

BETWEEN:

ALH GROUP PROPERTY HOLDINGS PTY LIMITED

HIGH COURT OF AUSTRALIA

Appellant

FILED

23 SEP 2011

and

CHIEF COMMISSIONER OF STATE REVENUE

Respondent

THE REGISTRY SYDNEY

### RESPONDENT'S SUBMISSIONS

#### Part I: Certification

1. The respondent certifies these submissions as suitable for publication on the internet.

#### Part II: Issues

2. In these submissions the respondent adopts the defined terms in the appellant's submissions and includes a description in square brackets, from time to time, to assist in identification. For example 'ALPH [purchaser 2]'.  
3. The respondent submits that the appellant's issues 1 and 2 arise on the appeal subject to one clarification of language. In this regard, the respondent submits the appellant's submission that the right to refund turns on whether 'the Deed effected a complete novation of the 2003 contract' (paragraph 9 of the appellant's submissions, hereafter in the form 'AS 9') requires clarification. The phrase "effected a complete novation" is protean. The issue is whether there was a legal novation of the 2003 contract.  
4. The respondent submits that issues 3 and 4 are illusory because the Court of Appeal merely labelled the various rights and obligations arising under the Deed of Consent and Assignment as a hybrid tripartite contract. However, the respondent does address fully issues 3 and 4.

#### Part III: Notice under s 78B of the *Judiciary Act 1903* (Cth)

5. The respondent considers no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

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#### Part IV: Material Facts

6. The agreed facts remain the subject of agreement.
7. The respondent accepts the transaction documents are set out in paragraph 12 but disagrees with the described effects in paragraphs 12(b) and (c) and 13(g)(i). The legal conclusions in AS 12(b) and 13(g)(i) are contested. That is, it is not accepted that a 'new contract came into existence'. The respondent adopts the approach of the NSW Court of Appeal to the effect the Deed of Consent and Assignment was an assignment of the benefit of the 2003 contract and not a novation of it.<sup>1</sup> See the judgment of the NSW Court of Appeal at paragraphs 84 and 86 of the judgment.
8. AS14(a) is contested. The Deed was chargeable with duty as a transfer of dutiable property<sup>2</sup> [under s 8(1)(a) of the Act] being an assignment of the purchaser's rights under an existing contract.
9. The respondent attaches two tables intended to illustrate and highlight relevant material facts.

#### 20 Part V: Applicable Statutory Provisions

10. The appellant's statement is accepted.

#### Part VI: The Respondent's Argument

11. The appeal turns on the construction of the Deed and whether it gave rise to a legal novation of the 2003 contract. This was the approach taken by the NSW Court of Appeal in paragraph 14 of the judgment.<sup>3</sup>

#### 30 Issues 1 and 2 – The Contractual Characterisation of the Deed

##### The 2003 Contract was the only Source of the Vendor's Obligation to Convey

12. What is critical is that the 2003 contract was and remained the only source of the vendor's obligation to convey the hotel on receipt of the balance of the purchase price. This was the approach taken by the NSW Court of Appeal in paragraph 28 of the judgment<sup>4</sup>.

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<sup>1</sup> *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Ltd* (2011) ATC ¶20-251, 12,235 [84]-[86] (Handley AJA).

<sup>2</sup> *Duties Act 1997* (NSW) ss 8, 109(a).

<sup>3</sup> *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Ltd* (2011) ATC ¶20-251, 12,229 [14] (Handley AJA).

<sup>4</sup> *Ibid* 12,230 [28].

13. It is critical because:

‘A novation does not involve a transfer of rights: the parties obtain original rights under the replacement contract. In the case of an assignment, the assignee’s rights are derivative rather than original’.<sup>5</sup>

14. The Deed did not impose on the vendor any new or direct obligation to transfer the hotel to the appellant on receipt of the balance of the purchase price. The obligation to transfer the hotel remained sourced in the 2003 contract. This was the approach taken by the NSW Court of Appeal in paragraph 31 of the judgment.<sup>6</sup>

15. That the Deed did not impose on the vendor any new or direct obligation to transfer the hotel to the appellant on receipt of the balance of the purchase price is stark when one considers every relevant provision:

(i) Recital C records the vendor’s agreement to consent to purchaser 1 assigning its rights and obligations under the 2003 contract to purchaser 2. Importantly, there is no recital to the effect that the vendor agrees to convey the Parkway hotel to purchaser 2.

(ii) Clause 1.1 includes the definition ‘Assignment means the assignment of the Parkway Contract referred to in clause 3.1’

(iii) Clause 1.1 includes the definition ‘Date of Assignment means ...’

(iv) Clause 2 identifies three conditions precedent to the ‘Completion of the Assignment’.

(v) Clause 3 deals with ‘Assignment and Consent’ in the following manner. Clause 3.1 is headed ‘Assignment’ and provides:

‘Subject to satisfaction of the conditions precedent in clause 2, with effect from the Date of the Assignment, TCFS [purchaser 1] assigns to ALPHH [purchaser 2] all of TCFS’s [purchaser 1’s] rights and entitlements under and in relation to the Parkway Contract in consideration of ALPHH [purchaser 2] paying:

(a) TCFS [purchaser 1] \$638,661.10 by way of reimbursement of the deposit paid by TCFS [purchaser 1] to Oakland [vendor] under the Parkway Contract; and

(b) TCFS [purchaser 1] \$2,063,389 being the balance of the consideration,  
on the date of this Deed (receipt of which is acknowledged).’

(vi) Clause 3.3 deals with the vendor’s consent in the following manner: ‘Oakland [vendor] consents to the assignment by TCFS [purchaser 1] of all its rights and entitlements under and in relation to the Parkway Contract to ALPHH [purchaser 2].’

<sup>5</sup> J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2007) 346 [17-07].

<sup>6</sup> *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Ltd* (2011) ATC ¶20-251, 1231 [31].

- (vii) Clause 3.4 is headed 'Contract' and provides:  
'Forthwith after the assignment TCFS [purchaser 1] must deliver the original Parkway Contract to ALPH (sic).'
  - (viii) Clause 4 set outs ALPH's [purchaser 2's] covenants.
  - (ix) Clause 5 provides an indemnity by ALPH [purchaser 2].
  - 10 (x) Clause 6 contains, among other things, a release by the vendor to the following effect:  
  
Oakland [vendor] and ALPH [purchaser 2] release and discharge TCFS [purchaser 1] from:
    - (a) All claims, actions, demands and proceedings which Oakland [vendor] or ALPH [purchaser 2] may have or claim to have or but for this release might have had against TCFS [purchaser 1] arising out of or in connection with the Parkway Property and the Parkway Contract; and
    - 20 (b) All liability of TCFS [purchaser 1] arising out of the Parkway Property and the Parkway Contract, with effect from the Date of Assignment.
  - (xi) Clause 7 is entitled 'Vendor Disclosure' and contains acknowledgments and a waiver by ALPH [purchaser 2]
  - (xii) Clause 8 set out covenants by TCFS [purchaser 1].
  - (xiii) Clause 9 deals with costs and stamp duty.
  - 30 (xiv) Clause 10 deals with TCFS's [purchaser 1's] limitation of liability. The limitation arises from TCFS entering into the Deed as trustee of a trust and in no other capacity. In clause 10(b) Oakland [vendor] acknowledges that obligations incurred by TCFS are incurred solely in its capacity as trustee of a trust.
  - (xv) Clause 11 deals with GST.
  - (xvi) Clause 12 deals with severance.
  - (xvii) Clause 13 deals with the non-merger of rights and obligations.
  - (xviii) Clause 14 deals with notices
  - 40 (xix) Clause 15 is a 'further assurances' clause.
  - (xx) Clause 16 provides that the Deed is governed by the laws of New South Wales.
  - (xxi) Clause 17 deals with the execution of counterparts.
16. As is apparent from the above material, the Deed did not impose on the vendor any new or direct obligation to transfer the hotel to the appellant on receipt of the balance of the purchase price. The obligation to transfer the hotel remained sourced

in the 2003 contract. This was the approach taken by the NSW Court of Appeal in paragraph 31 of the judgment.<sup>7</sup>

17. As also apparent from the above material many provisions of the Deed would be unnecessary and superfluous if the Deed were intended to novate the 2003 Contract. For example:

- i. The part of Recital C recording the vendor's agreement to consent to purchaser 1 assigning its rights and obligations under the 2003 contract to purchaser 2;
- ii. In Clause 1.1, the definition of 'Assignment';
- 10 iii. Clause 3.1 providing for the assignment to ALPH [purchaser 2] all of TCFS's [purchaser 1's] rights and entitlements under and in relation to the Parkway Contract;
- iv. Clause 3.3 containing the vendor's consent to the assignment; and
- v. Clause 3.4 providing for delivery of the original Parkway Contract to ALPH (sic).

These are provisions which would be otiose and inappropriate if the Deed were intended to novate rather than to assign.

18. To say, as the appellant does at AS 52, that specific performance could have been  
20 obtained 'to transfer the subject land to ALH on completion on the tender of the balance of purchase monies by ALH' says nothing in opposition to the correctness of the proposition that the 2003 contract was the only source of the vendor's obligation to transfer the hotel.

That is to say, an action for specific performance would rely necessarily on, among other matters, the obligation in the 2003 contract on the vendor to convey the hotel to the appellant on receipt of the balance of the purchase price. That must be so because of the absence of any such obligation on the vendor in the Deed.

### 30 Further Analysis of the Deed

19. The Deed contains the following express provisions that evince an intention to assign and not to novate. There is also the absence of certain provisions consistent with a novation. The intention of the parties is to be gleaned objectively from the terms of the document that they entered into rather than on a subjective basis: See *Byrnes v Kendle* [2011] HCA 26, [98]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 25; (2004) 219 CLR 165, 179 [40]:

- 40 i. It is called a 'Deed of Consent and Assignment' not a 'Deed of Novation'. It could have been called a 'Deed of Novation' if the parties had intended it to operate as such.
- ii. Recital C states the vendor 'has agreed to consent to TCFS assigning its rights and obligations under the Parkway Contract to ALPH on the terms

<sup>7</sup> *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Ltd* (2011) ATC ¶20-251, 12,231 [31] (Handley AJA).

of this Deed'. The language of assignment of existing rights is used rather than the language of novation.

- 10
- iii. There is no recital to the effect 'The vendor agrees to convey the Parkway Hotel to the new purchaser' (appellant). There is no provision to that effect either.
- iv. There is no recital to the effect 'The Parkway Contract is rescinded'. The rescission of the Parkway Contract was essential for there to be a novation.
- v. The definitions in clause 1.1 include 'Date of Assignment means, subject to satisfaction of the conditions precedent in clause 2, the date which is 2 business days after TCFS [purchaser 1] gives Oakland [vendor] and ALPHH [appellant] a notice confirming that the Ratings Affirmation has been obtained on terms satisfactory to TCFS (acting reasonably).' The language of assignment is used rather than the language of novation.
- 20
- vi. The definitions in clause 1.1 include 'Ratings Affirmation means the necessary affirmations from the ratings agency under TCFS' financing documents to enable the Assignment to proceed and the consideration from the Assignment to be used for the purchase of the Boundary Property.' The language of assignment is used rather than the language of novation.
- vii. Clause 2 states 'Completion of the Assignment is subject to and conditional upon...' The language of assignment is used rather than the language of novation.
- 30
- viii. Clause 3.1 states '...TCFS [purchaser 1] assigns to ALPHH [purchaser 2] all of TCFS's rights and entitlements under and in relation to the Parkway Contract...'. This is an important provision because it appears to be the only provision in the Deed which deals with the appellant and its rights to receive a conveyance of the Parkway Hotel. However, importantly for present purposes, the conveyance is to occur 'under and in relation to the Parkway Contract' and not from a provision in the Deed obliging the vendor to convey to the appellant.
- 40
- ix. Clause 3.1(a) provides that purchaser 2 pays purchaser 1 the 10% deposit. The legal consequence is that if the 2003 contract was rescinded after the assignment the deposit would be refundable to purchaser 2 under the 2003 contract. If there had been a complete novation of the 2003 contract the deposit would have been paid by the vendor to purchaser 1 and a new deposit would have been paid by purchaser 2.

Further, there appears to be no provision in the Deed requiring the vendor to refund the deposit to purchaser 2 in the event the vendor was obliged legally to repay the deposit [eg if the vendor was unable to convey title to the hotel to purchaser 2]. This consequence points strongly to the intention of the parties to keep the 2003 contract on foot.

x. Clause 3.1 demonstrates that purchaser 2 was seeking to acquire the hotel property for a payment of \$8,450,000.00 [being the original purchase price of \$6,386,611 plus \$2,063,389 consideration paid to purchaser 1]. In such circumstances, that is where there was a new price, it appears a true novation was precluded. Windeyer J in *Olsson v Dyson* (1970) 120 CLR 365, 388-389 noted with apparent approval the observation of Lord Selborne LC in *Scarf v Jardine* (1882) 7 App Cas 345, 351, to the effect that novation means 'there being a contract in existence, some new contract is substituted for it...'. It would appear there could be no substitution in circumstances where purchaser 2 was paying \$2,063,389 more than purchaser 1 for the property.

xi. It appears to have been assumed in *Vickery v Woods* (1952) 85 CLR 336 that if there was to have been a novation of the contract for sale of land then the substituted contract would have had the same purchase price. The appeal, of course, turned on there being no evidence the original contract was rescinded.<sup>8</sup> See Williams J at page 347.9 and 350.2, Fullagar J at page 351.6.

xii. In *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473, the New South Wales Court of Appeal noted the novation was 'not intended to alter that arrangement'<sup>9</sup> [at page 480 [26]] and 'the subsequent events were consistent with Fightvision being substituted for Promotions in the original contract and carrying out the remainder of the agreement' [at page 492 [81]]<sup>10</sup>.

xiii. In *Scruples Imports Pty Ltd v Crabtree & Evelyn Pty Ltd* (1983) 1 IPR 315, 320, Powell J observed:

'Novation, since it involves the discharge of one contracting party and the acceptance of another in lieu, is a matter relating to the existence or otherwise of an allegedly legally enforceable obligation; ...

Reduced to its simplest form, a novation is merely a contract between three parties, the obligee, the original obligor, and the substituted obligor, the effect of which contract is that in consideration of the obligee releasing the original obligor from his obligation, the substituted obligor promises the obligee that he will assume responsibility for the performance of the obligation.'

The concept appears to involve 'the obligation' being performed by a substituted party. That is, the obligation needs to remain the same or essentially the same.

<sup>8</sup> See *Vickery v Woods* (1952) 85 CLR 336, 347 [9] (Williams J); 350 [2] (Fullagar J).

<sup>9</sup> *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473, 480 [26].

<sup>10</sup> *Ibid* 492 [81].

- xiv. In H.G. Beale et al (eds), *Chitty on Contracts* (Thomson Reuters, 30<sup>th</sup> ed, 2008) [1367]:

‘Novation – There is no doubt that with the consent of both contracting parties all contracts of any kind may be transferred, and the term “novation” has been introduced from Roman law to describe this species of transfer.’

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It is submitted that inherent in the observation is the notion the terms of the contract remain the same or essentially the same.

- xv. To similar effect is D W Greig and J L R Davis, *The Law of Contract* (Lawbook, 1987) 1023 [5], it is stated:

‘Novation occurs when a contract between A and B is discharged and replaced by a new contract. Such a contract might be between the original parties or involve a new party, for example, between A and C. The effect of the latter transaction can thus be that a right owing by A to B is replaced by the same liability from C to A.’ [emphasis added]

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And, N C Seddon and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2008) 375 [8.46] :

‘Put more generally, a novation (of the type of present concern) occurs when two parties to a contract enter into an agreement with a third party under which, in consideration for the first party releasing the second party from the contract, the third party undertakes to assume responsibility for performance in place of the second party.’ [emphasis added]

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And, Charles Bruce Morison, *Rescission of Contracts* (Stevens & Haynes, 1916) 26:

‘Where the obligation of a third person is by express agreement accepted by one party to an existing contract with the consent of such third person and of the other party to the contract, in lieu of the obligation of such other party, who, by the new contract, is released from his obligation under the original contract.’ [emphasis added]

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- xvi. Clause 3.3 states ‘Oakland [vendor] consents to the assignment by TCFS [purchaser 1] of all its rights and entitlements under and in relation to the Parkway Contract to ALPH [purchaser 2].’ This is not the language of rescission or termination of the Parkway Contract. Rather, the concept is that of keeping the Parkway Contract on foot so that rights and entitlements under it can be assigned.

- xvii. Clause 4.1(b) states ‘ALPH covenants with Oakland that ... as from the Date of Assignment, ALPH [purchaser 2] shall perform and observe all obligations of the Purchaser under the Parkway Contract.’ The concept is



that the Parkway Contract is being kept on foot. This sits uneasily with the notion that Parkway Contract is rescinded.

xviii. The same observation is made in relation to Clause 4.2 which states 'ALPHH covenants with TCFS that ALPHH shall on and from the Date of Assignment perform and observe all the obligations of TCFS as purchaser under the Parkway Contract whether before or after the Date of Assignment.'

10 xix. Importantly, a comparison of clause 4.1(b) with clause 4.2 demonstrates that as between TCFS [purchaser 1] and ALPHH [purchaser 2], ALPHH [purchaser 2] has to observe all the obligations whether before or after the date of assignment. Whereas under clause 4.1(b) with Oakland [vendor], ALPHH [purchaser 2] only has to perform the obligation from the date of assignment and not from the date of the 2003 contract. That supports the submission there is no novation. Because, under the 2003 contract purchaser 1 had an obligation to advance the purchase price by loan but by clause 4.1(b) there was no obligation, which there would be under a novated contract, on ALPHH [purchaser 2] to re-advance the loan.

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xx. Clause 6 deals with releases of obligations. Importantly for present purposes, there is no release, in clause 6 or anywhere in the Deed, by TCFS [purchaser 1] of the obligations of Oakland Glen [vendor] to it. The placement of the legal content of those obligations in the hands of ALPHH [purchaser 2] is a legal consequence of the executed transfer by the Deed. The absence of such a release meant that the vendor's obligation to transfer the property on receipt of the balance of the purchase price remained in place in the 2003 contract. And importantly for present purposes, was the only source of the vendor's obligation to convey the property.

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xxi. Clause 7.1(a) contains an acknowledgment by ALPHH [purchaser 2] that 'it takes the Parkway Contract and the Parkway Property on an "as is where is" basis...'. The acknowledgment is explicable on the basis that the Parkway Contract is not being rescinded. The acknowledgment sits uneasily with the notion that the Parkway Contract is rescinded.

#### The 2003 Contract was not Rescinded

40 20. What is also critical is that the 2003 contract was not rescinded. This was the approach taken by the NSW Court of Appeal in paragraph 28 of the judgment.<sup>11</sup>

21. AS 23(a) notes, novation requires, among other things, 'the rescission of the existing contract'. The respondent agrees. *Vickery v Woods* (1952) 85 CLR 336, 345, 351 is authority for that proposition, as was noted by the NSW Court of

<sup>11</sup> *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Ltd* (2011) ATC ¶20-251, 12,230 [28] (Handley AJA).

Appeal at [41] of the judgment.<sup>12</sup> In that regard, a fundamental problem for the appellant is that the existing contract was not rescinded until 24 October 2008<sup>13</sup>. See clause 2.1 and the definition of 'Contract' and 'Termination Date' in clause 1.1 of the Deed of Termination. In such circumstances, there can be no novation.

10 22. The Deed of Termination has not been the subject of "rectification". No such "rectification" [by recourse to a blue pencil or otherwise<sup>14</sup>] is appropriate because it would adversely affect a third party (Trust Company Fiduciary Services Limited) which would on termination of the Deed [or on such a construction of the Deed] be liable to repay to the appellant more than \$2M which the third party received as consideration for the Deed.

23. The appellant's submissions, in relation to the issue of rescission of the 2003 contract, rely on a proposition to the effect 'the bilateral 2003 contract necessarily ceased to exist the moment, one of the two parties to it was released from all liability under it'. AS 50, 24, 30, 60.

20 24. The submission ought be rejected because a bilateral contract is not terminated necessarily when one party no longer has liability or obligations under the contract. The other party may and often does, have obligations that are yet to be performed. See, J W Carter, LexisNexis, *Carter on Contract* (at 15 September 2011) [32-050] states:

'The parties to a contract may expressly agree to its discharge at any time, by agreeing that the former contract has been 'rescinded', 'abrogated', 'abandoned', 'cancelled', 'discharged' or by the use of some similar expression, provided there is at least one executory obligation under the former contract.

30 Where there are executory obligations on both sides, discharge is established by an agreement which amounts to a release of both sets of obligations.'

25. Carter cites, as authority for that proposition, the observations of Lord Diplock in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All ER 34, 48 f to g:

'Abandonment of a contract (the former contract) which is still executory, ie one in which at least one primary obligation of one or other of the

<sup>12</sup> *Ibid* 1231 [41].

<sup>13</sup> The evidence is admissible to identify the things with which the contract deals. See *White v Australian & New Zealand Theatres Ltd* (1943) 67 CLR 266 ; *Spunwill Pty Ltd v Bab Pty Ltd* (1994) 36 NSWLR 290, 304-313; *Sportsvision Australia Pty Ltd v Tallglen Pty Ltd* (1998) 44 NSWLR 103,117. See also *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310, 328, 331.

<sup>14</sup> The concession made in the NSW Court of Appeal and mentioned for the appellant in the application for special leave, does not assist the appellant on this question. That is because the concession arises only after the subject matter of the Deed has been identified as being the 'first 2008 contract' not before such identification, which is the point in time now being considered.

primary parties remains unperformed, is effected by the parties entering into a new contract (the contract of abandonment) by which each party promises to release that other party from further performance of any primary obligations on his part under the former contract then remaining unperformed, without such non-performance giving rise to any substituted secondary obligation under the former contract to pay damages.'

As noted above, there was no release in the Deed of the obligations to purchaser 1 of the vendor under the 2003 contract.

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26. Parties can exercise their contractual freedom to provide for the release of both sets of obligations or, as here, for the release of only one set of obligations. Particularly where, as here, the existence of a stamp duty exemption for corporate reconstruction [see paragraph 6 of the judgment of Handley AJA]<sup>15</sup> might be sought to be protected by keeping such a contract on foot rather than novating it completely and thereby creating fresh original rights under the replacement contract. See paragraphs 11 and 12 in the Agreed Statement of Facts.

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27. In any event, it is not accurate to characterise, as the appellant does in [AS 30], the release of TCFS [purchaser 1] as being a release from a bilateral contract simpliciter, because the release occurred at the same time and in the same document as the assumption of cognate obligations by the vendor and purchaser 2.

28. Similarly, where a lessor has granted a lease for say 10 years and after say 5 years the lessee with the consent of the lessor assigns the lease and the lessor agrees to a request from the lessee/assignor to release the assignor from ongoing obligations, no-one would suggest the legal consequence is that the lease has been novated rather than assigned.

### 30 Issues 3 and 4

29. As set out above, had there been a rescission of the 2003 contract under the Deed of Consent and Assignment, and then clause 3 in terms makes no sense. That is because there would be no rights under the 2003 Contract for the appellant to acquire for consideration and no assignment needing Oakland Glen's consent.

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30. Without more than the rights and obligations set out in clause 3, of course, Trust Company would have remained obliged to pay the balance of the purchase price because an assignment of its contractual rights does not itself rid a party of its contractual obligations. Moreover, Oakland Glen, though it could resist an action to transfer the property to the appellant except on tender of the balance of the purchase price, would not be able to sue the appellant for balance of the purchase price or damages, only Trust Company.

<sup>15</sup> *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Ltd* (2011) ATC ¶20-251, 12,228 [6] (Handley AJA).

31. The additional covenants that follow in clauses 4,5 and 6 of the Deed of Consent and Assignment manifest an intention to confer upon Oakland Glen the right to sue the appellant for the balance of the purchase price and to release Trust Company from its obligation to Oakland Glen to pay the balance of the purchase price under the 2003 contract.
32. None of these other covenants negate or render Oakland Glen's obligations under the 2003 contract illusory. For example, Oakland Glen would still be treated for CGT purposes as having disposed of the property in 2003.<sup>16</sup>
- 10 33. It is the inclusion of these covenants that led to the Court of Appeal describing the Deed of Consent and Assignment as a "hybrid tripartite contract".<sup>17</sup>
34. The appellant has seized upon this expression as a doctrinal error of the Court of Appeal recognising "a new creature of the common law".<sup>18</sup> It is not; it is a mere subjective description of combination of the rights and obligations arising under the Deed of Consent and Assignment, no different from the terms of an express trust being described as a unit trust, an exhaustive discretionary trust, a non-exhaustive discretionary trust etc.<sup>19</sup>
- 20 35. Accordingly, it is submitted that the appellant's issues 3 and 4 are illusory. The arguments set out do not assist with determining the simple issue in this case. Nevertheless, the respondent deals with them as follows.
36. The word 'novation' does not with adequate legal precision describe the character of the contract on the findings of the NSW Court of Appeal. This is because the parties have chosen, as is their right, to fashion their bargain in a particular manner.
- 30 37. The character of the contract, chosen by the parties, was to keep the 2003 contract on foot as the sole source of the obligation of the vendor to convey the hotel on receipt of the balance of the purchase price.
38. The appellant's submissions [AS 59] identify three 'doctrinal impediments' which, it is said, require the character of the contract to be described as a novation and only as novation.

<sup>16</sup> *FCT v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520.

<sup>17</sup> [37], Appellant's submissions.

<sup>18</sup> [57], Appellant's submissions.

<sup>19</sup> Cf. *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, [8]:

"In submissions upon the appeal, the term 'discretionary trust' was used as an overall description of the trusts for which the Deed of Settlement provided. The meaning of this term is disclosed by a consideration of usage rather than doctrine, and the usage is descriptive rather than normative. Accordingly, a 'discretionary trust' is not a component of the doctrinal divisions by which there is determined the formal and essential validity of trusts".

39. To describe novation as a doctrine, is to overstate the role of novation, it is to pay obeisance to a shibboleth.
40. The first impediment [AS 59(a)] is said to be that ‘the effect of the Deed was to substitute ALH as purchaser under the 2003 contract in place of Trust Company and release Trust Company from all obligations under the 2003 contract’.
41. There is no legal doctrine which prevents a tri-partite assignment and deed of consent, such as the present Deed, containing such characteristics.
- 10 42. The first impediment appears to rely on the notion that the release of Trust Company mandated a rescission of the 2003 contract. For the reasons set out above, a rescission was not mandated by the release of Trust Company.
43. For completeness it need be noted that the statement ‘substitute ALH as purchaser under the 2003 contract’, while perhaps true for some purposes and for some perspectives, is not the entire truth. The fuller perspective is that on exchange Trust Company paid the balance of the purchase price to the vendor. See special condition 53 of the 2003 contract and clause 3.1(b) of the Deed. However, ALH did not step into the shoes of Trust Company in that regard. Rather, Oakland Glen [vendor] repaid ‘the loan’ and there is no evidence of any further payment being made to Oakland Glen [vendor] by ALH [purchaser 2]. See the statement made by counsel for ALH in the NSW Court of Appeal hearing on the last page of the transcript at lines 2 and 3, and lines 25 to 30.
- 20 44. The second impediment [AS 59(b)] is said to be to the effect ‘with its burdens and benefits removed from Trust Company the 2003 contract had no content and was extinguished’. This is a re-statement of the first impediment.
- 30 45. The third impediment [AS 59(c)] is said to be to the effect ‘ALH assumed the obligations of the purchaser under the 2003 contract and the vendor released the purchase from “all liability” [under the 2003] contract.’
46. There is no legal doctrine which prevents a tri-partite assignment and deed of consent, such as the present Deed, containing such characteristics.
47. On the other hand, there are two reasons why the word ‘novation’ does not adequately describe the character of the contract on the findings of the NSW Court of Appeal. First, in order for there to have been a novation the Deed needs to be the source of the vendor’s obligation to transfer the hotel on the payment of the balance of the purchase money. As demonstrated above, by the analysis of the relevant provisions of the Deed, there is no such obligation.
- 40 Secondly, in order for there to have been a novation, the 2003 contract must be rescinded. As demonstrated above, there has been no rescission of the 2003 contract.

48. In such circumstances, given that, for the above reasons, the word 'novation' does not adequately describe the character of the contract, it was correct for Handley AJA to state at [35], [36] and [37]:

The Deed was not a mere assignment, which would not affect the purchaser's liability to the vendor, or impose a direct liability on the taxpayer.

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Nor was it a mere novation which would have rescinded the original contract and replaced it with a new one.

The Deed was a hybrid tripartite contract under which the vendor's obligations flowed from the assignment and the taxpayer's 'concurrent and mutually dependent obligations' flowed from the Deed.<sup>20</sup>

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49. Contrary to the appellant's submissions, there has been no creation of a new legal doctrine, merely a fleeting description of a departed commercial event. In the alternative, even if the Court of Appeal's description of the Deed as a "hybrid tripartite contract" goes too far, its conclusion that the Deed did not effect a novation is correct.

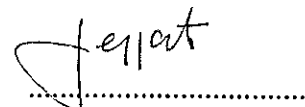
50. For the above reasons it is appropriate for the appeal to be dismissed with costs.

#### **Part VII: Statement on Notice of Intention or Notice of Cross-Appeal**

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51. There is no notice of contention or notice of cross-appeal and accordingly there is no statement of the respondent's argument in relation to such matters.

**Date: 23 September 2011**



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<sup>20</sup> *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Ltd* (2011) ATC ¶20-251, 12,231 [35], [36], [37] (Handley AJA).

**Table 1**

**Summary of Outcomes pursuant to Court of Appeal's Decision**

Date	Parties	Document/Transaction	Character of Document/Transaction	Subject Property	Agreed Consideration	Liability for Duty	Duty Assessed	Duty Refundable?
5 November 2003	V <sup>1</sup> and P1 <sup>2</sup>	Contract for the Sale of Land	Conditional agreement for the sale of land, subject to subdivision	Part of V's land, following subdivision	\$6,386,611	exempt as intra-group transaction (but, otherwise, \$336,758.50 payable)	\$Nil	No, since no duty paid because of exemption
27 June 2008	V, P1 and P2 <sup>3</sup>	Deed of Consent and Assignment	Agreement by P1 to assign the purchaser's rights under the 2003 Contract to P2 <sup>4</sup>	Part of V's land, following subdivision	\$2,702,050.10	Deed dutiable as a transfer of an interest in land [s8(1)(a)]	\$134,105.50	No, since no relevant refund applicable
24 October 2008	V and P2	Deed of Termination	Agreement to terminate the 2003 contract.	Part of V's land, following subdivision	N/A	None	\$Nil	N/A
24 October 2008	V and P2	Contract for the Sale of Land	Unconditional agreement for the sale of land	All of V's land	\$6,386,611	Dutiable as an agreement for the sale of land [s8(1)(b)(i)]	\$336,758.50	N/A

<sup>1</sup> V means Oakland Glen Pty Limited

<sup>2</sup> P1 means Trust Company Fiduciary Services Limited

<sup>3</sup> P2 means ALH Group Property Holdings Pty Limited

<sup>4</sup> In addition, P2 agreed to assume P1's obligations as purchaser, V agreed to consent and release P1 and to reimburse P1 \$5,747,949.90, being a loan made by P1 to V on exchange of an amount equal to the Balance of the Price payable on settlement

**Table 2**

**Summary of Outcomes pursuant to Decision at First Instance**

Date	Parties	Document/Transaction	Character of Document/Transaction	Subject Property	Agreed Consideration	Liability for Duty	Duty Assessed	Duty Refundable?
5 November 2003	V and P1	Contract for the Sale of Land	Conditional agreement for the sale of land, subject to subdivision	Part of V's land, following subdivision	\$6,386,611	exempt as intra-group transaction (but, otherwise, \$336,758.50 payable)	\$Nil	No, since no duty paid because of exemption
27 June 2008	V, P1 and P2	Deed of Consent and Assignment	Conditional agreement for the sale of land, subject to subdivision <sup>5</sup>	Part of V's land, following subdivision	\$2,702,050.10	Deed dutiable as an agreement for the sale of land [s8(1)(b)(i)]	\$134,105.50	Yes, \$134,105.50 refundable under s50 on basis that this Deed was an agreement for sale which terminated as a result of the Deed of Termination
24 October 2008	V and P2	Deed of Termination	Agreement to terminate the 2008 contract	Part of V's land, following subdivision	N/A	None	\$Nil	N/A
24 October 2008	V and P2	Contract for the Sale of Land	Unconditional agreement for the sale of land	All of V's land	\$6,386,611	Dutiable as an agreement for the sale of land [s8(1)(b)(i)]	\$336,758.50	N/A

<sup>5</sup> In addition, P1 agreed to assign to P2 the purchaser's rights to purchase the property, P2 agreed to assume P1's obligations as purchaser, V agreed to consent and release P1 and to reimburse P1 \$5,747,949.90, being a loan made by P1 to V on exchange of an amount equal to the Balance of the Price payable on settlement