IN THE HIGH COURT OF AUSTRALIA **NO. S 285 OF 2011**
SYDNEY OFFICE OF THE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF NEW SOUTH WALES

BETWEEN: **ALH GROUP PROPERTY HOLDINGS PTY LIMITED**
Appellant

AND: **CHIEF COMMISSIONER OF STATE REVENUE**
Respondent

REPLY

Part I – Internet certification

1. The appellant certifies that this Reply is suitable for publication on the internet.

Part II – Issues

2. RS [3] disputes the formulation of the first two issues in the characterisation of the Deed as a "complete novation". That term was chosen to distinguish the novation from a partial novation having both assignment and novation characteristics under the Court of Appeal's alternative "tripartite hybrid contract" approach (at [37], [38] and [84]).

3. RS [3] and [11] refer to a "legal" novation. It is inferred that this term is adopted to repeat a submission made before the Primary Judge (it is recited at [5] and [17]) to the effect that there is a difference between a "true" novation and a transaction having that "effect". It mis-states the nature of novation, involving an inference as to the parties' mutual intention. There is no difference between a novation's "form" and its "effect".

4. RS [4] and [49] dispute the validity of the formulation of the third and fourth issues as true stand-alone issues. With respect, there can be no serious doubt that the "tripartite hybrid contract" approach, under which, "[if] there was a novation, it was limited to 'the concurrent and mutually dependent obligations' [of ALH and] the benefit of the vendor's obligation was not novated, but assigned", was an alternative approach to the characterisation of the Deed as an outright assignment (at [84]), because Handley AJA stated as much at [85]. His Honour there said that that finding was made "[e]ven if, contrary to my view [as to an outright assignment in [84]], there was a novation …"

Part IV – Material Facts

5. Whilst the appellant accepts that agreement as to facts does not import agreement as to their legal consequences, it does contend that some of the agreed facts (AF) lead to certain inescapable legal consequences, notably AF [7] ("the effect of the Deed was to substitute [ALH] as the purchaser and to release [Trust Company] from all obligations under [the 2003 contract]"). Furthermore, RS [7] conflates the Court of Appeal's two alternative lines of reasoning (at [84]-[86]) identified in par 4 above. If the principal line of reasoning is correct and there was an outright assignment of the 2003 contract then no new contract came into existence on the date of, and in consequence of the making of, the Deed in 2008. But if the alternative line of reasoning is correct then the partial novation of the 2003 contract effected by the Deed – the "novation … limited

Solicitors for the appellant:
JDK Legal
Level 5, 1 Castlereagh Street
SYDNEY NSW 2000
Email: j.martin@jdklegal.com.au

Tel: (02) 9236 8533
Fax: (02) 9236 8599
Ref: Mr Jon Martin
File no: JCM:110088

to the concurrent and mutually dependant obligations" of ALH (at [84]) – must have brought into existence in 2008 a new contract to support those novated obligations, and the 2003 contract must have remained in place to support the assignment of the benefits of the contract of ALH. But if ALH is correct, and there was a complete (as distinct from a partial) novation of the 2003 contract, the first 2008 contract identified in AS [12(d)] came into existence in consequence of the making of the Deed in 2008.

Part IV – Reply to the Respondent's Argument

Issues 1 and 2 – The contractual characterisation of the Deed

6. RS [12] relies on the Court of Appeal's finding at [28] that the 2003 contract remained the source of the vendor's obligation to convey the land based on its conclusion that "the 2003 contract was not rescinded". The source of this conclusion is in [18], where it was found that "[t]he 2003 contract was not, in terms, rescinded" [Emphasis added].

7. The finding is unsound. It fails to appreciate that rescission depends on intention (see *Vickery v Woods* (1952) 85 CLR 336, 345, cited at AS [19]) and that it was the "clear [mutual] intention of the parties to the Deed", namely, that "Trust Company was to drop out and ALH was to be substituted for it," as the Primary Judge found at [11].

8. RS [14]-[17] advance the contention, by a process of contractual interpretation, that the Deed did not impose on the vendor any new or direct obligation to transfer the hotel to ALH on receipt of the purchase price, as the Court of Appeal found at [31].

9. Two points need to be made on this critical finding before addressing the respondent's support for it by a thorough process of contractual interpretation (which goes well beyond that which was undertaken by the Court of Appeal at [32]-[34]).

10. *First*, this finding was made to support the rejection by the Court of Appeal (at [30]) of the Primary Judge's conclusion (at [12]-[13]) that, "with its burdens and benefits removed from [the purchaser], the 2003 contract had no content and was extinguished" and that "a new contract was constituted by [ALH] undertaking the obligations ... identical to those in the 2003 contract ..." That is, the Court of Appeal was rejecting the Primary Judge's reasoning for finding that the 2003 contract was *rescinded* by the Deed *despite the absence of an express rescission* in its terms. This issue is, from a doctrinal perspective, perhaps the most critical source of difference between the approach of the Primary Judge and that of the Court of Appeal.

11. *Secondly*, the Court of Appeal placed reliance on Deed cl. 4.2(b), under which ALH covenanted to perform all the obligations of the purchaser, and cl. 6(b), in which Trust Company was released from "all liability ... arising out of ... the [2003] Contract" (at [32]); it noted that operation of the covenant in cl. 4.2(b) did not require the continued existence of the obligations of Trust Company (at [33]); and it noted that its operation did not require Trust Company to remain contractually bound (at [34]). No other terms of the 2003 contract were relied on by it. But the Court of Appeal failed to appreciate that the 2003 contract, a bilateral contract, necessarily had to have been rescinded in consequence of the terms of cl. 6(b), to which it had turned its mind, not only for the Primary Judge's reasons (at [10]-[12]), but also for those given in AS [19]-[31].

12. The respondent's analysis of many contractual terms in RS [15]-[17] does not advance his contention. To focus on the *language* of the Deed rather than on the *legal effect* of the terms of the Deed is to fall into error. It is, as was contended at AS [45], a triumph of form over substance. The appellant cited and addressed at length in AS [65]-[68] the decision of Sundberg J in *Orica Limited v FCT* (2010) ATC 20-168 to demonstrate that the mere adoption of the language of an "assignment" in a tripartite deed is of no consequence in its characterisation, if its legal effect is to rescind the first contract and to create a second contact, either on the same or different terms, in substitution for it.

13. The respondent fails to come to grips in his analysis of the Deed's language with the proposition developed by the appellant at AS [19]-[31], namely, that, having regard to the bilateral nature of the 2003 contact and the terms of AF [7] (see par 5 above), "the release [of Trust Company] from all obligations under [the 2003 contract]" requires the conclusion to be drawn that the 2003 contract was rescinded by the Deed.

14. The proposition in RS [12] that the 2003 contract remained the only source of the vendor's obligations to convey the land to ALH fails to explain how privity of contract arose between ALH and the vendor, Oakland Glen, where both parties to the 2003 contract had executory obligations to perform to bring about a transfer of the land.

15. The respondent's answer in RS [18] to the contention that ALH had an entitlement to specific performance of the first 2008 contract, namely, that it "would rely necessarily on ... the obligation in the 2003 contract on the vendor to convey the hotel to the appellant" is, with respect, unsound. Clause 16 of the 2003 contract (esp. cll. 16.1 and 16.3) requires "the vendor" to transfer title to the hotel to "the purchaser" named in it, namely, Trust Company. There is *no* obligation to transfer title to ALH because ALH was not a party to the 2003 contract and never became a party to it under the Deed.

16. The analysis of the Deed in RS [19] is answered by what is contended above in pars 8-15. Insofar as specific replies are called for to RS [19(i)]-[19(xxi)] they are as follows.

17. Clause 3.1(a) of the Deed provides for the refund of the 10% deposit and simultaneous payment of another 10% deposit to the vendor by ALH (see RS [19(ix)]). The parties adopted the expedient of ALH simply reimbursing the 10% deposit to Trust Company (involving one payment) rather than the somewhat cumbersome arrangement of the vendor repaying the deposit to Trust Company by one payment and ALH then paying the vendor an equivalent amount as the substituted 10% deposit by a second payment. The 10% deposit issue is addressed more fully in chief in AS [38], [42], [44] and [45].

18. The contention in RS [19(x)] that a novation can only occur where the new contract is made in identical terms to the rescinded contract is unsupported, *firstly*, by authority or public policy or, *secondly*, by the facts of this case. The sale price under *both* the 2003 contract and the first 2008 contract was $6,386,611. By agreeing to assume all Trust Company's obligations as purchaser under the 2003 contract (Deed cl. 4) and to pay the 10% deposit (Deed cl. 3.1(a)), ALH agreed to pay $6,386,611 for the hotel. The promise to pay $2,063,389 to Trust Company under cl. 3.1(b) of the Deed was *not* a payment to Oakland Glen for the sale of the hotel under either the 2003 contract or the first 2008 contract, but *rather* was a payment to Trust Company under the Deed, as consideration for Trust Company's consent to the rescission of the 2003 contract.

19. The contention in RS [19(xi)] as to an assumption in *Vickery v Woods* (1952) 85 CLR 336 of a requirement for the new contract to state an identical price as the substituted contract, in order to establish a novation, is unsupported by the citations made to it. The appellant failed in *Vickery* because there was no evidence of rescission of the first contract. The sale price under the alleged new contract was not under consideration.

20. The contention in RS [19(xii)], citing *Fightvision v Onisforou* (1999) 47 NSWLR 473 at [26], is unsupported by the citation: a finding limited to the facts there rather than a statement of principle supporting the respondent's thesis requiring the same sale price.

21. Nothing stated by the learned text writers cited in RS [19(xiv)] or [19(xv)] supports the thesis requiring the substituted contract to be in identical terms to the rescinded contract in order to found a novation. The reference to "*the same liability*" in Greig and Davis is an example and not a statement of general principle. The references in the other texts to "*in place of*" and "*in lieu of*" do not import identity of contractual terms.

22. The contention in RS [19(xix)] misconstrues cl. 4.1(b), which refers to "all obligations of the Purchaser", but ALH could not practically have been bound to perform them before the "Date of Assignment". Therefore, cl. 4.1(b) is not inconsistent with cl. 4.2.

23. With regard to the loan ("**the Advance**") referred to in RS [19(xix)] and [43], the 2003 contract provided for the purchaser to finance the construction of a hotel on the land. Clause 51 provided that the deposit was to be "released in full" on the "Contract Date" but, if applicable, must be repaid to the purchaser on the date on which the contract is "rescinded". Under cl. 53, the purchaser was obliged to lend the vendor the balance of the purchase moneys, subject to a right of set-off on completion (cl. 53.3). Clause 53.5 provided that, "If this contract is rescinded or terminated then the Vendor must pay to the Purchaser on the date of that rescission [the Advance and interest]." This regime was adhered to when the parties entered the Deed. Clause 2(b) of the Deed creates, as a condition precedent to its operation, the due repayment of the Advance referred to in cl. 53.1 of the 2003 contract. The fact that the Advance was repaid suggests the parties to the 2003 contract objectively regarded that contract to be "rescinded or terminated" by the Deed, and it supports the Primary Judge's findings to that effect (at [11]-[12]).

24. RS [21]-[22] contend that no rescission of the 2003 contract occurred until the Deed of Termination was made on 24 October 2008. This resort to the Deed of Termination to support the characterisation of the Deed is unsound. It occurs too late in point of time. Either the Primary Judge and appellant are correct – namely, the 2003 contract was rescinded on entry into the Deed on 27 June 2008 by virtue of the complete release of Trust Company from the 2003 contract, so that a novation was effected – or they are wrong, and the Court of Appeal and respondent are correct – namely, the benefit of the 2003 contract was assigned by Trust Company to ALH, despite Trust Company's release, because there was no express rescission under the Deed. The characterisation must occur as at 27 June 2008, when the Deed was made and when any assignment or novation of the 2003 contract it effected occurred, rather than as at 24 October 2008, under the Deed of Termination. The Primary Judge's finding as to the parties' mutual intention to novate the 2003 contract on 27 June 2008 by the Deed (at [11]) cannot be "trumped" by resort to their later conduct under the Deed of Termination, as the respondent seeks to do in RS [21]-[22]: see *Agricultural & Rural Finance v Gardiner*

(2008) 238 CLR 570 [35]; and [162], citing *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603. The "fundamental problem" presented by the Deed of Termination identified in RS [21] does not exist. The Deed of Termination terminated the first 2008 contract, not the 2003 contract: see AS [7(b)].

25. RS [23]-[25] contend the 2003 contract did not cease to exist due to Trust Company's release from it, as "there was no release in the Deed of the obligations to purchaser 1 of the vendor under the 2003 contract". That fails to have regard to the combined operation of cll. 4-6 of the Deed, under which Trust Company was released from the 2003 contract, *for all purposes (obligations and benefits)*, Oakland Glen was assured of performance of *all* Trust Company's obligations under it by ALH (cl. 4.1), and releases were given, by *both* Oakland and ALH, of Trust Company from that contract.

26. RS [26] imputes a motive to the form of the Deed which is neither apparent nor real. The fact that the 2003 contract happened to be exempt under s.281 did not prevent the contract arising on novation from being dutiable. That the parties so contemplated was found by the Primary Judge (at [24]) in reference to cl. 3 of the Deed of Termination.

27. RS [28] is neither factually nor doctrinally sound. The release in Deed cl. 6 of Trust Company was complete: past, present and future. This is uncontroversial: see AF [7]. The release by deed of the assignor of a lease from only its *future* obligations does not disqualify that deed from characterisation as a novation, as Sundberg J found in *Orica* (see par 12 above), where the release only affected *future* obligations (at [123], [124]).

28. The CGT contention in RS [32] is, with great respect, incorrect. Section 104-10 of the *Income Tax Assessment Act* 1997 (**ITAA97**) provides that a change of ownership *must* occur *before* any CGT event can occur, and if that condition is satisfied the CGT event occurs on the contract date. Note 1 to s. 104-10(3) makes this clear: "*If the contract falls through before completion, this event does not happen because no change of ownership occurs*". The Deed of Termination terminated the 2003 contract, according to the thesis of the respondent in RS [21]. That circumstance prevents CGT event A1 happening, under that thesis, in consequence of entry into the 2003 contract. When the second 2008 contract was entered into, and duly completed with a transfer of title in late 2008, the only CGT event that ever occurred under the ITAA97 (event A1) occurred as that was the only contract under which any change of ownership occurred.

Issues 3 and 4 – The alternative "tripartite hybrid contract" reasoning

29. The proposition in RS [46] that "there is no legal doctrine which prevents a tri-partite" hybrid contract approach is unsound. The Deed is either a novation or an assignment. The requirement for the former to have, as an essential ingredient in its recognition, a rescission of the first contract, and the requirement that the first contract must remain in existence to support the latter, prevents their merger into this new 'hybrid' doctrine.

Dated: 28th September 2011

ANASTASIA TSEKOURAS
Counsel for the appellant
Tel: 9232 0288 Fax: 9223 3941

C. J. BEVAN
Counsel for the appellant
Tel: 9235 3122 Fax: 9233 7416
Email: cjbevan@wentworthchambers.com.au