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Supreme Court of New South Wales

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**Kenneth Walter ← Waddell → v Allan William ← Waddell → as
executor of the Estate of the late Ronald John ← Waddell → (No. 3)
[2012] NSWSC 252 (20 March 2012)**

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Last Updated: 24 May 2012

Supreme Court

New South Wales

Case Title: Kenneth Walter ← Waddell → v Allan William ←
Waddell → as executor of the Estate of the late
Ronald John ← Waddell → (No. 3)

Medium Neutral Citation: [\[2012\] NSWSC 252](#)

Hearing Date(s): 16 December 2011

Decision Date: 20 March 2012

Jurisdiction:

Before: Slattery J

Decision: Benefit received by the plaintiff assessed at \$167,869. Directions made for the determination of issues of costs.

Catchwords: EQUITY - equitable remedies - plaintiff entitled in equity to the conveyance from the estate of a 10 acre property but on terms that he give credit for any benefits he has received from an interest free loan advanced to him by the deceased - inquiry as to benefit received by plaintiff from the \$500,000 interest free loan.

Legislation Cited:

Cases Cited: *McCathie v Federal Commissioner of Taxation* [1944] HCA 9; (1944) 69 CLR 1
Tchadovitch v Tchadovitch [2010] NSWCA 316
← **Waddell** → v ← **Waddell** → as Executor of Estate of ← **Waddell** → [2011] NSWSC 1174
← **Waddell** → v ← **Waddell** → as Executor of Estate of ← **Waddell** → (No. 2) [2011] NSWSC 1688

Texts Cited:

Category: Principal judgment

Parties: Plaintiff- Kenneth Walter ← **Waddell** →
Defendant- Allan William ← **Waddell** →

Representation

- Counsel: Plaintiff- L. Ellison SC; H. Bennett
Defendant- A. Hill















- Solicitors: Plaintiff- T.D.Khouri
Defendant- M. Boemi

File number(s): 2010/00158898

Publication Restriction: No

JUDGMENT

1. This is the Court's third judgment in these proceedings. The first judgment on 4 October 2011 made findings that the late Ronald John ← **Waddell** → ("Ron") had promised his son, the plaintiff,

Kenneth Walter  **Waddell**  ("Ken"), that he would devise to Ken a 10 acre orchard block, then held in Ron's name; that Ken relied upon those promises to his detriment; and, that such detriment can only now be avoided by conveying the 10 acre block to Ken:  **Waddell**  v  **Waddell**  *as Executor of Estate of*  **Waddell**  [2011] NSWSC 1174. In the second judgment the Court, made a declaration to give effect to the first judgment, and made directions for an inquiry to quantify the benefit Ken had received from Ron's interest free loan to him in the 2007-2008 financial year, as described in [101] of the first judgment:  **Waddell**  v  **Waddell**  *as Executor of Estate of*  **Waddell**  (No. 2) [2011] NSWSC 1688. This third judgment results from that inquiry, which involved the filing of written expert evidence on both sides and an oral hearing on Friday, 16 December 2011. The remaining issue in the proceedings is costs. Directions are made at the end of this judgment to facilitate resolution of that issue.

2. This judgment should be read with the Court's two prior judgments. Parties, events and things referred to in this judgment are described in the same way as they were in the two earlier judgments. The inquiry, the subject of the present judgment, arises out of paragraph [101] of the principal judgment, where the Court said:-



"Here it seems to me that the Court should not grant relief in the plaintiff's favour without making some adjustment for the benefit that he has already received from the sale of part of the larger block. Notwithstanding the fact that he was promised the 10 acre block and not the larger block, the benefit he received in 2007 by way of advance for his superannuation can only be explained as a reward for the time he spent on the farm. In that sense what he received should be assessed in diminution of his benefits otherwise received. An inquiry will be needed as to what the value of that benefit has been to Ken and set off against the relief he claims."

3. In the second judgment on 3 November 2011, the Court gave directions for the service of statements calculating the alleged benefit Ken had received and the serving of any additional evidence for the inquiry, including expert evidence. The Court also formally directed the holding of an inquiry in the following terms:-

"7. Direct an inquiry in accordance with paragraph [101] of my principal judgment into: the benefit that the plaintiff received from the interest free loan; and the taxation benefit that the plaintiff may have received from the contribution of a substantial sum to his superannuation fund in the 2006/2007 financial year."

4. At the inquiry hearing Ken contended that the scope of the inquiry into the benefits he had received was wholly limited to the receipt of past benefits (that is, benefits up to the date of the inquiry), which could be quantified as the interest he and his superannuation fund had earned on the capital of \$500,000 advanced to him as an interest free loan. In contrast, the defendant, executor, contended for the estate that the benefit Ken had received was at least these past benefits but together with the net present value of all future superannuation, taxation and other future financial benefits, from which Ken would benefit, through his superannuation fund during his expected lifetime.
5. In the result the Court has found that the estate's approach to the assessment of the benefits Ken has received is generally the one the Court prefers. But the estate's approach to the assessment should be modified to cover a more limited period than Ken's lifetime.
6. Both parties presented expert evidence on the inquiry, without objection on either side as to relevance or admissibility. Both experts made assumptions about appropriate discount rates for actuarial calculations in respect of the plaintiff's expected life span. Because of this common, and if I may say so sensible approach, the Court has taken the evidence into account: *Tchadovitch v Tchadovitch* [2010] NSWCA 316, especially [55] - [59].

Subdivision Proceeds applied to Superannuation for Ken and Bill

7. The narrative of facts set out in the Court's first judgment at [97], shows that Ron subdivided part of the larger farm block in November 2007. The larger block had been reduced by subdivision in 1991, from 46 acres to 35 acres. The 2007 subdivision excised a further 5 acres from the larger block: so that after the subdivision, the remaining farm was a total of about 40 acres, being the 30 acres left from the larger block, and the 10 acre block the subject of these proceedings. The sale of the 5 acres in November 2007 generated net proceeds of approximately \$1.2 million, out of which Ron advanced \$500,000 to each of Ken and Bill, to provide them with funds for each to make superannuation contributions. Of Ron and Vera  Waddell s children only Ken and Bill spent extended periods of time working at the farm and only they were given the benefit of these interest free loans. Ken received this \$500,000 loan in December 2007, during the 2007-2008 financial year. He took advantage of the favourable tax regime, which Commonwealth legislation provided for superannuation contributions made in that financial year. Although the loan is repayable to the estate, as a practical matter the loan is either likely to be deducted from any distribution Ken receives from the estate or recovered from Ken if necessary by legal process. Ron also gave \$169,000, almost the full balance of the proceeds of sale of the five acres, to Bill's son Paul, to assist him in paying off an outstanding mortgage.

The Experts' Reports and the Parties' Contentions

8. The parties' respective contentions and the common ground ultimately reached between them is well summarised in the experts reports, filed in the course of this inquiry. The estate engaged Ms Tamara Lindsay, a director of Forensics Accounting ("Forensics") to undertake the assessment contended for by the estate. The first Forensics report of 18 November 2011 ("the Forensics report") explains the estate's calculation of past and future benefits that the estate claims Ken received.
9. Ken engaged Mr Wayne Griffiths of Griffiths and Co Pty Limited to report and provide the mathematical basis for Ken's contentions that he derived a lesser benefit from Ron's November 2007 interest free loan. Griffiths and Co reported on 25 November 2011, ("the Griffiths report") setting out a calculation of the benefit Ken is said to have received. The Forensics and Griffiths reports readily contrast the different positions of the estate and Ken on the question of benefit received. The remaining differences of principle between the experts are best understood by examining the course of the expert evidence.

The Griffiths Report

10. The Griffiths report supports Ken's contention that the only benefit he received from the interest free loan was the interest he earned himself or through his superannuation fund on the loan up to the inquiry. Most of the important common facts about the earning of past interest are uncontroversial. Ron made his interest free loan of \$500,000 to Ken in December 2007. Ken placed the funds in a term deposit in his own name, maturing in April 2008. When the term deposit matured Ken applied \$455,000 of the loan advance to make a contribution on 28 April 2008 into his superannuation fund. This comprised a non-concessional contribution of \$422,500 and a concessional contribution of \$32,500. In the 2007-2008 financial year Ken earned \$11,788 in interest on the sum deposited in his name before its contribution into his superannuation fund. Once deposited into Ken's superannuation fund the \$455,000 continued to earn interest up until Ron's death and more interest up to the time of the inquiry hearing in December 2011. None of these funds in the superannuation fund were applied to purchase shares or other securities. From the date of the loan until Ron's death in 2009, the total interest earned from the advance within Ken's superannuation fund and for Ken's benefit was, \$52,575. From the time of Ken's death until 1 December 2011, just before the inquiry hearing, the interest earned from the advance in Ken's superannuation fund was a further \$49,881, a period when the fund was in pension phase and its earnings were tax free. Thus the total past interest earned on the advance is \$102,456 (\$52,575 plus \$49,881). The Griffiths report assessed this sum as the total benefit Ken received from the making of the interest free loan.
11. The Griffiths report sought to justify its approach of only assessing Ken's financial benefits received up to 1 December 2011 the notional date of the inquiry, from the text of [101] of the first

judgment, which is set out in [2] above. The Griffiths report argued that "a literal reading" of this part of the first judgment, is written in "the past tense" and implies that the only benefits to be assessed are those that the plaintiff, Ken, can already be demonstrated "to have received".

12. There are two difficulties with this reasoning. First, the Court did not decide in [101] of the first judgment that Ken should only have to account for benefits received up to the time of the Court inquiry. This was pointed out to the parties in argument during the inquiry. The passage at [101] does not preclude argument about future benefits. Nor does it preclude Ken's right to argue on an inquiry that he received no financial benefit. Moreover, there was no argument between the parties during submissions prior to the first judgment about the precise extent to which, if the relief Ken sought were granted, he would have to give credit for benefits he had received from Ron. It would therefore be a denial of procedural fairness to the estate now to treat [101] in the first judgment as deciding part of this question in Ken's favour.
13. The second difficulty with this reasoning in the Griffiths report, is that Ken's claimed distinction between past and future benefits received is an artificial one. The expert evidence explained below assesses the net present value, as at the date of the inquiry (or as at the date of the first judgment), of the future benefits Ken could expect to receive over his lifetime, from the interest free loan. Thus Ken's expected future benefits may be quantified as a present sum, and treated as a benefit already received.
14. The Griffiths report reasoned to a total benefit of \$102,456, being the past benefit. An important step in the Griffiths report reasoning was that once the estate was repaid the \$500,000 this would extinguish "any future benefit [to Ken] and would repatriate (sic) the estate to a position that there would be no impairment as a result of the loan. The estate would be retained (sic) to a position as if no loan had been made at all".
15. It is necessary to bring to account in the calculations the expected repayment of the \$500,000 to the estate. It should not be assumed Ken will retain this sum. In my view, it will in fact be repaid. But, Ken may perhaps receive benefits from Ron's having made the interest free loan, long after it is repaid. The Forensis report attempts to assess these benefits. The Griffiths report does not. But a question in the inquiry is whether the Forensis report adequately makes this assessment.
16. The Griffiths report calculates Ken's past benefit by taking the movement in the value of the superannuation fund (which was held in cash throughout the period) from inception to the date for valuation, and adding to that movement, as a benefit to Ken, any pensions that have been paid to Ken. The Griffiths report claims this approach takes into account all the income and tax advantages from and expenses associated with, having this structure.
17. Finally, the Griffiths report treats part of the \$500,000 not contributed to the superannuation fund (\$45,000) as having earned at the same rate of return as the \$455,000 that was contributed to the fund.

The Forensis Report

18. The Forensis report, which the estate advances, takes the wider view, that Ken will benefit from the interest free loan for a long time into the future, as well as in the past. The Forensis report was produced making a series of assumptions about the investment of the interest free loan in Ken's superannuation. Forensis was required to make these assumptions because it did not have access to Ken's actual transaction records. But these assumptions corresponded surprisingly closely with the financial decisions that Ken actually took to apply the interest free loan. The Forensis report concluded that the benefits Ken both received in the past and was entitled to receive in the future from investing the loan according to his assumed highest financial advantage are:

- (a) interest (after tax) on the cash deposit in the 2007-2008 financial year;

- (b) the one-off tax benefit in the 2008 financial year arising from the concessional superannuation contribution;
 - (c) the present value of the earnings (after tax) to date, and future earnings (after tax), on the accumulated balance of the superannuation fund; and
 - (d) the present value of the tax benefit arising from the tax free nature of the allocated pension drawings.
19. According to the Forensis report Ken would have derived these benefits from the interest free advance, if he had:
- (1) invested the \$500,000 interest free loan in a bank cash management account (earning interest at the average rate published by the Reserve Bank of Australia) between November 2007 (when received) and mid 2008 (just before investing in Ken's superannuation fund) earning interest;
 - (2) in mid June 2008, contributed the maximum non-concessional contribution of \$450,000 to a self managed superannuation fund (upon which no tax was payable);
 - (3) in mid June 2008, contributed the available balance of \$50,000 (\$500,000 less \$450,000) as a concessional contribution to the self managed superannuation fund (upon which of 15 per cent was payable); and then
 - (4) commenced an allocated tax free pension in the self managed superannuation fund from 1 July 2008 for the duration of Ken's life.
20. Using these assumptions the Forensis report then sketches and reports upon the financial consequences of two pension withdrawal scenarios that Ken could adopt, from the many possible future scenarios. The first (Scenario 1) assumes that Ken has and will continue to withdraw a pension from his self managed superannuation fund equal to the minimum pension prescribed by the Australian Taxation Office (the ATO). The second scenario (Scenario 2) assumes that Ken has and will continue to withdraw an annual pension in an amount which will cause his superannuation fund pension account to be fully drawn down by the end of Ken's life.
21. The Forensis report calculations were also based on a number of other general assumptions about Ken's financial decision-making and his personal and financial circumstances, which may be briefly stated: Ken made no concessional or non-concessional contributions in the 2007-2008 financial year other than those funded by Ron's interest free loan; Ken has a normal life expectancy; Ken is not entitled to receive the Age Pension from Centrelink, due to the market value of his assets (other than his home and superannuation fund) exceeding the assets test threshold (i.e. Ken will not be denied the Age Pension due to his establishment of the superannuation fund and his investment of the \$500,000 into it); Ken's taxable income from 2010 until age 75 (in 2020) will be the same as that for the 2009 financial year; Ken's superannuation fund will achieve "average" investment earnings (based on Australian Prudential Regulation Authority ("APRA") figures which calculate averages for the earnings of all superannuation funds) on a tax free basis (because Ken's superannuation fund is assumed to be in pension phase); the tax benefit arising from the tax free nature of Ken's allocated pension drawings represents the tax applicable to the capital portion of the pension drawings, had Ken received an amount equal to the pension amount as normal taxable income each year; and, Forensis discounted Ken's future benefits (interest and tax benefits) to present values as at 4 October 2011 (the date of the Court's first judgment) using the discount rate of 3 per cent per annum.
22. Forensis calculated the total benefits that Ken has received or may receive upon the stated assumptions. They were broken down into their subcomponents. On Forensis' Scenario 1 (Ken withdraws only the minimum pension) Ken's benefit totals \$332,530. On Scenario 2 (Ken withdraws a pension that depletes the entire superannuation fund over his expected life span) Ken's benefit totals \$236,944. The more specific calculations of Ken's inferred benefits in each of the

sub-components may be found in the Forensis report. But their detail is not required for these reasons, as the expert evidence developed further.

The Supplementary Forensis Report

23. As is evident from the abbreviated description of the Griffiths and Forensis reports above, the former was based on direct access to the underlying documents of Ken's superannuation fund. But Forensis had not been provided with such documents. The Court assumed upon making of directions for the inquiry that there would be a full exchange of information about Ken's actual dealings with the \$500,000 interest free loan. But that did not occur, and occasioned another round of reporting from Forensis, so its calculations could be based on Ken's actual (not assumed) past financial information.
24. Other differences between the two reports were that Forensis had instructions to calculate past and future benefits as a result of the interest free loan, whereas the Griffiths report only calculated past benefits (up to 1 December 2011); Forensis could consider the maximum potential benefits to the plaintiff from tax effective superannuation planning strategies, whereas the Griffiths report dealt with Ken's actual superannuation investment decisions and transactions; and finally, only Forensis dealt with the tax benefits available to Ken from drawing a tax free income in the future in the form of a pension from his superannuation fund.
25. After further directions from the Court the experts set about reconciling the different assumptions upon which their reports had been prepared. As a result Forensis prepared a Supplementary Report dated 6 December 2011 ("the Forensis Supplementary Report"): based upon Ken's actual superannuation fund documents; calculated for past and future benefits; and, based on actual transactions up to 1 December 2011. Basing the Forensis Supplementary Report on Ken's actual transactions up to 1 December 2011, rather than the theoretical assumed transactions of the first Forensis report, was ultimately found not to be difficult, as the differences between the two turned out to be immaterial.
26. There were a number of other mathematical adjustments made in the Forensis Supplementary Report, through which Forensis accommodated criticisms that the Griffiths report made of the Forensis methodology. These adjustments were not in material amounts and do not need analysis in these reasons. They included Forensis making adjustments to the calculation of income tax up to the date of Ron's death on 14 August 2009. Other adjustments related to changes in the value of Ken's superannuation fund between Ron's death and the inquiry. As a result of these adjustments, the Forensis Supplementary Report updated its calculations based, on the following:-
 - (a) using the actual interest that Ken declared in his 2007-2008 year income tax return;
 - (b) using the actual transactions involved with the superannuation fund, as to contributions, pensions, earnings, rates and costs; and,
 - (c) using Ken's actual taxable income for the 2009-2010 financial year, in calculating the tax benefit attributable to his pension from his superannuation fund (and assuming his ongoing income is equal to an average of his income for the 2009 and 2010 financial years).
27. Forensis also corrected a relatively minor error in its report that the Griffiths report had identified.
28. The principal remaining differences between Forensis and Griffiths after the Forensis Supplementary Report were ones of principle: (1) whether the calculation of benefits from Ron's interest free loan should extend beyond 1 December 2011, and (2) whether the tax benefits associated with the pension (drawing a tax free income) should be taken into account as benefits to be received by Ken. As will be seen, these differences of principle were not resolved by agreement and the Court has been asked to determine them.
29. The result of the adjustments made in the Forensis Supplementary Report, to each of Scenarios 1 and 2 of the Forensis report, were recorded by the author over three time periods; (1) from date of

loan to 14 August 2009; (2) from 15 August 2009 to 1 December 2011; and, (3) from 2 December 2011 for Ken's life expectancy, as follows:

Head of benefit

Forensis Forensis
Scenario 1 Scenario 2

(1) From Date of Loan to 14 August 2009

Total Benefits \$63,147 \$63,311

(2) From 15 August 2009 to 1 December 2011

Superannuation fund earnings \$59,627 \$59,627

Present Value of taxation benefit
For pension \$4,262 \$4,783

Total benefits \$63,888 \$64,409

(3) From 2 December 2011 for Ken's life expectancy.

Present value of superannuation
fund earnings 204,312 141,462

Present value of taxation benefit
from pension 39,868 70,289

Total benefits \$244,181 \$211,751

Scenario 1 - Plaintiff withdraws minimum pension

Scenario 2 - Plaintiff withdraws pension which draws down entire fund

30. Once the Forensis Supplementary Report was available the experts were directed to confer together, to see if common mathematical calculations could be agreed. Significant progress towards a common set of calculations was able to be achieved in the Forensis and Griffiths "Experts' Joint Report on Benefits" dated 9 December 2009 ("the Joint Report").

The Joint Report

31. The experts conferred in conformity with the Court's directions and produced the Joint Report. As a result only three issues of principle remained between them. And only the first two of these issues of principle were of enduring financial consequence. The three remaining issues of principle were:-

(a) whether the calculation of the benefit Ken received should include any amount for benefits to be received in the future after Ken repays the loan;

(b) whether the benefits Ken has received from the interest free loan should be calculated:

(i) by assessing the movement in the value of the superannuation fund between the two dates being used as the dates for valuation, together with any benefit which the plaintiff may have received personally (the Griffiths view); or

(ii) by separately addressing (A) the benefits of the earnings in the superannuation fund; and, (B) the tax benefits resulting from Ken's personal receipt of a tax free pension from the fund (the Forensis view); and

some other miscellaneous issues which are not of material value.

32. Each of these three issues of principle will be considered in turn. It should then be possible to apply commonly agreed mathematics to the result decided by the Court.

Issue (a) Including Benefits Received After Loan Repayment

33. Griffiths & Co (Mr Griffiths) says that no financial benefits accrue to Ken after he repays the loan. Forensis (Ms Lindsay) says that Ken continues to receive benefits after that time. The Court prefers the Griffiths contention on this issue and finds on this issue that any future benefits Ken receives after he repays the loan will not be included among the benefits for which Ken must account to the estate when the 10 acre block is conveyed to him. But the Court reaches this view for reasons that differ somewhat to those Griffiths & Co advances.
34. The Griffiths & Co analysis is (to use its logical steps) that: any benefit Ken receives or may receive from the interest free loan is received solely as a result of the loan being established; the loan is an asset of the estate which must be repaid when the estate is fully administered; it only makes sense to speak of the interest free loan as a continuing to benefit Ken whilst it is outstanding but it must be called in very soon, when the estate is finally administered.
35. In contrast, the Forensis analysis is that: whether benefits arise solely in the past (up to the date of repayment of the interest free loan) or also arise in the future is a legal issue and not one on which Ms Lindsay is able to express an opinion. Nevertheless, Forensis has usefully separated its calculations into past and future periods. But Forensis notes importantly, that the benefits quantified by the experts are those associated with the superannuation fund rather than the loan itself and Forensis assumed that the superannuation fund will exist for the duration of Ken's full life expectancy.
36. In my view, Ken's repayment of the interest free loan does alter the assessment of the financial benefits he derives from the interest free loan. Before its repayment all the benefits he derives from the investment of the loan flow from the making of the loan. But once the time for repayment comes, Ken must either use his own money or use borrowed funds to repay the estate. In so doing he either must incur the financial costs of borrowing the funds for repayment or, if he uses his own capital, forgo the income he would otherwise have earned on his capital, and incur the "opportunity cost" of his use of that capital. After the interest free loan is repaid Ken cannot enjoy the original benefits he derives from the loan, without also either paying the financial cost of borrowing the capital to repay the loan, or incurring the opportunity cost of forgoing the use of the capital he applied to repay the loan. In short after repayment Ken cannot be treated as receiving the benefit of the interest free loan without giving him credit for the cost of repayment.
37. But the Forensis calculation only looks at the benefit Ken receives after repayment, without making any allowance for the financial cost of repaying the interest free loan. Forensis fully acknowledges this aspect of its calculations. Were such a calculation to be done, it might show that the combination of superannuation fund tax advantaged earnings and the taxation benefits of the payment of a pension to Ken, is greater than the financial cost of funding the repayment of the interest free loan. But the calculation may equally show a shortfall. The calculations have not been done. Even if they were done, the many assumptions that underly them would be highly debatable. In my view, such considerations show that Ken should not have any benefit from the interest free loan assessed against him after its repayment. This conclusion is not reached for the simple reason that Griffiths & Co claims, that any benefit Ken receives is merely as a result of the loan being established. Rather, it is because there is no evidence of Ken continuing to receive any clear marginal benefit from the interest free loan after its repayment.
38. But what then is the likely date of repayment of the interest free loan? Ken's original instructions to

Griffiths & Co assumed that the loan repayment occurred simultaneously with or closely proximate to the Court's inquiry. But that is unrealistic. There is an appeal already on foot in these proceedings. Further appeals are possible. Once the appeals are concluded the estate's administration will need to be finalised, including the conveyance of the 10 acre block to Ken. In the course of that administration the interest free loan will have to be repaid. There is no precise evidence as to when repayment is likely. But it is realistic to assume in my view that it will occur some time in about mid-2013. For the purpose of undertaking a calculation of present benefit to Ken, it is reasonable to assume that the loan will be repaid by 1 July, 2013. The Court has directed that Ken and the estate undertake calculations of Ken's benefits assuming repayment by this date.

39. The estate submitted on 20 December 2011 that "it is unrealistic to suggest that the loan of \$500,000 will be repaid". This submission conflicts with the executor's proper execution of his duty to administer the estate within reasonable time, usually twelve months, by realising its assets (including unsecured loans) and discharging its liabilities: *McCathie v Federal Commissioner of Taxation* [1944] HCA 9; (1944) 69 CLR 1. The estate's submission does not represent a realistic future state of affairs. The Court therefore will adopt calculations of the benefit Ken receives on the basis that he repays the loan and that he does so on 1 July 2013. But the second issue of principle must also be determined before a final benefit figure can be reached.

Issue (b) - Bringing to Account the Tax Effect of Ken's Superannuation Pension

40. The first remaining issue of principle, Issue (a), related to a question of timing: over what period the benefits said to be enjoyed by the plaintiff should be assessed. This second issue, Issue (b), concerns the range of possible benefits in each year that shall be brought to account against Ken as benefits received. The core question within this second remaining issue of principle is whether Ken derives a tax benefit from receiving a pension from the superannuation fund whilst it is in pension phase, and if so whether that tax benefit should be taken into account in assessing his benefits received. As to this, the experts advanced competing views.
41. The Griffiths & Co analysis is that Ken gained no tax benefit from the pension, he has started to receive from the superannuation fund. The Griffiths & Co say that all Ken's tax savings and benefits from going into the structure, namely the tax deduction for the superannuation contribution that Ken was allowed in his 2008 income tax return, have already allowed for by Griffiths & Co as benefits received. In Mr Griffiths' opinion, once the interest free loan funds are in the superannuation structure, if the question is asked, "were any additional benefits received?" the answer to that must be "no". This is because, as Mr Griffiths says, Ken is at an age that he is entitled to receive the superannuation pension tax-free and it is therefore not an additional benefit. The Griffiths analysis also explains that there is an additional benefit to Ken from the superannuation fund receiving additional interest from the favourable taxation regime within the superannuation fund whilst it is in pension phase. Thus, the Griffiths analysis takes into account the tax deduction allowed in the 2008 financial year and the favourable tax treatment of money within the superannuation fund every subsequent year. But Mr Griffiths' analysis holds that it is not necessary to add to those two benefits any allowance for the tax benefit to Ken from his tax favoured receipt of the pension.
42. Forensic accounting takes the opposite view. The Forensic analysis is that there is a considerable and two-sided tax benefit of being in "pension phase" in a superannuation fund. This tax benefit is said to arise not only because the earnings of the fund are untaxed in that phase, but also because the pension which is received in that phase is not taxable in the hands of a recipient such as Ken. Forensic says that without the superannuation fund, if the plaintiff were to receive the income equivalent of the pension he is being paid, then it would be taxable. The Forensic analysis is that the tax benefit Ken receives from the pension is the amount of tax that he would otherwise have paid on the pension income, if it were non-pension income.
43. The Forensic analysis is the more persuasive. By setting up the superannuation vehicle, Ken has created a structure through which he can take the benefit of the interest free loan. But in order to enjoy that benefit two steps are required: the funds must be deposited into the fund and accumulate

interest; and then the funds are paid out to Ken in the form of a pension. In consequence of the structure he created both steps are necessary for him to enjoy the fruits of the interest free loan. Ken receives a benefit at both of these points, both through a favourable tax regime for retained earnings in the superannuation fund and through a favourable personal tax regime when he derives those earnings in the form of income as a pension. In my view, Forensis is correct that the benefit he receives in both these steps should be brought account in calculation Ken's benefit received. Accordingly, the Forensis calculation of Ken's benefit is the preferred calculation in this respect.

Issue (c) Miscellaneous Issues

44. The third remaining issue of principle really consists of a bundle of miscellaneous disputes between Forensis and Griffiths & Co. The range of miscellaneous issues still outstanding between the parties varied depending upon whether the Court were to accept the Forensis analysis or the Griffiths analysis on the second issue of principle. In the result the Court has accepted the Forensis analysis. The first issue of principle only concerns the time into the future that the analysis of benefit extends. In those circumstances, paragraph 26 of the Joint Report appears to be applicable, which provides as follows:-

"Although Mr Griffiths [Griffths and Co] does not agree with Ms Lindsay's [Forensis] overall approach for the reasons outlined earlier, he concludes that the calculations are mathematically correct"

45. There were a number of other miscellaneous issues between the parties relating, for example, to mathematical errors by one or other expert, differences in the quantum of the "Mature Age Worker off-set", the availability of franking credits, a difference in the quantum of the "Spouse off-set", whether calculations were prepared on a cash or accruals basis, whether the plaintiff's correct future taxable income should be assumed to be \$49,000 per annum, or some other figure and finally, whether Ken should be assumed to have maximised the financial advantages that might accrue to him from the interest free loan or whether the benefit to him is to be calculated on the basis of his actual transactions, even though they did not reflect his highest theoretical financial advantage. The Court assumes from paragraph 26 of the Joint Report that those issues have now been resolved, if the Forensis figures are to be adopted on the second issue of principle (Issue (b)). Should either party contend that any one of these miscellaneous issues of principle is still unresolved, then the Court reserves that matter for further consideration. But the nature of the issue alleged still to be outstanding will need to be notified to the Court within seven days.

Choosing Scenarios and Final Figures

46. The Court has preferred the Forensis calculations for fixing the scope of the benefit Ken has received from the interest free loan. Although the Court has not accepted that the Forensis calculations should be accepted beyond 30 June 2013. It is still necessary to select between Forensis Scenario 1 (Ken withdraws the minimum pension) and Forensis Scenario 2 (Ken withdraws the pension, exhausting the entire fund during his lifetime). Of course, as Ms Lindsay pointed out, there are actually many possible scenarios between those two. But the choice among the possible scenarios in fact makes little difference in the figures on the findings the Court has now made. This is evident from the final schedule that Forensis produced calculating Ken's benefits up to 30 June 2013:-

Head of Benefit Schedule Forensis Forensis"
Scenario 1 Scenario 2

Total benefits to 14 August 2009 \$63,456 \$63,456

Total benefits from 15 August 2009
to 1 December 2011 \$64,610 \$64,610

Total benefits from 2 December
2011 to 30 June 2013 \$39,803 \$42,305

Total benefits from 14 August 2009
To 30 June 2013 \$167,869 \$170,371

47. It can be seen from this Schedule that there is no difference between Scenarios 1 and 2 other than for the period 2 December 2011 to 30 June 2013 and that difference is only of the order of \$2,500. The difference arises because it is in this last period, that Ken first experiences the beneficial taxation effect of receiving a pension from his superannuation fund.
48. A choice between the scenarios, or the choice of some point between them must nevertheless be made. In the Court's assessment Ken appeared to be a financially and personally conservative person. He did not seem to be impetuous by nature and he is not of an age where rash financial decision making is likely. He has waited for a long time for Ron and now the estate to fulfil an expectation which the Court has found was created in him a long time ago. He has stayed in the one occupation all his life. He is in the Court's assessment the kind of person who is more likely to take the minimum pension from his superannuation fund (Scenario 1) than someone who is likely to take the maximum pension (Scenario 2). In taking the maximum pension he would risk exhausting the entire fund before his death. This is not something he is likely to do. Accordingly, the appropriate assessment is Scenario 1.

Conclusions and Orders

49. Subject to the observations the Court has made about the possible need to resolve any outstanding miscellaneous issues of principle, the total benefits that the plaintiff Ken has received or will receive up to 1 July 2013 through the interest free loan, based upon Ms Lindsay's (Scenario 1) calculations, is \$167,869. This is the figure for which Ken must give credit when the 10 acre block is conveyed to him in conformity with the Courts orders.
50. This figure was calculated by Ms Lindsay on the basis of net present values as at the date of the Court's first judgment, 4 October 2011. Because the net present value date is now in the past, it may be appropriate for the experts to agree upon some daily rate of interest to reflect the passage of time between that conventionally agreed date and the eventual future date of conveyance of the 10 acre block to Ken. This no doubt can be accomplished by both experts consulting and a figure being included in final short minutes of order. The 10 acre block will therefore only be conveyed to the plaintiff, on terms that he restore this benefit to the estate in exchange for the transfer of the land. The parties should bring in short minutes of order to give effect to these reasons and those in the principal judgment.
51. The only outstanding issue now is costs. I direct that by 4.00pm on Friday, 23 March 2012 the parties file written submissions as to the appropriate costs orders in the proceedings. The parties should structure their written costs submissions upon the assumption that a further oral hearing on costs will not be necessary. But if either party does contend an oral hearing on costs is needed, then a short hearing on that issue can take place at 9.30am on Friday, 30 March 2012.
