IN THE HIGH COURT OF AUSTRALIA **NO. S285 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

APPELLANT'S SUBMISSIONS

Part I – Internet certification

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

Part II - Issues arising on the appeal

2. Whether the Deed of Consent and Assignment between Oakland Glen Pty Limited (**Oakland Glen**) (as vendor), Trust Company Fiduciary Services Limited (formerly Permanent Trustee Co Limited) (**Trust Company**) (as purchaser) and the appellant (**ALH**) (as the new purchaser) dated 27 June 2008 (**the Deed**) effected an assignment of the benefit of the contract for sale of the Parkway Hotel, French's Forest (**the subject land**) between Oakland Glen (as vendor) and Trust Company (as purchaser) dated 5 November 2003 (**the 2003 contract**), as varied by the Deed, from Trust Company (as assignor) to ALH (as assignee)? (**Issue 1**)

3. Whether the Deed effected a complete rescission and, therefore, a complete novation of the 2003 contract, in consequence of which a new contract for the sale of the subject land came into existence between Oakland Glen (as vendor) and ALH (as the new purchaser), on the terms and conditions of the 2003 contract as varied by the Deed, on 27 June 2008 (**the first 2008 contract**)? (**Issue 2**)

4. Whether the Deed was a "hybrid tripartite contract under which the vendor's obligations flowed from the assignment and the taxpayer's [ALH's] 'concurrent and mutually dependent obligations' flowed from the Deed"? (**Issue 3**)

5. Whether the Deed "effected a novation of the 'concurrent and mutually dependent obligations' [of the taxpayer, ALH, but], at the same time, effected an assignment of the benefit of the vendor's obligation to transfer the hotel on payment of the balance of purchase money"? (**Issue 4**)

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6. Until the special leave hearing, two statutory questions, namely, whether the Deed and/or the first 2008 contract, which the Deed brought into existence on 27 June 2008 in substitution for the 2003 contract:

(a) was an agreement for the sale of dutiable property, within the meaning of s. 8(1)(b)(i) of the *Duties Act*, 1997 (NSW) **(the Act)**, and, if so;

(b) was "cancelled" on 24 October 2008 by the Deed of Termination made between Oakland Glen (as vendor) and ALH (as purchaser) **(the Deed of Termination)**, within the meaning of s. 50 of the Act,

(the statutory questions) were live issues between the parties.

7. However, the statutory questions are no longer live issues, in consequence of the following concessions made by the respondent at the special leave hearing, namely:

(a) if there was a novation [of the 2003 contract by the Deed], then it is accepted by the respondent that there was a cancellation of that contract within the meaning of s. 50 of the Act (see [2011] HCA Trans 215 (12.8.11) at p.6 (exchange between Kiefel J and Mr Leggat SC at lines 3-27));

(b) the question [under the Act] reduces to the question as to whether the Deed of Consent is an agreement for the sale of dutiable property, and if that is so, on the basis that it is a novation, then the Deed of Termination would operate as a cancellation and there is no need to worry about special leave question 5 [relating to the application of s. 50 of the Act to the Deed or to any new contract it brought into existence] (see [2011] HCA Trans 215 at p.6 (exchange between French CJ and Mr Leggat SC at lines 28-33)); and

(c) the incidence of multiple liability for stamp duty or the possibility thereof falls away once you confine the question to that issue [namely, the question referred to in paragraph 8(b) above] (see [2011] HCA Trans 215 at p.6 (exchange between French CJ and Mr Leggat SC at lines 36-45)).

8. These three concessions are hereafter defined as "**the respondent's concessions**".

9. Accordingly, it is agreed between the parties that the appellant's right to a refund of *ad valorem* duty paid on the Deed under s.50 of the Act as a "cancelled" agreement for sale of dutiable property (the second statutory question) will turn on the success of its contentions that the Deed effected a complete novation of the 2003 contract.

Part III – Notice under section 78B of the *Judiciary Act*

10. No notices pursuant to s. 78B of the *Judiciary Act*, 1903 (Cth) need to be given.

Part IV – Citations to the judgments below

11. The decision of the Primary Judge is reported as *ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue* (2010) ATC 20-176. The decision of

the Court of Appeal is reported as *Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Limited* (2011) ATC 20-251.

Part V – The agreed facts

12. The proceedings before the Primary Judge and Court of Appeal were conducted on agreed facts (**agreed facts (AF)**). The transaction documents the facts rely on are:

(a) contract for sale of the subject land between Oakland Glen (as vendor) and Trust Company (as purchaser) dated 5 November 2003 (the 2003 contract);

(b) Deed of Consent and Assignment between Oakland Glen (as vendor), Trust Company (as purchaser) and ALH (as the new purchaser) dated 27 June 2008 (the Deed), in consequence of which a new contract for the sale of the subject land came into existence on the same terms as the 2003 contract as varied by the Deed (the first 2008 contract);

(c) Deed of Termination between Oakland Glen (as vendor) and ALH (as purchaser) dated 24 October 2008 which terminated the first 2008 contract created by the Deed on 27 June 2008 (the Deed of Termination); and

(d) a contract for the sale of the subject land (together with an additional parcel of contiguous land) dated 24 October 2008 made between Oakland Glen (as vendor) and ALH (as purchaser) (**the second 2008 contract**), which was duly completed, pursuant to which the subject land was transferred to ALH.

13. The appellant summarises the consequences of the transaction documents identified in par 12 (**the transaction documents**) and, where agreed, so states as follows:

(a) 5 November 2003 - Oakland Glen agreed to sell the subject land to Trust Company for $6.386m: AF [3] (the 2003 contract);

(b) 24 November 2003 - the respondent approved of the 2003 contract as a corporate reconstruction transaction under s. 281 of the Act, rendering it exempt from the duty that would otherwise have been payable under s. 8(1)(b)(i) of the Act as an agreement for sale of dutiable property: AF [5];

(c) 27 June 2008 - Oakland Glen, Trust Co and ALH made the Deed: AF [6];

(d) the Deed operated to effect the following agreed consequences, namely:

(i) it substituted ALH for Trust Company as the purchaser of the subject land (**the substitution**); and

(ii) it released Trust Company from all its obligations as the purchaser of the subject land under the 2003 contract (**the release**): AF [7];

(e) the Deed also required ALH to pay valuable consideration to both of the other parties for their entry into the Deed, namely:

(i) $6.386m to Oakland Glen, as the price payable for the subject land;

(ii) $2.063m to Trust Company;

(f) 24 October 2008 – Oakland Glen and ALH entered into a Deed of Termination (the Deed of Termination): AF [9];

(g) the Deed of Termination:

(i) rescinded the first 2008 contract (despite its erroneous reference to the date of the 2003 contract) (see the Primary Judge at [27]-[31]);

(ii) "cancelled" the Deed, insofar as it operated as an agreement for the sale of dutiable property, for the purposes of s. 50 of the Act;

(h) 24 October 2008 – Oakland Glen and ALH made a new contract for sale of the subject land and a parcel of contiguous land (the second 2008 contract): AF [10]; and

(i) ALH paid *ad valorem* duty on the second 2008 contract: AF [11].

14. The Deed had the following stamp duty consequences under the Act, namely:

(a) it was chargeable with *ad valorem* duty [under s. 8(1)(b)(i) the Act] as an agreement for sale of dutiable property [subject to s. 50 of the Act]; and

(b) duty in the amount assessed by the respondent [under s. 8(1)(a) of the Act] was paid on the Deed on 20 November 2008: see AF [12]-[13].

Part VI – The appellant's argument

The relevant findings made by the Court of Appeal

15. The Court of Appeal made the following findings relevant to the four live issues arising for determination on the appeal (Issues 1-4) **(the findings)**, namely:

(a) the overall effect of the Deed was that the purchaser (Trust Company) assigned its rights under the 2003 contract to the taxpayer (ALH) (cl. 3.1), the vendor (Oakland Glen) released the purchaser (Trust Company) from its obligations under that contact (c. 6), and the taxpayer (ALH) assumed those obligations (cl. 4.1(b)) (at [17]);

(b) the 2003 contract was not, in terms, rescinded (at [18] and [28]);

(c) the vendor (Oakland Glen) did not undertake any new or express obligation to transfer the hotel to ALH on payment of the balance of the purchase money under the 2003 contract, the source of the vendor's obligation to transfer the hotel remained the 2003 contract that had been assigned to ALH (at [19] and [18]) and the 2003 contract continued to determine the date and consideration for the vendor's disposal [to ALH] (at [28] and [39]);

(d) the deposit paid by the purchaser (Trust Company) remained in the vendor's (Oakland Glen's) hands for ALH's benefit and no further or other deposit was

paid (at [18]), however, the Deed transferred to ALH the deposit and purchaser's lien (at [39]);

(e) the benefit of the 2003 contract could be assigned in equity but the obligations, the burden of the contract, could not be assigned (at [20]);

(f) the fact that ALH assumed 'the obligations' of the purchaser under the 2003 contract and that the vendor released the purchaser from 'all liability' did not prevent the Deed from operating as an assignment of the benefit of that contract (at [26]);

(g) the Primary Judge fell into error (at [12]-[13]) when he found that, with its burdens and benefits removed from [the purchaser], the [2003] contract had no content and was [thereby] extinguished and that a new contract was constituted by ALH undertaking obligations identical to those of the [2003] contract; its benefits having been assigned to it (at [29]-[30]);

(h) the Deed was a tripartite contract which did not impose on the vendor any new or direct obligation to transfer the hotel to the taxpayer (ALH) on receipt of the purchase price, as its obligation to do so remained sourced in the 2003 contract, and ALH's only right to enforce that transfer came from the assignment in cl. 3.1 [of the benefit of the 2003 contract] (at [31]);

(i) the purchaser's [Trust Company's] obligations [under the 2003 contract] did not survive because cl. 6(b) released the purchaser from 'all liability arising out of the [2003] contract' (at [32]);

(j) the Deed was not a mere assignment which would not affect the purchaser's liability to the vendor or impose a direct liability on ALH (at [35]);

(k) nor was the Deed a mere novation which would have rescinded the original contract and replaced it with a new one (at [36]);

(l) the Deed was a "hybrid tripartite contract" under which the vendor's obligation flowed from the assignment and ALH's "concurrent and mutually dependent obligations" flowed from the Deed (at [37]);

(m) the Deed may have effected a novation of the "concurrent and mutually dependent obligations" but at the same time it effected an assignment of the benefit of the vendor' obligation to transfer the hotel on payment of the balance of purchase money (at [38]);

(n) the increase in the hotel's value since the 2003 contract accrued to the purchaser, which received $2.06m from ALH under the Deed (at [39]);

(o) the increase in the hotel's value since the date of the 2003 contract would have accrued to an arm's length vendor if the 2003 contract had been rescinded and replaced by a new contract with ALH (at [39]);

(p) the decision in *Orica Limited v FCT* (2010) ATC 20-168 at [48] and [118]-[128] (Sundberg J) (a partial novation case which was cited by ALH in response to the appeal made to the Court of Appeal by the respondent) was

distinguishable because "it is not authority for the proposition that a hybrid transaction, such as the Deed, must take effect as a novation" (at [77]);

(q) the judgment of the plurality of this Court in *FCT v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at [19]-[31], esp. at [21] [25] and [27], and at [58]-[64], cited by the appellant (ALH) in the Court of Appeal, "does not compel [that] Court to characterise the hybrid contract in the Deed as a novation of the 2003 contract" (at [51], [54], [57]-[64], [83]);

(r) the Deed was to be characterised as an assignment of the benefit of the 2003 contract to a new purchaser (at [56] and [84]);

(s) even if, contrary to its assignment conclusion [in sub-par 15(r) above], there was a novation, it was limited to "the concurrent and mutually dependent obligations" of ALH, and the benefit of the vendor's obligations were not novated but rather were assigned [by Trust Company to ALH] (at [85]);

(t) on either characterisation [that is, that in sub-pars 15(r) or 15(s) above], the Deed was a transfer of dutiable property, namely, the benefit of the 2003 contract [within the meaning of s. 8(1)(a) of the Act], and was not an agreement for its sale or transfer [within the meaning of s.8(1)(b)(i) of the Act], so that its cancellation did not attract s. 50(1) of the Act, and ALH was thereby not entitled to any refund of the duty paid on the Deed (at [86]).

16. The critical findings which appear to the appellant to be at the very heart of the reasoning for the conclusion that the Deed effected an assignment of the benefits of the 2003 contract from Trust Company to ALH (at [84]), and for the alternative conclusion that any novation was, at best, a partial novation limited to "*the concurrent and mutually dependent obligations*" of ALH, with the benefit of the vendor's obligations assigned by Trust Company to ALH (at [85]), are as follows:

(a) there was *no express rescission* of the 2003 contract effected in the terms of the Deed (at [18]), so that the only source of the vendor's obligation to transfer the hotel remained in the 2003 contract (at [19], [28] and [39]);

(b) the Deed *transferred* to ALH *the deposit and the purchase's lien* (at [39]);

(c) *the increase in value* of the hotel since the date of the 2003 contract ($2.06m) *accrued to the purchaser* (Trust Company) but *would [should] have accrued to an arm's length vendor* (Oakland Glen) *if the 2003 contract had been rescinded* and replaced by a new contract with ALH (at [39]); and

(d) the Deed *in its terms did not impose on the vendor any new obligation* to transfer the hotel to the new purchaser, ALH (at [31], [32] and [56]).

Issues 1 and 2 – the contractual characterisation of the Deed

17. The 2003 contract was also a bilateral contract made between Oakland Glen (as vendor) and Trust Company (as purchaser). The Deed was a tripartite contract made

between Oakland Glen (as the vendor under the 2003 contract, as the releasor under the Deed and as the vendor under the first 2008 contract), Trust Company (as assignor under the Deed and releasee in respect of the 2003 contract) and ALH (as assignee under the Deed and purchaser under the first 2008 contract). The 2003 contract was also an executory contract at the date when the Deed was entered into.

18. It is axiomatic that, although contractual rights and benefits can effectively be assigned, contractual obligations cannot be assigned.[1]

19. In view of the fact that the 2003 contract was executory at the date of the Deed, the only way in which ALH could have been made subject to the obligations of the purchaser under that contract was by way of a complete novation of that contract.[2] A novation can be express or it can be implied from the circumstances.[3] In *Vickery v Woods,*[4] Dixon J said, *"Rescission and novation ultimately depend on intention."*

20. In *Fightvision Pty Ltd v Onisforou,* [5] the Court of Appeal of New South Wales said that, *"in searching for the contractual intention, 'no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.' This equally applies, in our view, when searching for an intention that there be a novation."*

21. The task of the Supreme Court here was to infer what the parties' mutual intention was. For that purpose, the Court needed to consider the Deed as a whole and the context in which it was made.[6] The Primary Judge did so and found (at [11]) that:

> *"The intention of the parties to the Deed of Consent and assignment is clear enough. Trust Company was to drop out and ALH was to be substituted for it. The benefits under the [2003] contract were assigned to ALH by cl. 3.1. Its burdens were assumed by ALH under cl. 4.2 with the consent of Oakland [Glen] under cl. 4.1 and cl. 6."* [Counsels' emphasis added]

22. The inevitable doctrinal consequence of that finding of fact as to mutual intention is that, *"with its burdens and benefits removed from Trust Company, the [2003] contract had no content and was extinguished"* (as found by the Primary Judge at [12]). It was doctrinally inevitable because the 2003 contract was a *bilateral* contract.

23. Novation involves the following two critical elements:

(a) the rescission of the existing contract; and

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1 *Tolhurst v Associated Portland Cement Manufacturers (1900) Limited* [1902] 2 KB 660 at 668-669, Lord Collins MR; aff'd at [1903] AC 414 at 416, Lord Halsbury LC; 420, Lord Macnaughten; 423-424, Lord Lindley; *Linden Gardens Trust Limited v Lenesta Sludge Disposals Limited* [1994] 1 AC 85 at 103, Lord Browne-Wilkinson

2 *Olsen v Dyson* (1970) 120 CLR 365 at 388, Windeyer J

3 *Orica Limited v FCT* (2010) ATC 20-168 at [119]; *Vickery v Woods* (1952) 85 CLR 336 at 345; *Williams v Frayne* (1937) 58 CLR 710 at 738, Dixon J; *Olsen v Dyson* at 390, Kitto J; *Christianos v Rohrlach* (1981) 55 ALJR 681 at 682 (column 2), Mason, Murphy, Aickin, Wilson & Brennan JJ

4 (1952) 85 CLR 336 at 345

5 (1999) 47 NSWLR 473 at 493 [86], Sheller, Stein & Giles JJA, citing *Upper Hunter County District Council v Australian Chilling and Freezing Co Pty Ltd* (1968) 118 CLR 429 at 437, Barwick CJ

6 *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 401, Brennan J

(b) the substitution for it of a new contract.[7]

24. Once the (bilateral) 2003 contract was rescinded – as it had to have been once Trust Company was released from it (an agreed fact: AF [7]) – the privity of contract between Oakland Glen and Trust Company was destroyed. Oakland Glen could no longer look to Trust Company to perform its executory obligations as the purchaser under the 2003 contract (notably to pay the balance of the purchase price). Trust Company's executory obligations as purchaser were extinguished by the novation.[8]

25. The parties' mutual intention in executing the Deed (a tripartite contract) was:

(a) to create privity of contract between the vendor (Oakland Glen) and ALH in relation to the novated 2003 contract, with the result of making over to ALH all of its rights and benefits and to subject ALH to all the obligations as the purchaser under the novated 2003 contract (namely, the first 2008 contract);

(b) to release Trust Company from the corresponding obligations and for Trust Company to cease to hold any of those corresponding rights and benefits.

26. The mutually intended result was that the 2003 contract would cease to exist as the source of any rights, benefits or obligations as between the vendor (Oakland Glen) and the purchaser (Trust Company). In other words, it was to be *rescinded*.[9]

27. The parties' intentions were manifested by the following provisions of the Deed:

(a) recital C, which states that the parties intend that ALE [Trust Company] "assign" its "rights and obligations";

(b) cl. 3.1, under which ALE [Trust Company] assigns all its "rights and entitlements" under the 2003 contract;

(c) cll. 4.1 and 4.2, under which ALH covenants in favour of the vendor (Oakland Glen) and ALE [Trust Company] respectively that it would perform all of the obligations of ALE [Trust Company] as the purchaser under the 2003 contract "*whether before or after the date of assignment*";

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7 *Scarf v Jardine* (1882) 7 App Cas 345 at 351, Lord Selborne LC; *Vickery v Commissioner of Stamp Duties* (1950) 51 SR (NSW) 79 at 81-82, Street CJ; *Olsson v Dyson* (1969) 120 CLR 365 at 388, Windeyer J; *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 287, Megarry V-C; *Harry v Fidelity Nominees Pty Ltd* (1985) 41 SASR 458 at 461, King CJ; *Calaby Pty Ltd v Ampol Pty Ltd* (1990) 71 NTR 1 at 16-17, Angel J; reversed on the application of these principles to the facts at (1992) 110 ALR 343 at 354-356, Spender, French and von Doussa JJ; *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452 at 465, Northrop, Merkel and Goldberg JJ; *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] 1 Ch 52 at 84-85, Jenkins LJ

8 *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54 at 60-61, Lord Buckmaster LC; *Browning v Stallard* (1814) 5 Taunt 450 at 450; 128 ER 764 at 764 (Full Court of the Court of Common Pleas affirming a finding at first instance of a complete novation by Chambre J); *Re United Ports and General Insurance Company; Evens' Claim* (1873) LR 16 Eq 354 at 361-362, Bacon V-C; *Re Bank of Nova Scotia and Vancouver Island Renovating Inc* (1986) 31 DLR (4th) 560 at 564-566, Macfarlane JA (citing as authority *Bank of BC v Firm Holdings Ltd* (1984) 57 BCLR 1 at 20-3, Lambert JA); Lambert JA agreeing at 567; Cheffins JA agreeing at 569 (BCCA)

9 *Olsson v Dyson* 120 CLR at 389, Windeyer J; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 286, Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel

(d) cl. 5, under which ALH indemnifies ALE [Trust Company] in relation to its obligations under the 2003 contract;

(e) cl. 6 under which the vendor (Oakland Glen) releases ALE [Trust Company] from all claims obligations "arising out of or in connection with" the Hotel Contract and all liability "arising out of" the 2003 contract; and

(f) cl. 8.3, under which ALE [Trust Company] "consents to the termination" of the 2003 contract for the purposes of that and another (irrelevant) contract.[10]

28. The effect of the above express provisions of the Deed was that, from the date the Deed took effect, the vendor (Oakland Glen) could look only to ALH (as the new purchaser) and not Trust Company to perform all the obligations of the purchaser in relation to the 2003 contract, including any antecedent executory obligations.[11] Importantly, this entailed ALH paying the purchase price for the subject land.[12] In return, ALH would obtain a transfer of the subject land instead of Trust Company.

29. The mutual intention of the parties was that the assignment of the benefits under the novated 2003 contract (the first 2008 contract) in favour of ALH was not intended to be conferred independently of the assumption by ALH of all of the burdens and obligations under the first 2008 contract, particularly the payment of the purchase price. Recital C of the Deed states that the parties' intention is that the "*rights and obligations*" of Trust Company are intended to be the subject matter of the Deed.

30. The 2003 contract was a bilateral contract. Once it was found (indeed it was an Agreed Fact: see AF [7]) that there was a complete release of Trust Company from the 2003 contract, the finding that a novation occurred is inescapable. The contrary finding that an assignment occurred entails the corollary that a bilateral contract has remained in existence *after* one of its parties has been totally released from it. ALH contends that, in light of the preceding analysis, this is doctrinally insupportable.

31. The Primary Judge was correct when he made the following findings after applying the contractual doctrine of novation, in the same terms as addressed above, namely:

(a) a new contract [the first 2008 contract] was constituted by ALH undertaking obligations in terms identical to those of the [2003] contract under cl. 4, its benefits having been assigned to it under cl 3.1. Oakland [Glen's] consent to this assignment was not necessary but given anyway under cl. 3.3 (at [13]);

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10 The express or implied consent of Trust Company to the rescission of the 2003 contact here was essential: see *Sydney Corporation v West* (1965) 114 CLR 481 at 501-502, Windeyer J; *Toikan International Insurance Broking Pty Ltd v Plasteel Windows Australia Pty Ltd* (1989) 15 NSWLR 641 at 645, Samuels JA; *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 234-239, esp. at 238, Northrop, Gummow and Hill JJ (FFC); *Re Manchester and London Life Assurance and Loan Association* (1870) LR 9 Eq 643 at 648-649, James V-C; *Lindern Trawler Managers Ltd v WHJ Trawlers (a firm)* (1950) 83 Lloyd's List L Rep 131 at 135 (column 2), Devlin J; *Irvine v Public Trustee* (1978) 1 SR (WA) 23 at 26, Pidgeon DCJ; *R and I Bank of Western Australia Ltd v McNamee*, NSWSC (Comm Div), Giles J, Unrep, 20/5/94, at p. 8; Butterworth's Cases BC9402545

11 *Cf. Orica Limited v FCT* (2010) ATC 20-168, where Sundberg J held a valid novation was effected notwithstanding that antecedent obligations remained in place on the part of the original 'purchaser'

12 *Cf. Dublin Buildings Pty Limited v Rose* (1933) 49 CLR 84 at 97, Dixon J

(b) after citing *Orica,*[13] where Sundberg J found a novation under a deed of assignment effected by a provision recited by Sundberg J at [48], the Primary Judge found that, like the present case, in *Orica* there was no express extinguishment of the Distribution Agreement yet Sundberg J nonetheless found that a novation had occurred in that case (at [14]-[17]);

(c) the Deed replaced Trust Company's benefits and burdens under the 2003 contract with benefits and burdens in identical terms between Oakland Glen (as vendor) and ALH (as the new purchaser) (at [18]); and

(d) the Deed was, therefore, a novation containing a contract for the sale of the subject land between Oakland Glen (as vendor) and ALH (as the new purchaser) on identical terms to the 2003 contract (at [29]).

32. The appellant now turns to the rationale for the rejection by the Court of Appeal of the Primary Judge's characterisation of the Deed as a complete novation of the 2003 contract, favouring either an assignment analysis or its partial novation and partial assignment analysis as its alternative characterisation of the Deed. That rationale, as best the appellant can identify it, appears to be represented by the four critical findings which it has identified and set out at length in par 16 above.

33. The first reason for rejection of the novation characterisation is that there was *no express rescission* of the 2003 contract effected in the terms of the Deed (at [18]), so that the only source of the vendor's obligation to transfer the hotel remained in the 2003 contract (at [19], [28] and [39]), which is identified in par 16(a) above.

34. There are two answers to this first reason which ALH proffers. *First*, a rescission can arise both expressly and by implication.[14]

35. The Primary Judge made the necessary finding at [11]. There is no finding by the Court of Appeal that it was in error, as contrary to, or unsupported by, the evidence.

36. *Secondly*, the complete release of Trust Company by cl. 6 of the Deed (see AF [7]) necessarily effected a complete rescission of the 2003 contract (see par 30 above).

37. In *Olsson v Dyson,*[15] Windeyer J said, in relation to the perceived requirement for consideration in support of a novation, and after citing *Justinian's Institutes*, Book III, 29, 3, that, *"[i]f both privity between promisor and promisee and consideration moving from the promisee are essentials of a valid contract, there is a serious theoretical difficulty in every case of novation when the only consideration for the debtor's assumption of an obligation to a new party is the extinguishment of his obligation to the original creditor ...it arises in every case of simple novation when a new creditor is substituted for the former creditor...However, the requirements of our law are satisfied by a tacit agreement to extinguish the former obligation, and this is inferred when an inconsistent obligation is by agreement substituted."* That is, the

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13 *Orica Limited v FCT* (2010) ATC 20-168 at [48] and [118]-[125], Sundberg J (FCA)
14 *Olsson v Dyson* (1969) 120 CLR 365 at 390, Windeyer J
15 *Olsson v Dyson* (1969) 120 CLR 365 at 390, Windeyer J

mere substitution of the new contract (the first 2008 contract created by the Deed) answers the need for consideration to support rescission of the 2003 contract.

38. In the alternative, insofar as a rescission is held to require consideration to support it, because it can only arise in consequence of a new contract being made, the Deed is a contract under seal. Consideration was, therefore, unnecessary in this case.[16] If, contrary to the contention it is unnecessary, novation is held to have an additional requirement for consideration,[17] it was provided here. ALH paid Trust Company $2.702m, by reimbursing it for the deposit it paid ($638,661) and by paying an amount ($2,063,389) pursuant to cl. 3.1 of the Deed (see Primary Judge at [10]).

39. Oakland Glen, the vendor, released Trust Company from the 2003 contract under cl. 6 of the Deed (Primary Judge at [10]). Furthermore, the procuring by Oakland Glen of ALH to pay the two amounts totalling $2.702m to Trust Company under cl. 3.1, together with its promise in the Deed to enter into the first 2008 contract in substitution for the 2003 contract, is consideration moving from Oakland Glen.[18]

40. The second reason for the rejection of the novation characterisation is that the Deed *transferred to ALH the deposit and the purchase's lien* (at [39]).

41. The third reason can conveniently be analysed with the second reason, as they appear to have the same underlying rationale. The third reason for rejection of the novation characterisation is that *the increase in value of the hotel since the date of the 2003 contract ($2.06m) accrued to the purchaser (Trust Company) but would [should] have accrued to an arm's length vendor* (Oakland Glen) if the 2003 contract had been rescinded and replaced by a new contract with ALH (at [39]).

42. The appellant assumes, for present purposes, that the rationale for the calculation of the amount of $2.063m payable by ALH to Trust Company pursuant to cl. 3.1 as consideration for the rescission of the 2003 contract is indeed "*the increase in value of the hotel*" since the date of the 2003 contract, as the Court of Appeal found (at [39]) is correct. (In fact, not only is there is no evidence to support that finding, but it is equally unsupported by the agreed facts, and the entire case was conducted on agreed facts in both of the courts below.) The combined doctrinal effect of these two reasons

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16 *FCT v Orica Ltd* (1998) 154 ALR 1 at 33-34 [114]-[116], Gummow J, citing as authority: *Comm'r of Stamp Duties (NSW) v Bone* (1976) 135 CLR 223 at 227-229; *McDermott v Black* (1940) 63 CLR 161 at 176-177, Starke J; and 183-185, 187, Dixon J; *Creamoata Ltd v Rice Equalisation Ass'n Ltd* (1953) 89 CLR 286 at 306, Williams ACJ; 321, Fullagar J; 326, Kitto J; and *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 217-218, Barwick CJ

17 *Cook v Chas E Blanks Pty Ltd* [1968] 3 NSWR 356 at 357, Sugerman A-P; Walsh JA agreeing at 358; Hardie AJA agreeing at 359; *Redman v Permanent Trustee Company of New South Wales Ltd* (1916) 22 CLR 84 at 96, Isaacs J; *Norman v FCT* (1963) 109 CLR 9 at 24, Windeyer J; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 915-916, Lord Diplock

18 *Bird v Gammon* (1837) 3 Bing (NC) 883; 132 ER 650, Tindal CJ, Park, Vaughan and Coltman JJ; *Steanes v Cth* (1919) 20 SR (NSW) 27 at 42, Ralston J; *Morris v Barron* [1918] AC 1 at 12-13, Lord Finlay LC; *cf. Re European Assurance Society Arbitration Acts and Wellington Reversionary Annuity and Life Assurance Society; Conquest's Case* (1875) 1 Ch D 334 at 341-342, Lord Cairns LC; James and Mellish LJJ agreeing at 344; *Re Towns Drainage and Sewage Utilization Co; Morton's Case* (1873) LR 16 Eq 104 at 105-106, Lord Selborne LC; *Re Kleiss; ex parte Kleiss v Capt'n Snooze Pty Ltd* (1996) 61 FCR 436 at 440, Drummond J (FCA), citing as authority: *Langford Concrete Pty Ltd v Finlay* (1978) 1 NSWLR 14 at 17 (NSWCA)

is, therefore, that there could not have been an effective rescission of the 2003 contract because, *first*, the incoming purchaser reimbursed the outgoing purchaser for the deposit that was held to its joint account with the vendor pending completion, and *secondly*, the outgoing purchaser received a benefit from having entered into the 2003 contract, notwithstanding that that contract was rescinded.

43. If one analyses this comprehensive reasoning (namely, the second and third reasons together) at a commercial level, it is hard to see why the first purchaser would not expect, and receive, valuable consideration for its (necessary) consent to the rescission of what was a valuable contract.[19] There is no discernable public policy reason for the outgoing purchaser's demand for, or receipt of, payment of valuable consideration for its concurrence to a complete rescission of the contract by the incoming purchaser as cutting across the finding of the Primary Judge (at [11]) (based *inter alia* on an agreed fact: see AF [7]) that there was a mutual intention of the parties to the 2003 contract that it be rescinded and replaced by the first 2008 contract which the Deed created.

44. If one then analyses this comprehensive reasoning at the doctrinal level, one arrives at the same conclusion. Contrary to the findings at [39], there was no "*transfer to [ALH of] the deposit and purchaser's lien*". Under cl. 3.1 ALH reimbursed Trust Company for the deposit. In doing so it paid a deposit in that amount to Oakland Glen as the vendor under the first 2008 contract that the Deed created on 27 June 2008. The proposition that there was a transfer of anything on 27 June 2008 is antithetical to the extinguishment of the parties' rights under the 2003 contract and the creation of a new set of rights *inter se* under the (bilateral) first 2008 contract.

45. The Court of Appeal also fell into error when it held (at [39])[20] that there had been a *transfer of the deposit*. Although not stated, this conclusion appears to have been made on the ground that there was no physical movement of funds effected between Oakland Glen (as vendor) and Trust Company (as the outgoing purchaser) to refund the deposit paid or to pay a new deposit by ALH (as the substituted purchaser) to Oakland Glen as consideration for the rescission of the 2003 contract (together with the further payment of $2.063m made by ALH to Trust Company). But the "reimbursement" of the deposit under cl. 3.1 of the Deed by ALH to Trust Company achieved the same result as if Oakland Glen had refunded the deposit to Trust Company (as vendor) and taken a new deposit from ALH (as the substituted purchaser). The Court of Appeal's analysis is a triumph of form over substance.

46. Equally, there was no *transfer of the purchaser's lien*. Trust Company's lien was extinguished when the contract which created that lien was itself extinguished. A new purchaser's lien was vested in ALH upon the creation of the first 2008 contract on 27

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19 In *Leveraged Equities Ltd v Goodridge* (2011) 191 FCR 71 (FCAFC, 18.1.11), Finklestein, Stone & Jacobson JJ held (at [299]-[317]) that a contract can be novated bilaterally, but subject to the releasing party having given its consent to the novation in advance in the original contract, citing (at [313]-[316]) *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2011] 2 WLR 1165 at [22], Moore-Bick LJ (Rix LJ agreeing at [47]) and *216 Jamaica Avenue LLC v S & R Playhouse Realty Company* 540 F (3d) 433 (2008) (US CA 6th Cir), Sutton J (for the Court) at 438, as authority, and reversing the conclusion of Rares J at first instance (at [2010] FCA 67 at [103] and [106]) who held that a party to a bilateral contract cannot prospectively authorise its unilateral novation by the other party at a later date.

20 Citing *Rose v Watson* (1864) 10 HLC 672

June 2008, in consequence of the contemporaneous rescission of the 2003 contract and creation of the first 2008 contract by the parties' entry into the Deed.

47. Insofar as the apparent rationale for this comprehensive reason is that the *monetary* consideration for the rescission moved *from ALH rather than from Oakland Glen*, it is answered in pars 37-39 above. That is to say, *first*, there was no requirement for consideration for the reason given by Windeyer J in *Olsson v Dyson,*[21] based on the doctrinal rationale for a novation. *Secondly*, there was no requirement for consideration because the rescission here was effected by a deed. *Thirdly,* for the reasons in pars 38-39 above, consideration was given by Oakland Glen and ALH.

10 48. The fourth reason for the rejection by the Court of Appeal of the Deed's novation characterisation is that the Deed in its terms *did not impose on the vendor any new obligation to transfer the hotel to the new purchaser, ALH* (at [31], [32] and [56]).

49. But this reason is, with respect, another triumph of form over substance. The Deed did not have to make any express statement or acknowledgement, or secure any additional express promise, that Oakland Glen would transfer title to the subject land to ALH rather than to Trust Company on completion of the first 2008 contract. That obligation arose by operation of law. It had to, for the reasons which follow.

50. *First*, the bilateral 2003 contract necessarily ceased to exist the moment one of the two parties to it was released from "*all liability*" under it (an agreed fact: see AF [7]; and
20 cl. 6 of the Deed) which is also the subject of findings in both of the courts below: see the Primary Judge at [11]-[12] and Court of Appeal at [17] and [26]).

51. *Secondly*, Oakland Glen covenanted with ALH to accept performance of the purchaser's obligations under the 2003 contract from ALH in identical terms to those which bound Trust Company to perform the contract (Primary Judge at [10]).

52. *Thirdly*, the release Oakland Glen gave to Trust Company in cl. 6 of the Deed of all its obligations under the 2003 contract – past, present and future – coupled with its covenant with ALH, made in a tripartite contract between the parties to both of the bilateral contracts, to accept performance of all purchaser's obligations by ALH, on any view of it, created an enforceable obligation on Oakland Glen to transfer the
30 subject land to ALH. Oakland Glen would have had no arguable defence to an action for specific performance of the promise to transfer the subject land to ALH on completion on the tender of the balance of purchase monies by ALH. [22]

53. *Fourthly*, a fundamental aspect of the law of contract is that an assignment cannot relieve the assignor of his or her contractual obligations.[23] Yet it is both an agreed fact (see AF [7]) and has been found in both of the courts below (Primary Judge at [10]-[11] and Court of Appeal at [17] and [26]) that the assignor, Trust Company, was

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21 *Olsson v Dyson* (1969) 120 CLR 365 at 390, Windeyer J

22 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668-9, Lord Collins MR; aff'd at [1903] AC 414 at 416, Lord Halsbury LC; 420, Lord Macnaughten; 423-424, Lord Lindley; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 475-477, Dixon J; 467; 486

23 *The 'Jordan Nicolov'* [1990] 2 Lloyd's Rep 11 at 16 (column 1), Hobhouse J

released from "*all liability*" (past, present and future), that is to say, the assignor was relieved of all its contractual obligations. That finding alone, without more being necessary, supports the complete novation characterisation of the 2003 contract and its substitution by the first 2008 contract found by the Primary Judge.

Issues 3 and 4 – the alternative 'hybrid tripartite contract' characterisation of the Deed

54. The appellant contends that the Court of Appeal has enunciated a new principle by merging the doctrines of novation of contracts and the assignment of contractual rights when it made the following four findings referred to in par 15 above, namely:

(a) the Deed was a "*hybrid tripartite contract*" under which the vendor's obligation flowed from the assignment and ALH's "concurrent and mutually dependent obligations" flowed from the Deed (at [37]);

(b) the Deed may have effected a novation of the "concurrent and mutually dependent obligations" but at the same time it effected an assignment of the benefit of the vendor' obligation to transfer the hotel on payment of the balance of purchase money (at [38]);

(c) its ultimate conclusions on the doctrinal characterisation of the Deed were reached "*uninstructed by direct authority*" (at [56], [84] and [85]); and

(d) even if, contrary to its principal conclusion that there was an assignment of the benefits of the 2003 contract from Trust Company to ALH, there was indeed a novation, it was limited to "*the concurrent and mutually dependent obligations*" of ALH, and the benefit of the vendor's obligations were not novated but rather were assigned [by Trust Company to ALH] (at [85]).

55. The novel concept of a "*hybrid tripartite contract*" appears to inform the alternative conclusion of a partial novation and a partial assignment, rather than the primary conclusion of an outright assignment of the benefits of the 2003 contract from Trust Company to ALH, as best the appellant can track the Court of Appeal's reasoning. If that reading of the reasons of the Court of Appeal is found to be wrong by this Court, such that the "*hybrid tripartite contract*" is held to also inform the principal characterisation of the Deed as an outright assignment of the benefit of the 2003 contract, then the complaint made about it on appeal by ALH is the same, albeit the result of that complaint, if upheld, will go to the accuracy of the *ratio* finding on the characterisation of the Deed rather than to the *obiter* finding of partial assignment, being a finding that will become operative if the principal *ratio* finding is set aside.

56. The appellant also contends that there is, as the Court of Appeal candidly conceded, no direct authority for its enunciation of the novel concept of a "*hybrid tripartite contract*" and, furthermore, there is no indirect authority to support its recognition.

57. This new creature of the common law, which merges into one new concept the distinct doctrines of the novation of contracts and the assignment of contractual rights and

which, for want of any (direct or indirect) authority on the point, the Court of Appeal has assigned the label "*hybrid tripartite contract*", apparently holds that:

(a) the vendor's obligation in this case to transfer the subject land (and perform other less fundamental contractual obligations) flowed from the *assignment* from Trust Company to ALH of the benefit of the vendor' obligation to transfer the subject land on payment of the balance of purchase money; and

(b) ALH's "concurrent and mutually dependent obligations" flowed from the *novation* of those "concurrent and mutually dependent obligations" from Trust Company to ALH, albeit there was no express recognition made by the Court of Appeal of a new contract arising to act as the doctrinal "vehicle" to support or contain that novated tranche of obligations, but so much can be assumed as a necessary corollary of the partial novation analysis which has been made.

58. The appellant contends that acceptance of the "*hybrid tripartite contract*", whether it be as a new principle of the common law or as a concurrent application of aspects of the doctrines of novation and the assignment of contractual rights, faces three hurdles.

59. *First*, the "*hybrid tripartite contract*", enunciated by the Court of Appeal (at [37], [38], [56] and [85]) as identified in par 54 above, and as restated in a comprehensive common law concept in par 57 above, fails to address the doctrinal impediments which any assignment of rights under the (bilateral) 2003 contract faces, caused by:

(a) the fact 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"* (see AF [7]);

(b) the findings by the Primary Judge (which were not reversed on appeal) that "*the intention of the parties to the Deed of Consent and Assignment is clear enough. Trust Company was to drop out and ALH was to be substituted for it. The benefits under the [2003] contract were assigned to ALH by cl. 3.1. Its burdens were assumed by ALH under cl. 4.2 with the consent of Oakland [Glen] under cl. 4.1 and cl. 6*" and that, "*with its burdens and benefits removed from Trust Company the [2003] contract had no content and was extinguished*" (see the Primary Judge at [11] and [12]); and

(c) the findings by the Court of Appeal that "*the overall effect of the Deed was that the purchaser assigned its rights under the 2003 contract to [ALH] (cl. 3.1), the vendor released the purchaser [Trust Company] from its obligations under that contract (cl. 6), and [ALH] assumed those obligations [cl. 4.1(b)]*", and that *"[ALH] assumed 'the obligations' of the purchaser [Trust Company] under the 2003 contract and the vendor released the purchaser from 'all liability' [under the 2003 contact]"* (see the Court of Appeal at [17] and [26]).

60. The corollary of the assignment finding identified in par 15(r) above is that the 2003 contract continued to operate after the complete release from it of Trust Company. That release is an uncontroversial proposition for the reasons in par 53 above. That continuing operation is necessary to support an effective assignment as a fundamental tenet of the doctrine of the assignment of contractual rights. That post-release

operation means that a bilateral contract (for only Oakland Glen and Trust Company were parties to the 2003 contract) has remained in existence and operative *long after* one of its parties has been *completely released* from it. This involves a fundamental departure from the accepted position that no bilateral contract can remain in existence after a party's complete release from it. It is, with respect, a doctrinal *non sequitur.*

61. The Primary Judge's conclusion (at [12]) that, "*with its burdens and benefits removed from Trust Company the [2003] contract had no content and was extinguished*" was, therefore, in a doctrinal sense, somewhat of a self-evident conclusion. Indeed, from a purely doctrinal perspective, that conclusion was inescapable. The Court of Appeal's rejection of it (at [30]) on the ground that "*an assignment of a contract always removes its benefits from the assignor*" is, with respect, not to the point.

62. *Secondly*, "*the hybrid tripartite contract*" fails to address the line of case law which recognises a valid novation occurring even where the rights under the first contract which have been extinguished represent only *some* of the rights arising under that contract. This line of authority recognises the second tripartite contract, which effects this movement of rights between the three parties to that second (novating) contract, and which brings into existence the third (replacement) contract, as a valid novation, albeit a partial novation of the first (novated) contract, as distinct from effecting an assignment of rights under it. Two such examples will serve to make this point, one of which (*Orica Limited v FCT*) [24] was cited by ALH in the Court of Appeal (at [57]), but which was distinguished by that Court as being inapplicable on its facts (at [77]).

63. *Example 1* is the Supreme Court of Canada decision in *Weldwood-Westply Ltd v Cundy* [25] (***Weldwood***). B owed A, a debt, in an amount well in excess of $20,000. A and C agreed (with the acquiescence of B) that C would assume B's liability to pay A $20,000 on account of the debt on behalf of B, and that upon payment, B would be discharged from its liability to pay the $20,000. The Court held that there was a partial novation of the loan agreement, limited to the promise to pay the $20,000.

64. In *Weldwood*, Spence J held[26] that:

> "*...[c]ertainly, the old debt was extinguished as to $20,000 thereof and therefore the defence must be that there could not be a novation of only part of the old debt. I have been unable to find any authority for that proposition ... I have found that Williston in vol. 6 of the revised edition of his authoritative work on Contracts, at p. 542 states: 'Novation necessarily involves the immediate discharge of an old debt, or part of it, and the creation of a new one.' Thereby implying that the novation may be part only of the original debt. In my view,* Hodgson v Anderson *(1825) 3 B & C 842, 107 ER 945, and* Fairlie v Denton and Barker *(1823) 8 B & C 395, 108 ER 1089, are authorities for that proposition.*" [Original emphasis]

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24 (2010) ATC 20-168 (FCA, Sundberg J)

25 (1965) 50 DLR (2d) 744; (1965) 54 WWR 50, Martland, Judson, Ritchie, Hall and Spence JJ

26 (1965) 50 DLR at 749-750; 54 WWR at 54-55, Spence J

65. *Example 2* is *Orica Limited v FCT* (***Orica***),[27] where Sundberg J was asked to deal with a partial novation of a pharmaceutical distribution agreement between entities, allegedly crystallising a CGT event on rescission of the original contractual rights.

66. In *Orica*, in 1935 a deed was entered between ICI and Orica giving Orica a licence to use ICI's intellectual property associated with its pharmaceutical manufacturing business in Australasia. On 1 June 1993 a pharmaceutical distribution agreement was entered between Orica and Zeneca, an entity within the ICI group, providing for Zeneca to have the right to distribute the pharmaceutical products which Orica was manufacturing under its 1935 licence in Australasia. The parties negotiated a termination of the 1993 distribution agreement and the entry into a new distribution agreement which was designed to overcome certain doubts as to the strength of Orica's licence to continue to manufacture the ICI pharmaceutical products in Australasia under the 1935 deed. After an ICI corporate reconstruction was undertaken and legal proceedings about the 1935 deed were commenced between the parties, Orica, Zeneca BV (a new ICI entity) and Zeneca entered into an "assignment deed" under which some, but not all, of the rights of Zeneca under the 1993 distribution agreement were to be assigned to Zeneca BV. This assignment deed was designed to sell and transfer to Zeneca BV Orica's pharmaceuticals business in Australasia.

67. The assignment clause, which was in dispute as to its status as a novation of part of the 1993 distribution agreement, was set out by Sundberg J (at [48][28]) in these terms:

> "[*Recital] C. As part of the Sale of Business Agreement, Orica has agreed to assign the rights and obligations under the [Distribution Agreement] to [Zeneca BV] and [Zeneca BV] has agreed to assume Orica's obligations under the Distribution Agreement] ...*
>
> *[Clause] 2. [Zeneca BV] shall be bound by and comply with the provisions of the [Distribution Agreement] binding on [Orica] and shall enjoy all the rights and benefits of [Orica] under the [Distribution Agreement].*
>
> *[Clause] 2.2 [Zeneca releases Orica from] all its obligations and liabilities under the [Distribution Agreement] and all actions, claims or proceedings that it may have against Orica under or in respect of the [Distribution Agreement]."*

68. Sundberg J made the following conclusions as to the characterisation of these terms of the assignment deed in *Orica*[29] (which are of present relevance as they were cited by ALH to the Court of Appeal but rejected for the detailed reasons given at [65]-[77]):

(a) "*the circumstances leading to the making of the September 1998 agreements disclose that the parties intended there to be a novation of the Distribution Agreement*" (*Orica* at [121]);

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27 (2010) ATC 20-168

28 (2010) ATC 20-168 at 10,722

29 (2010) ATC 20-168 at 10,732-10,735 [118]-[128], esp. at [121]-[125], where Sundberg J cited with approval and applied the statement of principle enunciated by Spence J in *Westwood-Westply Ltd v Cundy* (1965) 50 DLR at 749-750; 54 WWR at 54-55 addressed in par 59 and fn 20 above

(b) *"I do not accept Orica's submissions ... that the Assignment Deed did not effect a novation of the Distribution Agreement to Zeneca BV. The first [submission] is that Orica did not receive a complete release from all its obligations. Clause 2.2 covered the prospective liabilities only ... That, says Orica, means that there was not a complete discharge of the Distribution Agreement ...*

(c) *"The two core elements of novation are the rescission by agreement of an existing contract ...and entering into a new contract by way of substitution"* (*Orica* at [123]);

(d) Sundberg J adopted as correct the statement[30] that *"whether the novation lets B off the hook depends on what the parties intended to do in rescinding the original contract. If they only intended to rescind the original contract without affecting existing causes of action, A will be able to pursue B for past breaches. But if it was intended that the original contract and all accrued causes of action arsing out of the contract were to be discharged by the novation, that will be the effect of the novation. Mr Bayley concludes: 'The reason this occurs is that the incidents and consequences of a consensual rescission are essentially plastic to the intention of the parties.' [This flexibility can be summarised[31]]... as follows: 'In the sphere of rescission ... the only limits that can be placed to the possible incidents of rescission of a contract are the limits to the power of making one'."* (*Orica* at [123]);

(e) *"... the parties agreed that future events were to be governed by a contract between Zeneca and Zeneca BV in the same terms, mutatis mutandis, as those in the former contract between Orica and Zeneca. Orica falls out of the picture so far as they are concerned. But as to the past, the parties agreed that Orica would remain liable to Zeneca in respect of events that occurred before the rescission. What the parties have done is to adopt the scheme of rescission for breach. The contract is not rescinded from the beginning. The original parties are discharged from further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected"*[32] (*Orica* at [124]); and

(f) *Weldwood*[33] and *Corbin on Contracts*[34] are authority for the proposition that a partial release of rights and a partial rescission are sufficient to constitute a novation of those rights (*Orica* at [125]).

69. *Thirdly*, no public policy necessitates recognition of a new principle of *"a hybrid tripartite contract"*, which merges the doctrines of novation and assignment into one, in order to separately treat with the assignment of the benefits of a contract on the one hand and the relinquishment of its burdens or obligations on the other.

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30 See *Novation*, Julian Bayley, Journal of Contract Law (1999) vol. 14, p. 189 at pp. 191-194

31 See *The Principles of Rescission of Contracts*, Morison, Stevens & Haynes, 1916, p. 4

32 Citing *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477, Dixon J

33 (1965) 50 DLR (2d) 744; (1965) 54 WWR 50, Martland, Judson, Ritchie, Hall and Spence JJ

34 *Corbin on Contracts,* Revised edition, 2003, vol. 13, §§ 71.3 (1)

70. Insofar as the Court of Appeal found (at [64]) that *FCT v Sara Lee Household & Body Care (Aust) Pty Ltd* (***Sara Lee***)[35] supported a recognition of the novel concept of "*a hybrid tripartite contract*" because "*[t]he plurality may have considered that a tripartite contract in which an assignee assumed direct obligations to the obligee without the assignor being released, was not a novation*", it fell into error.

71. The transaction in *Sara Lee* failed to qualify as a novation because (as the plurality found at [25][36] and the Court of Appeal cited at [58]), "*[t]he manifest intention of the parties was not that the agreement of 31 May 1991 should be wholly rescinded and replaced by a new agreement, but that the rights and liabilities under, and the mode of performance of, the agreement, should be varied in certain respects.*" Accordingly, *intention* can be seen as the principal determinant of the non-existence of a novation in *Sara Lee*. That approach was, with great respect, a direct application of the long-standing principle enunciated by Dixon J in *Vickery v Woods*, [37] namely, that "... *rescission and novation ultimately depend on intention.*"

72. Having considered both *Orica* and *Westwood*, the Court of Appeal (at [65]-[77]) appears to have concluded, from the terms of its distinguishing of them (at [75]-[77]), namely, "[Orica] *is not authority for the proposition that a hybrid transaction, such as the Deed, must take effect as a novation,*" there was need of a new doctrinal concept to be recognised to cope with a partial rescission case (assuming this to be such a case).

73. That perception is, with respect, erroneous. *First*, this is not a partial rescission case. On the agreed facts and findings of the Primary Judge (at [11]-[13]) and the Court of Appeal (summarised in pars 15(f) and 15(i) above), the rescission of the 2003 contract was complete and unequivocal. Trust Company was released from "*all liability*" under it. Trust Company had ceased to be a party to it for all purposes. The Primary Judge found (at [12]) that the 2003 contract "had no content and was extinguished" because the Deed had removed all of Trust Company's burdens and benefits under it.

74. *Secondly*, *Westwood* and *Orica* are authority for the proposition that the 2003 contract was nonetheless novated insofar as there was a rescission of rights under it and the creation of new rights on the same terms and vested in Oakland Glen and ALH alike.

75. Insofar as the Court of Appeal found support for its approach to the characterisation of the Deed (at [78]-[79]) on the ground that the freedom to novate contracts recognised in *Leveraged Equities Ltd v Goodridge*,[38] supported the proposition that "the law should allow the same freedom for assignments", it fell into error. The freedom which the doctrine of novation accords to parties to a contract to novate contractual benefits and burdens, as recognised in *Leveraged Equities*, cannot inform the operation of the doctrine of assignment nor support its extension as the Court of Appeal did in this case

76. The Court of Appeal's approach to the concept of novation involves a rejection of the doctrinal aspects of it identified by Sundberg J in par 68(d) above (*Orica* at [123]),

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35 (2000) 201 CLR 520 at 535 [27], Gleeson CJ, Gaudron, McHugh & Hayne JJ
36 (2000) 201 CLR 520 at 534 [25], Gleeson CJ, Gaudron, McHugh & Hayne JJ
37 (1952) 85 CLR 336 at 345, Dixon J
38 (2011) 191 FCR 71 (FCAFC, 18.1.11), Finklestein, Stone & Jacobson JJ (addressed in footnote 19)

namely, that the incidents and consequences of a consensual rescission are essentially plastic to the intention of the parties and that the only limits that can be placed on the possible incidents of the rescission of a contract are the limits to the power of making one, in order to define the flexibility of the scope for rescission.

77. By way of conclusion on Issues 3 and 4, the appellant contends that the Deed was not a "*hybrid tripartite contract*". *First*, there is no reason to recognise such a concept of the common law. *Secondly*, even if this Court were to recognise such a concept, the Deed, as construed by the Primary Judge, falls within the confines of the existing doctrine of novation as a complete novation of the 2003 contract, which resulted in the creation of a new contract, on the same terms as the contract it rescinded and as varied by it (namely, the first 2008 contract), as the Primary Judge found (at [11]-[13]).

The statutory questions – was the Deed or the first 2008 contract a s. 8(1)(b)(i) agreement and, if so, was it cancelled by the Deed of Termination for the purposes of s. 50?

78. The statutory questions necessarily follow the event of determination of Issues 1-4, for the reasons given in pars 6-9 above, in consequence of the respondent's concessions.

Part VII – The applicable statutory provisions

79. The schedule to these submissions contains the applicable statutory provisions.

Part VIII – Relief sought

80. The appellant seeks the following orders if the appeal is allowed, namely:

(a) Appeal allowed;

(b) Judgment and orders of the Court of Appeal of New South Wales dated 3 March 2011 set aside;

(c) In lieu thereof, order that:

(i) the appeal to the Court of Appeal of New South Wales against the decision of the Supreme Court of New South Wales dated 20 April 2010 be dismissed;

(ii) the respondent pay the costs of the appeal to the Court of Appeal of New South Wales;

(d) Respondent pay the costs of the appeal to this Court.

Dated: 2nd September 2011

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