross amount of distributions paid by MHT to MFGT. Those amounts totalled approximately \$98m before tax, well short of the post-tax value of the equity injections identified above.

108 Third, the Commissioner's contention that the non-exercise of the discretion to distribute income to LF adversely affected LF's capital adequacy ratio and thereby put LF's credit rating at risk is not supported by the evidence. The evidence was that LF's credit rating improved from 2000 to 2014. As the primary judge observed, there was no evidence from a rating agency. Based on the evidence that was before the primary judge, LF's credit rating was not merely a function of its capital adequacy ratio at any particular point in time. LF's credit rating was downgraded in May 2017 (having been increased to BBB in November 2016) together with the credit rating of 23 other financial institutions operating in Australia because of perceived economic imbalances in the Australian economy due to strong growth in private sector debt and residential property prices. This was a matter unrelated to the manner in which distributions were made by MHT.

109 The Commissioner's submission could rise no higher than LF's capital adequacy ratio would have been higher had it received distributions from MHT and retained those distributions as equity capital in its business. But the contention that LF would have retained the distributions and not distributed them results in the Commissioner's scheme having a different commercial outcome for Jupiter and Vesta than the schemes as carried out. Jupiter and Vesta had applied the distributions from MFGT (which had been sourced in the distributions MFGT had received

from MHT) to repay interest bearing debt owed to LF. Absent those distributions, Jupiter and Vesta’s financial position would have been adversely affected.

110 The evidence was that the non-payment of distributions to LF in the relevant years did not affect the solvency, profitability or credit rating of LF. LF had derived sufficient revenues to support its business needs in the relevant years. The changes in the financial position of LF as a result of the appellant’s exercise of its discretion as trustee of MHT to distribute no more than a small amount to LF as special unitholder in the relevant years do not support a conclusion that a party entered into or carried out any of the schemes for the dominant purpose of obtaining a tax benefit.

111 The primary judge concluded that the sixth factor was “neutral”. In so doing, the primary judge essentially put to one side the commercial outcomes achieved by the scheme. At first instance, and on appeal, the Commissioner accepted that the financial position of Vesta and Jupiter “improved as a result of the scheme”. But it is important to understand how and why it improved. The distribution of income to MFGT resulted in MFGT distributing that income to Jupiter and Vesta. Jupiter in turn used the income distributions to reduce/repay amounts owed to LF. The debts owed by Jupiter were interest bearing. The repayment of those advances reduced the debt burden of Jupiter and its future interest expense. Vesta effectively applied the distributions due to it from MFGT to increase its investment in MFGT. This had the corresponding effect of increasing the capital base of MFGT. There is no objective basis on which it might be said that the choice by Vesta to increase its investment in the “trust silo” was not commercially rational.

112 Those same commercial outcomes would not have resulted if the MHT distributable income had been distributed to LF as the special unitholder. Contrary to the submissions of the Commissioner on appeal, it is not clear how LF would have been able to make equivalent distributions to Jupiter to reduce its indebtedness or to Vesta to enable it to increase its equity investment in MFGT and correspondingly increase MFGT’s equity capital base. The assets of LF were subject to a charge and LF had no history of making distributions.

113 In so far as the consequences to LF were concerned, it is a necessary consequence of distributions not being paid to LF that LF derived less income than it otherwise would have. But there is no evidence to support a conclusion that LF suffered a detriment beyond that obvious and necessary consequence. LF was remunerated by way of management and administration fees. LF continued to be profitable, solvent and maintained its credit rating in

each of the relevant years. Its capital needs grew because its business grew and not because it had been deprived of distributions by MHT. At the same time, the schemes had real economic and financial consequences to Vesta and Jupiter. These factors point away from a party having the requisite dominant purpose.

Seventh factor — any other consequence for the relevant taxpayer, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out

114 As Middleton and Robertson JJ observed in *Macquarie Bank* at [283], construed in context, the reference to “other consequences” for the relevant taxpayer or connected person should be taken to refer to non-financial and non-fiscal consequences of the scheme.

115 The primary judge did not identify any relevant matters under this factor and neither party submitted there were any non-fiscal nor non-financial consequences from any of the schemes. This factor is of no assistance in the present case in forming a conclusion as to the dominant purpose of any party to any of the schemes.

Eighth factor — the nature of any connection between the relevant taxpayer and any person whose financial position is affected as a result of the scheme

116 It is a fact that all the entities in the “corporate silo” and the “trust silo” were ultimately owned by the same entities. The primary judge considered this factor to be neutral.

117 By notice of contention, the Commissioner contended that the primary judge erred in his consideration of this factor. The Commissioner submitted that the connections between the entities “meant, and the primary judge should have found that, the only difference between MFGT making distributions to its unitholders and [the appellant] distributing dividends to its shareholders is and was the tax consequence”.

118 The Commissioner’s submission on this point cannot be reconciled with his earlier submission that the effect of the scheme was to deprive LF of retained earnings (and therefore capital) it was said to have needed for its business. If the distributions had been paid out of the corporate silo to the ultimate shareholders the distributions would not have been retained by LF as capital to sustain LF’s business. Furthermore, the submission does not take into account the charge that existed over the net assets of LF which would most likely have inhibited a distribution by LF.

119 The connection between the entities effected by the schemes enabled the distributions between them to be paid by entries to intercompany loan accounts. However, the fact that the payment

of the distributions was effected by entries to intercompany loan accounts is, as the primary judge recognised, unexceptional as a matter of common business practice. The Commissioner submitted that the result of the “loan offsets” to effect the payment of distributions by MFGT to Jupiter and Vesta was to increase the amount owed by MFGT to LF, a strategy which it was said was “unsustainable”. The evidence was that MFGT’s loan owed to LF did increase in 2012 and 2014 due to distributions made by MFGT but MFGT was distributing more than the amounts it was receiving from MHT in each of those years. There was no change in MFGT’s indebtedness to LF to the extent that MFGT on-distributed amounts it received from MHT. The schemes as identified by the Commissioner did not result in an increase to MFGT’s indebtedness to LF. The Commissioner’s submission concerning the effect of the scheme on MFGT’s indebtedness is not sustained by the evidence.

120 As Gordon J said in *Noza Holdings Pty Ltd v Commissioner of Taxation* [2011] FCA 46 at [315], the fact that the transactions in issue are all intercompany transactions within a group in which distributions are paid otherwise than in cash, and are transactions believed to have significant Australian taxation consequences, if considered alone “would very probably excite the closest attention to the possible application of Pt IVA”. However, once it is accepted that the trust silo was established as part of a legitimate restructure, the question becomes whether the particular way in which distributions within that structure were made thereafter attracts the operation of Part IVA. The schemes identified by the Commissioner and the possible alternatives all necessarily involved connected parties. To point to the fact that the entities affected were all connected casts no light on whether a party to any of the schemes had the requisite dominant purpose.

Conclusion on dominant purpose

121 The s 177D factors are to be considered in light of the counterfactual or other possibilities and the outcomes resulting from the scheme. Part of the difficulty in the present case is that the same commercial outcome for the parties would not have been achieved by a distribution of income to the special unitholder as was achieved by the distribution of income to the ordinary unitholder, putting aside the Australian income tax consequences. Jupiter was indebted to LF and the distributions from MFGT enabled the repayment of that debt. Vesta increased its capital investment in MFGT and increased MFGT’s equity capital base. The premise of the Commissioner’s case was that the failure to distribute to LF deprived LF of retained earnings. That “commercial” outcome was different from the commercial outcome in fact achieved. To

adopt the language of Hely J in *Macquarie Finance Ltd v Commissioner of Taxation* [2005] FCAFC 205; (2005) 146 FCR 77 at [243], the fallacy in this case is that — contrary to the direction in s 177D(2) — it confines attention to the tax consequences of the actual and “counterfactual” transactions and leaves out of account the commercial advantages and consequences obtained by parties connected with the appellant and flowing from what was done.

122 As has been explained, the Commissioner’s case rested upon a comparison between the way in which the finance business was structured in 2007 and the way in which income flows occurred in the relevant years. It assumed, in effect, that there was no objective reason for the change in income flows other than a desire to secure a tax advantage. A case of that kind failed to engage with the unchallenged finding that the restructure in 2007 was not a scheme to which Part IVA applied and the evidence as to the changed commercial circumstances, including the business need for further sources of capital. Those changes had consequences for the role of LF, including as to its sources of income. The appellant was entitled to point to these matters as part of the context in which the objective reasons for the distributions of income from MHT were to be evaluated.

123 At the end of the day, the appellant as trustee of MHT made a distribution of distributable income in accordance with the terms of the MHT trust constitution and the terms on which the units in MHT had been issued. The making of that distribution resulted in MFGT being able to make a distribution to its unitholders which resulted in a real benefit to those unitholders. It was not disputed that a tax benefit had been obtained by the appellant. If distributions had been made differently more Australian tax would have been payable. But the identification of a tax benefit does not answer the question posited by s 177D. Nothing in the surrounding context objectively supports a conclusion that any party to any of the schemes either entered into or carried out any of the schemes for a dominant purpose of enabling the appellant to obtain a tax benefit.

DISPOSITION

124 The matters raised by way of contention should not be accepted and the appeal ought to be allowed with costs.

I certify that the preceding one hundred and twenty-four (124) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Besanko, Colvin and Hespe.

Associate:

Dated: 8 March 2024