David W Marks QC
Barrister-at-Law

Inns of Court
16th Level 107 North Quay
Brisbane Qld 4000

Tel: (07) 3236 5477
Fax: (07) 3236 1147
Email: dmarks@qldbar.asn.au

Sale of land & GST – what the cases tell us

By David W Marks QC

Table of Contents

1. I intend to take us down some dark alleyways: to cases often not reported, and certainly to cases unnoticed.
2. The GST is a transactional tax. Thus there are disputes about those transaction (and advice received about the transactions).
3. Therefore, we are going to consider GST, as it appears largely in the State courts. We will divert into the Federal Court of Australia, and the Administrative Appeals Tribunal, only where the cases are mentioned are usually not read, or not read for the point noticed here.

1 Adventure in the nature of trade

1.1 Davan Developments v HLB Mann Judd[1]

4. This is an intermediate appellate court decision, concerning "adventure or concern in the nature of trade". The issue arose out of allegations of negligence, which the District Court of Queensland, and the Queensland Court of Appeal, found to be baseless.
5. The case reminds us that a project, which begins in a way that does not amount to an adventure in the nature of trade, may become such an adventure when the terms of the arrangement between the parties change.

1.1.1 Facts

6. Davan Developments Pty Ltd was controlled by Mr Pearse. The company appears to have had a separate land development business, but that did not prove material in this case.
7. In 2004, Davan acquired land, originally with a second company ("TTK", controlled by Mr Kearney, Mr Pearse's friend).
8. The land was 2 adjoining lots in East Brisbane.

[1] [2015] QDC 121 (Dorney DCJ); [2016] QCA 90 (Gotterson, Morrison & P McMurdo JJA). Whilst I may have had a connection with a related matter, some years ago, I have no recollection of the details. I am relying instead on maps and on the reasons for judgment, for the facts.

9. Prior to acquisition of the land, Mr Kearney had proposed amalgamation of the lots, and re-sub-division into 3 lots. The resulting lots would have river frontage and a street frontage to Laidlaw Parade.

10. Mr Kearney also spoke with his uncle, Mr Collins, who had expertise as a property developer.

11. The three men decided to pursue the development. They intended that each would take one of the 3 resulting lots, in order to build a house as his residence. From time of purchase of the land, they had already agreed which proposed lot would be transferred to which man. Mr Collins was to get lot 1; Mr Kearney, lot 3; and Mr & Mrs Pearse, lot 5.

12. The purchase price, of $4.1M, was funded by a bank loan. The loan was guaranteed by the 3 men. On occasions, one of the men had to pay an amount of development costs, but was always reimbursed by Davan.

13. There was no written agreement between the men. At trial, it was uncontroversial that the men had agreed that:

    (a) Davan and TTK were to purchase and hold the original lots;

    (b) Following settlement, the existing structures would be demolished and removed to create a vacant site;

    (c) Council approval would be sought to subdivide into three new properties;

    (d) Following Council approval, the three new properties would be developed;

    (e) The three new properties would be addressed 1, 3 and 5 Laidlaw Parade, East Brisbane;

    (f) The men were to each have one of the three new properties designated to them, with the designated lot to be transferred to each of them respectively by Davan and TTK on completion of the development;

(g) The three new properties following transfer were to be used by their respective owners to construct a family home or for other purposes as wished by the owners;

(h) The men each had a first right of refusal over one designated lot against the Davan and TTK at a price representing a share of the costs associated with the development;

(i) The men were each to bear equally the costs of the development by way of sharing in the repayment of the bank loan drawn down by Davan to pay each of the men, or associated entities, for their respective contributions to the development;

(j) Mr Collins, a director of a civil construction company, was to contribute his construction expertise to the development;

(k) Mr Kearney was to contribute his real estate experience and contacts to assist in negotiation of contracts and trades that were involved in providing structural, civil, construction and demolition works to the development; and

(l) Mr Pearse was to assist with his experience in property development and to contribute his expertise in arranging the finance for the development.

14. Each man engaged an architect to design a house for his proposed lot.

15. In 2005, Davan became sole owner of the land. The men's intention, as to ultimate use of the property, remained unchanged.

16. But the development took longer than anticipated. Mr Collins told the others he desired to withdraw, and not acquire his lot. The lot was sold in 2007 for $2.6M, on the open market. The proceeds were used to pay down bank debt, and a balance retained to pay development expenses. Mr Collins saw none of it.

17. A couple of months later, lot 3 was transferred to Mr & Mrs Kearney for a stated consideration of $1.6M.

18. Those two transactions were the subject of the current proceedings. The company returned them as taxable supplies for GST purposes; and returned them as on income account for income tax purposes.

19. The Commissioner of Taxation became interested. There was a difference between the two prices charged. There was an issue, under the latter transaction, under Division 75 of the GST Act. The issue was whether the GST-inclusive market value ought to have been used, if Mr Kearney was an associate.

20. An objection contended, against the GST assessment, that there was no supply in the course or furtherance of an enterprise, and that Mr Kearney was not an "associate".

21. The matter was only settled after an application was made to the Administrative Appeals Tribunal, and then on a commercial basis, accepting the GST assessment on the basis of consideration of just $1.6 M on the second transaction.

22. The company sued its accountants. A key point was that the company disagreed, now, with the form of the returns prepared and filed for it.

1.1.2 Arguments on appeal – relevant to GST

23. The Court of Appeal upheld Dorney DCJ's finding that there was no trust of the land, and this removed a deal of complexity.

24. Nevertheless, this left an argument that the company was conducting no enterprise, given the arrangements originally agreed. The respondent pointed to the change in the arrangements.

25. In upholding the District Court, the Court of Appeal said (emphasis added):[2]

> *[51] However the difficulty for the appellant in contending that there was no enterprise in the course of which this sale was made was that the argument depended upon the effect of an agreement between the investors which was no longer in place. Absent that agreement between the investors, as pleaded and proved by the appellant, there could have been no basis for disputing the existence of an enterprise in this project. Whilst that agreement was in place there was a*

[2] [2016] QCA 90 (P McMurdo JA, Gotterson & Morrison JJA concurring)

> *sound basis for doing so. But as the trial judge found, the agreement was not in place at least from late 2006.*
>
> *[52] As it happened, the land designated for Mr Kearney was sold to him. But as I have discussed, it was not sold according to the terms of the original agreement because it was sold at a price fixed by an agent's estimate of value, rather than for an amount representing Mr Kearney's one-third contribution to the costs of the development.*

26. I note Dorney QC DCJ had said, of the first arrangement, that:[3]

> *[39] As I have just canvassed, I accept that each of the relevant contributing parties to the purchase of the Laidlaw land did engage an architect from an early stage and that, at least for some time, each had the intention that the ultimately developed subdivided Lot would be used as their personal residence.*
>
> *[40] I conclude, therefore, as did Mr West [a solicitor, who had acted in the ATO dispute for the plaintiff and who was called as a witness in the plaintiff's case], that there is sufficient evidence to show that Mr and Mrs Pearse, Mr Kearney and Mr Collins did not intend that the subdivision and subsequent transfer of the Laidlaw land would be part of a business operation, or "enterprise", but, rather, part of a "limited development" (which Mr West described as being "in the sense of wanting to simply subdivide to have three lots so that they could build houses on the properties").*

27. The plaintiff had also argued that, by the time of the sale to Mr Kearney, the company carried on an enterprise, but one which excluded the Kearney land.

28. The Court of Appeal said (emphasis added):

> *[54] … By November 2007, the appellant was concerned to make a profit or at least minimise a loss and it is to be inferred that the appellant acted with that objective when agreeing upon Mr Kearney's price. As the ATO noted in its audit report, in giving its reasons for a conclusion that this was a sale for an enterprise:*
>
> > *"That [the appellant] took steps around November 2007 to obtain a market appraisal from Ray White Bulimba indicates that the transfer of Lot 2 was conducted in a business like manner and that [the appellant] considered it part of [its] business."*
>
> *[55] The appellant was not to be indemnified by the three investors. Mr Pearse as its director may have considered that he was obliged to offer this lot to Mr Kearney before taking it to the market. But again the sale was made on the apparent understanding that the price represented the market value.*

29. The case is focussed upon the conduct and duties of professional advisers. Nevertheless, the holdings of an intermediate appellate court are of practical use.

---

3 [2015] QDC 121 (Dorney DCJ)

1.1.3 Conclusions

30. The Court of Appeal was prepared to contemplate that the company was not conducting an enterprise, where its sole function was to hold the property, act as borrower, develop, and transfer to the participants at cost, for use as their dwellings.

31. The Court did not need to decide whether that was correct. Once the arrangement changed, it was an adventure in the nature of trade.

1.2 Bryxl

32. I remain puzzled by *Re Bryxl Pty Ltd and Commissioner of Taxation*.[4]

33. Recall that it is possible to be "carrying on" enterprise, even during its commencement.[5] This case decided that the preliminary work, undertaken toward property development activity, should be characterised as done prior to the commencement of an enterprise.

34. We previously had decisions of the Federal Court and Full Court in *Russell v Commissioner of Taxation*, to illuminate the way.[6] Since each case is essentially fact-based, another practical example from the Administrative Appeals Tribunal is welcome.

1.2.1 The project

35. In *Bryxl*, the taxpayer signed a contract to buy land, for $2.035M, inclusive of GST of $185,000. A deposit of $185,000 was payable. The balance was payable on settlement.

36. The Tribunal was left in a state of uncertainty about aspects of the proposed development. The contract, itself, was not produced, but only self-contradictory parts of the alleged document. There was no hard proof of payment of the deposit. The oral evidence tended

---

4 [2015] AATA 89; 97 ATR 214;

5 Definition of *carrying on*, s 195-1 of the *A New Tax System (Goods and Services Tax) Act* 1999

6 Before Logan J, [2009] FCA 1224; (2009) 74 ATR 466; [2009] ATC ¶20-143. Before the Full Court, [2011] FCAFC 10; (2011) 190 FCR 449; (2011) 274 ALR 545; (2011) 79 ATR 315; 2011 ATC ¶20-240

to contradict the abstracted document. The case put by the self-represented applicant was a shambles, at best.[7]

37. Despite evidence that the contract provided for settlement in a year, it had been 3½ years without settlement. And the claimed planning permit must have expired in the absence of progress with subdivisional approval, under the Victorian laws applicable. The town planner did not seem to have been engaged to secure the subdivision. Finally, it seemed that the taxpayer had been unable to raise money to enable settlement.

38. It was claimed that the taxpayer had in view a quick profit by on-sale to a syndicate of investors. But there was no satisfactory evidence of this, especially since the document produced on that account did not mention the taxpayer.

1.2.2 Not carrying on an enterprise

39. Mr Fice, Senior Member, having adverted to the above points, and much more, concluded (emphasis added):

> *58 The obvious conclusion which I must reach is that Bryxl has not been able to obtain the funds necessary to purchase the Kyabram land. Furthermore, until such time as the land is in fact conveyed to Bryxl, it could not possibly have commenced an enterprise involving the subdivision of that land. Although Mr Heading told the ATO that in November 2011 Bryxl had presold 20 blocks of residential land to a company called About Turn Property Pty Ltd for $100,000 per block, I had no documents before me evidencing such a sale. Furthermore, given the fact that in November 2011 Bryxl was not the owner of any part of the Kyabram land, it plainly could not enter into a contract to sell what it did not own.*
>
> *59 The evidence in this case regarding Bryxl conducting a business or enterprise involving the subdivision and sale of land discloses that while Bryxl may have had the intention to carry out such a business or enterprise, the steps it undertook in obtaining a planning permit and a market valuation cannot properly be described as being steps taken in the course of commencement of an enterprise. Until such time as it acquired the right to deal with the land in such a way that subdivision and sale could occur, it is artificial to suggest it was conducting the enterprise involving the subdivision and sale of land. The steps taken were clearly precursors or preparatory to the possible commencement of business, whether that be subdivision of the land or a quick sale to a syndicate of buyers.*

[7] See at [30]-[35], for example.

40. But it is possible (absent statutory intervention[8]) to agree to sell things one does not presently own. It happens under futures contracts. And it is commonplace, because of Queensland stamp duty, for a developer to prosecute approvals and to carry on the physical works, whilst not the owner of the land under subdivision.

41. A more secure way of arguing cases such as *Bryxl*, in future, will be to grasp the nettle, and identify any GST refund abuse. Treating this kind of activity as "land development", where there is simply a large claim for a refund and little other activity, is too polite. It has the potential to do damage to the deliberately broad definition of "carrying on".

2 Rectification

42. There were always going to be GST cases invoking the remedy of rectification.[9]

43. In two recent cases, the applicants have bucked the trend by being successful in seeking this difficult remedy.

2.1 Principles

44. I take the following summary of principles from Buss JA's judgment in *Franknelly Nominees Pty Ltd v Abrugiato*:[10]

> *176. The object of the equitable doctrine of rectification is to reform an instrument in which the parties have mistakenly expressed their agreement or common continuing intention. Equity may and does rectify instruments. It does not rectify contracts or transactions. ...*
>
> *177. Rectification corrects a disconformity between the agreement or common continuing intention of the parties, on the one hand, and the instrument, on the other, so that the instrument contains the provisions which the parties actually intended it to contain. ...*
>
> *178. The mistakes which may be corrected by rectification include a mistake as to the effect (and not merely the form) of an instrument. ...*
>
> *179. It must be emphasised, however, that rectification will not be available where the parties are merely mistaken as to the consequences of, or the advantages to*

8 *Land Sales Act* (Qd) regulates sales of prospective lots, in Queensland.

9 A more comprehensive treatment is in Mr Chris Sievers' paper, "GST and Real Estate Contracts – when things go wrong", viewed on 24.04.16 at https://chrissievers.com/gst-and-real-estate-contracts-when-things-go-wrong/

10 (2013) 10 ASTLR 558; [2013] WASCA 285, [176]-[182] (WASCA)

> *be gained by, a contract or transaction recorded in an instrument. That is, equity will not grant rectification where a mistake by the parties relates only to the expected consequences or advantages of a contract or transaction, and not to the expression in the instrument of what the parties actually agreed or intended. ...*
>
> *180. ... [R]ectification will not be available to correct "consequences which the parties did not have in their mind when the deed was executed even if, had they thought of them, they would have intended them" ... [The] court must look at the intention of the parties "at the time when the deed was executed, and not what would have been their intent if, when they executed it, the result of what they did had been present to their minds" ....*
>
> *181. A person who seeks rectification must establish, by convincing proof, that an instrument does not embody the common continuing intention of the parties at the time when the instrument was executed. ...*
>
> > *"Although the remedy of rectification is no longer held to depend upon proof of an antecendent concluded contract ..., it is necessary to show a concurrent intention of the parties, existing at the time when the written contract is executed, as to a term which would have been embodied in the contract if the parties had not made a mistake in expressing their intention. Proof of such an intention is necessary to 'displace the hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties'..."*
>
> *182. An inference as to the common continuing intention of the parties when an instrument was executed can be drawn from circumstances both before and after the execution of the instrument. ... However, it is necessary to exercise caution in receiving evidence of a party's conduct after the execution of an instrument because this conduct may not relate to the party's intention before or at the time of execution, but only to a later intention which may be different. ...*

2.2 Implying a term vs rectification

45. There is a difference between prosecuting a case for rectification, and relying on an alleged implied term.

46. In *Duoedge Pty Ltd v Leong*[11] the written contract for sale of land was for "$916,000 GST inclusive". The seller provided a tax invoice, showing the 1/11th amount of GST included in the price. The buyer paid the full amount, but later was denied the credit on the basis that this was an acquisition of residential property.[12] The position was that this was a development site, but presently occupied by a tenanted residence.[13] Thus this was not a taxable supply.

---

11 [2013] VSC 36, [2013] NSW ConvR ¶56-521, [2013] Q ConvR ¶54-801, [2013] V ConvR ¶54-830, [2013] ANZ ConvR ¶13-009. I recommend the ANZ Conveyancing Reports note, pp 154-155 (Dixon J)

12 At [12]

13 At [13]

47. The Magistrate had purported to rectify the contract, by specifying the GST exclusive dollar amount of the price "plus GST". But the Magistrate also decided that there was an implied term in the contract, that if there was no GST payable, the GST component would be refunded. The Magistrate found that term to have been breached. The Magistrate ordered refund of the GST component.

48. On appeal, the Victorian Supreme Court emphasised that:[14]

> *A contract is either rectified to accord with the true agreement, or properly construed to identify the true agreement it records.*

49. The Supreme Court quoted a well-known passage from *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (per Mason J):[15]

> *The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it - it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention.*

2.3 Recent rectification cases

50. The first case I deal with is *Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No.2)*.[16] the Court of Appeal applies a difficult principle, again affirming the care with which a case must be formulated in seeking rectification.

51. The second case, *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd*,[17] demonstrates how difficult a case may be for both sides. Although the standard

14 At [18]

15 (1982) 149 CLR 337 at 346

16 [2015] NSWCA 119, [2015] NSW ConvR ¶56-350 (Meagher & Gleeson JJA, Sackville AJA)

17 [2016] NSWSC 362 (Stevenson J)

cross-examination manual form the USA, which I have used, speaks of this aspect of advocacy as a science: it is still an art. And the rub of the green can be determinative.

52. Whilst you will always be told, at the outset, that rectification is an inherently difficult remedy, these two cases demonstrate that a determined applicant, with the right evidence, can succeed.

2.4 Mayo

53. *Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No.2)*[18] concerns equipment leases drawn by an accountant. They contained 4 key errors. The GST error arose this way.

54. Ms Mayo bought plant, which she let on to the company. The invoiced price of the plant, to Ms Mayo, included GST.

55. The accountant, purporting to act for Ms Mayo, the company, and the guarantor, completed the leases by calculating lease instalments by reference to the GST inclusive price, but then including GST on the lease instalments (in six of the eight leases). This resulted in GST being charged twice.

56. The trial judge found that the parties had a common intention when entering into the leases, that "GST be appropriately treated in the leases".[19] Ms Mayo challenged this, in effect contending that the parties wanted GST to be treated inappropriately by the leases.[20]

57. The interesting point in the case was Ms Mayo's contention about *Commissioner of Stamp Duties v Carlenka Pty Ltd*.[21] There, McLelland AJA had pointed out that:

> *In general, the remedy of rectification of an instrument is available where it is established by clear and convincing proof that at the time of execution of the*

18 [2015] NSWCA 119, [2015] NSW ConvR ¶56-350 (Meagher & Gleeson JJA, Sackville AJA)

19 At [93]

20 At [94]-[95]

21 (1995) 41 NSWLR 329; (1995) 7 BPR 15,083; [1996] ANZ ConvR 219; (1995) 95 ATC 4620; (1995) 31 ATR 281; (1996) Aust Contract R 90-061; (1996) NSW ConvR 55-761

> *instrument the relevant party or parties as the case may be had an actual intention (if more than one party, a common intention) as to the effect which the instrument would have which was inconsistent with the effect which the instrument as executed did have in some clearly identified way. In this context "effect" means the legal and factual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral, kind (for example, its liability to stamp duty).*
>
> *[emphasis added]*

58. Part of that passage is extracted by Sackville AJA, before answering the contention that the trial judge had erred in proceeding on the basis that "the parties intended the leases to achieve a particular effect, namely for GST to be charged correctly".[22]

59. Sackville AJA then stated:

> *[100] Here the effect of the leases as executed was that the charge for GST was duplicated. The leases failed to achieve their intended effect as to the amount to be charged to the company for GST. This was not a legal or factual consequence of the operation of the leases of a remote or collateral kind of the type referred to by McLelland AJA in Carlenka, where rectification would not be appropriate.*

60. This passage is difficult. It shows that care must be taken in positioning a claim that an instrument does not achieve a particular tax effect, where seeking rectification. Perhaps here it was simpler to do, given that the error was directly to do with GST, rather than an effect that generates a GST effect. But the distinction is elusive, at one level, and there is room for advocacy here.

2.5 SAMM

61. *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd*[23] involved sale of land at auction in NSW.

---

22 Mayo, at [98]

23 [2016] NSWSC 362 (Stevenson J)

2.5.1 Writing requirements & auctions

62. A contract of sale is formed on fall of the hammer, accepting a bid.[24] This does not overcome the requirement of written proof of a contract,[25] relevantly under section 54A *Conveyancing Act* 1919 (NSW).[26]

63. One common means of overcoming this requirement for writing is a term of the auction that the auctioneer may, as agent, sign for each of the buyer and seller, as required.[27] (It appears that this practice has become otiose in the UK, but remains an important procedure in places which have not reformed the law.)

2.5.2 Buyer's advice before auction

64. Here, the proposed contract for the prospective auction was taken by the purchaser to its solicitor for advice. The draft contract was in a common form, previously productive of trouble in NSW.[28] Whilst the box on page one was ticked to indicate this was a taxable supply, clause 13.2 (read with clause 1) provided that the price was inclusive of GST.

65. The solicitor advised the bidder to seek clarification from the auctioneer as to whether bids were inclusive of GST.

---

24 *Payne v Cave* (1789) 3 Term Rep 148; 100 E.R. 502, where the defendant withdrew his bid for whiskey-making plant, before the fall of the hammer. He did so after the auctioneer had made a statement going to the worth of the plant, but where the auctioneer stated he was not prepared to warrant the correctness of the statement. The Court of King's Bench said (at (Term Rep) 149; (ER) 503:

"The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

25 Harvey & Meisel *Auctions Law and Practice* (3d), [3.09], [9.12]

26 Cf section 59 *Property Law Act* 1974 (Qd)

27 See *Emmerson v Heelis* (1809) 2 Taunt. 38;127 E.R. 989 (Court of Common Pleas, per Mansfield CJ). See also, now, Harvey & Meisel *Auctions Law and Practice* (3d), [9.12], quoting from the report of the UK Law Reform Commission, into *Transfers of Land and Formalities for Contracts for Sale etc of Land*, (Law Com. No.164, 1987)

28 See *Ashton v Monteleone* [2010] NSWSC 258; 77 ATR 1 (Gzell J)

2.5.3 Advice not followed

66. The bidder sent a bidding agent to the auction. The bidding agent made no such enquiry, despite instruction, relying on a statement by the auctioneer, which the bidding agent recalled was (materially): "The sale is a taxable supply, with GST in full."

67. In retrospect, that statement, even if made in that form, was equivocal.[29] The bidding agent might have done well to query it. Nevertheless, that did not occur.

68. The auctioneer's evidence, as to what he said, was quite different, as we shall see.

2.5.4 Bidding stalls

69. The bidding stalled short of the previously instructed reserve. The auctioneer procured an alteration to his written instructions as to reserve. To induce the ultimate buyer to come up, to meet the new reserve, the auctioneer showed the bidding agent the letter. That letter showed the previous reserve as "$3,500,000 + GST".

70. (That was later altered to reduce the numbers to the knocked down dollar amount of the price.)

71. After negotiation, the bidding agent bid $3.325M. The property was knocked down to the buyer.

72. The contract was signed, but not altered to overcome standard term 13.2. The stated price was thus inclusive of GST, according to the written contract.

73. The seller now sought rectification.

2.5.5 Auctioneer's evidence

74. There were a number of witnesses on each side. Principally for the seller, the auctioneer swore to his particular recollection of this auction, of the many hundreds he conducted that year, for clear reasons he was able to give. He had a practice to check the front page

[29] The Court found that a different form of words was used by the auctioneer, which was clearer: [81]

of the contract, to see if the box was ticked to show it was a taxable supply. If he saw that, and had observed the property to be vacant, he would announce at the commencement of the auction: that the sale would be a taxable supply; that therefore GST would be payable, and by the buyer; that bids would be exclusive of GST; and GST would be in addition to the knock down price.[30]

75. The auctioneer sent an email, in the week after the auction. He had been asked by the buyer's solicitor, in an open way, what he recalled of the auction. This email confirmed the making of that kind of announcement at the commencement of the auction.

76. Critically, the buyer's counsel did not cross-examine the auctioneer on this email. It had been admitted into evidence without objection. There was an opportunity to cross-examine, after the judge had asked a question going to why the email had been written, but that opportunity was not availed.[31] (The buyer was represented by experienced counsel. There are good reasons why questions are, and are not, asked. We will never know the reason, here.)

2.5.6 Other witnesses

77. There were divergences, and it is unnecessary to say anything beyond this:

78. This was a classic case where eight well-intentioned eye-witnesses (including the buyer's principals listening on the phone), all asked to give an account of the one event, give radically different accounts.

79. The only person with no obvious interest, a by-stander who had attended out of curiosity,[32] proved of no assistance to the Court, given the deviation between his affidavit

30 At [23]

31 All this is critical, to the way evidence is handled during trial, and by the judge. See [32]-[37].

32 At [17]

and oral evidence.[33] (No criticism is intended. Giving evidence is stressful, and here occurred months after the event.)

80. As often happens, the critical things proved to be the contemporaneous documents. Naturally there was the contract. But, for the seller, there were also the letter instructing the reserve on a "+ GST" basis; and the auctioneer's email 6 days after the auction.

81. It was plain that the letter was shown to the bidding agent, from his principals' evidence[34] (though the bidding agent could not recall it[35]). That letter suggested that the auction was on a "+ GST" basis.

82. Most critically, there was the auctioneer's email, where the email, and auctioneer's motives in writing same, went unchallenged in cross-examination.[36]

83. The contract was ordered to be rectified to reflect a common intention that the price be $3.325M plus GST.

3 Surprise for standard contract – *International Palace*

84. Under a Queensland, standard form commercial land contract, where a deposit is a percentage of the "Purchase Price", is that a percentage of the price including GST?

85. *International Palace Pty Ltd v Novaheat Pty Ltd*[37] is one of those cases that looks odd, on first reading. Daubney J said, *obiter dicta*, that the deposit, specified as 10% of the Purchase Price, was 10% of the GST exclusive amount.

86. Perhaps it suffices to say that:

    (a) this turned on the intricate provisions of a standard form contract, and

    (b) it simply shows that heuristics and instincts can be wrong.

---

33 At [60]

34 At [67]

35 At [65]

36 At [79]

37 [2016] QSC 75 (Daubney J)

87. But it is worthwhile looking at the contract, and then the reasons for decision.

88. Daubney J summarises the material provisions of the contract as follows:[38]

> *The contract was the standard form REIQ "Contract for Commercial Land and Buildings", with a number of special conditions. The Items Schedule to the contract included the following:*
>
> > *"N Purchase Price*
> >
> > *$750,000 + GST*
> >
> > *O Deposit*
> >
> > *$10,000 paid within 3 day of both parties signing contract. Balance of 10% paid on acceptance of due diligence*
> >
> > *...*
> >
> > *Date for Completion*
> >
> > *Date: ON OR BEFORE 30 DAYS FROM UNCONDITIONAL DATE."*
>
> *The Items Schedule also contained a number of provisions relating to GST. The part of the Schedule entitled "GST 3" contained the questions "Does the Purchase Price include GST?", with boxes to indicate "Yes" or "No" answers. There was an instruction to "Mark 1 box only". This section of the Schedule then went on to provide:*
>
> > *"If yes, clause 34.4 (Purchase Price Includes GST) applies.*
> >
> > *If no, clause 34.5 (Purchase Price Does Not Include GST) applies.*
> >
> > *If neither box is marked or both boxes are marked, Clause 34.4 (Purchase Price Includes GST) applies."*
>
> *In this contract, the "No" box was ticked.*
>
> *Clause 34.5 of the standard conditions which formed part of this contract provided:*
>
> > *"34.5 Purchase Price Does Not Include GST*
> >
> > *If this Clause 34.5 applies, the Purchase Price does not include the Seller's liability for GST on the Supply of the Property. The Buyer must on the Date for Completion pay to the Seller in addition to the Purchase Price an amount equivalent to the amount payable by the Seller as GST on the Supply of the Property."*
>
> *[paragraph numbers of judgment removed for clarity]*

89. The buyer only paid amounts totalling $75,000, not $82,500.

90. The seller was able to justify its termination of the contract on another ground. But Daubney J went on to deal with the seller's alternative argument that insufficient deposit had been paid:

---

38 At [2]-[5]. Daubney J also quotes a special condition, but it is material to another aspect of this decision.

> *[40] The clear difficulty with this argument for the defendant, however, is that it is completely at odds with the specific GST provisions in the Items Schedule, referred to in paragraphs [3] and [4] above. That part of the Items Schedule made it abundantly clear that the Purchase Price did not include GST. By ticking the "No" box in that part of the Items Schedule, cl 34.5 was invoked, which expressly provided that the Purchase Price did not include the defendant's liability for GST on the supply of the property.*
>
> *[41] The contract needs to be read as a whole. Item N, on which the defendant's argument rests, cannot be read in isolation from the rest of the contract. In the absence of anything further, it seems to me that the unequivocal answer in the part of the Items Schedule specifically addressed to GST issues that the Purchase Price did not include GST can only mean that the Purchase Price under this contract was $750,000. The "+ GST" annotation in Item N could be seen as an unnecessary, and unfortunate, adornment which was intended to signify that GST would be payable in addition to the Purchase Price of $750,000.*
>
> *[emphasis added]*

91. I wonder if this has implications for other standard form contracts, interstate. It does seem to be a sensible, and correct, decision on the point. But it is likely to trip up the unwary. It may call for some attention to the Queensland standard form contract, at least by way of note.

4 Property management arrangements – *Crown Estates*

92. *Crown Estates (Sales) Pty Ltd v Commissioner of Taxation* ended in a whimper, with Logan J holding that the taxpayer had raised no proper point of law in seeking to appeal the Administrative Appeals Tribunal's decision.[39]

4.1 Whether principal-principal purchases shown

93. Recall that the Tribunal[40] had found that the taxpayer had not shown it was entitled to input tax credits. It was merely acting as agent for owners of properties which it managed.

94. The business was appointed under a PAMDA form: "PAMD Form 20a: Appointment of agent – Letting and property management". This was the then usual form, under Queensland law, for appointments of this sort. It spoke in terms of agency.

---

39 [2016] FCA 335; 2016 ATC ¶20-562 (Logan J)

40 [2015] AATA 949; 2015 ATC ¶10-411 (Mr McCabe, Senior Member)

95. Mr McCabe, Senior Member, put the taxpayer's case this way (emphasis added):

> *10 The taxpayers' case comes down to this. TPM's property management activities require the acquisition of goods and services – from tradespeople, for example. While those goods and services are acquired for use in properties owned by TPM's clients, TPM says it is not acting on behalf of those owners when it engages the contractors. Rather, it acts as a principal when it engages contractors. TPM then delivers the goods and services to its own clients pursuant to a separate understanding with those clients in which TPM and the client are both principals contracting at arms' length. Mr Watts pointed out he was aware of a number of instances where property owner-clients simply refused to pay for goods or services that were used in their properties, but TPM was still liable to the contractor under the contract. He said that was a product of the fact the owners were strangers to the contracts TPM negotiated with suppliers. Mr Watts said the word "agent" in the PAMD Act and in common discourse did not assist in defining the true nature of the relationship. "Agent" in this context was a term of art rather than a legal characterisation. As principals, the taxpayers say they were entitled to claim input tax credits for GST purposes.*

96. The case was run in the Tribunal, on a limited basis, which determined its outcome:

> *20 The terms of appointment are set out at the end of the document. They speak to the obligations of the agent and the client, and the agent's authority. There is an indemnity clause and a range of other provisions that define aspects of the agent's work and responsibilities.*
>
> *21 I am satisfied the document describes a relationship between TPM and each of its property-owning clients in which TPM acts as an agent in the classic sense of that term. The essence of agency is there for all to see: TPM is clearly in a position to "create or affect legal rights and duties as between another person, who is called [the] principal, and third parties". In his evidence, Mr Watts used language redolent of agency: he spoke of "acting on behalf of" clients. While I accept the Form 20a may not exhaustively define the scope of the relationship in practice – I do not doubt the relationship with each client might have varied depending on the client's preferences and personal circumstances notwithstanding anything said in the PAMD Act and Form 20a – there is no reason to doubt TPM contracted with third parties as agent for the property owners in accordance with its authority, even where that authority had to be specifically sought or confirmed in relation to particular transactions. …*
>
> *22 I was provided with limited evidence about the detail of specific transactions with third parties. … But I was not shown anything in the evidence which suggests the Commissioner's conclusion about the existence of an agency relationship was wrong, and that a different outcome was appropriate. I was certainly not shown invoices or other documents evidencing or describing transactions in a way that suggested the third party and TPM intended that goods or services would be supplied to TPM as principal, rather than to a property-owning client.*

97. There was certainly something odd going on here. Mr McCabe SM reminded the parties:

> *24 I would add that if the taxpayers were liable to pay for goods and services that were found to have been supplied to TPM but which TPM subsequently on-supplied to a property-owning client, any input tax credits that could be claimed by the taxpayers would be offset by the amount of GST they were liable to pay when they were reimbursed by the clients.*

98. It is possible that the taxpayer had some good point, which was not put, or which did not come through in the evidence. I am suspicious of the idea that appointment under a PAMDA form truly constitutes people as agents, when they are sometimes just brokers or negotiators.[41] This required a scientific, thorough, line-by-line analysis of transactions. That was not undertaken in this case.

99. On appeal to the Federal Court, Logan J rejected the contention that the question, of agency or no agency, could never have been competently been raised.

> *21. In my view, … while questions as to the existence of agency are usually questions of fact, those questions of fact emerge from settled legal principles as to what is necessary in order that one person be considered the agent of another and there can be circumstances where, upon evidence of a particular consensual relationship, the law will impose upon the parties to that relationship the consequences of agency. It is not therefore impossible to conceive of a case where a question of law might be found in posing as a question that, having found particular facts, was the Tribunal obliged in law to conclude that an agency relationship existed?*
>
> *…*
>
> *23. Another way of putting such a proposition would be to pose as a question whether, on the facts found, the Tribunal was obliged in law to conclude that it was TPM which had made the creditable acquisition?...*
>
> *24. Thus, while I do not accept the Commissioner's submission that the existence of agency is always a question of fact, TPM has chosen not to frame its amended notice of appeal in a way which would, on the basis of the findings of fact made by the Tribunal, raise questions as to whether on those facts TPM was not acting as an agent in acquiring particular goods and services or, put another way, whether it was the party making the creditable acquisition?*

100. Logan J then turned to the correctness of the Tribunal's decision, undoubtedly lest the matter go further.

101. Logan J observed that the taxpayer had approached its task, below, "at a much more general level of evidentiary abstraction".[42] As for the PAMDA form:[43]

> *Having regard just to that form, in particular, Pt 4, "The client appoints the agent to perform the following services [with nominated particular services then selected]", a conclusion that TPM became an agent of the client for the*

---

41 Duncan *Real Estate Agency Law in Queensland* (4ed) para 8.30; Robinson "Estate Agents - Agents" (1988) 15(1) University of Queensland Law Journal 46

42 2016 ATC ¶20-562, [37]

43 2016 ATC ¶20-562, [39]

> *performance of the nominated services would have been unremarkable. The Tribunal reached just such a conclusion …*

4.2 The future of this issue

102. I suggest that there may be something more to this issue.[44] But the taxpayer has to be prepared to commit the resources to the fight. In light of the observation, that a contrary conclusion might in any case have led to much the same financial result, a deal more care will be required to show which acquisitions are made by the manager on its own account (such as general administrative expenses and overheads), and which are intended by the manager and the landlord to have been incurred as agent by the manager, acting on behalf of the principal.

103. This is not the end of this issue, though the particular dispute does not look prospective to advance.

104. Perhaps the point here was the inability of the landlords to claim input tax credits. But the evidence is sparse, and we are left to guess at that, also.

5 When liability arises - *Anderson*

105. We tend to ignore the self-represented cases, since there is a fair amount of dross confronting the Tribunal, which has to explain the obvious to taxpayers who seem unwilling to accept it.

106. *Anderson v Commissioner of Taxation* should not have been reported by CCH.[45]

107. Mr Anderson was trustee of a family trust. As such, he conducted a land development. It was unsuccessful. He sold the land, and the proceeds went entirely to the bank. Mr Anderson neglected to include the sale in his trust BAS. He retired as trustee between the date of settlement and date of BAS.

---

44 See note 41.

45 [2015] AATA 167; 2015 ATC ¶10-387 (Mr McCabe, Senior Member)

108. Mr McCabe, Senior Member, said:

> *22. The GST liability arises on the day when the taxable supply occurred, but it does not crystallise until the end of the quarter. In this case, the taxable supply occurred on the days on which the sales of the two lots were settled: that is, on 13 October 2009 for lot 32, and on 18 November 2009 for lot 2. The applicant, Mr Anderson, was still the trustee at those points of settlement: he did not retire until 9 December 2009 at the earliest.*

109. The Tribunal also points to a decision of Logan J, concerning dealings of a provisional liquidator, where his Honour said:[46]

> *21. On any view, though, as at the time when the application for the appointment of a provisional liquidator was made, the Commissioner was, in law, at least a contingent creditor. I say "at least" a contingent creditor because the GST liability crystallised at the end of the period and was therefore due but was not payable until, at the earliest, 28 July or, on the evidence, perhaps later as the result of an extension to a lodgement requirement given by the Commissioner to Eskdale's accountants.*

110. Whilst this conclusion, at paragraph 108 above, was relevant to whether Mr Anderson avoided personal liability to GST, in an unusual factual situation, it confirms the position as commonly understood, since GST commenced.

David W. Marks QC

Chambers, Inns of Court

25 April 2016

46 *Eskdale South Cattle Co Pty Ltd v Deputy Commissioner of Taxation* [2013] FCA 1125 (Logan J)