Federal Court of Australia

Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation [2023] FCA 257

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| File number: | VID 492 of 2021 |
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| Judgment of: | **HESPE J** |
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| Date of judgment: | 24 March 2023 |
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| Catchwords: | **TAXATION** – Goods and Services Tax – *A New Tax System (Goods and Services Tax) Act 1999*(Cth) – whether applicant entitled to input tax credits in respect of payment of invoices for provision of services – whether services acquired in carrying on an enterprise |
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| Legislation: | *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 9-5, 9-20, 11‑5, 11-10, 11‑15, 40‑5  *Taxation Administration Act 1953* (Cth) |
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| Cases cited: | *Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199  *Cox v Smail* [1912] VLR 274  *Customs and Excise Commissioners v Redrow Group Plc* [1999] 1 WLR 408  *Edwards (Inspector of Taxes) v Barnstow* [1956] AC 14  *Federal Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49; (2014) 254 CLR 376  *Federal Commissioner of Taxation v Montgomery* [1999] HCA 34; 198 CLR 639  *Federal Commissioner of Taxation v Radnor Pty Ltd* (1991) 102 ALR 187  *Federal Commissioner of Taxation v Stone* [2005] HCA 21; (2005) 222 CLR 289  *Federal Commissioner of Taxation v Visy Industries USA Pty Ltd* [2012] FCAFC 106; (2012) 205 FCR 317  *Pascoe v Commissioner of Taxation*(1956) 30 ALJR 402  *Professional Admin Service Centres Pty Ltd v Federal Commissioner of Taxation* [2013] FCA 1123; (2013) 94 ATR 445  *Secretary, Department of Transport (Vic) v Commissioner of Taxation* [2009] FCA 1209;(2009) 261 ALR 39  *Secretary, Department of Transport (Vic) v Commissioner of Taxation* [2010] FCAFC 84; (2010) 188 FCR 167  *Stone v Federal Commissioner of Taxation* (1918) 25 CLR 389  *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338  *Watson v Federal Commissioner of Taxation* [2020] FCAFC 92; (2020) 277 FCR 253  *Western Gold Mines NL v Commissioner of Taxation (WA)* (1938) 59 CLR 729 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Taxation |
|  |  |
| Number of paragraphs: | 135 |
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| Date of hearing: | 24–26 October 2022 |
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| Counsel for the Applicant: | Mr A T Broadfoot KC with Mr G J Redenbach |
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| Solicitor for the Applicant: | Madgwicks |
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| Counsel for the Respondent: | Ms M L Baker SC |
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| Solicitor for the Respondent: | Australian Taxation Office |

ORDERS

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|  | | VID 492 of 2021 |
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| BETWEEN: | KONEBADA PTY LTD AS TRUSTEE FOR THE WILLIAM LEWSKI FAMILY TRUST  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| order made by: | HESPE J |
| DATE OF ORDER: | 24 MARCH 2023 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent’s costs, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

HESPE J:

# INTRODUCTION

1. This is an application by Konebada Pty Ltd (the **Applicant**) under Pt IVC of the *Taxation Administration Act 1953* (Cth) (***TAA***) appealing against objection decisions of the **Commissioner** of Taxation disallowing the Applicant’s objection against amended assessments of net amount for each of the quarterly periods between 1 January 2015 and 31 December 2017 (**relevant** **periods**).
2. By the amended assessments, the Commissioner denied the Applicant’s claims in respect of input tax credits that related to invoices paid by the Applicant for services provided by lawyers and other professionals in relation to issues concerning members of the Lewski family and affiliated entities (**Lewski Family Group**). Some services related to court or tribunal proceedings to which Lewski Family Group members were a party or were otherwise involved (**Litigation Services**). Members of the Lewski Family Group were parties to a number of proceedings which resulted in a need for legal representation and advice. Other services were not related to litigation (**Other Services**). In the relevant periods, the Applicant paid invoices relating to Litigation Services and Other Services totalling over $3.6m.
3. The following table shows the input tax credits sought to be claimed by the Applicant and the adjustments made by the Commissioner to the assessed net amount for each period.

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| **Period** | **Input credits sought to be claimed** | **Adjustment to assessed net amount** |
| 01/01/2015 – 31/03/2015 | $8,253.67 | $8,253.67 |
| 01/04/2015 – 30/06/2015 | $44,026.39 | $32,085.00 |
| 01/07/2015 – 30/09/2015 | $28,236.64 | $28,236.64 |
| 01/10/2015 – 31/12/2015 | $15,086.53 | $15,086.53 |
| 01/01/2016 – 31/03/2016 | $19,479.55 | $19,479.55 |
| 01/04/2016 – 30/06/2016 | $10,088.69 | $10,088.69 |
| 01/07/2016 – 30/09/2016 | $26,561.68 | $26,561.68 |
| 01/10/2016 – 31/12/2016 | $43,544.53 | $43,544.53 |
| 01/01/2017 – 31/03/2017 | $40,676.16 | $40,676.16 |
| 01/04/2017 – 30/06/2017 | $49,099.53 | $49,099.53 |
| 01/07/2017 – 30/09/2017 | $13,045.72 | $13,045.72 |
| 01/10/2017 – 31/12/2017 | $32,159.40 | $32,159.40 |

1. There is disagreement between the parties as to whether the Applicant is entitled to now claim input tax credits in an amount in excess of the adjustment made by the Commissioner (that is, in excess of the input tax credits denied by the Commissioner). The difference arises because the Applicant did not claim input tax credits in its business activity statement (**BAS**) relating to a number of tax invoices that it has now identified as having been paid during the tax period in respect of which the relevant BAS was lodged. This disagreement applies only to the period 1 April 2015 to 30 June 2015. Given the reasons below, it is not necessary for me to decide this issue.

# ISSUES

1. In broad terms, the ultimate issue in this proceeding is whether the Applicant, acting in its capacity as the trustee of the William Lewski Family Trust, is entitled to input tax credits in respect of its payment of invoices for the provision of Litigation Services and Other Services. This issue raises the following sub‑issues:
2. Did the Applicant acquire the services by way of a taxable supply to the Applicant, as required by s 11‑5(a) and s 11‑5(b) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (***GST Act***)?
3. If so, did the Applicant acquire those services in carrying on an enterprise and thus acquire those services for a creditable purpose, as required by s 11‑5(a) and s 11‑15(1) of the *GST Act*?
4. If so, did the acquisitions relate to making supplies that would be input taxed as financial supplies (with the result that the services would not be taken to be acquired for a creditable purpose, as provided by s 11‑15(2)(a) of the *GST Act*)?
5. Only if both (a) and (b) are answered in the affirmative will it be necessary to address question (c).

# FACTUAL BACKGROUND

1. The Applicant is the trustee of the William Lewski Family Trust. During the relevant periods, Mr Ari Lewski was a director of the Applicant. Mr William Lewski was a director of the Applicant from its incorporation on 3 March 1979 until 20 December 2014, and again from 12 August 2016 until 11 October 2019.
2. Irrespective of whether he held the office of director or not, Mr William Lewski at all times controlled the Applicant. Mr William Lewski was also the “Specified Beneficiary” of the William Lewski Family Trust. The “General Beneficiaries” of that Trust were defined by reference to their relationship with the Specified Beneficiary. Relevantly, the General Beneficiaries included Mr William Lewski’s wife, Mrs Roslyn Lewski, and their sons, Mr Ari Lewski, Mr Joshua Lewski and Mr Matthew Lewski.
3. The Applicant, as trustee for the William Lewski Family Trust, accounted for GST on a cash basis and lodged the BASs for the trust on a quarterly basis.
4. Both the Applicant and Mr William Lewski were registered tax agents.
5. Aside from the BASs lodged for the William Lewski Family Trust, there were no financial statements before the Court relating to the Applicant. The BASs disclosed that the Applicant returned no GST on sales or income in all but four of the twelve GST returns lodged in the relevant periods. The amounts of income on which GST was returned were:
6. GST inclusive fees of $146,685 from the Reynolds Road Unit Trust received on 11 March 2015;
7. GST inclusive fees of $28,600 from the Reynolds Road Unit Trust received on 15 July 2015;
8. GST inclusive fees of $317,000 relating to the management of “Glendale” and a refund of legal fees of $27,983.14, both received on 31 March 2013; and
9. GST inclusive fees of $1,443,000 relating to the management of “Glendale” received on 20 November 2017.

## Litigation Funding Agreements

1. The Applicant, as trustee for the William Lewski Family Trust, was a party to the following deeds dated 16 November 2016, each entitled “Litigation Funding Agreement”:
2. An agreement between the Applicant as “Litigation Funder” and Mr William Lewski as a “Beneficiary”. Schedule 2 of the deed listed the following proceedings:

1 Supreme Court of Victoria proceeding no. SCI 2012 01199 (Listing Fee Proceeding)

2 Supreme Court of Victoria proceeding no. SCI 2013 05042 (Auditor’s Proceeding)

3 Supreme Court of Victoria proceeding no. SCI 2014 06713 (Management Rights Proceeding)

4 Federal Court of Australia proceeding number VID 594 of 2012 (ASIC Proceeding)

5 Federal Court of Australia proceeding number VID 752 of 2012 (ASIC Appeal Proceeding)

6 Supreme Court of Victoria proceeding no. SCI 2013 01341

7 Supreme Court of Victoria proceeding no. SCI 2014 01136

1. An agreement between the Applicant as “Litigation Funder” and Mrs Roslyn Lewski, Mr Matthew Lewski and Mr Joshua Lewski, each as a “Beneficiary”. Schedule 2 of the deed listed the following proceedings:

1 Supreme Court of Victoria proceeding no. SCI 2013 05042 (Auditor’s Proceeding)

2 Supreme Court of Victoria proceeding no. SCI 2014 06713 (Management Rights Proceeding)

3 Supreme Court of Victoria proceeding no. SCI 2013 01341

4 Supreme Court of Victoria proceeding no. SCI 2014 01136

1. An agreement between the Applicant as “Litigation Funder” and Carey Bay Pty Ltd, Retirement Guide Pty Ltd, **Daytree** Pty Ltd, Australian Property Custodians Pty Ltd and Australian Property Administrators Pty Ltd, each as a “Beneficiary”. Schedule 2 of the deed listed the following proceedings:

1 Supreme Court of Victoria proceeding no. SCI 2012 01199 (Listing Fee Proceeding)

2 Supreme Court of Victoria proceeding no. SCI 2013 05042 (Auditor’s Proceeding)

3 Supreme Court of Victoria proceeding no. SCI 2014 06713 (Management Rights Proceeding)

4 Supreme Court of Victoria proceeding no. SCI 2013 01341

5 Supreme Court of Victoria proceeding no. SCI 2014 01136

6 Supreme Court of Victoria proceeding no. SCI 2013 05416

7 Supreme Court of Victoria proceeding no. SAPCI 2016 0019

8 Supreme Court of Victoria proceeding no. SCI 2016 01357

1. An agreement between the Applicant as “Litigation Funder” and Daytree as the “Beneficiary”. Schedule 2 of the deed was divided into two parts:
   1. Part 1 was entitled “Proceedings” and listed the following proceedings:

1 Supreme Court of Victoria proceeding number SCI 1990 of 2012 (Daytree Proceeding)

2 County Court of Victoria proceeding number CI‑16‑03211 (Kidder Communities Proceeding)

* 1. Part 2 was entitled “Other Proceeding” and listed the following proceedings:

1 Supreme court of Victoria proceeding no. SCI 2012 01199 (Listing Fee Proceeding)

2 Supreme Court of Victoria proceeding no. SCI 2013 05042 (Auditor’s Proceeding)

3 Supreme Court of Victoria proceeding no. SCI 2014 06713 (Management Rights Proceeding)

4 Federal Court of Australia proceeding number VID 594 of 2012 (ASIC Proceeding)

5 Federal Court of Australia proceeding number VID 752 of 2012 (ASIC Appeal Proceeding)

6 Supreme Court of Victoria proceeding no. SCI 2013 01341

7 Supreme Court of Victoria proceeding no. SCI 2014 01136

8 Supreme Court of Victoria proceeding no. SCI 2013 05416

9 Supreme court of Victoria proceeding no. SAPCI 2016 0019

10 Supreme Court of Victoria proceeding no. SCI 2016 01357

11 Federal Court of Australia proceeding no. VID 1496 of 2016

12 Administrative Appeals Tribunal proceeding no. 2015/4655‑4656

1. Although dated 16 November 2016, the Litigation Funding Agreements were in fact executed in October 2017. Each was signed on behalf of the Applicant by Mr Ari Lewski and Mr William Lewski as directors of the Applicant.
2. The terms of Agreements (1) to (3) were essentially the same. Relevantly:
3. The recital to the deeds stated:

This deed records the agreement between the Litigation Funder and the Beneficiaries in relation to the payment of Litigation Costs and Litigation Proceeds arising in connection with the Proceedings.

1. The term “Proceedings” was defined in cl 1.1 to mean:

**Proceedings** means the court proceedings described in Schedule 2 and any claim, demand, cause of action or other legal proceedings, whether intermediate, incidental or ancillary, which relate to or are connected with such court proceedings.

1. Clause 2 provided:

The parties acknowledge and agree that:

(a) the Litigation Funder has, prior to the date of this deed, paid all Litigation Costs; and

(b) after the date of this deed, the Litigation Funder will continue to pay all Litigation Costs.

1. The term “Litigation Costs” was defined in cl 1.1 to mean:

**Litigation Costs** means all costs and expenses paid or payable by the Beneficiaries, or incurred for the benefit of the Beneficiaries, that relate to or arise in connection with the Proceedings including (without limitation):

(a) all legal costs, expenses and disbursements incurred in respect of the Proceedings;

(b) any amounts paid or payable to the courts in respect of the Proceedings;

(c) transcript fees;

(d) witness fees and expenses; and

(e) any fees or costs incurred to any service providers in relation to any of the Proceedings, including database servers, costs consultants and others[.]

1. Clause 3 provided:

**3.1 Litigation Proceeds**

In consideration for the payment of the Litigation Costs by the Litigation Funder in accordance with clause 2, each of the Beneficiaries agrees to pay to the Litigation Funder any Litigation Proceeds that are paid to it within 5 business days of receipt of such amounts.

1. The term “Litigation Proceeds” was defined to mean:

**Litigation** **Proceeds** means all money paid or payable to the Beneficiaries in respect of the Proceedings including (without limitation) amounts paid or payable in connection with:

(a) the settlement of the Proceedings;

(b) an amount awarded by the court by way of judgment in favour of the Beneficiaries; and

(c) any cost order made by the court in favour of the Beneficiaries[.]

1. Agreement (4) was in slightly different terms.
2. Clause 3 of that Agreement provided:

**3.1 Litigation Proceeds and Costs Proceeds**

In consideration for the payment of the Litigation Costs by the Litigation Funder in accordance with clause 2, the Beneficiary agrees to pay to the litigation Funder any Litigation Proceeds and Costs Proceeds that are paid to it within 5 business days of receipt of such amounts.

1. The terms “Costs Proceeds” and “Litigation Proceeds” were defined as follows:

**Costs Proceeds** means all money paid or payable to the Beneficiary in respect of any cost order made by the court in favour of the Beneficiary in relation to the Proceedings and the Other Proceedings.

…

**Litigation Proceeds** means all money paid or payable to the Beneficiary in respect of the Proceedings including (without limitation) amounts paid or payable in connection with:

(a) the settlement of the Proceedings; and

(b) an amount awarded by the court by way of judgment in favour of the Beneficiary,

but only to the extent that such amount is greater than $5,000,000[.]

## Lay witness evidence

1. At the hearing of the proceeding, the Applicant called evidence from the following lay witnesses, each of whom was cross‑examined:
2. Mr William Lewski;
3. Mr Ari Lewski;
4. Mr Andrew Joseph;
5. Mr Samuel Bond;
6. Mr John Young; and
7. Mr Steven Casper.

### Evidence of Mr William Lewski

1. Mr William Lewski gave evidence concerning the history of the Applicant’s activities. From 1979, the Applicant had carried on a clothing retail business which it sold in 1987. In 1987, Mr Lewski commenced to carry on a practice of providing accounting and commercial consulting as well as being a registered tax agent. When the rules changed to permit trustees to act as tax agents, the Applicant also registered as a tax agent. Mr Lewski’s evidence was that the Applicant then took over his consultancy and tax agent practice, providing services to members of the Lewski family, the entities they controlled and members of the public.
2. Mr Lewski testified that, between 1991 and 1994, the Applicant also conducted a litigation and forensic accounting speciality practice through which expert valuation reports were prepared for third parties. From 1995 to 2001, the Applicant conducted a practice involving the provision of advice in relation to commercial property syndications. Between 1997 and 1998, the Applicant conducted chattel leasing businesses and was involved in film production. In 1998, the Applicant ceased providing accounting and other services to the public and unrelated third parties but continued to provide consultancy, advisory and accounting services to the Lewski Family Group. From 2001 to 2007, the Applicant carried on a consultancy and advisory practice providing services to the trustee of the Prime Retirement and Aged Care Property Trust. The termination of that Trust and the winding up of its trustee, Australian Property Custodian Holdings Pty Ltd (**APCHL**), resulted in significant litigation for the Lewski Family Group. The Applicant was not a party to that litigation.
3. The Applicant continued to provide consultancy services in respect of retirement villages, and residential aged care and home care businesses conducted by companies and trusts controlled by, or affiliated with, the Lewski family. Mr William Lewski was the individual engaged by the Applicant to provide the consulting and advisory services.
4. Mr Lewski’s evidence was that the Applicant paid the invoices rendered by solicitors, barristers and accountants, including those relating to the litigation to which members of the Lewski Family Group were parties. Mr Lewski’s evidence was that the Applicant was authorised to “conduct” the litigation on behalf of those persons who were the parties to that litigation. Although he had no specific recollection of any particular conversations with other members of the Lewski Family Group, his recollection was that each member “approved of the [A]pplicant managing [the] litigation”. All instructions to the lawyers were provided by Mr Lewski. He considered that he was providing those instructions “as a representative of the [A]pplicant”.
5. Mr Lewski’s evidence was that he gave instructions to the lawyers and made a strategic decision about whether and, if so, how to act on the advice. He claimed to have received the advice from the barristers and lawyers on behalf of the Applicant and that he, as representative of the Applicant, “disseminated” that advice to the members of his family. Mr Lewski gave oral evidence in this respect in the following terms:

[COUNSEL FOR THE APPLICANT:] Was there or was there not, Mr Lewski, ever any formal conferral of authority on you or on [the Applicant] by other Lewski Family Group individuals or corporate entities for [the Applicant] to acquire services for the broader group?---What do you mean by formal?

Well, written, verbal, recorded. How did it work? Tell her Honour how it worked?---Your Honour, we’re — we’re a tight‑knit family, and as — as a family business and conducting family businesses, I — I was obviously more experienced, skilled and knowledge [sic] than any other members of the family, but I always communicated with whomever was involved and however they were to be involved with activities that related to what they were doing and what [the Applicant] as trustee of the trust needed to support them with, whether it be advice, compliance work or accounting services, etcetera. It — it was a range of activities over a long period of time, and in the course of family dealings, things are done informally. Each member of the family that was involved either dealt with me on a day‑to‑day basis in our office, because we work in the same offices, or at home at the dinner table whenever a matter arose and I needed to communicate something if I hadn’t spoken to them during the day. It was what I would say oral, but you say oral is formal. I would have said informal.

1. And later:

[COUNSEL FOR THE APPLICANT:] And what did you do with the advice once [the Applicant] received it?---Well, I dealt with the advice, formulated whatever actions needed to be taken, including strategising, consulting with the lawyers and then instructing them and, at the same time, advising any member of the group that was affected, at what stage we were up to and what was happening.

And what happened after the group members were advised? Did they make decisions or tell you what to do or did you tell them what to do or how did … the decision‑making get implemented?---Well … the word I heard before was “disseminate”. I disseminated the information and the final determinations that were decided between the lawyers and myself, told them what they meant in respect of their particular circumstance and said to them, “This is the way I believe we need to move forward and deal with these matters,” and they acquiesced, again, in oral communications.

1. In cross‐examination, Mr Lewski said (emphasis added):

[COUNSEL FOR THE COMMISSIONER:] What I’m trying to understand, Mr Lewski, is exactly what services you say [the Applicant] was providing to members of the Lewski Family Group when it paid for the legal costs of those members of the Lewski Family Group?---It provided advice and services related to strategising ensuring that their solvency could be maintained for those that were defendants; those members, entities or individuals, that were defendants and, on the other hand, for those that were plaintiffs, again, advising them and telling them exactly what was decided in terms of the legal process as it was evolving from time to time.

When you say that [the Applicant] was advising them about the legal processes, that advice was actually being provided directly to the parties of the litigation by the law firms concerned, wasn’t it?---No.

The law firms were not performing services on behalf of the litigants to the - - -?---You said providing advices directly to them and they weren’t.

The advice — when you use the expression “directly” in that context, are you talking about physically receiving a piece of advice that concerns the affairs of another party? Is that what [the Applicant]’s role was limited to?---I’m sorry. You’re confusing me now. What I’m trying to say is that, as I understood your question to be, the lawyers were providing advice directly to the plaintiff entities or the defendants and defendant entities of the various litigation matters during the period. *And the answer to that is no, unless they needed to call for individuals to become witnesses for any proceedings, their advice was to* [*the Applicant*]*.* [*The Applicant*]*, in turn, informed and advised each of the parties that were associated to the proceedings of what was happening and how it was happening as matters evolved.*

Perhaps we’re at cross‑purposes, Mr Lewski, and I apologise for confusing you. The role that you’ve just described when you say that [the Applicant] was having the advice provided to it: was [the Applicant] the conduit for receiving advice that actually concerned the other members of the Lewski Family Group?---Yes.

So its role was simply as conduit. It wasn’t actually advising personally?---No, it was. It was advising, consulting, strategising. I mean, I engaged — [the Applicant] selected lawyers, instructed the lawyers, advised and strategised and even sacked lawyers from time to time if they weren’t aligned with the strategies that [the Applicant] wanted adopted. So that’s not true at all.

1. And later:

[COUNSEL FOR THE COMMISSIONER:] What was the arrangement, as you understood it, with respect to the legal services that were being performed by the law firms in relation to litigation?---What do I understand - - -

Was [the Applicant] acquiring the legal services - - -?---Yes. Yes.

- - - and then on‑supplying the litigation services to the members of the Lewski Family Group?---*It was providing services to the members of the Lewski Family Group which may have, in part, included legal advice that* [*the Applicant*] *received in its direct form or in a modified form, depending on what* [*the Applicant*] *made of the advice.*

Put aside legal advice as an example and think about activities performed in litigation. So the drawing of an affidavit. You’re saying that, in the context of litigation, that work was performed for [the Applicant] and not the parties to the litigation?---It was performed under the instruction of [the Applicant] for the purposes of the litigation, and it was performed by the lawyers that were engaged to do so.

1. In cross‑examination, Mr Lewski said of the Litigation Funding Agreements:

[T]he litigation funding arrangements — and that’s kind of a misnomer. It really is an engagement for services arrangement. [The Applicant] coordinated all the ensuing litigation that emanated out of the APCHL liquidation where individual members might have been defendants or joined as defendants in any of the proceedings.

1. And later (emphasis added):

[COUNSEL FOR THE COMMISSIONER:] Now, I think earlier in your answers you had said that the Litigation Funding Agreements weren’t really litigation funding agreements, they were services agreements?---Well, engagements for services agreements, yes.

Is that to say that you didn’t consider that the Applicant … was carrying on a business of being a litigation funder?---What I’m saying is it carried on the business of managing all the litigation that emanated from APCHL and the family members that would be affected in the event that if they were found to be liable in any of their proceedings it would affect the ability for the plaintiff entities to retain the proceeds that it would be entitled to. So by way of example: if [Mrs Roslyn Lewski] went bankrupt, she’s a beneficiary of a trust; if I went bankrupt; if the boys went bankrupt, it would open up the asset protection that otherwise wouldn’t be afforded to them if their proceedings were defended, so that whatever proceeds were received would be then unfettered by a trustee in bankruptcy stepping into the shoes of the various entities.

Sorry, Mr Lewski, you might have to explain that to me again?---The entities that were entitled to proceeds also had as ownership interests family members. If the family members were found liable in other causes of action then they may become bankrupt and if they were bankrupt then the trustee in bankruptcy would have entitlement to the entities that were receiving proceeds, the benefit of those proceeds.

So when you say that, you’re saying that the Litigation Funding Agreements were the way of protecting the assets of the Lewski Family Group?---*What I’m saying to you is that the coordination of all the litigation under the control of the Applicant was the form of protection. The* [*Litigation Funding Agreements*] *were supposed to memorialise what in fact was in practice for a number of years already such that there would be a formal record of some sort to point to so that the situation of proceeds being received and returned to* [*the Applicant*] *could be explained.*

1. In oral evidence, Mr Lewski provided further context to the Litigation Funding Agreement in respect of which Daytree was the Beneficiary. The proceedings involved claims by members of the Lewski Family Group against the liquidators for unpaid debts owed by the trustee company and the enforcement of security over particular assets of the trust. Daytree claimed an entitlement to security to the value of $5m in the Australian Financial Services Licence that was held by the trustee company in respect of a loan made by Daytree. The $5m had since been recovered and Daytree and other members of the Lewski Family Group had lodged proofs of debts with the liquidators of the trustee company in respect of moneys still owed over and above that $5m. A deed of settlement had been entered into with the liquidator and Mr Lewski believed there would be a return to the members of the Lewski Family Group.
2. I accept that Mr Lewski was the directing mind of the Applicant, irrespective of whether he held the office of director or not. As the directing mind of the Applicant, evidence of his state of mind is relevant: *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 5 (Hunt J). I accept that Mr Lewski sought to co‑ordinate the direction of complex interrelated litigation and that he directed the strategy for the conduct of that litigation. I also accept Mr Lewski’s evidence that he believed that having litigation proceeds paid to the Applicant rather than individuals might insulate the proceeds from the claims of future creditors against those individuals. I accept that Mr Lewski instructed the lawyers acting for members of the Lewski Family Group. I accept that Mr Lewski was the party to whom the lawyers conveyed their advice and that he made strategic decisions concerning whether to accept advice given by the lawyers. I also accept that the Applicant paid the invoices rendered by the professional service providers.
3. However, I attach little weight to the evidence of Mr Lewski’s *ex post facto* understanding of the capacity in which he gave instructions and received advice, or to his characterisation of the operations of the Applicant in so far as they related to the issues in this case. There are a number of difficulties with Mr Lewski’s evidence. First, much of his evidence was conclusionary or argumentative in form. The evidence approached that described by Dixon J (as he then was) in *Williams v Lloyd* (1934) 50 CLR 341 at 371: “[*e*]*x post facto* statements of a narrative order are not admissible upon the state of mind at a past date of the person who makes them”.
4. Second, Mr Lewski’s evidence was also self‑serving and uncorroborated by contemporaneous documentary evidence. The evidence of witnesses who have interests that turn on whether their evidence is accepted needs to be approached critically and will necessarily be the subject of careful scrutiny. Although evidence that may be described as “self‑serving” should not necessarily be disbelieved (*Imperial Bottleshops Pty Ltd v Federal Commissioner of Taxation* (1991) 91 ATC 4546 at 4552 per Hill J) or be regarded as “prima facie unacceptable” (*McCormack v Commissioner of Taxation* (1979) 143 CLR 284 at 302 per Gibbs J), statements of purpose, object or state of mind must be “tested most closely, and received with the greatest caution” (*Pascoe v Commissioner of Taxation*(1956) 30 ALJR 402 at 403 per Fullagar J, citing *Cox v Smail* [1912] VLR 274 at 283 per Cussen J).
5. Mr Lewski’s evidence must be weighed in light of the objective facts. Those objective facts include the fact that Mr Lewski was a registered tax agent with knowledge of GST. Not only was Mr Lewski a party with an interest in the outcome of the proceedings, he had an educated and technical understanding of the nature of the issues in these proceedings.
6. Mr Lewski’s evidence that the Applicant received advice and then disseminated the advice, or used the advice to formulate its own advice, was not supported by contemporaneous evidence. There was no contemporaneous evidence that the Applicant conducted, or was legally able to conduct, a practice entailing the provision of legal advice. There were no trustee resolutions or board papers or other documents to support a conclusion that the Applicant provided legal advisory services to the members of the Lewski Family Group. There was no evidence that the Applicant received fees or remuneration for the provision of such services. The revenues recorded in the Applicant’s BASs were limited to revenues referable to advisory and consulting services provided by the Applicant relating to the retirement villages, and residential aged care and home care businesses conducted by companies and trusts controlled by, or affiliated with, the Lewski Family Group.
7. The arrangements as described by Mr Lewski have an air of artificiality. By his description, the Applicant, a trustee of a family trust, received legal advice relating to proceedings or matters to which it was not a party and then formulated recommendations and advised family group entities, and provided instructions to the professional advisors advising in relation to those proceedings or matters and the legal representatives for the parties to those proceedings.
8. For these reasons, I do not accept that Mr Lewski instructed lawyers and received the Litigation Services and Other Services on behalf of the Applicant as trustee of the William Lewski Family Trust. Rather, I conclude that he did so for and on behalf of the Lewski Family Group individual or entity that was party to the proceedings or the transaction or dealing in issue.
9. Further, I do not accept Mr Lewski’s evidence that the Litigation Funding Agreements were really agreements for the provision of services. That description is not supported by the terms of the Agreements, which, as set out above, do not require the Applicant to provide any services to the named Beneficiary, other than to pay invoices. The Agreements did not require the Applicant to provide some form of service to the Beneficiary which would have created a need for the Applicant to acquire legal services for its own account. The Agreements required the Applicant to fund the provision of services by others. Furthermore, the Agreements do not cover all of the proceedings to which members of the Lewski Family Group were parties. Mr Lewski testified that any such oversights were “omissions” or “mistakes”. As explained further below, I do not accept that evidence.
10. I also attach no weight to Mr Lewski’s evidence that the Litigation Funding Agreements “memorialised” arrangements that had been in place for decades. There is no objective contemporaneous evidence of an arrangement by which the Applicant provided legal advice and litigation support services to the members of the Lewski Family Group prior to the execution of the Litigation Funding Agreements. The contemporaneous evidence discloses that the Applicant received the proceeds of a costs order and paid invoices, but the basis and reasons for the payment, other than to benefit the beneficiaries of the William Lewski Family Trust of which the Applicant was trustee, were not determined prior to 2017 when the GST audit commenced. As Mr Lewski himself said, he “realised that, because of the audit, there may be a need to have something formally in place recording what the practicalities of what going on in the family business was about with respect to [the] litigations” and the Litigation Funding Agreements were “a formal record of some sort to point to so that the situation of proceeds being received and returned to [the Applicant] could be explained”. Prior to that time,everything was said by Mr Lewski to have been done “informally”. I infer that this informality extended not just to the initial form of the arrangement (not being formally recorded in writing) but also to the terms of the arrangement, which had not been fully thought‐through or developed prior to the drafting of the Litigation Funding Agreements. Even then, Mr Lewski’s evidence was that the Litigation Funding Agreements did not accurately record what he described as an engagement for services arrangement.

### Evidence of Mr Ari Lewski

1. Mr Ari Lewski is the son of Mr William Lewski and also a director of the Applicant. He gave evidence that he was “aware” that the Applicant (through his father) dealt with lawyers and accountants and his understanding was that, in doing so, the Applicant was giving instructions and receiving services for natural persons in his family and the entities associated with his family. Mr Ari Lewski’s understanding was that it was the Applicant that co‑ordinated and effectively managed litigious and non‑litigious work for the Lewski Family Group, “with the Applicant paying fees and acting as a central point of contact to co‑ordinate the obtaining of professional services and to which (through [his] father) advice and other services were provided”. His evidence was that the work performed by Mr William Lewski for the Applicant was performed “with my knowledge and approval”.
2. Mr Ari Lewski was aware of numerous litigious matters involving members of the Lewski Family Group, including:
3. Supreme Court of Victoria proceeding number SCI 2012 01199 (Listing fee Proceeding). The members of the Lewski Family Group that were parties to this proceeding were Mr William Lewski; Daytree; Carey Bay Pty Ltd and Australian Property Administrators Pty Ltd. These proceedings involved claims by the liquidator of APCHL, the trustee of the Prime Retirement and Aged Care Property Trust, seeking repayment or damages in respect of a $33m listing fee payment made by APCHL as trustee;
4. Supreme Court of Victoria proceeding number SCI 2013 05042 (Auditor’s Proceeding). The members of the Lewski Family Group that were parties to this proceeding were Mr William Lewski; Daytree; Retirement Guide Pty Ltd; Australian Property Custodians Pty Ltd; Australian Property Administrators Pty Ltd; Mrs Roslyn Lewski; Mr Joshua Lewski and Mr Matthew Lewski;
5. Supreme Court of Victoria proceeding number SCI 2014 06713 (Management Rights Proceeding). The members of the Lewski Family Group that were parties to this proceeding were Retirement Guide Pty Ltd; Australian Property Custodians Pty Ltd; Mr William Lewski; Mrs Roslyn Lewski; Mr Joshua Lewski and Mr Matthew Lewski. These proceedings related to claims by the liquidator seeking repayment or damages in respect of a $60m payment received by members of the Lewski Family Group relating to the sale of management rights in respect of particular aged care properties to Babcock & Brown;
6. Federal Court of Australia proceeding number VID 594 of 2012 (ASIC Proceeding). Mr William Lewski was a party to this proceeding in which ASIC sought to have him banned from being a director;
7. Federal Court of Australia proceeding number VID 752 of 2012 (ASIC Appeal Proceeding). This was an appeal by Mr William Lewski (amongst others) against the banning orders obtained by ASIC;
8. Supreme Court of Victoria proceeding no. SCI 2013 01341. The members of the Lewski Family Group that were parties to this proceeding were Mr William Lewski; Retirement Guide Pty Ltd; Daytree; Carey Bay Pty Ltd; Australian Property Custodians Pty Ltd; Australian Property Administrators Pty Ltd; Mrs Roslyn Lewski; Mr Joshua Lewski and Mr Matthew Lewski;
9. Supreme Court of Victoria proceeding number SCI 2014 01136. The members of the Lewski Family Group that were parties to this proceeding were Mr William Lewski; Retirement Guide Pty Ltd; Daytree; Carey Bay Pty Ltd; Australian Property Custodians Pty Ltd; Australian Property Administrators Pty Ltd; Mrs Roslyn Lewski; Mr Joshua Lewski and Mr Matthew Lewski;
10. Supreme Court of Victoria proceeding number SCI 2013 05416. The member of the Lewski Family Group that was a party to this proceeding was Retirement Guide Pty Ltd;
11. Supreme Court of Victoria proceeding number SAPCI 2016 0019. According to Mr Ari Lewski, the member of the Lewski Family Group that was a party to this proceeding was Retirement Guide Pty Ltd. In addition to causes of action against a number of entities controlled by the Lewski family, these proceedings also appeared to involve Mr William Lewski being personally sued for breach of fiduciary duties;
12. Supreme Court of Victoria proceeding number SCI 2016 01357. The member of the Lewski Family Group that was a party to this proceeding was Kingsby Pty Ltd;
13. Supreme Court of Victoria proceeding number SCI 1990 2012 (Daytree Proceeding). The members of the Lewski Family Group that were parties to this proceeding were Daytree; Mr William Lewski; Mrs Roslyn Lewski; Australian Property Administrators Pty Ltd and Mr Harry Lewski (as trustee for David Lewski and Mala Lewski);
14. County Court of Victoria proceeding number CI‑16‑03211 (Kidder Communities Proceeding). The member of the Lewski Family Group that was a party to this proceeding was Daytree;
15. Federal Court of Australia proceeding number VID 1496 of 2016. The member of the Lewski Family Group that was a party to this proceeding was Mrs Roslyn Lewski;
16. Administrative Appeals Tribunal proceeding number 2015/4655‑4656. Mrs Roslyn Lewski was the Applicant in this proceeding, which also involved Australian Commercial Property Syndications Pty Ltd (as trustee of a trust) and Drewvale Pty Ltd (as trustee of a trust), whose income had been adjusted which, in turn, affected Mrs Roslyn Lewski as a trust beneficiary.
17. Mr Ari Lewski was a director of many of the companies controlled by the Lewski family. As a director of these entities, he said he “knew of and approved of the Applicant managing and co‑ordinating” the “provision of instructions and obtaining of services” but that there was no “explicit decision” that the Applicant “represented other entities that were part of the Lewski Family Group”.
18. His evidence in cross‑examination was:

[COUNSEL FOR THE COMMISSIONER:] So you can’t tell me whether [the Applicant] itself provided legal services to members of the Lewski Family Group?---As far as I know, [the Applicant] was acting on behalf of the Family Group.

Now, you yourself, you had limited dealings with the lawyers and the service providers that were involved in providing legal services and advice to the Lewski Family Group during the period that you were a director of [the Applicant]?---That is correct.

And is that because that’s work that you left to your father?---Yes. I didn’t have the requisite skill or expertise to manage those activities, so I left it to someone who I trusted who did have that requisite skill, knowledge, expertise.

And in terms of your father’s authority to act, you say in your affidavit, I think a couple of times, that there was no formal conferral of authority on your family to act on behalf of [the Applicant] in representing [the Applicant] in litigation?---Yes.

Okay. So, in terms of there being no formal conferral or authority, was the arrangement that you approved of — that you were aware of and that you approved of simply that [the Applicant] was paying the fees and acting as a central point of contact in the litigation and the legal services?---Yes.

1. I accept that Mr Ari Lewski answered questions in cross‑examination to the best of his ability. However, like Mr William Lewski’s evidence, much of it was conclusionary. The basis on which he considered the Applicant (as opposed to his father) “managed” the litigation to which the family were parties and knew that the Applicant was “involved with managing those and co‑ordinating those on behalf of the family group” was not evident beyond his reliance on what his father had told him. He described the role of the Applicant in sporting terms, as:

Playing point. Running point. Being in charge of — the point guard in basketball is the one that distributes, delegates. So I sort of see it the same way. Sort of like a streamlines process.

1. What is evident is that Mr Ari Lewski had complete trust in his father to handle the litigation to which members of the Lewski Family Group were parties. I accept that it made sense to Mr Ari Lewski for his father to co‑ordinate the handling of the numerous litigious matters. I accept that Mr Ari Lewski understood that the Applicant was paying all of the invoices related to the conduct of the litigation and that his father was the person responsible for providing instructions to, and dealing with, the legal advisors.
2. Mr Ari Lewski was a signatory on behalf of the Applicant to the Litigation Funding Agreements. He recalled signing them some time in 2017. His evidence of why the agreements bore the date of 16 November 2016 was:

As far as I can recall, the agreements were — were backdated with that date. The arrangement documented in this — these agreements were certainly already sort of effective in practice; this is what was happening and we were — we decided to formalise and document what was already in place and in practice at a time when, I believe, we received a GST audit notice, then we just thought it would be best to put this — formalise this in writing and document it properly because of that.

[COUNSEL FOR THE COMMISSIONER:] When you talk about formalising writing and documenting it properly, what was the — what is it that you’re talking about having formalised by these agreements?---Formalising the arrangement that was in place, what was happening in practice: [the Applicant] representing the entities, running — running or advising or managing the — the lawyers, the litigation, strategising, all that — all those activities related to the litigation, they were in charge of doing that.

Now, that arrangement that you described, that pre‑dates you becoming a director of [the Applicant]; is that right?---Yes.

And it also pre‑dates you becoming a director of the other entities that I think you’ve named in paragraph 6 of your affidavit?---It — it may. I don’t remember specific dates, but I suggest since 2012 or so it was working like that.

Okay. So in terms of the arrangement from 2012, you weren’t part of agreeing that original arrangement?---Not at — not at 2012, not at the very beginning, because I wasn’t a director. I mean, it was discussed and, as I said, we were kept abreast of everything that was happening as affecting the family. So these were family entities. We all had an interest, so I was aware what was going on and that — it continued on.

But is it the case that your father simply told you to sign these agreements on the basis that they were in some way reflecting an earlier agreement?---No, I wouldn’t sign anything that he just tells me to sign. I review and I understood what was going on. It fit in with my understanding of the circumstance and I signed on that basis.

What, on the basis that [the Applicant] was paying the invoices and playing point?---Correct.

1. Like Mr William Lewski’s evidence, Mr Ari Lewski’s description of the Litigation Funding Agreements as documenting an arrangement pursuant to which the Applicant “was representing the entities, running — running or advising or managing the — the lawyers, the litigation, strategising, all that — all those activities related to the litigation” does not reflect the terms of the Litigation Funding Agreements which he signed.
2. When asked why there was no litigation funding agreement in respect of which he was named as a Beneficiary, Mr Ari Lewski testified that:

I relied on the — the advice and expertise of my father, so — in these particular matters. So I relied on him working out what litigation funding agreements were necessary given what was happening at the time, and so, if one wasn’t done for me personally, there must have been a reason for it.

### Evidence of Mr Joseph

1. Mr Joseph is a retired partner of the law firm known as Strongman & Crouch (**S&C**), which firm worked on a number of matters for entities related to the Lewski family. Mr Joseph gave evidence of the background to S&C’s retainers in relation to the litigation related to the liquidation of APCHL as follows:
2. In August 2011, S&C was retained by Mr William Lewski and associated companies in connection with the “defence of prospective proceedings against professional advisers & others, and all related and consequential matters”. This was a “general retainer” in anticipation of matters pertaining to APCHL. The acknowledgement by the client of the terms of engagement was signed by Mr William Lewski.
3. In January 2012, S&C was retained by Mr William Lewski, Mrs Roslyn Lewski, and Mr William Lewski’s parents, Mala and David, to act generally in the liquidation of APCHL. The acknowledgement by the client of the terms of engagement was signed by Mr William Lewski on his own behalf and on behalf of Australian Property Administrators Pty Ltd and Daytree, and on behalf of his parents under power of attorney. The acknowledgement was also signed by Mrs Roslyn Lewski.
4. Subsequent to the issue of proceedings in the Supreme Court of Victoria numbered 01199 of 2012 and 01990 of 2012, Mr William Lewski told Mr Joseph that the Applicant was to pay the professional costs and disbursements rendered by S&C in both these proceedings (and in all subsequent matters arising out of APCHL). On 31 July 2013, Mr Joseph sent two further costs agreements addressed to the Applicant:
   1. One disclosure statement was in regard to Supreme Court of Victoria proceeding number 2012 01990 between Daytree & Ors and APCHL (in Liq) (Rectification Proceedings) and all related and consequential matters. The acknowledgement by the client of the terms of engagement was to be signed for and on behalf of the Applicant. Mr Joseph’s evidence was that, although the copy attached to his affidavit was not signed on behalf of the Applicant, he believed that a signed page had been received by S&C at the time. Attached to the acknowledgment was a note entitled “note in relation to third party funding”. That note included the following caution:

If your legal proceedings are, or may be, funded and maintained by a non party, that being a non party with no apparent interest in those proceedings, these cases may be relevant.

It is very difficult to say whether an adverse party in a case would apply for such an Order against a non party, and whether a Court would hold the non party responsible for any costs ordered against you. This is not least because the matter of liability for costs is subject to the discretion of the Court. However, the cases, at least, make such an outcome possible. It is most important that any non party understands this. Our own view is that though it may seem unjust that a non party cannot assist you without such an exposure, it is clear that risk is involved for that non party.

As your interests conflict with those of any non party in this case we cannot advise the non party on what course should be taken. Any non party should take this opportunity to seek independent legal advice and to be satisfied about the extent of any potential liability that may exist in funding your litigation.

* 1. The second disclosure statement was in regard to Supreme Court of Victoria proceeding number 2012 01199 between Daytree & Ors and APCHL & Ors arising from a $33m listing fee payment made by APCHL as trustee and all related and consequential matters. The acknowledgement by the client of the terms of engagement was signed for and on behalf of the Applicant. Attached to the acknowledgment was a copy of the “note in relation to third party funding”.

1. In February 2018, it seems that S&C sent a further costs agreement to Mr Lewski in relation to Supreme Court of Victoria proceeding number 2012 01990 and all related and consequential matters. This costs agreement was directed to the Applicant as well as Daytree, Mr William Lewski, Mrs Roslyn Lewski, Mr Harry Lewski and Australian Property Administrators Pty Ltd (together referred to as “the client”). Mr Joseph had no clear memory of why that agreement was necessary. It too contained the “note in relation to third party funding”.
2. Mr Joseph at all times had taken instructions from Mr William Lewski almost exclusively. Mr William Lewski was the single point of contact for taking instructions in litigation related to the Lewski Family Group. Mr Joseph met with and discussed matters with the natural persons who were named as litigants on very rare occasions, usually prior to a public examination or giving evidence, and on the day evidence was to be given. Ordinarily, Mr Joseph gave his work product to Mr William Lewski “who issued instructions on behalf of the relevant litigant”.
3. Mr Joseph’s affidavit evidence was:

Consistent with my professional obligations, I regarded my clients as those to whom my firm and I owed contractual, tortious and/or fiduciary obligations in the relevant litigation. This included the actual plaintiffs or defendants as the case required in each matter. I do not regard this as inconsistent with acting in accordance with instructions given through a person who is authorised to act on the behalf of the litigant. In these matters, I would generally regard as my clients the relevant plaintiff or defendant (as the case required) and, depending on the costs agreement, or oral instructions from [Mr William] Lewski, other entities such as [the Applicant]. I believe that after July 2013 most if not all invoices from S&C in relation to APCHL were directed to [the Applicant]. I do not now recall whether the other clients in each retainer were included in the invoices, but it was certainly [the Applicant] that I generally expected to pay them, and who I think did pay them.

I cannot say that I thought of my instructions coming from [Mr William] Lewski in any particular corporate capacity, and whether that capacity related to [the Applicant] or another entity named in the litigation. I can say that I was satisfied at the time of the matters that [Mr William] Lewski had authority to receive information and advice from me about the conduct of the litigation and to issue instructions in respect of the litigation.

1. Mr Joseph’s evidence in cross‑examination was that, although he could not recall precisely, he doubted whether the Applicant was a party to any of the Supreme Court of Victoria proceedings to which the costs agreements related. According to Mr Joseph, the reason he believed he had received a signed acknowledgment from the Applicant was that:

[T]he single most important aspect of acting for a client if you’re a commercial solicitor is knowing it’s going to pay, and if [Mr William Lewski] had said to me he wanted [the Applicant] to be the person liable, then, as far as I was concerned, it was very important to have [the Applicant] sign up.

1. Mr Joseph accepted that there were instances where S&C issued invoices to the Applicant even though there was no costs agreement naming the Applicant as the client and “that may well [have been] the case, because Mr [William] Lewski had said that that’s the way he wanted it to be”.
2. Mr Joseph’s evidence was:

I trusted Mr [William] Lewski completely. He was a very good client as far as I was concerned; always treated me very well; never any problem with getting paid that I recall. Once he said to me that [the Applicant] was going to pay and once I had him signed up on those two initial costs agreements, I promptly took the view that that was enough, but I never thought that — of course, I had duties to [the Applicant], but I never thought it was the client in any — in any – inasmuch as it wasn’t a party to relevant legal proceedings. I — I’m drawing … a distinction between the clients on the record and the person who was to pay the bill. I hope that doesn’t confuse you.

[COUNSEL FOR THE COMMISSIONER:] No, Mr Joseph. I — to use an expression that I think is used under the costs legislation these days, you regarded [the Applicant] as a third‑party payer?---Yes, that’s a reasonable — yes, that’s reasonable. Yes. It was akin to a position where you acted for an insurer — you acted for a — which was — and you acted in the name of a particular person, who was your client, that is to say the party to the litigation, but the insurer was paying the bills. Alternatively, it was akin to a position where you acted for a managing director of a public company where the public company was paying the bills, but the director was the client and the name on the record; he was the real client, but the public company simply paid his bills; that’s how I treated it.

1. In re‑examination, Mr Joseph explained that the similarity with an insurer, as he saw it, was that (emphasis added):

[W]hen you act for an insurer, the insurer is not named as a party to the legal proceeding. The insurer is normally — in my experience, anyway — the insured.

[COUNSEL FOR THE APPLICANT:] Sorry, the client is the insured?---The client is the insured.

Yes?---You’re quite right. The client is the insured. The insurer is paying the bill.

Yes?---That’s why I said it was kindred.

And what role, if any, does the insurer have with respect to making decisions or strategies or - - -?---They have quite – they have quite a substantial role, because under the policy, it has got the right to conduct the litigation, ordinarily.

Yes. And is that a feature of representing the parties to the litigation that you were involved in that was similar to the situation with an insurer?---*It wasn’t identical, because I have no doubt that when Mr Lewski gave instructions, he was giving them on behalf of the parties to the litigation. He wasn’t giving them representing a separate interest, such — such as would be equal to an insurer.*

Well, what - - -?---A rather subtle — subtle distinction, but that’s how I thought about it.

*Well, what role did you understand* [*the Applicant*] *to be playing in the scheme of things, then?---It was paying the bills.*

*All right?---Unless it was a party to the proceeding, it was — it was merely paying the bills.*

1. Although Mr Joseph did not know the capacity in which Mr William Lewski was acting when he provided instructions, his evidence was that:

[T]here was an overwhelming — overwhelming inference that he was the agent of the persons on whose behalf he was providing the instructions. It’s not unusual in the — in such circumstances to draw that inference. I’ve known the fellow very well for 25 years before these proceedings started.

1. Mr Joseph gave his evidence in a considered and honest manner. I accept his evidence.

### Evidence of Mr Bond

1. Some of the disputed input tax credits related to invoices issued by a law firm known as SBA Law Pty Ltd. Mr Bond is a principal of SBA Law.
2. Mr Bond’s evidence was that, from at least 2006, SBA Law worked on a number of matters for the Lewski Family Group. Mr Bond acted in litigious matters involving entities and individuals in the Lewski Family Group. In respect of those matters, Mr Bond nearly wholly dealt with Mr William Lewski. Almost all instructions Mr Bond received were given by Mr William Lewski, and all information and advice given by Mr Bond was given to Mr Lewski.
3. When Mr William Lewski ceased to be a director of a number of entities in the Lewski Family Group in 2014, Mr Bond spoke with the replacement or remaining directors (in particular, Mr Ari Lewski and Mr Joshua Lewski) to confirm that Mr William Lewski was authorised to give instructions.
4. Most of the litigation matters in respect of which Mr Bond provided services related to the liquidation and receivership of APCHL, the trustee of the Prime Retirement and Aged Care Property Trust. Mr Bond testified that SBA Law acted for a number of different entities in the Lewski Family Group which were defendants to claims by the liquidators and receivers and/or were creditors proving in the winding up. The claims by the liquidators and receivers were against members of the Lewski Family Group relating to the payment of a listing fee of $33m to entities in the Lewski Family Group upon the listing of the Prime Retirement and Aged Care Property Trust, and the sale by members of the Lewski Family Group of management rights in respect of particular aged care properties, for approximately $60m. The creditor claims made by the members of the Lewski Family Group were for debts owed by APCHL to those members.
5. The litigious matters in which SBA Law, by Mr Bond, acted also included a claim against Mr William Lewski for a breach of fiduciary duty as well as a claim by APCHL against Pitcher Partners and in respect of which a number of entities in the Lewski Family Group were joined as third parties. SBA Law also acted in proceedings involving the public examination of members of the Lewski Family Group by the liquidators.
6. Mr Bond’s evidence was that the majority of the work in relation to the litigation was defensive and resisting claims by the liquidators against members of the Lewski Family Group, but a claim by Daytree in respect of a debt owed to it by APCHL might give rise to payments to Daytree, depending on the outcome of the liquidation. In cross‑examination, Mr Bond testified that he understood that APCHL’s liabilities greatly exceeded its assets and that the liquidators had yet to complete their work.
7. The Applicant was the entity billed for the services rendered by SBA Law to the named parties to the litigation proceedings and Mr Bond considered the Applicant to be liable for those fees.
8. Mr Bond, as principal of SBA Law, also acted in respect of prosecution proceedings brought by ASIC which resulted in banning orders against Mr William Lewski, preventing him from being a company director for a period of time. In respect of these matters, all fees were rendered to the Applicant and Mr Bond considered the Applicant to be liable for those fees.
9. SBA Law also performed work in relation to taxation proceedings involving an entity in the Lewski Family Group which was a trustee for a superannuation fund. Mr Bond was instructed by and provided advice to Mr William Lewski. All fees were rendered to the Applicant and Mr Bond considered the Applicant to be liable for those fees.
10. Annexed to Mr Bond’s affidavit were two unsigned costs agreements. The first costs agreement named “Mr Bill Lewski” as the client and the matter was described as “Australian Property Custodian Holdings Limited (Receivers and Managers Appointed) (Controllers Appointed) (Administrators Appointed)”. The second was a redlined draft entitled “Costs Agreement Between a Law Practice and an Associated Third Party Payer”. It appeared to have been prepared in 2016 and included the following text:

Section 180(1)(d) of the Uniform Law allows a Costs Agreement to be made between a law practice and an associated third party payer (refer to section 171 of the Uniform Law for the definitions of ‘third party payer’ and ‘associated third party payer’). In this case, Konebada Pty Ltd (**Konebada**) is an associated third party payer.

This document is an offer to enter into a Costs Agreement with Konebada, the associated third party payer, in accordance with the information contained in the Disclosure Statement (**attached**) given to our clients, Hamish MacKinnon and Kidder Communities Pty Ltd (Receiver & Manager Appointed) (**Our Clients**), in compliance with Division 3 of Part 4.3 of the Uniform Law. A copy of that Disclosure Statement is hereby given to Konebada in compliance with section 176 of the Uniform Law.

If Konebada accepts these terms, the Disclosure Statement and this document will make up the complete Agreement between us for this matter.

Konebada may accept the Agreement by writing to us indicating its acceptance or by returning a signed copy of this document as provided in the Acknowledgement at the end of this document.

1. In cross‑examination, Mr Bond testified that, in his view, the named party to litigation proceedings was his client. His evidence was that, when speaking to Mr William Lewski day‑to‑day, Mr Bond did not turn his mind to the capacity in which Mr Lewski was receiving advice or providing instructions. Mr Bond’s focus was on the various litigation proceedings rather than the hat Mr Lewski was wearing at the particular time. Mr Bond’s evidence was that the Applicant was not a named party to any of the proceedings in respect of which he acted.
2. I accept Mr Bond’s evidence.

### Evidence of Mr Casper

1. Mr Casper is another principal of SBA Law. He performed what he described as “compliance related work” (such as drawing meeting minutes and other regulatory compliance work) and transaction‑related, non‑litigious work for the Lewski Family Group.
2. Mr Casper testified that, following discussions he had with Mr William Lewski, the Applicant was the entity SBA Law billed for Mr Casper’s services. Mr Casper recalled dealing with Mr William Lewski and Mr Joshua Lewski. Mr Casper’s evidence was that, in terms of day‑to‑day matters, he dealt with Mr Joshua Lewski but “in terms of strategic direction, the advice was given to and instructions received from” either Mr William Lewski or from Mr Joshua Lewski together with Mr William Lewski. He was not aware of the capacity in which Mr William Lewski or Mr Joshua Lewski acted when giving instructions or receiving advice.
3. Mr Casper’s evidence was that the Applicant was not a party to the transactions in respect of which he provided legal services. Although he “understood that [the Applicant] would ultimately benefit commercially from the deals that were being worked on in some manner”, he “did not understand the detail or inter‑relationship of all entities within the broader group”. The compliance work Mr Casper performed did not specifically relate to the Applicant.
4. Mr Casper was not aware of any written costs agreement between SBA Law and any member of the Lewski Family Group in respect of the work he performed.
5. Mr Casper was a careful and honest witness. I accept his evidence, though I attach little weight to his understanding of the commercial benefit to the Applicant. He did not profess to have any knowledge of the relationship between the entities in the Lewski Family Group.

### Evidence of Mr Young

1. Mr Young carries on his own practice as a tax consulting lawyer. He was previously the solicitor on the record for this application but ceased to act when it became apparent to him that he was to be a witness in the proceedings.
2. Mr Young commenced performing work in relation to matters concerning the Lewski Family Group in 2000. Mr Young was instructed by Mr William Lewski in July 2004 to prepare notices of objection against assessments issued to members of the Lewski Family Group relating to issues concerning retirement villages.
3. Since 2006, Mr Young has worked on about a dozen tax‐related matters for the Lewski Family Group. Mr Young received instructions from Mr William Lewski.
4. Two invoices annexed to Mr Young’s affidavit were dated 31 August 2006 and 27 October 2006. Each was addressed to “Mr Bill Lewski, Public Accountant”. Deposit slips record Mr Young having received payment of those invoices from accounts in the name of the Applicant. Mr Young had no written costs agreements with the Applicant or any member of the Lewski Family Group.
5. In cross‑examination, Mr Young testified that:

I knew at the time that [William] Lewski was a director of [the Applicant] and he was heavily involved in those matters, so, to that extent, [the Applicant] was involved through his directorship.

[COUNSEL FOR THE COMMISSIONER:] Now, Mr Young, when you say that, you’re inferring from the fact that [the Applicant] — sorry — Mr Lewski was a director of [the Applicant], that [the Applicant], therefore, had some involvement in those proceedings beyond paying your invoices?---Well, yes, because I — I regarded [William] Lewski as my sort of ultimate client in that respect, but he was acting, I understood, the whole way through as a representative of [the Applicant] and [the Applicant] was paying my bills, so I would receive instructions from [William Lewski]. I would provide advice to [William Lewski] and I would bill [the Applicant] and [the Applicant] would pay the bill. So, in my mind, it was [the Applicant] that was involved in all of those matters. I find it — I do accept that it’s hard to get your head around a concept of taking instructions other than from a human being, so there was somebody at the end of the line and that was [William Lewski].

What was said to you that made you think that [the Applicant] was involved at that point in 2006?---Well, initially, [William Lewski] said, “You had better” — well, it was paying the bills for starters, and then [William Lewski] said, “You had better bill [the Applicant]”.

1. In the relevant periods, Mr Young performed services in respect of both litigious and non‑litigious matters. The litigious matters related to the review of objection decisions in respect of income tax assessments issued to Mrs Roslyn Lewski. Although the Administrative Appeals Tribunal initially affirmed the objection decisions, the Full Court allowed Mrs Lewski’s appeal and the Commissioner was ordered to pay 90% of Mrs Lewski’s costs of the appeal as taxed if not agreed. An agreement on costs was reached and the payment from the Commissioner was deposited into a bank account in the name of the Applicant.
2. In relation to that dispute, Mr Young obtained direct instructions from Mrs Lewski on only one occasion, but otherwise received all instructions from Mr William Lewski and all information and advice was provided to Mr Lewski. Mr Young’s evidence was that he was of the understanding that Mr Lewski was authorised to act in respect of the litigation on behalf of the Applicant and considered that he was dealing with Mr Lewski “in that capacity in some respect”.
3. The non‑litigious work performed by Mr Young included matters incidental to Mrs Lewski’s matters in addition to matters unrelated to that litigation. Some of the work performed included advising the Applicant about the taxation treatment of a payment it might receive as compensation for the cancellation of a service agreement.
4. In relation to non‑litigious matters, Mr Young received his instructions from Mr William Lewski, and provided all information and advice to Mr Lewski. Although there was no written costs agreement, all invoices were issued to the Applicant. Mr Young was aware that Mr Lewski was a director of the Applicant and that he “was dealing with him in that capacity in some respect”. Mr Young testified that “there were usually a number of entities involved in each transaction and I was generally dealing with multiple entities simultaneously by providing advice and information to [Mr William] Lewski and receiving instructions”. In cross‑examination, Mr Young accepted that, in relation to the non‑litigious matters, he did not know in what capacity Mr Lewski was acting when providing instructions.
5. In a letter sent to the Australian Taxation Office in December 2019, Mr Young estimated that about $4.14m would be paid by the liquidators of APCHL and that the payment would be received by the Applicant. As at the date of the hearing in this matter, no payment had been received from the liquidators. Mr Young testified in cross‑examination that the statement he made to the Australian Taxation Office in relation to the prospect of payment from the liquidators was not based on his personal knowledge but had been based on instructions he had received from Mr Lewski.
6. I accept Mr Young’s evidence that he dealt with Mr Lewski, that, at some point after October 2006, he issued invoices to the Applicant, and that he was paid by the Applicant. However, I attach no weight to the evidence of his understanding that he dealt with Mr Lewski in his capacity as director of the Applicant or that the Applicant was his client.
7. Even though Mr Young is not an applicant in these proceedings, I regard his evidence to be in the nature of self‑serving evidence and in the nature of advocacy. Mr Young represented the Applicant in these proceedings initially and had represented the Applicant in liaising with the Australian Taxation Office in its audit of the Applicant in respect of the subject matter of this proceeding. His evidence is not that of a disinterested party. His evidence before this Court that he dealt with Mr Lewski in his capacity as director of the Applicant in respect of Mrs Lewski’s taxation dispute is not consistent with the statement he filed with the Administrative Appeals Tribunal where he stated that he “dealt almost exclusively with Mr William Lewski who [he] understood to be acting on behalf of [Mrs Lewski] as her tax agent”. Nor is his evidence supported by contemporaneous documents.
8. As with Mr William Lewski’s evidence, there is an air of artificiality and reconstruction about Mr Young’s evidence of the basis on which he provided advice to, and received instructions from, Mr Lewski.

# STATUTORY FRAMEWORK

1. Under s 9‑5 of the *GST Act*, you make a “taxable supply” if:

(a) you make the supply for \*consideration; and

(b) the supply is made in the course or furtherance of an \*enterprise that you \*carry on; and

(c) the supply is \*connected with the indirect tax zone; and

(d) you are \*registered, or \*required to be registered.

However, the supply is not a \*taxable supply to the extent that it is \*GST‑free or \*input taxed.

1. Under s 11‑5 of the *GST Act*, you make a “creditable acquisition” if:

(a) you acquire anything solely or partly for a \*creditable purpose; and

(b) the supply of the thing to you is a \*taxable supply; and

(c) you provide or are liable to provide, \*consideration for the supply; and

(d) you are \*registered, or \*required to be registered.

1. Section 11‑10 defines the concept of an “acquisition” and relevantly provides:

(1) An ***acquisition*** is any form of acquisition whatsoever.

(2) Without limiting subsection (1), ***acquisition*** includes any of these:

(a) an acquisition of goods;

(b) an acquisition of services;

(c) a receipt of advice or information;

(d) an acceptance of a grant, assignment or surrender of \*real property;

(e) an acceptance of a grant, transfer, assignment or surrender of any right;

(f) an acquisition of something the supply of which is a \*financial supply;

(g) an acquisition of a right to require another person:

(i) to do anything; or

(ii) to refrain from an act; or

(iii) to tolerate an act or situation;

(h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).

1. Section 11‑15 relevantly provides:

(1) You acquire a thing for a ***creditable purpose*** to the extent that you acquire it in \*carrying on your \*enterprise.

(2) However, you do not acquire the thing for a creditable purpose to the extent that:

(a) the acquisition relates to making supplies that would be \*input taxed; or

(b) the acquisition is of a private or domestic nature.

1. As Edmonds J said in ***Professional Admin Service Centres*** *Pty Ltd v Federal Commissioner of Taxation* [2013] FCA 1123; (2013) 94 ATR 445 at 453 [37]:

The concept of “enterprise” is central to the GST Act; the carrying on of an enterprise is the first requirement to trigger the obligation to register (s 23‑5(a) of the GST Act); the second requirement to the making of a taxable supply (s 9‑5(b) of the GST Act); and a fundamental requirement to the entitlement to credit for input tax (s 11‑15(1) of the GST Act).

1. The term “enterprise” is relevantly defined in s 9‑20 of the *GST Act* as follows:

(1) An ***enterprise*** is an activity, or series of activities, done:

(a) in the form of a \*business; or

(b) in the form of an adventure or concern in the nature of trade; or

…

(g) by the Commonwealth, a State or a Territory, or by a body corporate or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory…

(2) However, ***enterprise*** does not include an activity, or series of activities, done:

…

(c) by an individual (other than a trustee of a charitable fund, or of a fund covered by item 2 of the table in section 30‑15 of the ITAA 1997 or of a fund that would be covered by that item if it had an ABN), or a \*partnership (all or most of the members of which are individuals), without a reasonable expectation of profit or gain…

1. The word “business” is defined in s 195‑1 of the *GST Act* as including “any profession, trade, employment, vocation or calling but does not include occupation as an employee”. As Edmonds J said in *Professional Admin Service Centres* at 453 [39]:

Australian income tax law jurisprudence emphasises the existence of a profit‑making purpose, repetition and regularity, the conduct of activities using business‑like methods, the volume of activity and the existence of a significant commercial purpose as relevant indicia to a finding that the activity or activities constitute a business.

1. Section 9‑20(1)(b) extends the concept of an “enterprise” beyond a business to include an adventure or concern in the nature of trade. The entry into an adventure in the nature of trade imports an element of commerciality, involving a consideration of the context in which the transaction was entered into and the exercise of business skill and judgment, which will usually include a consideration of the benefits of the transaction to the taxpayer: See, eg, *Federal Commissioner of Taxation v Visy Industries USA Pty Ltd* [2012] FCAFC 106; (2012) 205 FCR 317 (***Visy USA***)*.* Acommercial venture in the nature of trade implies that it be entered into for a commercial purpose, including the purpose of profit‑making: *Professional Admin Service Centres* at 453 [39] (Edmonds J), citing *Edwards (Inspector of Taxes) v Barnstow* [1956] AC 14; *Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199 and *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 344–5 (Mason CJ, Brennan and Gaudron JJ), 351–2 (Dawson J), 360 (McHugh J).
2. The fact that the outcome of a particular activity may be dependent, in part, on chance does not negate a business activity being carried on: *Visy USA* at 333 [58] (Edmonds, Greenwood and Robertson JJ). A transaction may have the character of an isolated venture in the nature of trade notwithstanding that a party to the contract does not know at the time of entering into the contract that the terms of the contract will ultimately be to that party’s benefit. As the Full Court said in *Visy USA* at 332 [51] (Edmonds, Greenwood and Robertson JJ):

[T]here will be many cases where a party to a contract does not know, at the time of entering into the contract, whether the terms of the contract will ultimately be to its commercial advantage. That will not impede a conclusion that the contract, from that party’s point of view, was a commercial transaction to enter into or, if it be the case, that the party entered into the contract with a not insignificant purpose of profit‑making, provided the terms of the contract accommodate the potentiality for realisation of profit if circumstances contemplated by the contract eventuate; then, while the contract might be described, from that party’s point of view, as many other things, it cannot be described as not commercial.

1. However, it is difficult to see how an isolated activity that does not form part of a wider business can constitute an adventure or concern in the nature of trade if the potential for profit is so remote as to be fanciful. Although s 9‑20(2) excludes activities carried on by individuals or partnerships without a reasonable expectation of profit or gain from constituting an enterprise, it is difficult to see how the concept of an adventure or concern in the nature of trade extends to an isolated transaction that has no prospect of profit, irrespective of whether the activity is carried on by an individual or corporate trustee.
2. As Edmonds J recognised in *Professional Admin Service Centres* at 453–4 [40], the practical consequence of the statutory framework is that the Applicant will only be entitled to an input tax credit in respect of its payment of invoices for the provision of legal services if those services were acquired by the Applicant by way of taxable supplies and were acquired by the Applicant in carrying on an enterprise. The Commissioner contends that the Applicant has not established either requirement and is therefore not entitled to the input tax credits claimed; but, if it has established both, the acquisition relates to making supplies that would be input taxed, namely, financial supplies: s 40‑5(1) of the *GST Act*.

# ANALYSIS OF ISSUES

1. The central issue in this proceeding is whether the Applicant is entitled to input tax credits in respect of its payment of invoices for the provision of legal and other professional services. The resolution of this issue involves the determination of two sub‑issues:
2. whether the Applicant acquired anything by way of taxable supplies; and
3. whether the Applicant’s acquisitions were made in carrying on an enterprise.

## Whether the Applicant acquired anything by way of taxable supplies?

1. The Applicant is not entitled to an input tax credit notwithstanding its payment of the relevant invoices unless it made a creditable acquisition. This requires the Applicant to have acquired services under a taxable supply from the advisors concerned.
2. Under the *GST Act*, one set of acts may constitute two or more different supplies of services and may give rise to two or more different acquisitions: *Secretary,* ***Department of Transport*** *(Vic) v Commissioner of Taxation* [2009] FCA 1209;(2009) 261 ALR 39 at 48–9 [42(6)] (Gordon J); on appeal, [2010] FCAFC 84; (2010) 188 FCR 167 (***Department of Transport FC***). Those proceedings concerned the supply of transport services by taxi cab operators to passengers with disability under Victoria’s Multi Purpose Taxi Program (**MPTP**).
3. On appeal in *Department of Transport FC*, in reaching the conclusion that s 11‑5(a) was satisfied and that the **Department** of Transport had made an acquisition, the majority (Kenny and Dodds-Streeton JJ) said at 180 [46]–[47]:

[46] Once the trip became an MPTP trip, the MPTP Member was carried effectively at the request of the [Department]…

[47] Once the trip became an MPTP trip, the [Department] assumed liability to make a MPTP Payment. As Senior Counsel for the [Department] put it, every time a Member MPTP Card was inserted into the EFTPOS terminal and the trip authorised, it was as if the [Department] was sitting in the taxi cab too, because the authorisation told the driver and the passenger that the [Department] would pay the MPTP component of the fare … In this circumstance, the [Department] acquired from the taxi cab operator a service, being the transport of the MPTP Member, which the [Department] sought when the Member MPTP Card authorised the trip as a MPTP trip.

1. In considering whether there had been a supply made to the Department for the purposes of s 11‑5(b), their Honours explained (at 181–2 [56]) that the taxi cab operator had made a taxable supply of transport of the MPTP Member to the Department in addition to the supply of transport to the MPTP Member; firstly because the taxi cab operator was effectively doing what the Department had asked him to do when the Member MPTP Card was validated and the MPTP trip was authorised, and secondly because the supply of the service of transporting the MPTP Member to the Department enabled the Department to fulfil its objects under the *Transport Act 1983* (Vic) and to perform its functions.
2. In *Professional Admin Service Centres,* the issue before Edmonds J was whether the applicant was entitled to input tax credits in respect of its payment of invoices for the provision of legal services in the defence of Mr Felson’s criminal proceedings. Although it could not be doubted that the lawyers supplied legal services to Mr Felson and that he acquired those services under a taxable supply, unless the applicant also acquired those services under a taxable supply from the lawyers concerned, the applicant was not entitled to an input tax credit, notwithstanding its payment of the relevant invoices. The applicant’s entitlement to input tax credits thus required a conclusion that the lawyers in supplying legal services to Mr Felson also made a supply to the applicant.
3. In considering when a single set of acts might constitute two or more supplies, Edmonds J said (at 454 [43]):

It is not possible, indeed it would be dangerous, to generalise the circumstances when this might occur, but in the present context, it would at least require an arrangement between the applicant and the lawyers whereby the lawyers were engaged by the applicant to provide legal services to Mr Felson and, by doing so, provided legal services to the applicant as well. I have great difficulty in comprehending how this might occur although I hasten to add that my difficulty in this regard is not to be taken as concluding that it could not occur.

1. The terms of the Litigation Funding Agreements here provide for the Applicant to pay each Beneficiary’s Litigation Costs but do not impose any obligation or otherwise provide for the Applicant to retain the advisors. The contemporaneous evidence of any arrangement between the Applicant and the lawyers pursuant to which legal services would be provided to the Applicant was limited to the fee agreements and engagement letters. The Court accepts the oral evidence of the advisors that they issued invoices to the Applicant and that they considered the Applicant to be liable for the payment of those fees.
2. The Commissioner contended that the payments made by the Applicant to the Beneficiaries’ legal representatives were consideration for the legal services that were supplied to the Beneficiaries. It was contended that the Applicant had an administrative arrangement with the Beneficiaries to pay the invoices that were rendered by the lawyers. A person who enters into a reimbursement obligation does not make an acquisition of the supply, the cost of which is to be reimbursed. The Commissioner contended that the analysis of Edmonds J in *Professional Admin Service Centres* was applicable here and the *Department of Transport* case was readily distinguishable.
3. In oral submissions, the Applicant contended that the supply of the Litigation Services was a supply to two parties at the same time — to the Beneficiary the party to the proceedings and to the Applicant, “because it [was] through Mr [William] Lewski that that work [was] done, apart from the fact that [there was] a contractual arrangement with the [Applicant]”. The Applicant appeared to contend that the position in respect of the Other Services was somewhat different. In respect of the Other Services, it was suggested, based on the statements made by Mr William Lewski, that the service was provided exclusively to the Applicant and the Applicant in turn formulated advice to the relevant Lewski Family Group member.
4. The facts of this case are distinguishable from those considered by Edmonds J in *Professional Admin Service Centres*. There is evidence in this case of a pre‑existing framework between the Applicant and the legal service providers under which the Applicant was liable to make payments to the legal service providers as consideration for services provided to the Beneficiaries. The engagement arrangement with the legal service providers (whether reduced to writing or not) was an arrangement to which the Applicant was a party. Unlike the facts in *Professional Admin Service Centres*, there was more here than the fact that, as a practical matter, the legal service providers looked to the Applicant for payment of their fees.
5. The Court does not accept the description provided by Mr William Lewski of the nature of the Applicant’s operations. The Court does not accept the Applicant’s contention that the position with respect to the Other Services was different or that those services were provided exclusively to the Applicant. Although the Court does not accept that the Applicant instructed, substantively engaged with or received advice from the legal service providers for its own account (through Mr William Lewski or otherwise), the Applicant had a contractual right to request that the lawyers provide legal services to the Lewski Family Group member who was the party to the relevant transaction or court proceeding. The provision of legal services (whether they be Litigation Services or Other Services) to the relevant Beneficiary also discharged the obligation of the service provider to the Applicant.
6. As the High Court said in *Federal Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49; (2014) 254 CLR 376 at 390 [34] (French CJ, Hayne, Kiefel, Gageler and Keane JJ):

The concept of supply as employed in the GST Act is of wide import. Absent modification of the general operation of the GST Act through application of a special rule, there is a supply whenever one entity (the supplier) provides something of value to another entity (the recipient). Section 9‑10(1), the amplitude of which is highlighted by ss 9‑10(2) and 9‑10(3), serves to emphasise that the something can be anything and can be provided by any means. The expansive language of ss 9‑10(2)(g) and 9‑10(3) serves in addition to emphasise that the thing provided can be provided by means of the supplier refraining from acting, or by means of the supplier tolerating some act or situation, just as it can be provided by means of the supplier doing some act.

1. Gordon J, at first instance in *Department of Transport*,said (at 47 [38]):

As has been said on numerous occasions, acquisition by an entity in carrying on its enterprise will normally consist of the supply of goods or services to that entity. However, “it may equally well consist of the right to have goods delivered or services rendered to a third party” where “[t]he grant of such a right is itself a supply of services”: *Customs and Excise Commissioners v Redrow Group Plc* [1999] 2 All ER 1 at 12; [1999] 1 WLR 408 at 418 (*Redrow*).

1. Her Honour went on to say (at 48 [41]):

Ultimately, we are driven back to the words of the GST Act and the fact that even in the case of multiple supplies, we are concerned with a limited set of relevant concepts: a taxable supply to the taxpayer for consideration (see, for example, the discussion of the proper characterisation of what was alleged to be two taxable supplies in *Federal Cmr of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342; 246 ALR 448; [2008] HCA 22 at [42] and an acquisition for a creditable purpose.

1. Justice Gordon then set out a summary of seven applicable principles (at 48–9 [42]), three of which were:

(4) An acquisition can include the acquisition of services or the acquisition of a right to require another person to do anything, refrain from an act or tolerate an act or situation: s 11‑10.

(5) The concepts of taxable supply and acquisition are related. In other words, a taxpayer makes an acquisition if the taxpayer is the recipient of the supply: seefor example *Sterling Guardian Pty Ltd v Cmr of Taxation* (2006) 149 FCR 255; 228 ALR 712; [2006] FCAFC 12 at [15]. As a result, to determine the eligibility of entitlement to input tax credits, therelevant perspective is the standpoint of the entity: compare *Redrow* at All ER 6; WLR 412.

(6) There is nothing in the GST Act or its explanatory material to prohibit one set of acts constituting two or more supplies. Relevantly, this may include “the right to have goods delivered or services rendered to a third party … [where] the grant of such a right is itself a supply of services”: *Redrow* at All ER 11; WLR 418; *Plantiflor* at [32], [50]and [55]; *Ashfield District Council v Customs and Excise Commissioners* [2001] STC 1706.

1. Nothing in the decision of the majority on appeal in *Department of Transport FC* cast doubt on these statements of principle. They generally flow from the breadth of the term “acquisition” by virtue of its definition in s 11‑15.
2. In the present case, by the arrangement agreed between the Applicant and the legal advisors, services were provided to the Beneficiaries at the effective request of the Applicant. By the terms of the arrangements with the advisors, the Applicant acquired a right to require the legal advisor to provide legal services to the Beneficiaries. The Applicant acquired from the legal advisor who provided legal services to the Beneficiaries a service — the provision of legal advice or services to the Beneficiaries. That service was acquired by the Applicant in implementation of the arrangement it had agreed with the legal service providers. When legal services were provided to the Beneficiaries and invoiced to the Applicant, the Applicant became liable for the payment. There was an acquisition by the Applicant each time legal services were provided to the Beneficiaries. The occasion for the payment was the provision of legal services to the Beneficiaries. It was at that point that the Applicant may be said to have assumed a liability to pay for the legal services. Although it was the relevant Beneficiary or their authorised representative (generally, Mr William Lewski) who instructed the legal service providers, the advice and service was provided by the legal service provider effectively at the request of the Applicant. In these circumstances, the Applicant acquired from the legal service providers a service, being the provision of legal advice or legal services to the Beneficiaries.
3. There was an acquisition by the Applicant for the purposes of s 11‑5(a) of the *GST Act* and the supply to the Applicant was a taxable supply within the meaning of s 11‑5(b).
4. However, as explained below, the fact that the Applicant may have made an acquisition from the lawyers does not mean that the Applicant’s acquisition was for a creditable purpose. Pursuant to s 11‑15(1), a thing is acquired for a creditable purpose to the extent that it is acquired in carrying on an enterprise. It is therefore necessary to examine the nexus between the acquisition and the Applicant’s enterprise.

## Whether the Applicant’s acquisitions were made in carrying on an enterprise?

1. The Applicant’s description of its relevant enterprise was somewhat fluid and amorphous. By its written submissions, it was contended that the Applicant carried on an enterprise which involved it managing litigation, tax, legal, regulatory compliance and commercial matters for the Lewski Family Group and/or involved the procurement of legal services for members of the Lewski Family Group. The Applicant received distributions, fees and dividends. It was submitted that the Applicant acquired the Litigation Services and Other Services while carrying on its enterprise of providing services and information to the members of the Lewski Family Group.
2. Although the Commissioner did not dispute that the Applicant was engaged in carrying on some form of enterprise which involved the provision of management‑related services to the Reynolds Road Property Trust (involving property syndication) and in respect of Glendale RV Syndication Pty Ltd, he contended that the nature and extent of the Applicant’s enterprise did not extend to include its litigation funding activities or the provision of consulting or advisory services to which the Litigation Services and Other Services related.
3. In the *Department of Transport* case, given that the taxpayer was a State government department, it was not necessary or relevant to consider whether the Department was carrying on a form of business or adventure in the nature of trade. There had been no dispute that the MPTP was an activity or series of activities done by the State through one of its executive arms, the Department and was, therefore, an enterprise within s 9‑20(1)(g) of the *GST Act*: *Department of Transport* at 700 [37] (Gordon J). The connection between the taxi transport services acquired and the statutory objects and functions of the Department explained the acquisition by the Department. The taxi cab operator provided the Department with a benefit in line with its statutory objects; namely, the transportation of passengers with disability.
4. In the present case, it is necessary to consider the extent to which the Applicant made its acquisitions in carrying on its enterprise. Contrary to the Applicant’s contention, it is not sufficient that an acquisition be made “while carrying on an enterprise”. The phrase “in carrying on” requires more than a temporal nexus. To use the words of Gordon J in *Department of Transport* at 705 [58] (adopting the language of Lord Millett in *Customs and Excise Commissioners v Redrow Group Plc* [1999] 1 WLR 1999),the goods or services acquired must be used or to be used for the purposes of the enterprise.
5. The nature and extent of the enterprise must be identified with some precision. Whether a taxpayer is engaged in an enterprise (more specifically, a business) is a matter of fact and degree and requires a “wide survey and exact scrutiny” of the taxpayer’s activities: *Federal Commissioner of Taxation v Montgomery* [1999] HCA 34; 198 CLR 639 at 663 [69] (Gaudron, Gummow, Kirby and Hayne JJ), quoting *Western Gold Mines NL v Commissioner of Taxation (WA)* (1938) 59 CLR 729 at 740 (Dixon and Evatt JJ); ***Watson*** *v Federal Commissioner of Taxation* [2020] FCAFC 92; (2020) 277 FCR 253 at 263 [36] (Kenny, Davies and Thawley JJ).
6. Edmonds J considered in *Professional Admin Service Centres* that “Australian income tax law jurisprudence has emphasised the existence of a profit‑making purpose as a necessary indicia to a finding that activities amount to a business”: at 457 [60]. The Full Court in *Watson* observed that it is not “necessarily determinative that the activities are not conducted by a taxpayer with a view to making a profit” and that “[a] profit motive is not necessary for the activities to be characterised as a business”: at 263 [36] (Kenny, Davies and Thawley JJ), citing the plurality in *Federal Commissioner of Taxation v* ***Stone***[2005] HCA 21; (2005) 222 CLR 289 at 305 [55] (Gleeson CJ, Gummow, Hayne and Heydon JJ). The High Court in *Stone* stated: “[i]f a taxpayer’s motives are idealistic rather than mercenary, the conclusion that the taxpayer is engaged in a business may still be reached”: at 305 [55] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
7. That statement about motive was made in circumstances where the taxpayer had in fact derived income from the activities — she had turned her sporting prowess to account. As the High Court said at 305 [54] (Gleeson CJ, Gummow, Hayne and Heydon JJ):

Although [the taxpayer] did not seek to maximise her receipts from prize money, preferring to seek out the best rather than the most lucrative competitions, her pursuit of excellence, if successful, necessarily entailed the receipt of prizes, increased grants, and the opportunity to obtain more generous sponsorship arrangements.

1. It does not follow that the conduct of activities which are not inherently capable of generating income constitute the carrying on of a business.
2. For the reasons discussed below, there is an insufficient connection between the Applicant’s acquisition and the achievement of some commercial purpose of the Applicant to stamp the acquisition by the Applicant as being made in carrying on an enterprise.
3. The Applicant has claimed an entitlement to input tax credits in respect of its payment of invoices for legal and professional services that did not relate to proceedings or transactions to which it was a party. The Applicant contended that the nexus between the acquisition of the services that it acquired and its enterprise existed because it acquired those services in order to enable it, in turn, to provide advisory services to the members of the Lewski Family Group as part of an enterprise.
4. The Court finds that the Applicant did not carry on a business of providing litigation consulting services or a business of receiving and disseminating advice or formulating and making recommendations based on advice it received to members the Lewski Family Group in respect of litigation proceedings. The evidence does not support a finding that the Applicant carried on a business of providing or disseminating legal advice or of managing professional services for members of the Lewski Family Group. The Court does not have before it contemporaneous records that satisfy it that the Applicant’s activities extended to it providing such services. There was no acquisition of services by the Applicant in carrying on an enterprise of providing services and information to the members of the Lewski Family Group.
5. Nor is there evidence to support a conclusion that the engagement of service providers or the funding of the provision of the Litigation Services or Other Services was made in the course of an enterprise involving the Applicant providing procurement services for the members of the Lewski Family Group. There is no evidence that the Applicant was paid for any such procurement or funding service, or that it otherwise provided such a procurement service or funding service in a way from which it anticipated to earn a return.
6. The Litigation Funding Agreements do not support a finding that the Applicant carried on an enterprise involving the provision or procurement of litigation‑related consultancy or advisory services. The obligation of the Applicant under those agreements was to pay invoices. The Litigation Funding Agreements did not provide for the Applicant to provide consulting or advisory services, or require it to arrange for the provision of such services.
7. Nor do the Litigation Funding Agreements themselves evidence a concern in the nature of trade. The Litigation Funding Agreements required the Applicant to incur significant costs which it needed to fund without an entitlement to fees for a service. The Applicant had to borrow in order to fund its obligations under the Litigation Funding Agreements. The only return to the Applicant under the terms of the Litigation Funding Agreements depended on the Beneficiary being paid Litigation Proceeds. Just how the Applicant could be expected to earn a return from proceedings in which the family member or affiliated entity was either a defendant or respondent making no cross‑claim as to damages, and/or a party to a taxation dispute in the Administrative Appeals Tribunal in respect of which no costs order could be made, is not apparent. Even if a costs order were to be made in favour of a Beneficiary, such a costs order would be unlikely to cover the Beneficiary’s actual (as opposed to taxed) costs. Even in the case of the Daytree creditor claim proceedings, the prospect of any return to the Applicant requires the liquidators to pay an amount in excess of $5m. As was the case in *Professional Admin Service Centres* at 455–6 [51] (Edmonds J), here, the prospect of the Applicant ultimately making a return on any of the Litigation Funding Agreements was so remote that it had no meaningful nexus to the services that were supplied.
8. As set out above, I do not accept that, prior to the execution of the Litigation Funding Agreements in 2017, the payment of lawyers’ invoices had been done in a systematic manner on a commercial basis. Apart from the fact that the Litigation Funding Agreements were entered into repeatedly, I do not accept that the agreements were entered into in a systematic and organised manner which stamped them as bearing a commercial character. There is no contemporaneous evidence as to the manner in which the Applicant (or any director) came to decide to enter into any of the Litigation Funding Agreements or came to agree to pay the invoices. No trustee resolutions, no accounts, no financial statements or board papers relating to or explaining the basis on which those agreements were entered into or payments made were in evidence. As documented, the Litigation Funding Agreements are not like the foreign exchange transaction in *Visy USA*,where the prospect of profit was evident from the terms of the agreement and the surrounding circumstances. There is no evidence here of a contemporaneous consideration by the Applicant of the basis upon which it could, or the probability that it might, earn a return from any of the Litigation Funding Agreements or from any informal arrangement which preceded the execution of those agreements. As explained above, the Court does not accept that Mr William Lewski formed a view, at the time the invoices were paid by the Applicant, about the prospect of the Applicant receiving a return.
9. Although the fact that the Applicant is the trustee of a family trust cannot be conclusive of the question whether a business is carried on by the Applicant (see Hill J in *Federal Commissioner of Taxation v Radnor Pty Ltd* (1991) 102 ALR 187 at 200, cited with approval by the Full Court in *Watson* at 263 [37] per Kenny, Davies and Thawley JJ),its capacity as a trustee is not irrelevant to the characterisation of its activities. As trustee, the Applicant had the power to apply trust funds for the benefit of the beneficiaries of the trust and was not obliged, when doing so, to apply funds only with a view to making a profit from activities carried out for the benefit of the beneficiaries. As the Full Court said in *Watson* at 264 [39] (Kenny, Davies and Thawley JJ), the context does not imbue the activities of the Applicant with a business or commercial character.
10. The Applicant contended that it was not unusual for intra‑family group dealings to be conducted informally and it was not for the Commissioner to dictate how the Applicant might choose to conduct its affairs. So much may be accepted. However, if a taxpayer chooses to conduct its affairs informally, there may be practical consequences for its ability to prove its case: *Stone v Federal Commissioner of Taxation* (1918) 25 CLR 389 at 393 (Isaacs J). Such may be said to be the case here.

# Conclusion

1. For these reasons, the Applicant is not entitled to input tax credits in respect of its payment of invoices for the provision of the Litigation Services and Other Services. Any acquisition by the Applicant was not made in carrying on an enterprise as defined in s 9‑20 of the *GST Act*.
2. This conclusion makes it unnecessary to consider whether, if the Applicant acquired legal services by way of taxable supplies in carrying on an enterprise, the acquisitions relate to making supplies that would be input taxed by reason of being financial supplies.
3. As noted above, this conclusion also makes it unnecessary to resolve the disagreement between the parties as to whether the Applicant is entitled to now claim input tax credits in an amount in excess of the adjustment made by the Commissioner in the quarter ended 30 June 2015. The parties made submissions concerning the application of s 14ZV of the *TAA* to amended assessments issued in a single notice of decision (and therefore deemed by s 14ZR of the *TAA* to be a single taxation decision). The Court notes that it was not addressed on the application of s 29‑10(4) of the *GST Act* which, as Edmonds J observed in *Professional Admin Service Centres* at 449 [7], operates to deem an input tax credit not to be attributable to a tax period if the GST return for that tax period does not take that input tax credit into account.
4. The application is to be dismissed with costs.

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| I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Hespe. |

Associate:

Dated: 24 March 2023