IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S90 of 2014

BETWEEN

COMMISSIONER OF TAXATION
Appellant

AND

MBI PROPERTIES PTY LTD
Respondent

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RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION OF SUITABILITY FOR PUBLICATION

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES PRESENTED BY THE APPEAL

2. The appeal raises the following issues:

   a. Did the respondent ("**MBI**") intend to make any "supply" within the meaning of s 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* ("***GST Act***") to Mirvac
20 Management Pty Limited ("**Mirvac**") as a consequence of acquiring the reversionary interest in the residential premises?

   b. If so, was any such supply intended to be made "through the enterprise" that was the subject of the acquisition by MBI from South Steyne Hotel Pty Limited ("**South Steyne**") for the purposes of s 135-5?

   c. If so, what was the character of any such supply? In particular, was it an input taxed supply of residential premises by way of lease within the meaning of s 40-35?

   d. What was the "price" of any such supply for the purpose of applying the formula in s 135-5(2)?

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3. The relevant statutory questions which arise are not properly reflected in the "principal issue" as stated in paragraph 2 of the submissions of the appellant Commissioner (**AS**).[1] Liability for an increasing adjustment under s 135-5 depends upon a careful identification of the supplies that the purchaser of a going concern intends to make, their character for the purposes of the *GST Act*, and the price for those identified supplies. It is of limited assistance in this context merely to ask the question posed by the Commissioner at AS2, since a positive answer to it does not determine the outcome of the appeal even without regard to the issue raised by MBI's notice of contention.

4. The Commissioner identifies two possible supplies in his written submissions. The first, identified in footnotes 22 and 23 of his submissions, is that "[b]y submitting itself to the statutory obligations, MBI made a supply to Mirvac, the sitting tenant" (AS22, fn22) when it acquired the reversion. However, his case depends upon the identification of supply that MBI intended to make "through the enterprise" acquired from South Steyne and carried on by it following the acquisition of the reversion. To that end, he submits that MBI also intended to make supplies by observing or tolerating the lease covenants from time to time during the term of the lease (AS14, 21, 24, 29), and that MBI thereby made a supply of premises "by way of lease" within the meaning of s 40-35.

PART III: NOTIFICATION OF CONSTITUTIONAL ISSUES

5. The respondent has considered whether notice of the proceedings is required to be given to the Attorneys General under s 78B of the *Judiciary Act 1903* (Cth). The respondent is satisfied that no such notice is required.

PART IV: MATERIAL FACTS

6. Subject to the following qualifications, MBI accepts the statement of facts in the Commissioner's submissions.

7. In paragraph 14 of his submissions the Commissioner suggests that in the present case MBI "expressly covenanted with [Mirvac] to perform its obligations under the lease." There have been no findings to that effect and no evidence to that effect was tendered in the proceedings below. MBI accepts that it made a series of contractual promises to South Steyne, which included acknowledgement of the lease.[2] The evidence goes no further than this. There is, however, no dispute that MBI intended the leases to remain on foot.

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[1] The proposition is effectively repeated at AS28.
[2] Special condition 47.6 to the Contract of Sale: AB.

8. Prior to the special leave application, the Commissioner had not at any point in this matter contended that MBI made a separate supply to Mirvac in the form of a supply of residential premises by way of lease. Before the primary judge and in the Full Court the Commissioner instead submitted that *South Steyne Hotel Pty Ltd v Commissioner of Taxation* [2009] FCAFC 155; (2009) 180 FCR 409 ("***South Steyne Hotel***") was correctly decided and that the assessment should be maintained on the basis that in respect of each property there was a single supply of residential premises by way of lease from South Steyne to Mirvac, which supply MBI as the acquirer of the reversionary interest intended would continue.[3] The Commissioner did not submit that MBI was liable for an increasing adjustment because MBI made or intended to make a supply of residential premises or any other supply to Mirvac. In these circumstances, no question arose either before the primary judge or the Full Court as to the identification, character or price of any supply intended to be made, or in fact made, by MBI.

9. The Commissioner's submissions regarding the supposed errors in the reasoning of the Full Court of the Federal Court in the present matter must be understood in this context.[4] The appeal is in substance an appeal from the decision of the Full Court of the Federal Court in *South Steyne Hotel*. In that case, in respect of the same transactions that are at issue in the present case, the Full Court held that MBI, as the purchaser of the reversionary interest in each case, did not make any supplies to Mirvac.

PART V: APPLICABLE STATUTES AND REGULATIONS

10. Most applicable provisions of the *GST Act* are accurately reproduced in the annexure to the appellant's submissions. It is also relevant to have regard to:

    a. s 9-20(1)(c) and s 11-15 of that Act;

    b. ss 117 and 118 of the *Conveyancing Act 1919* (NSW) ("***Conveyancing Act***");

    c. s 40(3) of the *Real Property Act 1900* (NSW).

PART VI: ARGUMENT

11. The supply of reversionary interests in strata units by South Steyne to MBI was GST-free because it was relevantly a supply of "all of the things that are necessary for the continued

[3] See Edmonds J at [30].
[4] AS26-30.

operation of an enterprise": s 38-325(2). MBI has been assessed to have an increasing adjustment in relation to that supply on the basis that it intended that "some or all of the supplies made through the enterprise to which the supply relates will be supplies that are neither taxable supplies nor GST-free supplies": s 135-5(1)(b). The outcome of the appeal depends largely upon the identification of the enterprise to which these provisions refer and the supplies, if any, that MBI intended to make through that enterprise. In that regard, it is necessary to consider the nature of the transaction between South Steyne and Mirvac, on the one hand, and the transaction between South Steyne and MBI, on the other, with reference to the text and the scheme of the *GST Act*.

The supply by South Steyne to Mirvac

12. In the language of the *GST Act*, each grant of lease by South Steyne to Mirvac constituted a "supply" of a strata lot "by way of lease": *South Steyne Hotel* at [30] and [84]-[86]. On the basis that the premises were "residential premises" as defined in s 195-1, the Full Court held that the supply of such premises by South Steyne to Mirvac was an input taxed supply pursuant to s 40-35(1)(a).

13. It is important to recognise that South Steyne's supply of premises to Mirvac by way of lease was therefore taxed. However, because the grant of each lease was an input taxed (as opposed to taxable) supply, the amount of GST effectively borne by South Steyne was not the GST on the rent, because there was none, but instead the amount of GST included in the cost of acquisitions incurred to produce the rent which South Steyne could not claim as input tax credits.. Being input taxed, GST was effectively borne by denying input tax credits to South Steyne for the GST it paid on any acquisitions that related to making the supply: s 11-15(2)(a).[5]

The supply by South Steyne to MBI

14. As between South Steyne and MBI, the supply which was held to be a "GST-free supply of a going concern" was the leasing enterprise that was the subject of the written agreement of the parties, as required by s 38-325(1)(c) of the *GST Act*: *South Steyne Hotel* at [44], [89]. That supply was not of a freehold estate out of which a lease might be granted or of any rights of occupation of real property which might then be supplied to a tenant, or of any other property or rights that could have derogated from Mirvac's

[5] See Hill J in *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at [13].

enjoyment of the leased premises in any way. Rather, it was a supply of the reversion after the existing leases.[6]

The scheme of the GST Act

15. There is no dispute between the parties that the *GST Act* applied to the transactions in the manner set out above. The dispute concerns the application of s 135-5 which gives rise to the possibility that a person who acquired an enterprise as a GST-free supply of a going concern might nevertheless be subject to an increasing adjustment in relation to the acquisition. The scope of that provision is informed by a consideration of the purpose of the *GST Act* as a whole and, more particularly, of the combined effect of ss 38-325 and 135-5.

16. In *HP Mercantile*, Hill J described the *GST Act* as being an example of a multi-stage "value added" tax that operates by reference to several taxing points: "multi-stage" because it seeks to impose tax on or by reference to expenditure incurred at each stage of the production of goods and the delivery of services; and "value added" because it seeks to tax only the value added at each stage. As his Honour also noted, a significant difficulty in the way of any multi-stage tax is that it can have the effect that tax is imposed in relation to goods or services by reference to a price that has already been inflated to include the effect of tax being imposed at an earlier stage of production. That problem, which his Honour described as "cascading", is avoided in the case of the GST by what his Honour described as the genius of a system of input tax credits: see especially [11]-[15]. The "basic rules" in Chapter 2 of the *GST Act* give effect to this system by ensuring that in the case of taxable supplies, a supplier includes in his or her "net amount" for each period the GST on taxable supplies but obtains a credit for GST paid on acquisitions that relate to making those supplies; and in the case of input taxed supplies, a supplier does not include GST on consideration for those supplies in his or her net amount because there is none, but the supplier also gets no credit for GST on acquisitions that relate to making input taxed supplies.

Not a supply through the enterprise

17. It is not in dispute that MBI intended to keep the leases on foot when it acquired the reversionary interests in the strata units. However it did not thereby make a supply to Mirvac within the meaning of the *GST Act*. The existence or otherwise of a deed of

[6] See *Figgins Holdings v SEAA Enterprises* (1999) 196 CLR 245 at 267-269.

acknowledgement makes no difference in this respect, because it did no more than acknowledge a state of affairs brought about automatically by the *Conveyancing Act*.

18. However, whether or not a supply of this kind was made (or intended to be made) is of little consequence. Liability for an increasing adjustment under s 135-5 only arises if the recipient of a supply of a going concern intends that "some or all of the supplies made through the enterprise to which the supply relates *will be* supplies that are neither taxable supplies nor GST-free supplies" (emphasis added). The purpose or object underlying s 135-5 is made clear by s 135-1[7], which states that the adjustment is intended to "take into account the proportion (if any) of supplies that will be made in running the concern....". Section 135-5 is concerned, in terms, with supplies that are intended to be made in the future through an enterprise *after* the acquisition of that enterprise and in carrying on that enterprise. The section demands attention to the supplies which MBI intended to make in the future through the enterprise, after acquiring the leasing enterprise from South Steyne. That necessarily excludes any supplies that could be said to be made by virtue of, or as an incident of, the transaction by which the leasing enterprise was supplied.

19. The enterprise supplied was a leasing enterprise within the meaning of s 9-20(1)(c). Becoming subject to the obligations of the landlord upon acquisition of the reversionary interests was not something done through that leasing enterprise. Rather, it was something that occurred – and which was accomplished by force of s 118 of the *Conveyancing Act* regardless of whether the parties otherwise agreed – before MBI could be said to be carrying on that enterprise in the first place.

Mere toleration is not a supply

20. The putative supply on which the Commissioner's case ultimately depends is variously described as being MBI's performance or toleration of the contractual covenants of the existing leases from time to time. There are significant difficulties in the way of a construction of the *GST Act* that treats mere toleration of a state of affairs, without more, as a supply.

21. First, however broad the definition of "supply" may be, it is not so wide as to pick up mere observance or toleration of another person's rights in relation to land or under a contract. The undoubted breadth of the definition should not be permitted to deflect attention from

[7] Sections headed "What this Division is about" may be used to discern, among other things, the purpose or object underlying an operative provision: s 182-10(2).

the requirement to give content to the expression "supply", which is after all used in the definition itself. The word "supply" denotes "some act of provision, furnishment, conferral or giving of some thing."[8] No such act has occurred as between MBI and Mirvac as a consequence of MBI tolerating the lease covenants.

22. Subsection 9-10(2) does not limit the scope of subsection (1), but it nevertheless sheds some light on what the expression "supply" is intended to mean. In this respect, two things may be noted. The first is that in all instances the more particular meaning of "supply" suggests the provision or furnishing of something to another person. The use of the expression "supply" in subsection (2) in this way reinforces that it denotes something being transacted between a supplier and a recipient. Leaving aside cases such as this in which the toleration is required by contract or by law, it is certainly doubtful that merely tolerating a situation or refraining from doing something could ever constitute a "supply", even though a person may benefit when others refrain from doing something or tolerate a situation. An example is a land owner who benefits from the fact that her neighbours tolerate her exclusive possession.

23. Section 9-10(3) does not expand the scope of the expression in the way suggested by the Commissioner at AS16. It is true that by reason of subs (3) it does not matter whether or not it is lawful for a person to do that which constitutes a supply, but it does not follow that all lawful toleration of a situation is a supply in the first place.

24. The requirement of some act of giving, furnishing, or providing is not met in the case of tolerating a situation or observing contractual or statutory rights by asserting that the toleration of a situation accords with something (usually a promise) given, furnished or provided earlier. The *GST Act* does not depend upon such a proposition in order to bring the whole of the consideration paid in respect of a contract into the GST net, because the attribution rules operate to ensure tax is paid on all consideration in respect of a contract in the manner provided by Div 29. The Court pointed out in *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at 346 [5] that the payment of tax on "taxable supplies" does not depend on whether or not subsequent acts of supply under a contract can be identified.[9] The same is true of input taxed supplies, since GST is collected by simply denying a credit for GST on acquisitions that relate to making the supply, whether or not the things that are promised to be done – or not done – are themselves supplies.

[8] *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461 at [16].

25. Merely performing an existing passive obligation such as a landlord's covenant for quiet enjoyment[10] is not the giving, furnishing or supply of anything. Nothing is transacted between the parties when a situation is merely tolerated. It is an instance of the parties tolerating (in the case of the landlord) or enjoying (in the case of the tenant) something supplied upon the grant of the lease.[11]

26. Secondly, and consistently with this view of the scope of "supply", the *GST Act* otherwise proceeds on the basis that leases and like arrangements involve a supply upon grant and do not continually involve distinct supplies from time to time. That is why s 156-22 is required at all. That section applies not only to leases but to any "hire or similar arrangement" and provides that such a supply or acquisition "is to be treated as a supply or acquisition that is made on a progressive or periodic basis." Were it not for s 156-22, a supply by way of a lease that was a taxable supply would be made upon grant and, by reason of the ordinary attribution rules in Div 29, any GST payable on the whole of the rent reserved for the life of the lease, would be required to be included in the grantor's net amount.

27. The effect of the Commissioner's construction is that the deeming effected by s 156-22 is unnecessary because leases and like arrangements involve multiple supplies from time to time anyway, including by the original grantor. That does not appear to be the premise underlying s 156-22. Furthermore, the fact that s 156-22 applies to a wide class of arrangements other than leases suggests that the GST Act generally makes the same assumption in relation to (at least) all arrangements of that kind. That is, in the case of all arrangements whereby a supplier agrees to tolerate someone's right to use a thing or occupy premises from time to time, there is in the absence of s 156-22 a supply upon entry into the arrangement.

28. That construction accords with the approach taken by Hill J, with whom Stone and Allsop JJ agreed, in *HP Mercantile*.[12] That case concerned the treatment of input taxed financial supplies, being the acquisition and collection of debts. The *acquisition* of debts in furtherance of an enterprise was specifically made an *input taxed supply*: see [19]. In considering whether certain input tax credits could conceivably have related to any other supply made by HP Mercantile in its enterprise other than the acquisition of the debts, Hill J noted at [22] that the taxpayer "made no supply taxable or otherwise other than the

[10] *Goldsworthy Mining Limited v Federal Commissioner of Taxation* (1972) 128 CLR 199 at 214.
[11] See s 9-10(2)(d) of the *GST Act*.
[12] Stone J at [79] and Allsop J at [88]-[89].

financial supply. It merely collected money payable on the debts it acquired." His Honour did not consider that the taxpayer's "toleration" or passive "performance" of the loan arrangements which it had acquired amounted to a supply of any kind.

29. Thirdly, it is necessary to construe the expression "supply" having regard to the overall policy and purpose of the *GST Act* in which it is the central and defining concept. That policy and purpose is relevantly to impose tax not on all "supplies", but on supplies for consideration, calculated by reference to the expenditure for the "supplies" in such a way that the tax burden is passed to the recipients of the supplies through the prices set for them. In no case is the mere identification of a "supply" sufficient for the operation of the Act. Rather, it is the expenditure incurred in relation to – or the prices paid for – supplies that give rise to liability.

30. In *Reliance Carpet* at 346 the Court approved the statement[13] that "what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply." It is the reference in that passage to a "transaction" that is presently significant. A "supply" in the context of the *GST Act* is something in respect of which there is or was an opportunity to have some dealing; some occasion to set a price or incur expenditure.

31. If the definition of supply is so wide as to pick up the mere toleration of the rights of a tenant or any other person separately from the supply made when they entered into a transaction, the policy of the *GST Act* is not advanced. On that construction, a supply may be something that is not and could never have been the subject of any dealing between the supplier and the recipient, as is the case here. That is precisely the result for which the Commissioner contends.

32. On MBI's submission, the objects of the *GST Act* are not advanced by the Commissioner's construction of "supply", nor is that construction supported by the language of the provisions or required for the operation of the basic rules in Chapter 2. For these reasons, the second putative supply for which the Commissioner contends, being the mere toleration or performance of the contractual covenants under the leases, is also not a "supply" within the meaning of the *GST Act* and the appeal should for this reason be dismissed.

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[13] See *Sterling Guardian Pty Ltd v Commissioner of Taxation* [2006] FCAFC 12; (2006) 149 FCR 255 at 258 [15] per Heerey, Dowsett and Conti JJ.

No input taxed supply

33. In the event that the Court holds that MBI did intend to make a supply through the enterprise it acquired from South Steyne, two further questions arise. The first is raised by the notice of appeal, namely whether any such supply was input taxed. The second, raised by MBI's notice of contention, is whether the tenant paid a "price" for any such supply, whether an input taxed supply or not.

34. The basis upon which it is suggested that supplies made by MBI might be input taxed is that they were supplies of residential premises "by way of lease" to Mirvac within the meaning of s 40-35. The "residential premises" in this context are the strata lots leased by Mirvac. The compound expression in s 40-35(1)(a) must be understood as referring to the supply of rights of occupation of real property and the entry into lease covenants, both of which are supplied on the grant which creates the leasehold interest in the premises. This is confirmed by the words in parentheses ("including a renewal or extension of a lease, hire or licence"). In each case there is a supply of rights which the lessee previously did not enjoy (whether upon initial grant or upon renewal or extension) in relation to "real property" and hence a supply within the meaning of s 9-10(2)(d). A lease is both an executory contract and an executed demise[14] and as a matter of statutory construction the phrase "supply of residential premises by way of lease" is best understood as a reference to the act of grant by which both of those elements are supplied. This is particularly so having regard to the reference to the manner in which real property may be supplied within the meaning of s 9-10(2)(d).[15]

35. The identification of the subject matter of the supply as "the residential premises" and the requirement that the supply be "by way of lease" serve to indicate that the *GST Act* is here concerned with the supply which confers or creates the lease, being both an estate or interest in land (ie the proprietary interest resulting from the lease), as well as the accompanying contractual covenants.[16] The Commissioner's contention pays insufficient attention to this dual character. Mere later performance of an obligation to allow quiet enjoyment would not be sufficient to amount to a "lease" at general law and cannot of itself be characterised as a supply "of residential premises" that is "by way of lease."

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[14] *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51 at [39], per French CJ, Hayne and Kiefel JJ and at [61] per Gageler J.
[15] See *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at 348.
[16] *Willmott Growers Group* at [39] per French CJ, Hayne and Kiefel JJ and at [67] per Gageler J.

36. The Commissioner's argument does not explain how or why the *GST Act* should be construed to the effect that the acquirer of a reversionary interest makes a separate and further supply of the same "residential premises" in respect of the same period also "by way of lease", as was supplied by the original grantor of the lease. As Finn J observed in *South Steyne Hotel* at [2], following the initial grant of the lease the benefit of the tenant's covenants and the burden of the landlord's covenants ran with the reversion by virtue of real property legislation: *Conveyancing Act 1919,* ss 117 and 118 and *Real Property Act 1900* (NSW) s 40(3). No promise or grant by MBI was necessary to create or continue that state of affairs. Nor was any act or omission by MBI capable of detracting from the rights which had already been conferred on Mirvac by way of lease. Whatever characterisation might attach to other aspects of the relationship between MBI and Mirvac, MBI did not supply, and was not capable of supplying, the residential premises by way of lease.

37. The Commissioner's reliance on *Westley Nominees* on this issue is misplaced. Their Honours did not conclude in that case that the purchaser of a reversion made a supply "by way of lease". To the extent their Honours considered that question at all, they indicated at [16] and [23] that they did not favour that construction.

38. The fundamental error for which the Commissioner contents at AS28, namely that the "underlying idea and implicit premise in [the reasoning of the Full Court in *South Steyne Hotel* and this matter] is the notion that in any commercial dealing there is, for GST purposes, only one relevant supply, to be identified as that which is "the essence and sole purpose of the transaction" is not made out. That is not what the Full Court found either in *South Steyne Hotel* or in this case, nor was that submitted by MBI. The relevant question is whether, on the facts, there was a supply of the kind for which the Commissioner contends. For the reasons set out above, MBI submits that there was not.

PART VII: ARGUMENT IN SUPPORT OF NOTICE OF CONTENTION

39. An increasing adjustment under s 135-5 is calculated according to the formula in s 135-5(2). One of the integers in that formula is the "supply price", meaning the price of the supply in relation to which the increasing adjustment arises. In this case, on the assumption that the Court finds that MBI intended to make supplies through the enterprise it acquired that were not taxable or GST-free supplies, it is necessary to identify their price. "Price" is relevantly defined in s 9-75 to mean the sum of the consideration for the supply (without any discount for GST). "Consideration" is defined in s 9-15 to include

"any payment, or any act or forbearance, in connection with a supply of anything" or "in response to" such a supply.

40. In the Court below, the parties' common position was that any adjustment was calculated on the basis that the "proportion of non-creditable use" was 100%, because as a result of the decision in *South Steyne Hotel* the only putative supply in issue was a supply made by South Steyne and there was no supply at any price by MBI.[17]

41. However, a different conclusion is to be reached in the event that the Court finds that MBI did make a supply of one of the two kinds for which the Commissioner contends. The correctness of the assessment rests on the proposition that the rent payable by Mirvac under its lease with South Steyne also constitutes the "price" paid by Mirvac to MBI for MBI accepting its obligations as landlord upon the purchase of the reversionary interest and/or performing its obligations as landlord after that purchase.

42. Whichever characterisation of the supply is accepted, it is artificial to describe the rent payable by Mirvac under the lease as consideration for a supply by MBI. In *Property Holding Co v Clark* [1948] KB 630, Evershed LJ said at 649 that "the question in each case is to determine what in substance is the subject-matter of the tenancy granted to the tenant by the contract: prima facie rent is the monetary compensation payable by the tenant in consideration for the grant, howsoever it be described or allocated." That passage was approved by McHugh JA in *Commissioner of Stamp Duties v JV (Crows Nest) Pty Ltd* (1987) 7 NSWLR 529 at 538F, Samuels JA agreeing at 530C. His Honour further described that definition as "being concerned with whether the payment – whatever its purpose – is part of the consideration for the right to use the premises" at 539D.

43. The Commissioner's assessment erroneously assumes that the rent is not to any degree consideration for the initial grant of the leasehold estate, nor is it to any degree for the right to use premises. It assumes that rent is paid wholly for actual performance of lease covenants, rather than for the right to enjoy the whole of the lease regardless of actual use. It further assumes that the rent payable by Mirvac is consideration for an aspect of a transaction in which Mirvac had no involvement and which, by reason of ss 117 and 118 of the *Conveyancing Act*, it had no need to involve itself in.

44. The better view is that the rent is consideration for the prior grant of the lease and for the right of Mirvac to have quiet enjoyment of the premises. This is reflected in s 117 of the

[17] See Edmonds J at [38] AB293.

Conveyancing Act. That section relevantly provides that the "rent reserved by [the] lease....shall be annexed and incident to, and shall go with the reversionary estate in the land..." The effect is that the rent, like the benefits of the lessee's covenants, runs with the reversion. MBI, by acquiring the reversion, became entitled to the rent. MBI did not receive that rent from Mirvac as consideration for observing lease covenants from month to month (nor did South Steyne).

45. This is further reflected in the fact that a breach of the landlord's covenants will not ordinarily relieve a tenant of the obligation to pay rent.[18] The tenant's rights in that case are generally restricted to limited rights of set-off.[19] In *Hawkesbury Nominees Pty Ltd v Battick Pty Ltd*[20] the Full Federal Court considered a submission that the obligation of the lessors to comply with the covenant to provide quiet enjoyment depended upon due payment of rent. At [50] Hill J, with whom Gallop J agreed[21] said that the submission was shortly disposed of because "...it is incorrect as a matter of law to say that the obligation to give quiet enjoyment is dependent upon payment of rent and outgoings so that non-payment relieves the landlord thereafter from the obligation, even where the obligation is expressed to be subject to the lessee .... The two covenants are independent covenants."

46. On the Commissioner's approach, the rent payable by a lessee must have the chameleon quality of being consideration for not only the grant of the leasehold estate and the promise of the original lessee to perform the obligations of lessee, but also for the performance of the lessee's obligations to whichever person or persons may come to acquire the reversionary interest.

47. The point may be illustrated by considering the situation in which rent is payable fully at the commencement of the lease. The purchaser of the reversionary interest in premises where rent has been paid up front assumes the same obligations as the purchaser of a reversionary interest in which rent is paid periodically. It is artificial to say that in the latter case a price is paid to the purchaser of the reversionary interest for the supply which arises from the transaction, whereas in the former scenario no price is paid. The more coherent view is that in both scenarios the lessee does not pay any price for the supply or supplies made by the purchaser of the reversionary interest on or after acquisition of that

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[18], *Halsbury's Laws of Australia*, Butterworths, [245-3090].
[19] See the discussion in *Halsbury's Laws of England*, 4th Ed, Vol 42 pp268-269; Meagher, Heydon and Leeming *Equity Doctrines and Remedies*, 4th Ed, 2002, [37-045], p1056.
[20] [2000] FCA 185.
[21] At [1]; Gyles J did not consider the question but broadly agreed with the conclusion reached by Hill J at [72]-[78].

interest. The consideration in the form of rent was and remains the payment for the grant of the leasehold interest and the landlord entering into obligations under the lease.

48. Division 156 affords a further illustration. In the absence of s 156-22, GST on the whole of the rent payable under a taxable supply of premises by way of lease would be required to be included in the lessor's net amount in the first period in which it received any rent or issued a tax invoice: s 29-5. That is because the whole of the rent payable under the lease would be regarded as the price for that supply, being the grant of the lease. The Commissioner's argument about what rent is for again seems to deny the premise which underlies s 156-22.

10 *The Commissioner's "capricious" consequences*

49. At AS39 and 40 the Commissioner suggests that the decision of the Full Court, if correct, leads to capricious consequences and curious results. That submission should be rejected. It does not correctly reflect the legislative scheme for either taxable or input taxed supplies. Those consequences outlined in AS40 simply do not arise.

50. If the Commissioner is there referring to the consequences which flow from the Full Court's decision in the case of a taxable supply of premises by way of lease, there can be no curious or capricious results because of the operation of Div 156, the effect of which is left out of the Commissioner's account. The combined effect of ss 156-5 and 156-22 is that the GST on a supply or acquisition of a taxable lease is attributable "as if each
20 progressive or periodic component of the supply were a separate supply." Whether or not a supply would otherwise be made from rental period to rental period is irrelevant, because for the purpose of paying or claiming credits for GST on a taxable lease, Div 156 ensures that the GST paid or claimed for rent is claimed or paid in the period in which the rent is paid or received. Under Div 156, rent will generate both tax and credits both before and after the sale of the reversion.

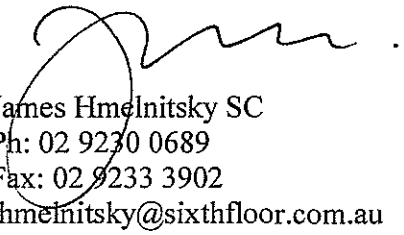
51. If the Commissioner is there referring to the case of an input taxed supply of premises by way of lease, the supposedly capricious consequences can never occur because an input taxed supply of premises does not give rise to GST payable or input tax credits.

52. The appeal should be dismissed with costs.

30 **PART VIII: ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT**

53. The respondent requires approximately 1.5 hours for the presentation of its oral argument.

Dated: 6 June 2014



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