

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
HAYNE, CRENNAN, KIEFEL AND BELL JJ

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ALH GROUP PROPERTY HOLDINGS PTY LIMITED

APPELLANT

AND

CHIEF COMMISSIONER OF STATE REVENUE

RESPONDENT

*ALH Group Property Holdings Pty Limited v Chief Commissioner of State  
Revenue*  
[2012] HCA 6  
8 March 2012  
S285/2011

## ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 3 March 2011 and, in their place, order that:*
  - (a) *the appeal to that Court be dismissed; and*
  - (b) *the Chief Commissioner of State Revenue pay the costs of ALH Group Property Holdings Pty Limited in that Court.*
3. *The respondent pay the appellant's costs in this Court.*

On appeal from the Supreme Court of New South Wales

### Representation

C J Bevan with A Tsekouras for the appellant (instructed by JDK Legal)

C W J Leggat SC with M L Robertson for the respondent (instructed by Crown Solicitor (NSW))

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



## CATCHWORDS

### **ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue**

Stamp duty – Agreement for sale or transfer of dutiable property – Cancelled agreement – Section 8(1)(b)(i) of *Duties Act* 1997 (NSW) ("Duties Act") charged duty on "an agreement for the sale or transfer of dutiable property" – Section 50(1)-(2) of Duties Act relevantly provided that cancelled agreement for sale or transfer of dutiable property not liable to duty and that respondent must refund duty paid on such agreement – Oakland Glen Pty Limited ("Oakland") entered into contract ("2003 contract") to sell property to Trust Company Fiduciary Services Limited ("Trust") – Oakland, Trust and appellant executed deed ("Deed of Consent") under which appellant assumed Trust's obligations under 2003 contract – Oakland and appellant executed deed ("Deed of Termination") which as rectified cancelled Deed of Consent – Whether Deed of Consent recorded agreement on which duty chargeable under s 8(1)(b)(i) of Duties Act – Whether Deed of Consent effected novation or assignment of Trust's rights under 2003 contract to appellant – Whether Deed of Consent rescinded 2003 contract – Whether Deed of Termination cancelled any agreement for sale or transfer of property recorded in Deed of Consent so that respondent must refund duty paid pursuant to s 50(2) of Duties Act.

Words and phrases – "an agreement for the sale or transfer of dutiable property", "assignment", "novation", "rescission".

*Duties Act* 1997 (NSW), ss 8(1)(a), 8(1)(b)(i), 50(1)-(2).



1 FRENCH CJ, CRENNAN, KIEFEL AND BELL JJ. On 5 November 2003, Oakland Glen Pty Limited ("Oakland") entered into a contract with Permanent Trustee Company Limited, as trustee of the ALE Direct Property Trust. Under the contract ("the 2003 contract"), Oakland agreed to sell to Permanent Trustee Company Limited a portion of freehold land at Frenchs Forest, New South Wales, on which a hotel was erected and of which Oakland was the registered proprietor, for the sum of \$6,386,611. The balance of the land was the subject of another contract of sale to a developer. Permanent Trustee Company Limited later changed its name to Trust Company Fiduciary Services Limited ("Trust"). No duty was charged on the 2003 contract, the Chief Commissioner of State Revenue for New South Wales ("the Chief Commissioner") having approved the transaction for the purposes of s 281 of the *Duties Act* 1997 (NSW), which concerns transactions in the nature of corporate reconstructions.

2 On 27 June 2008, Oakland, Trust and ALH Group Property Holdings Pty Ltd ("ALH") executed a document entitled "Deed of Consent and Assignment" ("the Deed of Consent") under which, in essence: Trust agreed to assign its rights under the 2003 contract to ALH; Oakland consented to the assignment; ALH promised Oakland that it would perform Trust's obligations under the 2003 contract; and Oakland released and discharged Trust from all liability under the 2003 contract.

3 On 19 September 2008, the solicitors for ALH wrote to the Chief Commissioner enclosing a copy of the 2003 contract and the Deed of Consent. The solicitors also enclosed a document described as a "Deed of Termination" which, they said, was proposed to be executed around 30 September 2008. The purpose of the letter to the Chief Commissioner was to submit that no duty was payable on the Deed of Consent, by reason of s 50 of the *Duties Act*. Section 50 concerns agreements for the sale or transfer of dutiable property that are cancelled<sup>1</sup>. Section 50(1) provides that no duty is payable thereon provided that the Chief Commissioner is satisfied of certain matters. Section 50(2) provides that if duty has been paid on an agreement that is not liable to duty because of s 50, the Chief Commissioner must reassess and refund the duty if an application for a refund is made within certain time limits.

4 ALH's solicitors explained to the Chief Commissioner that Oakland and ALH "have agreed to terminate [the 2003 contract] so that ALH can buy from Oakland the whole of the land and improvements on which the [hotel] stands ...

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1 Under s 50(3), "cancelled", for the purposes of s 50, means "rescinded, annulled or otherwise terminated without completion."

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Bell J

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including the land previously agreed to be sold to [the developer]." In fact the Deed of Termination and a new contract between Oakland and ALH for the sale of that property were executed on 24 October 2008. ALH paid ad valorem duty on this contract, in the sum of \$336,758.50.

5        Since no duty had been paid on the 2003 contract, it might be expected that the Deed of Termination would be directed to the Deed of Consent and the agreement reached between the three parties to it, if it were to be contended, as ALH does, that the Deed of Consent was not dutiable. Indeed, as will be seen, ALH consistently maintained that the 2003 contract, or at least the obligations of one or both parties under it, had been superseded by the agreement in the Deed of Consent. However, there appears to have been some confusion in the drafting of the Deed of Termination, for it purported to terminate the 2003 contract. The primary judge, Gzell J, considered this to be at odds with the intention of the parties and treated the Deed of Termination as rectified and as referable to the Deed of Consent<sup>2</sup>.

6        Any confusion created by the Deed of Termination may be put to one side. No issue now remains concerning the terms of the Deed of Termination and its efficacy in cancelling the Deed of Consent. The Chief Commissioner accepts that if the Deed of Consent contains an agreement to which s 50 applies, the Deed of Termination may be taken to cancel the Deed of Consent for the purposes of that section. The question then is whether s 50 applies to the agreement between Oakland, Trust and ALH. This will require consideration of its legal nature and effect.

7        Section 50(1) of the *Duties Act* provides that "An agreement for the sale or transfer of dutiable property that is cancelled is not liable to duty under this Chapter" (provided that the Chief Commissioner is satisfied about certain matters which are not presently relevant). "An agreement for the sale or transfer of dutiable property" would ordinarily be liable to duty under s 8(1)(b)(i) of the *Duties Act*, were it not for s 50(1).

8        Chapter 2 of the *Duties Act*, in which s 8(1)(b)(i) appears, is entitled "Transactions concerning dutiable property". In *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd*<sup>3</sup>, it was observed that

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2     *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* 2010 ATC ¶20-176 at 10,877-10,878 [22]-[31]; (2010) 79 ATR 51 at 55.

3     (2005) 221 CLR 496 at 503 [15]; [2005] HCA 3.

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the imposition of duty on transactions, as well as on instruments, represents a shift in emphasis as compared with earlier stamp duty legislation. Under s 11(1)(a) and (l), "[d]utiable property" relevantly includes an interest in land in New South Wales.

9 Ad valorem duty is also payable upon "a transfer of dutiable property", by reason of s 8(1)(a), but s 50(1) in its terms does not apply to such a transaction. A "transfer" of property is apt to refer to an assignment of property. In this case the Chief Commissioner contends that the Deed of Consent was effective to assign the interests of Trust to ALH, but that it does no more, and does not qualify as an agreement to which s 8(1)(b)(i), and therefore s 50, refers. So much appears from correspondence from the Chief Commissioner to ALH's solicitors dated 12 November 2008.

10 The transaction between Oakland, Trust and ALH, recorded in the Deed of Consent, must amount to an agreement for the sale or transfer of the land and improvements the subject of the 2003 contract from Oakland to ALH, and not from Oakland to Trust, in order to come within the terms of s 8(1)(b)(i). As will be explained, for there to be a new contract of sale between Oakland and ALH, the Deed of Consent must have effected a discharge of the 2003 contract. It was to these issues that ALH's solicitors' letter of 19 September 2008 was addressed.

11 In that letter, ALH's solicitors argued that, despite the terminology used in the Deed of Consent (a reference no doubt to the use of the word "assignment" in the title and in the terms relating to the transfer of Trust's rights under the 2003 contract to ALH), the effect of the document, read as a whole, was to effect a "novation of all of the rights and obligations and benefits of the purchaser under [the 2003 contract] from [Trust] to ALH."

12 A novation, in its simplest sense, refers to a circumstance where a new contract takes the place of the old<sup>4</sup>. It is not correct to describe novation as involving the succession of a third party to the rights of the purchaser under the original contract. Under the common law such a description comes closer to the effect of a transfer of rights by way of assignment. Nor is it correct to describe a third party undertaking the obligations of the purchaser under the original contract as a novation. The effect of a novation is upon the obligations of both parties to the original, executory, contract. The enquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged.

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4 *Olsson v Dyson* (1969) 120 CLR 365 at 389; [1969] HCA 3.

*French* CJ  
*Crennan* J  
*Kiefel* J  
*Bell* J

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13 If the obligations of Oakland or of Trust under the 2003 contract remained after the execution of the Deed of Consent, it could not be said that the 2003 contract had been discharged, or rescinded, as is essential to a novation. In such a circumstance a new contract could not have come into effect between Oakland and ALH. This was the conclusion the Court of Appeal reached in this case<sup>5</sup>.

14 In a letter dated 7 April 2009 notifying ALH's solicitors of the disallowance of ALH's objection to the assessment of duty on the Deed of Consent, the Chief Commissioner appears to have assumed, contrary to earlier expressed views, that the Deed of Consent effected a novation of the 2003 contract. This does not assume any significance. The issue to which disallowance was addressed was the efficacy of the Deed of Termination. As has been explained, that issue is no longer current.

15 ALH's solicitors were right to assert that conclusions about the agreement between Oakland, Trust and ALH could only be reached by having regard to the terms of the Deed of Consent read as a whole. The legal nature and effect of the agreement is to be determined by the construction of its terms, including those terms which may be implied in order to give effect to the intention of the parties evident from the Deed of Consent.

16 It is not without significance to the distinction between assignment and novation, to which reference will later be made, that each of the parties to the 2003 contract, Oakland as well as Trust, are parties to the Deed of Consent, along with ALH. The recitals to the Deed of Consent referred to the 2003 contract and identified the property the subject of it. Recital C stated that Oakland "has agreed to consent" to Trust "assigning its rights and obligations" under the 2003 contract to ALH on the terms contained in the Deed of Consent.

17 One of the conditions precedent to "Completion of the Assignment", contained in cl 2 of the Deed of Consent, concerned a loan, by way of the advance of the balance of the purchase monies (\$5,747,949.90) which had been made by Trust to Oakland under a term of the 2003 contract. By cl 2(b) of the Deed of Consent, Oakland undertook to repay those monies to Trust, together with interest, on the date of the Deed.

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5 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251 at 12,230 [28]; (2011) 15 BPR 29,297 at 29,302 per Handley AJA, with whom Allsop P and Tobias JA agreed.



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18 Subject to the satisfaction of that and certain other conditions precedent not presently relevant, by cl 3.1 of the Deed of Consent, Trust "assigns to [ALH] all of [Trust's] rights and entitlements under and in relation to [the 2003 contract]" in consideration of ALH: (a) reimbursing Trust for the deposit monies (\$638,661.10) paid to Oakland under the 2003 contract; and (b) paying Trust "the balance of the consideration" for the Deed of Consent (\$2,063,389). By cl 3.3, Oakland "consents to the assignment by [Trust] of all its rights and entitlements under and in relation to [the 2003 contract] to [ALH]." Following assignment, Trust is to deliver the original 2003 contract to ALH (cl 3.4).

19 Further provision is made in the Deed of Consent respecting the obligations of Trust and the undertaking of those obligations by ALH, by cll 4 and 6. These provisions assume particular importance to an understanding of the extent of the agreement reached between the parties by the Deed of Consent. Clause 4.1 concerns ALH's covenants with Oakland. It is in these terms:

"[ALH] covenants with Oakland that:

- (a) it has read and is aware of and specifically acknowledges the provisions of [the 2003 contract]; and
- (b) as from the Date of Assignment, [ALH] shall perform and observe all obligations of the Purchaser [Trust] under [the 2003 contract]."

By cl 4.2, ALH covenants with Trust that it, ALH, will perform and observe all the obligations of Trust as purchaser under the 2003 contract. ALH also agrees (by cl 5) to indemnify Trust with respect to all liability arising out of any default or delay on the part of ALH "in the performance of the Purchaser's [Trust's] obligations contained or implied under [the 2003 contract]."

20 Oakland and ALH then agree to release and discharge Trust from its obligations under the 2003 contract. Clause 6 provides:

"Oakland and [ALH] release and discharge [Trust] from:

- (a) all claims, actions, demands and proceedings which Oakland or [ALH] may have or claim to have or but for this release might have had against [Trust] arising out of or in connection with the [subject land] and [the 2003 contract]; and
- (b) all liability of [Trust] arising out of the [subject land] and [the 2003 contract],

with effect from the Date of Assignment."

21 Trust also expressed its consent to the termination of the 2003 contract and related agreements (cl 8.3), relevantly in so far as they concerned Oakland's duties under the 2003 contract with respect to the sale of the balance of the land to the developer.

22 Gzell J considered that it was the clear intention of the parties to the Deed of Consent that ALH be substituted for Trust, and that ALH have Trust's benefits under the 2003 contract and assume its burdens<sup>6</sup>. His Honour held that the effect of the Deed of Consent was to extinguish the 2003 contract and that a new contract, in identical terms to the 2003 contract, was constituted between Oakland and ALH<sup>7</sup>. His Honour ordered that the Chief Commissioner's assessment decision be set aside and that the Chief Commissioner refund the duty paid on the Deed of Consent.

23 The Court of Appeal allowed the Chief Commissioner's appeal from the judgment of Gzell J, with costs. The critical factors in the reasoning of Handley AJA, with whom Allsop P and Tobias JA agreed, against a conclusion that a new agreement arose between Oakland and ALH under the Deed of Consent, were that the 2003 contract "was not, in terms, rescinded" and that Oakland did not, by the Deed of Consent, undertake any new or express obligation to transfer the property to ALH on payment of the balance of the purchase price. The only source of Oakland's obligation to convey remained the 2003 contract<sup>8</sup>.

24 Handley AJA accepted that the Deed of Consent was not a mere assignment of Trust's benefits under the 2003 contract to ALH. His Honour recognised that ALH, by the terms of the Deed of Consent, assumed the obligations of Trust under the 2003 contract<sup>9</sup>. His Honour concluded that the

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6 *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* 2010 ATC ¶20-176 at 10,877 [11]; (2010) 79 ATR 51 at 54.

7 *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* 2010 ATC ¶20-176 at 10,877 [12]-[13]; (2010) 79 ATR 51 at 54.

8 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251 at 12,229 [18]-[19], 12,230 [28]; (2011) 15 BPR 29,297 at 29,301, 29,302.

9 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251 at 12,230 [26]; (2011) 15 BPR 29,297 at 29,302.

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Deed was a "hybrid tripartite contract"<sup>10</sup>, but not one by which a novation was effected (at least not a novation of anything more than ALH's "concurrent and mutually dependent" obligation to pay the purchase price)<sup>11</sup>.

25 His Honour was clearly correct to hold that the Deed of Consent contained more than a mere assignment of Trust's right to ALH. A telling factor in that regard was that Oakland, the vendor under the 2003 contract, was a party to the Deed of Consent. More importantly, it was thereby placed in a position to, and did, assent to the transfer of obligations from Trust to ALH and the release of Trust from its liabilities under the 2003 contract.

26 In *Olsson v Dyson*<sup>12</sup>, Windeyer J observed that, in the past, a novation of contract had been used as a method of circumventing the common law rule that debts were not freely assignable. His Honour explained the distinction between assignment and novation in these terms:

"The ultimate distinction, in juristic analysis, between a transfer of a debt by assignment and by novation is simple enough. Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the obligations of the old contract: if the new contract is to be fully effective to give enforceable rights or obligations to a third person he, the third person, must be a party to the novated contract. The assignment of a debt, on the other hand, is not a transaction between the creditor and the debtor. It is a transaction between the creditor and the assignee to which the assent of the debtor is not needed."

27 Handley AJA was also correct to identify the rescission of the existing 2003 contract as essential to its novation. "Novation" is a term derived from the civil law, Lord Selborne LC observed in *Scarf v Jardine*<sup>13</sup>, and therefore from Roman law. The term is applied to two classes of case: where the parties to a

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10 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251 at 12,231 [37]; (2011) 15 BPR 29,297 at 29,303.

11 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251 at 12,231 [36]-[37], 12,235 [83]-[85]; (2011) 15 BPR 29,297 at 29,303, 29,308, referring to *Foran v Wight* (1989) 168 CLR 385 at 396; [1989] HCA 51.

12 (1969) 120 CLR 365 at 388.

13 (1882) 7 App Cas 345 at 351.

contract make a new contract, with new obligations, impliedly rescinding an existing contract<sup>14</sup>; and, more commonly, to tripartite agreements, where "the obligation of a third person is by express agreement accepted by one party to an existing contract with the consent of such third person and of the other party to the contract, in lieu of the obligation of such other party, who, by the new contract, is released from his obligation under the original contract"<sup>15</sup>.

28 Lord Selborne LC in *Scarf v Jardine*<sup>16</sup> described a novation as operating where:

"there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract."

29 It has been observed that, in cases involving the substitution of one debtor for another, some legal systems permit a succession to an obligation which remains<sup>17</sup>, which is to say the obligation of the original debtor. But this is not the approach taken by English law<sup>18</sup>, which has developed by reference to Roman law principles and looks to the creation of a new agreement.

30 Handley AJA directed attention to the absence of an express term in the Deed of Consent effecting rescission of the 2003 contract. The logic of his Honour's reasons linked that absence to the continuance of Oakland's obligation as vendor, under the 2003 contract, to convey the property to Trust<sup>19</sup>.

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14 The *novatio inter easdem personas* of the Roman law: Morison, *Rescission of Contracts*, (1916) at 26.

15 Morison, *Rescission of Contracts*, (1916) at 26. The author also recognised that a tripartite agreement effecting a novation could be inferred from conduct. See also *Olsson v Dyson* (1969) 120 CLR 365 at 389.

16 (1882) 7 App Cas 345 at 351.

17 *In re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52 at 84-85, quoting Wolff, *Private International Law*, 2nd ed (1950) at 458.

18 Nor French law: see *In re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52 at 84.

19 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251 at 12,229 [18]-[19]; (2011) 15 BPR 29,297 at 29,301.

31 A problem for early Roman law, Windeyer J explained in *Olsson v Dyson*<sup>20</sup>, was whether extinguishment of an existing obligation could be implied. Justinian, his Honour noted, met the difficulty by providing that a stipulation could not operate as a novation unless the parties, in making the new contract, expressly declared that they extinguished the prior obligation. However, as his Honour observed, the common law allows a tacit agreement to extinguish the obligations under the existing contract. So much also appears from the following statement of Dixon J in *Vickery v Woods*<sup>21</sup>:

"Rescission and novation ultimately depend on intention, and here none existed in fact and nothing was done from which such an intention must necessarily be implied."<sup>22</sup>

32 Intention may be inferred from conduct, as is sometimes the case where dissolutions of partnership are concerned<sup>23</sup>. It will not be necessary to resort to conduct in this case. An intention on the part of Oakland, Trust and ALH to release and discharge the obligations of both Oakland and Trust under the 2003 contract and thereby effect a rescission of it is apparent from the terms of the Deed of Consent.

33 As Handley AJA observed, by the terms of the Deed of Consent, ALH promised that it would undertake Trust's obligations as purchaser under the 2003 contract. The promise was directed to both Trust and Oakland, and Oakland may be taken to have agreed to ALH's so promising.

34 The release and discharge given by Oakland to Trust under cl 6 amounted to a renunciation of Oakland's right to call upon Trust for performance as purchaser under the 2003 contract or to sue Trust for specific performance of that contract or for damages for its breach. There can be no doubt that it was intended that all of Trust's obligations under the 2003 contract be discharged. Moreover, Trust was permitted, pursuant to the Deed of Consent, not only to

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20 (1969) 120 CLR 365 at 390.

21 (1952) 85 CLR 336 at 345; [1952] HCA 7.

22 See also *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 135 per Kitto J, 144 per Taylor J; [1957] HCA 10; *Christianos v Rohrlach* (1981) 55 ALJR 681 at 682.

23 Morison, *Rescission of Contracts*, (1916) at 26.

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extricate itself from further obligations under the 2003 contract, but also to be restored to its pre-contractual position, by the repayment of monies advanced by it to Oakland and the reimbursement of deposit monies by ALH.

35       Against this background, it could not be said to have been intended that Oakland's obligations as vendor continued to have their source in the 2003 contract. Oakland had agreed to the release and discharge of Trust and accepted ALH as purchaser. To suggest that it may nevertheless be obliged to convey in accordance with the 2003 contract raises the questions: to whom was it now to convey the property and who was obliged to tender the balance purchase monies to it? The answer to each question, provided by the Deed of Consent, is: ALH.

36       It is unrealistic to suggest that it was intended that Oakland accept ALH's promise of performance as purchaser and release Trust from its obligations under the 2003 contract but that it was not to be obliged to convey to ALH upon tender of the balance of the purchase price. It is necessarily to be implied that Oakland would convey the land and improvements the subject of the 2003 contract to ALH upon its tender. Oakland's prior obligation to convey to Trust may be regarded as extinguished by reason of the later implied obligation to convey to ALH, which is inconsistent with the continuance of the former obligation<sup>24</sup>.

37       Handley AJA, in expressing the view that Oakland's obligations remained sourced in the 2003 contract, made mention of ALH itself paying no further deposit monies to Oakland and the fact that the deposit paid by Trust under the 2003 contract remained in Oakland's hands for the benefit of ALH<sup>25</sup>. Given that ALH reimbursed Trust for the deposit monies, to the knowledge of Oakland, there can be little doubt that Oakland held those monies for ALH, as upon trust. Since ALH undertook all the obligations of purchaser under the terms of the 2003 contract, it may be taken as having been intended that the monies be dealt with as deposit monies. We do not understand his Honour to suggest that any larger question arose concerning consideration provided for the new contract. As the passage from *Scarf v Jardine* quoted above<sup>26</sup> confirms, the law accepts that mutual consideration for a novation is provided by the discharge of the old contract (and what follows from it).

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24 *Olsson v Dyson* (1969) 120 CLR 365 at 390.

25 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251 at 12,229 [18]; (2011) 15 BPR 29,297 at 29,301.

26 At [28].

38           The Deed of Consent, properly construed, contained the elements necessary for the discharge of the 2003 contract and the substitution of a new contract.

Conclusion and orders

39           A new agreement came into existence between Oakland and ALH upon the execution of the Deed of Consent. That agreement was for the sale and transfer of the property the subject of the 2003 contract on the terms and conditions therein contained. The agreement so made was cancelled by the Deed of Termination. Section 50(2) of the *Duties Act* applies. The Commissioner is liable to refund the duty paid to it by ALH.

40           The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside, and in lieu thereof it should be ordered that the appeal to that Court be dismissed with costs.

41 HAYNE J. I agree with French CJ, Crennan, Kiefel and Bell JJ that the appeal to this Court should be allowed and consequential orders made in the form proposed. I agree generally with their Honours' reasons.

42 The determinative question in the appeal is whether a Deed of Consent and Assignment ("the Deed") between Oakland Glen Pty Ltd ("Oakland"), Trust Company Fiduciary Services Limited ("Trust") (formerly called Permanent Trustee Company Limited) and the appellant, ALH Group Property Holdings Pty Limited ("ALH"), was "an agreement for the sale or transfer of dutiable property" within the meaning of s 8(1)(b)(i) of the *Duties Act* 1997 (NSW). If it was an agreement of that kind, because the Deed was later cancelled, s 50 of the *Duties Act* was engaged and no duty was payable on the Deed.

43 Oakland had previously agreed, by a contract made in 2003 ("the 2003 contract") to sell to Trust the land which later became the subject of the Deed. The 2003 contract was never completed. Oakland, Trust and ALH made the Deed on 27 June 2008.

44 The Court of Appeal of the Supreme Court of New South Wales held<sup>27</sup> that the Deed was not an agreement for the sale or transfer of dutiable property because it was not a new contract for the sale of the relevant land by Oakland to ALH. The Court of Appeal concluded that the Deed was a "hybrid tripartite contract"<sup>28</sup>, not "a mere novation which would have rescinded the original contract [the 2003 contract] and replaced it with a new one"<sup>29</sup>.

45 The hinge about which the reasoning of the Court of Appeal turned in this respect was the proposition<sup>30</sup> that "[t]he Deed was a tripartite contract which did not impose on the vendor [Oakland] any new or direct obligation to transfer the [land] to [ALH] on receipt of the balance of the purchase price". Rather, it was said<sup>31</sup> that "the 2003 contract was not rescinded, and was the *only* source of the vendor's obligation to convey the [land] on receipt of the balance of the purchase price" (emphasis added).

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27 *Chief Commissioner of State Revenue (NSW) v ALH Group Property Holdings Pty Ltd* 2011 ATC ¶20-251; (2011) 15 BPR 29,297.

28 2011 ATC ¶20-251 at 12,231 [37]; (2011) 15 BPR 29,297 at 29,303.

29 2011 ATC ¶20-251 at 12,231 [36]; (2011) 15 BPR 29,297 at 29,303.

30 2011 ATC ¶20-251 at 12,231 [31]; (2011) 15 BPR 29,297 at 29,302.

31 2011 ATC ¶20-251 at 12,230 [28]; (2011) 15 BPR 29,297 at 29,302.



46 It is no doubt right to observe that the 2003 contract was not expressly rescinded by the Deed. It does not follow, however, that "the only source" of Oakland's obligation to convey the land was the 2003 contract.

47 First, reference to an obligation to convey the land is incomplete unless the person to whom the land is to be conveyed is identified. To speak of the 2003 contract as the source (or only source) of Oakland's obligation to convey necessarily implies that Oakland was bound to convey the land to Trust. But both parties accepted in this Court that the obligation which Oakland undertook by the 2003 contract – to convey the land to Trust – did not survive the making of the Deed (by Oakland, Trust and ALH). Second, and of determinative importance in the present matter, the effect of the provisions made by the Deed was to discharge the 2003 contract. By the Deed, Trust assigned its rights under the 2003 contract to ALH and Oakland consented to that assignment. But the provisions of the Deed went further. Oakland (and for that matter ALH) expressly released and discharged Trust from liability under the 2003 contract. And by the Deed, ALH promised Oakland that it would perform the obligations that Trust had had, as purchaser, under the 2003 contract.

48 The Deed thus brought to an end the obligations which Oakland had undertaken to Trust in the 2003 contract and the obligations which Trust had undertaken to Oakland in that contract. Because of the way in which the Deed was drafted, the new obligations which ALH undertook to Oakland, and Oakland undertook to ALH, were to be given their content by reference to the text of the 2003 contract. But the obligations which each had to the other were derived only from the Deed.

49 The Deed recorded a transaction that was an agreement for the sale or transfer of dutiable property. Because the Deed recorded that transaction and was later cancelled, the terms of s 50 of the *Duties Act* were engaged in the fashion described in the joint reasons of French CJ, Crennan, Kiefel and Bell JJ.