HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Appeal S158/2025

Gordon Stanley Merchant
First Appellant

GSM Pty Ltd ACN 074 508 124
Second Appellant

and

Commissioner of Taxation
Respondent

BETWEEN:

Appeal S157/2025

Commissioner of Taxation
Appellant

and

Gordon Stanley Merchant
First Respondent

GSM Pty Ltd ACN 074 508 124
Second Respondent

MERCHANT PARTIES' OUTLINE OF ORAL ARGUMENT

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: ARGUMENT

SUBMISSIONS IN CHIEF (APPEAL S158/2025)

A. FACTS AND LEGISLATIVE FRAMEWORK

2. The key facts are set out in detail at MPS [5]-[14]. **Annexure A** to this outline is a diagram that depicts the entities and transactions involved in each scheme.

3. Both appeals concern the operation of Part IVA of the ITAA36. Part IVA was designed to provide "an effective general measure against those tax avoidance arrangements that … are blatant, artificial or contrived" (EM to the Income Tax Laws Amendment Bill (No 2) 1981, **JBA Vol 7, Tab 44, p 1640**). Section 177D applies to a scheme if it would be concluded, having regard to the matters in s 177D(2), that the person/s who entered into or carried out the scheme did so for the dominant purpose of enabling a taxpayer to obtain a tax benefit in connection with the scheme. Section 177C applies to identify that tax benefit. Section 177E is a supplementary code to deal with dividend-stripping. Section 177F provides the Commissioner with the power to cancel the tax benefit obtained in connection with the relevant scheme.

B. THE BBG SHARE SALE SCHEME AND s 177D

B.1 ***Ground of appeal 1(a): The majority of the Full Court failed to consider the different legal, commercial and tax considerations that governed the entities involved in the scheme***

4. A central aspect of the primary judge and the majority's reasoning as to the purpose of those involved in the BBG share sale scheme, was that Mr Merchant maintained effective control of the BBG shares before and after the sale, such that the sale had no practical, commercial or economic consequence for Mr Merchant beyond the identified tax benefit (FCJ [233]-[234], [285], [297]; PJ [352], [392], [403]-[404], [406]). There are two problems with this reasoning: (1) relevant differences between the entities involved in the BBG share sale were not considered; and (2) in respect of the differences that were considered, the significance of those differences was erroneously dismissed.

5. **Differences not considered.** Mr Merchant maintained effective control of the BBG shares, however the transfer of those shares from a discretionary trust (MFT) to a superannuation fund (GMSF) still had significant consequences. *First,* the entities

involved were subject to different legal regimes which affected what they could lawfully do (MPS [21]-[22]). For example, the powers of MFT's trustee under the trust deed were broad when compared with the restrictions imposed on GMSF by the *Superannuation Industry (Supervision) Act 1993* (Cth). *Second,* the interest of the "beneficiaries" in the trust assets is different, which had objective significance in the event of bankruptcy, insolvency, death or a matrimonial dispute (MPS [23]). *Third,* MFT and GMSF were subject to different tax laws (MPS [24]).

6. **Differences dismissed.** The majority of the Full Court erroneously dismissed the significance of cash being "liberated" from the restrictions placed on GMSF and the BBG shares being protected in the concessionally taxed environment of the GMSF (FCJ [266]-[273]). As to the former, making a lump sum withdrawal from the GMSF would also have "liberated" cash but would have had other deleterious consequences (MPS [26]). As to the latter, the majority erred in considering the investment merits of the acquisition where there was the objective potential for the BBG shares to appreciate in value in the concessionally taxed environment of the GMSF (MPS [29]).

B.2 *Ground 1(b): The majority of the Full Court failed to conduct the correct counterfactual enquiry required by s 177D*

7. This Court has held that to draw a conclusion under s 177D about the purpose of the persons who entered into or carried out the relevant scheme requires a consideration of the "other possibilities" that existed to carry out the scheme (*Hart* (2004) 217 CLR 216 (**JBA Vol 3, Tab 13, p 464**) at [15], [18] (Gleeson CJ and McHugh J), [66]-[68] (Gummow and Hayne JJ), [94] (Callinan J); *Spotless* (1996) 186 CLR 404 (**JBA Vol 3, Tab 17, p 710**)). The key (but not the only) comparative enquiry is between the "ordinary" or "routine" manner of entering into or carrying out the transaction, and the actual manner in which the scheme was executed (MPS [32]-[33]). Before the Full Court, the parties identified up to five possible alternative mechanisms by which the scheme could have been conducted, none of which would have resulted in the same commercial consequences as the BBG share sale (see the table over the page).

8. The majority erred in three key respects in conducting the necessary comparative enquiry by reference to the factors listed in s 177D(2). *First,* the majority erred in rejecting the usefulness of a counterfactual comparison between the BBG share sale and a sale to a third party (FCJ [233], cf [356]; MPS [19]).

9. *Second,* the majority erred in purporting to distinguish the BBG share sale from a routine sale to a third party at market value: (1) the majority failed to ask whether the "routine" manner of carrying out the share sale achieved all the same commercial consequences as the share sale actually entered into (it did not); (2) the majority erroneously distinguished the BBG share sale on the basis that Mr Merchant maintained effective control of the shares, likening it to a "wash sale" (an inaccurate comparator). In substance, the majority's reasoning meant that once the sale of Plantic was in prospect, MFT was put to an election: sell the BBG shares to a third party and thereby reduce the Merchant Group's stake in BBG, or defer the sale until such time as a capital gain was not in prospect (MPS [47]-[48]). This cannot be the intended operation of s 177D.

10. *Third,* the majority erred in relying on a series of further counterfactuals, which each only achieved a singular commercial consequence of the BBG share sale, to reject the objective benefit of the commercial consequences of the BBG share sale (MPS [49]).

	Actual transaction	Sell on market	Do nothing	GMSF cash withdrawal	MFT draw on debt	MFT sell other assets
Capital loss	Yes	Yes	No	No	No	Depends
Control maintained	Yes	No	Yes	Yes	Yes	Yes
MFT gets cash	Yes	Yes	No	Yes	Yes	Yes
Super Fund gets BBG exposure	Yes	No	No	No	No	No
Super Fund can pay pension	No	Yes	Yes	No	Yes	Yes
Total assets in Super Fund maintained	Yes	Yes	Yes	No	Yes	Yes
No additional debt	Yes	Yes	Yes	Yes	No	Yes
Other assets of MFT maintained	Yes	Yes	Yes	Yes	Yes	No

C. THE DEBT FORGIVENESS SCHEMES AND s 177E

11. In determining whether a scheme falls within s 177E(1)(a)(i) or (ii), it is necessary to consider its <u>purpose</u> and <u>effect</u> (*Consolidated Press* (2001) 207 CLR 235 (**JBA Vol 3, Tab 11, p 391**) at [126], [129] (the Court)). The majority found that the Tironui scheme and the GSM scheme both had the necessary purpose of tax avoidance (FCJ [342]-[357]), but only the Tironui scheme had the necessary effect. The Merchant Parties' position is that neither scheme had the requisite purpose or effect.

C.1 ***The purpose of those involved in the debt forgiveness schemes***

12. There are two problems with the majority's approach to the question of purpose. The *first problem* arises if the Merchant Parties successfully demonstrate that the purpose of those who entered the BBG share sale was not tax avoidance. The purpose enquiry with respect to the debt forgiveness schemes hinges on the BBG capital losses because MFT having non-BBG capital losses was not an identified component of either scheme. The schemes will not have the requisite tax avoidance purpose where the capital losses which were expected to "shelter" the debt forgiveness amounts were not crystallised for that purpose (MPS [66]). The *second problem* concerns the comparative enquiry conducted by the majority, which erroneously focused on the alternative ways in which the loans could have been dealt with, which was just one aspect of each identified debt forgiveness scheme, and which it was accepted would not by itself have attracted the operation of Part IVA (FCJ [315]; MPS [68]). The dominant purpose of the loan forgiveness schemes was to facilitate the sale of Plantic for the highest ultimate return (FCJ [344], [349], [354]; MPS [70]).

C.2 ***The effect of the debt forgiveness schemes***

13. **Essential meaning of "dividend stripping".** The Court should resist adopting a construction of "dividend stripping" that ascribes the concept a meaning so protean as to be meaningless. The expression is "not a legal term of art, having a literal meaning which can be clearly defined apart from its context", and is "not defined in Pt IVA, presumably because the legislature considered its meaning to be sufficiently clear": *Consolidated Press Holdings* (2001) 207 CLR 235 (**JBA Vol 3, Tab 11, p 391**) at [100] (the Court). Previous decisions of this Court, and the extrinsic material which has accompanied the insertion of the concept into the ITAA36 demonstrates that the essential features of "dividend stripping" are those at MRS [20]:

> The stripper acquires shares in a target company with substantial undistributed profits that will attract tax if distributed to the vendor shareholder as dividends. Those profits, or a substantial proportion of them, are paid to the stripper by way of dividend. The stripper does not pay income tax on the dividend… The vendor shareholders receive a capital sum for their shares that is equal to the quantum of the profits distributed to the stripper…. The vendor shareholders thereby receive an amount equivalent to, or substantially equivalent to, the undistributed profits of the target company in a tax-free form, avoiding the tax that would have been payable on a distribution of dividends by the target company.

14. **The Merchant Parties' cross-appeal and amended notice of contention.** The debt

forgiveness schemes cannot be said to fall under s 177E(1)(a)(ii) where neither bears any resemblance to the paradigm of dividend stripping (MRS [22]). The Merchant Parties' position, in respect of their cross-appeal and amended notice of contention, is that the majority's conclusion that the GSM scheme did not attract s 177E(1)(a)(ii) was correct for additional reasons to those it gave, while the conclusion that the Tironui scheme did attract s 177E(1)(a)(ii) was erroneous. There are three problems with the majority's reasoning. *First,* the sequencing adopted in examining MFT's capital gains and losses (FCJ [375], [380], [386]) was inconsistent with the methodology set out in s 102-5 of the ITAA97 (MRS [73]-[76]). *Second,* the conclusion hinged on the availability of non-BBG capital losses, which were not an identified component of either scheme (MRS [77]). *Third,* there was no proper consideration of the tax consequences of the schemes for Mr Merchant, the "vendor shareholder" (MRS [78]-[80]).

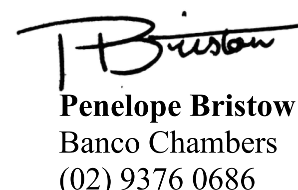
SUBMISSIONS IN RESPONSE (APPEAL S157/2025)

15. **Response to Commissioner's Ground 1: "Limitations" on the operation of s 177E.** The majority correctly identified that the established meaning of "dividend stripping" requires the substantial depletion of the target company's accumulated profits, and that those profits are made substantially tax free in the hands of the vendor shareholders. This established meaning is reflected in the prior cases of this Court (MRS [24]-[55]).

16. **Response to Commissioner's Ground 2: Retrospectivity of s 177D Determination.** The majority correctly identified (FCJ [373]) that the effect of the scheme "looks to the outcome in fact produced", which is to be determined with the benefit of hindsight, in contrast with the inquiry as to the purpose of those entering into or carrying out the scheme, which looks to the intended outcome (MRS [56]-[70]).

17. **Response to Commissioner's cross-appeal.** If the determination in respect of the BBG share sale scheme is found to have been made in error, s 177E still does not apply to the GSM debt forgiveness scheme. This is because, for all the reasons given above, the scheme lacked the requisite purpose and effect as a scheme having substantially the effect of a scheme by way of or in the nature of a dividend stripping (MRS [81]).

Dated 16 March 2026



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ANNEXURE A: ENTITIES AND TRANSACTIONS INVOLVED IN THESE APPEALS