

HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HEYDON, CRENNAN AND KIEFEL JJ

THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

RELIANCE CARPET CO PTY LIMITED

RESPONDENT

Commissioner of Taxation v Reliance Carpet Co Pty Limited
[2008] HCA 22
22 May 2008
M163/2007

ORDER

1. *Appeal allowed.*
2. *Set aside orders 1 and 2 of the orders of the Full Court of the Federal Court of Australia dated 5 July 2007 and, in their place, order that the appeal to that Court be dismissed.*
3. *The appellant pay the costs of the respondent.*

On appeal from the Federal Court of Australia

Representation

A Robertson SC with J O Hmelnitsky for the appellant (instructed by Australian Government Solicitor)

J J Batrouney SC with C M Sievers for the respondent (instructed by Ambry Legal)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commissioner of Taxation v Reliance Carpet Co Pty Limited

Taxes and duties – Goods and services tax – Taxable supply – *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the Act"), s 9-10 – Contract for sale of land – Whether there is a taxable supply when a deposit held as security for the performance of a purchaser's obligations is forfeited for failure by the purchaser to perform its obligations.

Vendor and purchaser – Deposit – Characteristics of deposit – Whether payment of deposit was "in connection with a supply" by vendor taxpayer for the purpose of s 9-15(1) of the Act – Whether forfeited deposit treated as consideration for a supply under s 99-5 of the Act.

Words and phrases – "consideration for a supply", "deposit", "grant, assignment or surrender of real property", "in connection with a supply", "real property", "supply", "taxable supply".

A New Tax System (Goods and Services Tax) Act 1999 (Cth), ss 9-5, 9-10, 9-15, 99-1, 99-5, 99-10.

Property Law Act 1958 (Vic), s 49(2).

Sale of Land Act 1962 (Vic), s 26(1)(a).

Statute of Frauds 1677, s 17.

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The issue

1 The issue before this Court, shortly stated, is whether the Full Court of the Federal Court of Australia (Heerey, Stone and Edmonds JJ)¹ erred in holding that the respondent ("the taxpayer") had made out its objection against an assessment by the appellant ("the Commissioner") of goods and services tax ("GST") in respect of a "taxable supply" by the taxpayer; the consideration for that supply by the taxpayer was treated by the Commissioner as being the deposit forfeited to the taxpayer upon its rescission of a contract for the sale of certain real property by the taxpayer.

2 The taxpayer rescinded the contract upon default by the purchaser in completion of the sale. Something should be said immediately of the use here of the term "rescission". A relevant distinction is expressed in the well-known passage in the reasons of Dixon J in *McDonald v Dennys Lascelles Ltd*². A contract may be rescinded because of matters, such as fraud, which affect its formation, with the consequence that, so far as possible, the parties are restored to their pre-contract positions. Rescission in that sense is distinct from rescission (or termination) at the election of one party for breach by the other, with the consequence that the contract, so far as it remains executory, is determined, and damages for breach may be recovered. The present case concerns rescission in the latter sense of termination upon a failure in performance by the other party.

The GST

3 Provision respecting the assessment and payment of the GST is made by the statute styled *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the Act"). An important point respecting the nature of the GST was made as follows by the Full Court of the Federal Court in *Sterling Guardian Pty Ltd v Commissioner of Taxation*³:

1 *Reliance Carpet Company Pty Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 433.

2 (1933) 48 CLR 457 at 476-478. See also the speech of Lord Wilberforce in *Johnson v Agnew* [1980] AC 367 at 396.

3 (2006) 149 FCR 255 at 258.

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"In economic terms it may be correct to call the GST a consumption tax, because the effective burden falls on the ultimate consumer. But as a matter of legal analysis what is taxed, that is to say what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply ..."

By way of contrast to the Australian system, counsel for the Commissioner referred to Art 2(1) of the first Council directive⁴ on the harmonisation of legislation of member states of the European Community concerning turnover taxes; this indicates that VAT is a general tax on the consumption of goods and services.

4 Section 7-1 of the Act relevantly states that GST is payable on "*taxable supplies"⁵. Section 9-5 answers a question "what are taxable supplies?", posed by a hypothetical taxpayer, by stating that "you make a **taxable supply**" if, among other criteria not presently relevant, "you make the supply for *consideration".

5 The composite expression "a taxable supply" is of critical importance for the creation of liability to GST. In the facts and circumstances of a given case there may be disclosed consecutive acts each of which answers the statutory description of "supply", but upon examination it may appear that there is no more than one "taxable supply".

6 The meaning of "supply" is given in s 9-10 and in addition to the general words "any form of supply" in s 9-10(1), par (d) of s 9-10(2) includes "a grant, assignment or surrender of *real property", and "real property" is defined⁶ expansively as including:

"(a) any interest in or right over land; or

(b) a personal right to call for or be granted any interest in or right over land; or

4 Directive 67/227.

5 The use of the asterisk is a device to alert the reader to the presence of a definition in the Dictionary to the Act.

6 In the Dictionary provision of s 195-1.

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- (c) a licence to occupy land or any other contractual right exercisable over or in relation to land".

Further, par (g) of s 9-10(2) includes "an entry into ... an obligation ... to do anything".

7 The term "consideration" is defined in par (a) of s 9-15(1) as including:

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

The payment, act or forbearance may be voluntary and need not be by the recipient of the supply (s 9-15(2)).

8 The amount of GST on a taxable supply is 10 per cent of "the value of the taxable supply" (s 9-70), and in the present case this was assessed as being the consideration represented by the forfeited deposit.

9 Division 29 lays down rules for the attribution to a tax period of the GST payable on a taxable supply. The general rule (s 29-5) is that the supplier becomes liable to pay GST on the earlier of two events, namely the receipt by the supplier of any of the consideration for the taxable supply, and the issue of an invoice relating to that supply; in the present case no invoice was issued by the taxpayer and the only relevant event was the receipt of the alleged consideration.

10 Special provisions are made in Div 99 respecting deposits as security. These are stated in Div 99 to apply despite anything in the general provisions respecting consideration (s 9-15), and tax periods (s 29-5). It will be necessary to refer to Div 99 more fully later in these reasons. It is sufficient at this stage to remark that the chapeau to s 99-1 reads "What this Division is about" and the text of s 99-1 reads:

"GST does not apply to the taking of a deposit as security for the performance of an obligation (unless the deposit is forfeited or is applied as consideration). GST is not attributable prior to forfeiture."

11 This temporal link is important. There may have been an anterior supply, or more than one anterior supply, but GST is not attributable prior to performance of the obligation or forfeiture of the deposit.

12 The effect of the Commissioner's submissions made to this Court and earlier made (unsuccessfully) to the Full Court, is that without the payment of the

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deposit by the purchaser, the purchaser would not have obtained contractual rights exercisable in relation to land, namely the benefit of the promise by the taxpayer to convey the subject land upon completion of the contract. By dint of the expansive definition of "real property" in the Act, this was a "supply" by the taxpayer which was constituted by "a grant ... of real property": par (d) of s 9-10(2). Further, the deposit received by the taxpayer was a payment "in connection with" that supply and so was "consideration" (s 9-15(1)(a)). However, by reason of the special provision of s 99-5, the deposit was treated as consideration only if and when the deposit was forfeited.

13 The Full Court held⁷:

"When the [taxpayer] entered into the contract for sale with the purchaser it entered into a contract for the supply of real property; nothing more and nothing less ... That supply did not take place because the contract was rescinded."

Several points should be made here. The circumstance that the contract did not proceed to completion does not necessarily prevent there having been a "supply" when the contract was entered into; the ultimate issue is whether there was "a taxable supply" to which GST was attributed for the relevant tax period. The contract was executory in nature and was never "rescinded" in the sense of being set aside for some vitiating factor attending its formation. Further, the use of the phrase "nothing more and nothing less" appears to give insufficient weight both to the definition of "real property" in the Act, and to the identity of the subject matter of the contract, in accordance with ordinary principles of conveyancing, as the title or estate of the vendor in a parcel of land rather than merely the parcel itself in a geographical sense⁸.

14 For the further reasons which follow the Full Court fell into error and should have upheld the disallowance by the Commissioner to the objection by the taxpayer to the GST assessment.

7 (2007) 160 FCR 433 at 445.

8 cf *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 13; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 426 [96]; [1999] HCA 5; *Risk v Northern Territory* (2002) 210 CLR 392 at 418 [82]; [2002] HCA 23.

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The facts

15 The facts were not disputed but the legal significance for the operation of the Act of various steps in the conveyancing process which led to the forfeiture of the deposit calls for some attention.

16 Upon exchange of instruments dated 10 January 2002, the taxpayer entered into a written contract ("the Contract") to sell real estate at Camberwell in Victoria where it conducted its business ("the property"). The premises were not sold as part of a going concern. Nothing turns on the identity of the purchaser, 699 Burke Road Pty Ltd ("the purchaser"). The Contract incorporated the standard form provisions set out in Table A of Sched 7 to the *Transfer of Land Act* 1958 (Vic). The Contract fixed the purchase price at \$2,975,000 and stated that the deposit of \$297,500 (or 10 per cent) had been paid "[u]pon the exercise of the option contained in the Option Agreement dated 3 December 2001 between the parties".

17 By written option agreement dated 3 December 2001 ("the Option Agreement") and in consideration of an option fee of \$25,000 paid by the purchaser before execution of the Option Agreement the taxpayer had granted to the purchaser an option to purchase the property upon the terms of the annexed contract. Clause 2 of the Option Agreement provided for the exercise of the option by written notice together with the payment of \$297,500, "being the deposit payable under the Contract". Clause 5 of the Option Agreement stipulated that upon receipt by the taxpayer of the written notice of exercise and the payment of the deposit, "the [taxpayer] will be bound to sell and the [purchaser] will be bound to purchase the property on the terms and conditions set out in the [annexed Contract]" and that the Contract was to be treated as having been entered into upon the day the option was exercised. In the events which followed execution of the Option Agreement, the parties agreed to extend the time for the exercise of the option until 10 January 2002 (which became the date of the Contract) and to defer payment of the deposit until 31 January 2002.

18 The deposit (with interest and legal costs) was paid on 5 February 2002 and the Contract subsequently was executed and exchanged between the parties; it specified as its date the earlier date of 10 January 2002.

19 The Contract provided that the balance of \$2,677,500 was to be paid on settlement. The Special Conditions in the Contract indicated that the purchase

price did not include GST (cl 7)⁹. Settlement was to take place on or before 10 January 2003, but the taxpayer had the right to defer settlement for a period of six months if required to relocate its business. On 27 February 2002, the taxpayer's solicitors, acting pursuant to s 27 of the *Sale of Land Act* 1962 (Vic) ("the Sale of Land Act"), released the deposit to the taxpayer¹⁰. The taxpayer later exercised its option to defer the date of settlement by six months, to 10 July 2003.

20 The purchaser failed to complete on 10 July 2003 and did not remedy that default within the period of the 14 day notice to complete (headed "Rescission Notice") given by the taxpayer on 11 July 2003. On or about 26 July 2003, the taxpayer rescinded the Contract and forfeited the deposit. By notice dated 9 November 2004, the Commissioner assessed the taxpayer as liable to pay GST in respect of the forfeited deposit for the three month tax period which had ended on 30 September 2003.

21 The matter proceeded with a grant by the Commissioner of test case funding. The Commissioner's disallowance of the taxpayer's objection was affirmed¹¹ by the Hon Howard Olney AM, QC as a Deputy President of the Administrative Appeals Tribunal ("the AAT"), but an "appeal" by the taxpayer to the Full Court of the Federal Court was successful.

The significance of the deposit

22 In *Howe v Smith*¹², Fry LJ said that money paid as a deposit must be paid on some terms implied or expressed; statute also may play a part in the formulation of those terms. The ordinary sense of the term "deposit", as

9 This case does not turn upon the special provision made by s 40-65 of the Act respecting sales of residential premises.

10 Section 27 provides for the purchaser to empower the release to the vendor "in his own right" of deposit moneys held by a legal practitioner or estate agent as a stakeholder. In the absence of an arrangement or legislation to the contrary, neither vendor nor purchaser has a proprietary interest in a deposit held by a stakeholder: *Hastingwood Property Ltd v Saunders Bearman Anselm* [1991] Ch 114 at 123.

11 *Re Reliance Carpet Co Pty Ltd and Federal Commissioner of Taxation* (2006) 63 ATR 1001; 2006 ATC 2206.

12 (1884) 27 Ch D 89 at 101.

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understood in the case law and in conveyancing usage, has several aspects which are relevant to the treatment by the Commissioner of the forfeiture to the taxpayer as the "consideration" for the "supply".

23 First, if the Contract had proceeded to completion, then, as the Contract itself stipulated, the deposit would have been counted towards the payment of the purchase price. Secondly, if specific performance had been sought by the taxpayer but had been refused, the Supreme Court would have been empowered by the wide terms of s 49(2) of the *Property Law Act* 1958 (Vic) ("the Property Law Act")¹³ to have ordered repayment of the deposit and to leave the taxpayer to recover such damages as it could against the purchaser¹⁴.

24 Thirdly, where, as here, the contract was terminated for breach, the deposit would be brought into account in any assessment of damages if an action were pursued against the purchaser¹⁵. By its notice of contention, the taxpayer submits that (i) the forfeited deposit was received by the taxpayer "in the nature of damages", (ii) damages do not attract GST in the absence of an "underlying supply" for which the damages are "consideration" within the meaning of the Act, and (iii) the taxpayer retained the property with the result that there was no "supply" in connection with the forfeited deposit. It is unnecessary to consider

13 Section 49(2) states:

"Where the Court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit."

There is legislation in similar terms in the United Kingdom and New South Wales: *Law of Property Act* 1925 (UK), s 49(2); *Conveyancing Act* 1919 (NSW), s 55(2A).

14 See, generally, *Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 NSWLR 268 at 272-273; *Poort v Development Underwriting (Victoria) Pty Ltd* [1976] VR 779 at 784-785, *affd Poort v Development Underwriting (Victoria) Pty Ltd (No 2)* [1977] VR 454; *Harkins v Butcher* (2002) 55 NSWLR 558 at 572-574; Butt, *The Standard Contract for Sale of Land in New South Wales*, 2nd ed (1998) at 461-478.

15 *NLS Pty Ltd v Hughes* (1966) 120 CLR 583 at 588-590; *Cowan v Stanhill Estates Pty Ltd (No 2)* [1967] VR 641 at 654; *Carpenter v McGrath* (1996) 40 NSWLR 39 at 45, 61.

the operation of the Act for which the taxpayer contends in propositions (ii) and (iii). The argument fails at proposition (i). Subject to the possibility of a successful application by the purchaser under s 49(2) of the Property Law Act¹⁶, a deposit may be forfeited by a purchaser irrespective of the vendor having sustained any loss sounding in damages for breach of contract. Further, in the present case there has been no action taken by the taxpayer to recover any alleged damages for failure to complete the Contract, still less is there any apprehended recovery of damages. No question arises of setting-off the deposit against damages recovered by the taxpayer.

25 Fourthly, the taxpayer emphasises that the deposit constitutes "a stand alone obligation", which is a token understood, even in the absence of express contractual provision¹⁷, to be provided by the purchaser to the taxpayer as "an earnest to bind the bargain" represented by the Contract¹⁸.

26 Fifthly, and although the taxpayer appeared to dispute this, the authorities indicate that whilst the Contract remained executory and was on foot but uncompleted by the purchaser, the deposit provided to the taxpayer a form of security for that performance by the purchaser¹⁹. The taxpayer could take the property off the market, "and not concern [itself] with other offers in case the sale should go off, with the comfort at least that the deposit is there for [its] security"²⁰. This security (in an amount representing no more than 10 per cent of the price) was enforced by the forfeiture to the taxpayer on or about 26 July 2003. That forfeiture upon termination for breach by the purchaser was

16 In an English decision, *Dimsdale Developments (South East) Ltd v De Haan* (1983) 47 Property and Compensation Reports 1 at 12, the vendor had resold at a higher price and on an application by the purchaser the Court ordered repayment of the deposit but on terms that the purchaser allow for a deduction from the deposit of the extra costs and charges paid by the vendor in respect of the second contract.

17 *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578-579.

18 *Brien v Dwyer* (1978) 141 CLR 378 at 386, 406.

19 *Brien v Dwyer* (1978) 141 CLR 378 at 392, 401, 406.

20 *Brien v Dwyer* (1978) 141 CLR 378 at 401; *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367 at 374 [20]; [2003] HCA 58.

supported not only by the general law respecting deposits²¹, but also by specific entitlement conferred by s 26(1)(a) of the Sale of Land Act²². Further, the forfeiture of the 10 per cent deposit did not attract the jurisdiction of a court of equity to relieve against penalties and forfeitures²³.

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The fourth and fifth aspects of the provision of the deposit are related but distinct. The expression "an earnest to bind the bargain" reflects, as Fry LJ put it in *Howe v Smith*, the adaptation by the common law of "[t]he practice of giving something to signify the conclusion of the contract, sometimes a sum of money, sometimes a ring or other object, to be repaid or redelivered on the completion of the contract, [which] appears to be one of great antiquity and very general prevalence"²⁴. The practice was received from Roman law into the mediaeval common law by the time of Bracton, and thus preceded the development of the modern law of contract and of the equitable principles which it includes²⁵. The quotation by Fry LJ from Bracton²⁶ indicates that where something was given by way of a deposit before delivery then if the buyer repented and wished to resile from the contract the buyer lost the deposit; if the seller was responsible for the non-performance then the seller was required to return double the amount of the deposit. Writing in the same period as Fry LJ, Benjamin said that in the modern law "the true legal effect of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding

21 In the absence of an express contractual stipulation to the contrary, a vendor terminating a contract for default by the purchaser in completion is entitled to retain the deposit, as an implied term upon which the deposit was provided: *Hall v Burnell* [1911] 2 Ch 551.

22 Section 26(1)(a) provides that in these circumstances, "the vendor shall be immediately entitled to be paid the deposit moneys in his own right".

23 *NLS Pty Ltd v Hughes* (1966) 120 CLR 583 at 588-589; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 455; *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578-579.

24 (1884) 27 Ch D 89 at 101.

25 *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 at 91 per Lord Hailsham LC.

26 (1884) 27 Ch D 89 at 102.

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on both [parties]"²⁷. Section 17 of the *Statute of Frauds* 1677²⁸, in dealing with the enforcement of contracts for the sale of goods for the price of £10 or upwards, treated separately the giving by the buyer of something "in earnest to bind the bargain" and "in part of payment".

28 The circumstance that the deposit forfeited to the taxpayer had various characteristics does not mean that the taxpayer may fix upon such one or more of these characteristics as it selects to demonstrate that there was no taxable supply. It is sufficient for the Commissioner's case that the presence of one or more of these characteristics satisfies the criterion of "consideration" for the application of the GST provisions respecting a "taxable supply". One of the characteristics of the deposit was that upon its payment on 5 February 2002 it operated as a security for the performance of the obligation of the purchaser to complete the Contract and was liable to forfeiture on that failure. That is sufficient for the Commissioner's case.

29 Counsel for the taxpayer referred to the statement of the modern French law respecting deposits in the recent judgment of the European Court of Justice (First Chamber) in *Société Thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie*²⁹, as follows:

"As regards, specifically, deposits, it must be noted first that they mark the conclusion of a contract, since their payment implies a presumption that the contract exists. Secondly, a deposit encourages the parties to perform the contract, because otherwise the party who has paid it stands to lose the corresponding sum, while the other party must, if responsible for the non-performance, return double that amount. Thirdly, the deposit constitutes fixed compensation, since its payment releases one of the parties from the need to prove the amount of the loss suffered if the other party goes back on the agreement.

The *raison d'être* for deposits in the hotel sector corresponds, as a rule, to the above characteristics. Such deposits serve therefore to mark

27 *Benjamin's Treatise on the Law of Sale of Personal Property*, 3rd ed (1884) at 301.

28 29 Car II c 3. Section 17 was repealed by the *Statute Law Revision and Civil Procedure Act* 1881 (UK) 44 & 45 Vict c 59.

29 [2007] 3 CMLR 38 at 1019-1020.

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the conclusion of the contract, to encourage its performance and, as the case may be, to provide fixed compensation."

30 This case concerned the operation of a VAT system upon deposits for hotel accommodation which were retained by the hotelier upon cancellation of reservations. The first characteristic of a deposit identified above accords with what Benjamin said of the common law, but the second and third characteristics do not state the common law. It was these characteristics which the Court emphasised in holding that VAT was not exigible because the sum was retained as compensation for the default by the client³⁰. The European Community directive in question³¹ requires that there be a direct connection between the services provided and what is received for them, as the judgment states³². In this case it was necessary that the deposit be linked to the provision of hotel services. In French contract law that link would only be present if the hotelier's obligation was interdependent with that of the customer, to pay the deposit³³. The parties to a contract may agree as to compensation to be paid upon breach, which is what they were taken to have done in providing the deposit. The direct connection required by the directive may be contrasted with that for a taxable supply under the GST legislation and the directive has no counterpart to s 99-5.

31 Counsel for the taxpayer also referred to treatment in the *Value Added Tax Act* 1994 (UK) of the grant and assignment of estates or interests in land. But that statute, which is fleshed out by extensive delegated legislation³⁴, is of no apparent assistance in construing the Australian legislation as it applies to the present case. Counsel also provided materials respecting the treatment of deposits in the taxation systems of New Zealand and Canada. However, these systems appear to lack any sufficiently close analogue to Div 99 of the Act for assistance to be derived from them in the present case.

30 [2007] 3 CMLR 38 at 1020.

31 Articles 2(1) and 6(1) of the Sixth Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: Uniform basis of assessment ([1977] OJ L145/1); see also Art 11(A)(1)(a).

32 [2007] 3 CMLR 38 at 1018.

33 [2007] 3 CMLR 38 at 1019.

34 See *Halsbury's Laws of England*, 4th ed, vol 49(1), pars 37, 40, 41.

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Conclusions

32 Was the taxpayer liable to pay GST as assessed for the three month tax period ending 30 September 2003? Had the taxpayer made a taxable supply, ie a "supply for consideration"?

33 First, as to the consideration. The payment of the deposit by the purchaser to the taxpayer was "in connection with" a supply by the taxpayer, within the meaning of the definition of "consideration" in s 9-15(1)(a) of the Act. That connection is readily seen from the circumstance that, with the receipt of the written notice of the exercise of the option by the purchaser, and by force of cl 5 of the Option Agreement, the payment of the deposit obliged the parties to enter into the mutual legal relations with the executory obligations and rights laid out in the Contract. Those legal relations were directed to the completion of the Contract by conveyance of the property to the purchaser by the taxpayer upon payment by the purchaser. But, as to the requirement for "consideration", that is not the end of the matter.

34 As noted earlier in these reasons, in this case the payment by the purchaser of the deposit was to be treated as "consideration" for a "supply" only if and when the deposit was forfeited because of the failure by the purchaser to perform its obligation to complete the Contract. That conclusion follows from the application of s 99-5. This states:

"99-5 Giving a deposit as security does not constitute consideration

- (1) A deposit held as security for the performance of an obligation is not treated as *consideration for a supply, unless the deposit:
 - (a) is forfeited because of a failure to perform the obligation; or
 - (b) is applied as all or part of the consideration for a supply.
- (2) This section has effect despite section 9-15 (which is about consideration)."

35 What, if any, principled concerns may support the adoption by the Parliament of this "wait and see" provision? The AAT pointed out in its reasons

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that in any standard contract for sale of land it may be expected that upon termination by the purchaser for breach by the vendor, the purchaser will be entitled to repayment of the deposit, and upon termination by the vendor for breach by the purchaser the deposit will be forfeited to the vendor. If the sale proceeds to completion the deposit will be applied towards the settlement payment. Until one of these three events comes to pass, the ultimate fate of a deposit will be unresolved. (Allowance would also have to be made for the possibility of an order under s 49(2) of the Property Law Act for the return of the deposit to the purchaser.) The AAT accordingly concluded³⁵:

"Having regard to the 3 possible alternative destinations of the deposit it is understandable that the legislature has put on hold the question of liability for GST until one or other of the events referred to in s 99-5(1) has occurred."

36 In the present case, and as remarked earlier in these reasons, whatever other characteristics were attributable to the deposit, it was held as security for the obligation of the purchaser duly to complete the Contract. Further, upon the termination by the taxpayer for default by the purchaser, there was a statutory entitlement conferred upon the taxpayer (as vendor) by s 26(1)(a) of the Sale of Land Act to the deposit moneys "in [its] own right".

37 The "supply" by the taxpayer occurred before the forfeiture and thus before the provision of consideration in accordance with s 99-5. Section 9-10 provides:

"9-10 Meaning of supply

- (1) A *supply* is any form of supply whatsoever.
- (2) Without limiting subsection (1), *supply* includes any of these:
 - (a) a supply of goods;
 - (b) a supply of services;
 - (c) a provision of advice or information;

35 (2006) 63 ATR 1001 at 1005; 2006 ATC 2206 at 2210.

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- (d) a grant, assignment or surrender of *real property;
- (e) a creation, grant, transfer, assignment or surrender of any right;
- (f) a *financial supply;
- (g) an entry into, or release from, an obligation:
 - (i) to do anything; or
 - (ii) to refrain from an act; or
 - (iii) to tolerate an act or situation;
- (h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g)."

The AAT correctly applied that definition to the Contract as follows³⁶:

"The ultimate obligation was of course to transfer title to the purchaser upon payment of the balance of purchase price. But there were other obligations, such as maintaining the property in its present condition (special condition 2.1), to pay all rates, taxes, assessments, fire insurance premiums and other outgoings in respect of the land (Table A, cl 9) and to hold the existing policy of fire insurance for itself and in trust for the purchaser to the extent of their respective interests (Table A, cl 10). In the circumstances it may fairly be said that upon execution of the contract the applicant made a supply in that, in terms of s 9-10(2)(g) of [the Act], it 'entered into an obligation' to do the things it was bound to do under the contract ..."

38 Further, as indicated earlier in these reasons, and within the meaning of par (d) of s 9-10(2) as extended by the definition of "real property", there was upon exchange of contracts the grant by the taxpayer to the purchaser of contractual rights exercisable over or in relation to land, in particular of the right to require in due course conveyance of the land to it upon completion of the sale.

36 (2006) 63 ATR 1001 at 1006; 2006 ATC 2206 at 2210-2211.

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39 The lack of temporal coincidence between "supply" and "consideration" was dealt with by s 99-10 as follows:

"99-10 Attributing the GST relating to deposits that are forfeited etc.

- (1) The GST payable by you on a *taxable supply for which the *consideration is a deposit that was held as security for the performance of an obligation is attributable to the tax period during which the deposit:
 - (a) is forfeited because of a failure to perform the obligation; or
 - (b) is applied as all or part of the consideration for a supply.
- (2) This section has effect despite section 29-5 (which is about attributing GST for taxable supplies)."

Thus the GST was attributable to the tax period in which the deposit was forfeited. Section 9-5 provides that "you", here, the taxpayer, make a taxable supply if "you make the supply for *consideration". The supply was made in advance of that failure by the purchaser in performance of the executory terms of the Contract which led to the forfeiture of the deposit to the taxpayer. But, as s 99-10 makes plain, the GST was attributable to the tax period within which the forfeiture occurred.

40 Upon forfeiture to the taxpayer of the deposit, by reason of the failure by the purchaser to complete the Contract, the "supply" represented by the making of the Contract became "a taxable supply".

41 Division 99 draws within the one regime the consequences of forfeiture of a deposit where there is no completion and of the application of a deposit towards the purchase price paid upon completion. It may be accepted that, as the taxpayer contends, the structure of Div 99 gives rise to an issue of construction where a contract does proceed to completion. Is there not then a "second supply", in addition to the making of the contract, which is represented by the conveyance to the purchaser?

42 However, upon the proper construction of the Act no question of two "taxable supplies" arises in that situation. The deposit is not treated as

Gleeson CJ
Gummow J
Heydon J
Crennan J
Kiefel J

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consideration for a supply (and therefore there is no taxable supply) unless, in the case of a sale that proceeds from contract to completion, it is applied (as normally it is on completion) as all or (more usually) part of the purchase price. If and when it happens that the deposit is applied as part (or all) of the consideration for the transfer of the land then the GST is attributable to the tax period during which that occurs, and there is only one taxable supply.

Orders

43 The appeal should be allowed. Orders 1 and 2 made by the Full Court of the Federal Court on 5 July 2007 should be set aside and in place thereof the appeal to that Court should be dismissed. In accordance with the terms of the grant of special leave the Commissioner must bear the costs to the taxpayer of the appeal to this Court and the costs order made by the Full Court is not disturbed.