HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND KEANE JJ

COMMISSIONER OF TAXATION APPELLANT

AND

MBI PROPERTIES PTY LTD RESPONDENT

Commissioner of Taxation v MBI Properties Pty Ltd
[2014] HCA 49
3 December 2014
S90/2014

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 to 4 of the orders made by the Full Court of the Federal Court of Australia on 18 October 2013 and, in their place, order that the appeal to that Court be dismissed.*

3. *The appellant pay the respondent's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

A H Slater QC with B C Kasep for the appellant (instructed by Australian Government Solicitor)

J O Hmelnitsky SC with D P Hume for the respondent (instructed by Balazs Lazanas & Welch LLP)

CATCHWORDS

Commissioner of Taxation v MBI Properties Pty Ltd

Taxation – GST – *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("GST Act") – Supply of a going concern – Where respondent purchased premises subject to existing lease – Whether continuing observance of lessor's obligations constituted the making of supplies through an enterprise which were neither taxable supplies nor GST-free supplies – Whether respondent liable to an increasing adjustment under s 135-5 of GST Act – Whether respondent's intended supply of residential premises by way of lease was for a "price" within the meaning of s 9-75 of GST Act.

Words and phrases – "GST", "increasing adjustment", "price", "supply of a going concern".

A New Tax System (Goods and Services Tax) Act 1999 (Cth), ss 38-325, 40-35, 135-5.

FRENCH CJ, HAYNE, KIEFEL, GAGELER AND KEANE JJ.

Introduction

1 This appeal, from a decision of the Full Court of the Federal Court, concerns the characterisation, for the purposes of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act"), of observance of obligations of lessor and lessee continued by operation of law following the sale and purchase of premises subject to an existing lease.

2 MBI Properties Pty Ltd ("MBI") acquired three apartments in a hotel complex, each of which was subject to a lease entered into between the vendor, South Steyne Hotel Pty Ltd ("South Steyne"), and the operator of the hotel, Mirvac Management Ltd ("MML"). MBI, on acquiring the rights of the lessor, became the recipient of a "supply of a going concern" within the meaning of the GST Act. The primary question on the appeal to the Full Court concerned the construction and application of s 135-5(1)(b) of the GST Act and whether, by reason of MBI's assumption of the lessor's rights and obligations with respect to MML, it was thereafter making supplies through an enterprise to which the supplies related. Contrary to the conclusion reached by the Full Court, MBI was making such supplies, which were neither taxable supplies nor GST-free supplies. MBI was thereby subject to assessment for GST under the increasing adjustment provision in s 135-5 of the GST Act. Moreover, it could not be said that the rental payments under the lease were to be treated exclusively as consideration for the supply made at the time of the grant of the lease. As explained in these reasons, the appeal by the Commissioner of Taxation ("the Commissioner") against the decision of the Full Court must therefore be allowed. The reasons begin with a consideration of the relevant provisions of the GST Act.

Legislative context

3 Under the GST Act, an entity is liable to pay GST on any "taxable supply", and is entitled to an input tax credit on any "creditable acquisition". For each tax period applicable to the entity, amounts of GST are set off against amounts of input tax credits to produce a net amount, which may then be subject to adjustments. The net amount, as adjusted, is the amount which the entity must pay to the Commonwealth, or which the Commonwealth must pay to the entity, in respect of the period.

4 Section 135-5 of the GST Act provides for an adjustment which can increase the net amount an entity must pay to the Commonwealth in respect of a tax period. The section provides that "[y]ou have an increasing adjustment if ... you are the recipient of a supply of a going concern ... and ... you intend 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"[1]. The amount of the increasing adjustment is calculated by taking one tenth of the price of the supply in relation to which the increasing adjustment arises and multiplying it by "the proportion of all the supplies made through the enterprise that you intend will be supplies that are neither taxable supplies nor GST-free supplies, expressed as a percentage worked out on the basis of the prices of those supplies"[2].

5 MBI's liability to an increasing adjustment under s 135-5 is in contest in this appeal. To set the context for that contest it is necessary to refer to three important statutory terms and the general rule of liability under the GST Act.

6 Section 9-10(1) defines the term "supply", which lies at the heart of this appeal, as "any form of supply whatsoever". Section 9-10(2), without limiting s 9-10(1), sets out particular examples of "supply". They include "a grant, assignment or surrender of real property"[3], the "creation, grant, transfer, assignment or surrender of any right"[4] and an entry into, or release from, an obligation to do anything or to refrain from an act or to tolerate an act or situation[5].

7 The other two important terms are "consideration" and "enterprise". "Consideration" includes "any payment, or any act or forbearance, in connection with a supply of anything"[6]. "Enterprise" means "an activity, or series of

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1 Section 135-5(1).

2 Section 135-5(2).

3 Section 9-10(2)(d) — the expression "real property" being defined in s 195-1 to include any interest in or right over land.

4 Section 9-10(2)(e).

5 Section 9-10(2)(g).

6 Section 9-15(1)(a).

activities, done" in any of a number of specified ways[7]. One of those ways is "on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property"[8].

8 The general rule of liability depends upon the concept of "taxable supply" in s 9-5, which uses each of the three preceding terms. That section provides in the relevant part that "[y]ou make a taxable supply if ... you make the supply for consideration ... and ... the supply is made in the course or furtherance of an enterprise that you carry on". The section adds the important qualification that "the supply is not a taxable supply to the extent that it is GST-free or input taxed".

9 The general rule of liability is to be found in s 9-40: "[y]ou must pay the GST payable on any taxable supply that you make". The amount of GST so payable is set, by s 9-70, at "10% of the value of the taxable supply". The value of a taxable supply is set, by s 9-75, at ten elevenths of the "price", which the same section goes on to define. The relevant effect of that definition is that, where "the consideration for the supply" is confined to consideration expressed as an amount of money, the price is that amount. According to the general "attribution rule" in s 29-5, save where accounting occurs on a cash basis, "GST payable by you on a taxable supply" is attributable to the tax period in which any invoice is issued in relation to the supply or, in the absence of an invoice, in which any of the consideration is received for the supply.

10 There are three special rules in the GST Act which are relevant to this appeal. The first is s 156-5, which provides that the "GST payable by you on a taxable supply that is made ... for a period or on a progressive basis ... and ... for consideration that is to be provided on a progressive or periodic basis ... is attributable, in accordance with section 29-5, as if each progressive or periodic component of the supply were a separate supply". For the purpose of that special rule, s 156-22 requires a supply "by way of lease" to be treated as a supply that is made on a progressive or periodic basis.

11 The second relevant special rule is in s 40-35, which provides that one of the forms of supply that is ordinarily input taxed is a supply of "residential premises" that is a supply "by way of lease, hire or licence". The expression "residential premises" is defined in s 195-1 to mean land or a building which is

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7 Section 9-20(1).

8 Section 9-20(1)(c).

occupied, or intended to be and capable of being occupied, as a residence or for residential accommodation. As an input taxed supply, no GST is payable on a supply of residential premises by way of lease, and there is no entitlement to an input tax credit for anything acquired to make that supply. There is no dispute that the apartments leased to MML were "residential premises".

12 The third relevant special rule is in s 38-325. It provides that one of the forms of supply that is ordinarily GST-free is "[t]he supply of a going concern". The expression "supply of a going concern" is defined in that section to mean a supply under an arrangement under which the supplier supplies to the recipient "all of the things that are necessary for the continued operation of an enterprise" which the supplier carries on or will carry on until the day of the supply. As a GST-free supply, no GST is payable on the supply of a going concern, and an entitlement for an input tax credit on anything acquired to make the supply is not affected. The acquisition by MBI of the lessor's rights under the leases over the three residential apartments which it acquired was the supply to it of a going concern.

13 Section 135-5 sets out the circumstances in which the recipient of the supply of a going concern is subject to liability for GST under the "increasing adjustment" for which that section provides. The purpose of s 135-5 was explained in the Explanatory Memorandum to the Bill for the GST Act as being "to ensure that you account for GST in proportion to the ... input taxed use of a going concern that you acquire" by being subjected to an adjustment which "increases your net amount by an amount equal to the GST you would bear on the acquisition if it had been a taxable supply to you", with the result that "you only get a going concern GST-free to the extent that you intend to make taxable supplies with it"[9].

14 Section 135-5 applies if the recipient of a supply of a going concern intends that "some or all of the supplies made through the enterprise" will be supplies that are input taxed supplies, and that are therefore neither taxable supplies nor GST-free supplies. Where those conditions are met, and where all of the supplies that the recipient intends will be made through the enterprise will be input taxed supplies (that is, where the proportion of input taxed supplies expressed as a percentage worked out on the basis of the "prices" of those

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9 Australia, House of Representatives, A New Tax System (Goods and Services Tax) Bill 1998, Explanatory Memorandum at [6.256]-[6.257].

supplies is 100%), the increasing adjustment to which the recipient will be subjected will be one tenth of the price of the supply of the going concern[10].

Factual context

15 In 2000, South Steyne purchased a hotel complex in Manly, New South Wales, known as the Sebel Manly Beach Hotel. In 2006, a plan of strata subdivision was registered which divided part of the hotel complex into 83 strata lots, each comprising an apartment in the hotel complex.

16 Later in 2006, South Steyne as "owner" and MML as "operator" entered into apartment leases in respect of each of the 83 strata lots. Under each apartment lease, the owner granted to the operator a lease of a lot comprising a specified apartment in the hotel complex for a term of ten years in consideration for the operator paying a monthly rent to the owner. Each apartment lease obliged the operator to use the apartment as part of a serviced apartment business (defined to mean the business of operating all of the lots in the strata plan in respect of which there were current leases as serviced apartments) and expressly provided that the operator was entitled to "occupy and use" the apartment for that permitted use "without interruption or interference by the [o]wner or any person claiming through the [o]wner". Each apartment lease also obliged the owner not to transfer title to the lot comprising the apartment unless the transfer was subject to the operator's rights under the apartment lease, and unless the transferee entered into an agreement with the operator in a specified form acknowledging that the apartment had been leased to the operator for use in the serviced apartment business and that ownership was subject to that lease.

17 In October 2007, South Steyne sold three apartment lots to MBI. Each contract of sale contained provision for MBI to elect to participate in what was described as a management rights scheme (defined to mean the scheme of operating or promoting the relationship between the operator and the owner of a lot in relation to the operator managing and letting out the lot). Each contract of sale stipulated that, if MBI so elected, the lot was sold subject to the apartment lease and MBI as purchaser intended that the lot would be used by the operator pursuant to that scheme. MBI elected to participate in the management rights scheme referred to in the contract of sale.

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10 Section 135-5(2).

Litigious history

18 In 2008, South Steyne and MBI were applicants in proceedings against the Commissioner in the Federal Court in which they sought declarations as to the characterisation for the purposes of the GST Act of what they identified as a number of categories of supply[11]. Amongst the categories of supply they identified were the sale of each apartment lot by South Steyne to MBI and what they described as "[t]he continuation of the leases of [the apartment lots] by MBI which, as purchaser of [the lots], took title subject to the ongoing lease of those [lots] to MML"[12]. The application was dismissed at first instance[13]. South Steyne and MBI were then appellants in an appeal to the Full Court.

19 In *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation*[14], the Full Court allowed that appeal in part. The Full Court held that the apartment lots were residential premises within the meaning of the GST Act[15]. The Full Court also held that the sale of each apartment lot by South Steyne to MBI subject to an existing apartment lease was the supply of a going concern, constituted by South Steyne thereby supplying to MBI all of the things necessary for the continued operation of the enterprise comprising the serviced apartment business which South Steyne was to carry on until the completion of the contract

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11 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 71 ATR 228.

12 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 71 ATR 228 at 233 [9].

13 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 71 ATR 228.

14 (2009) 180 FCR 409.

15 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 409 at 411 [1], 414 [17], 416 [30], 426 [84]-[85].

of sale[16]. The Full Court, by majority, declared that the sale of each apartment lot was GST-free under s 38-325 of the GST Act[17].

20 As recorded by the primary judge and as noted in the Full Court in *South Steyne*, there was "no dispute between the parties that the purchase of the reversionary interest in the apartments by MBI effected a 'supply' by MBI in favour of MML"[18]. The dispute between the parties was as to the characterisation of that supply.

21 Notwithstanding the common position of the parties, the Full Court in *South Steyne* held that MBI's purchase resulted in no supply at all by MBI to MML. The Full Court accepted that entering into each apartment lease constituted a supply by way of lease from South Steyne to MML. The Full Court also accepted that, by operation of law, each apartment lease continued after the sale of the corresponding apartment lot by South Steyne to MBI with MBI succeeding to the rights and obligations of the owner under the lease. That continuation of each apartment lease by operation of law, each member of the Full Court held, was insufficient to result in a supply by MBI to MML[19].

22 The Full Court having held in *South Steyne* that the sale of each apartment lot by South Steyne to MBI subject to an apartment lease was a GST-free supply of a going concern, and that the lots were residential premises, the Commissioner assessed MBI to GST on the basis of MBI having an increasing adjustment under s 135-5. On disallowance of MBI's objection to that assessment, MBI appealed to the Federal Court. MBI's appeal was dismissed at first instance[20], but allowed

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16 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 409 at 411 [3], 419 [44].

17 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 409 at 420 [50].

18 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 409 at 423 [75].

19 *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 409 at 411 [2], 417 [32]-[34], 423 [76].

20 *MBI Properties Pty Ltd v Federal Commissioner of Taxation* 2013 ATC ¶20-372.

on further appeal to the Full Court[21]. The Full Court set aside the objection decision and allowed MBI's objection to the assessment.

23 At neither stage of the proceedings on MBI's appeal to the Federal Court from the disallowance of its objection to the assessment did the Commissioner challenge the earlier holding of the Full Court in *South Steyne* that the continuation of each apartment lease after the sale of the corresponding apartment lot by South Steyne to MBI did not result in a supply by MBI to MML. The Commissioner at each stage argued instead that continuation of the apartment lease resulted in a continuation of an input taxed supply of residential premises by way of lease from South Steyne to MML[22].

24 The Commissioner's argument was accepted by Griffiths J at first instance[23], but was rejected by the Full Court. Edmonds J, with whom Farrell and Davies JJ agreed, said[24]:

> "The lease is the subject of the supply, not the 'supply'; the 'supply' is the grant of the lease: see s 9-10(2)(d) of the GST Act. The act of grant does not continue for the term of the lease; the 'supply' is complete on the lease coming into existence. The 'supply' constituted by the grant of the lease did not continue beyond the grant; the fact that the lease continued was solely a function of the terms of the grant, not a continuing supply by the grantor."

"If the 'supply' constituted by the grant of the lease did not survive the grant", Edmonds J continued, "it certainly did not survive the sale of the reversion from

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21 *MBI Properties Pty Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 65.

22 *MBI Properties Pty Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 65 at 69 [15].

23 *MBI Properties Pty Ltd v Federal Commissioner of Taxation* 2013 ATC ¶20-372 at 14,464 [38].

24 *MBI Properties Pty Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 65 at 71 [24].

South Steyne to MBI"[25]. That result, Edmonds J said, was "totally consistent" with *South Steyne*[26].

25 The Full Court's conclusion that there was no supply at all in respect of each lease following the sale of each apartment lot by South Steyne to MBI meant that there was no input taxed supply which MBI could have intended would be made through any enterprise it acquired from South Steyne as a going concern. That meant in turn that the conditions for the operation of s 135-5 were not met, and that there was accordingly no increasing adjustment.

This appeal

26 This appeal, by special leave, is from the decision of the Full Court which allowed MBI's appeal, set aside the objection decision and allowed MBI's objection to the Commissioner's assessment of MBI to GST on the basis of MBI having an increasing adjustment under s 135-5. In it, the Commissioner abandons the argument he put at each stage of the proceedings on MBI's appeal in the Federal Court. The Commissioner now challenges the conclusion of the Full Court in *South Steyne* that the continuation of each apartment lease after the sale of the apartment lot subject to the apartment lease by South Steyne to MBI did not result in MBI making any supply to MML. The continuation of each apartment lease, the Commissioner now argues, resulted in an input taxed supply of residential premises by way of lease by MBI to MML. The litigious history does not preclude the Commissioner from putting that new argument.

27 The Commissioner's new argument commences by pointing out that, from the time of grant by South Steyne to MML, each apartment lease had the dual character of an executed demise and an executory contract[27]: as an executory contract, the apartment lease obliged the owner to continue to give the operator use and occupation of the apartment lot throughout the term of the lease in consideration of the periodic payment of rent. The Commissioner next points out

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25 *MBI Properties Pty Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 65 at 71 [25].

26 *MBI Properties Pty Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 65 at 71 [26].

27 *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In liq)* (2013) 88 ALJR 132 at 140-141 [39]-[40], 144-145 [62]-[67]; 304 ALR 80 at 88, 93-94; [2013] HCA 51.

that MBI became subject to that continuing obligation by operation of law on the sale of the apartment lots subject to the apartment leases by South Steyne to MBI[28]. The Commissioner argues that MBI's intended observance of that continuing obligation to give MML use and occupation of the apartment lot is properly characterised as an intended supply by MBI to MML of use and occupation of the apartment lot. The apartment lots being residential premises, and the supply occurring through the medium of the lease, the intended supply by MBI to MML was an input taxed supply by operation of s 40-35.

28 MBI does not dispute that each apartment lease had the character of both an executed demise and an executory contract. Nor does MBI dispute that, on the sale of each apartment lot, MBI succeeded by operation of law to the obligation to continue to give MML use and occupation of the apartment lot under the lease. What MBI disputes is the characterisation for the purposes of the GST Act of its observance of that continuing obligation.

29 MBI points out that observance of its continuing obligation to give MML use and occupation of each apartment lot involved no action on its part. MBI argues that mere passive observance of an existing obligation is insufficient to give rise to a supply within the meaning of s 9-10; for there to be a supply something must be done by the supplier. Even if observing its obligation to give use and occupation of the apartment lot were sufficient to constitute a supply, MBI goes on to argue, it would not be a supply made through an enterprise and it would not be a supply of residential premises within the meaning of s 40-35: the supply to which that section refers is not the supply of premises or of the use of premises but the supply of a right to use premises; here MML already had that right.

30 MBI does not dispute that the conditions for the operation of s 135-5 were met if its observance of the obligation to give use and occupation of each apartment lot was sufficient to give rise to a supply of residential premises by way of lease to MML. That is to say, MBI does not dispute that the supply was one which MBI intended would be made through the enterprise it acquired from South Steyne as a going concern.

31 But MBI has a fall-back argument reflected in its notice of contention. The argument is that no increasing adjustment can be calculated using the

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28 Section 40(3) of the *Real Property Act* 1900 (NSW) and s 118 of the *Conveyancing Act* 1919 (NSW).

formula set out in s 135-5. That is because the formula requires the existence of a price for the intended supply. MBI argues that the rent to be paid to MBI by MML remains exclusively the price for the earlier supply constituted by the grant of the apartment lease by South Steyne to MML and cannot also be the price for any supply by MBI to MML. That must be so, according to MBI, because the general operation of the GST Act is to avoid double taxation by implicitly requiring that any one amount of consideration only ever be the price of one supply. A single payment in connection with two or more sequential supplies can only ever be treated as the price of the earliest of those supplies and cannot also be treated as the price of the later supplies.

Issues

32 The issues in the appeal can therefore be crystallised as follows:

- Whether MBI, as purchaser of the reversionary estate in the leased apartments, made a "supply" (as defined in the GST Act) to MML as tenant during the currency of each lease after completion of the purchase.

- Whether, if MBI did make a relevant supply to MML, there was any "price" for the supply for the purpose of calculating an increasing adjustment under s 135-5(2).

Did MBI intend to make a supply of residential premises to MML?

33 *Federal Commissioner of Taxation v Qantas Airways Ltd*[29] shows that it is wrong to consider that one transaction must always involve the making of just one supply. It is similarly wrong to consider that the making of a supply must always involve the taking of some action on the part of the supplier.

34 The concept of supply as employed in the GST Act is of wide import. Absent modification of the general operation of the GST Act through application of a special rule, there is a supply whenever one entity (the supplier) provides something of value to another entity (the recipient). Section 9-10(1), the amplitude of which is highlighted by ss 9-10(2) and 9-10(3), serves to emphasise that the something can be anything and can be provided by any means. The expansive language of ss 9-10(2)(g) and 9-10(3) serves in addition to emphasise that the thing provided can be provided by means of the supplier refraining from

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29 (2012) 247 CLR 286; [2012] HCA 41.

acting, or by means of the supplier tolerating some act or situation, just as it can be provided by means of the supplier doing some act.

35 A transaction which involves a supplier entering into and performing an executory contract will in general involve the supplier making at least two supplies: a supply which occurs at the time of entering into the contract, in the form of both the creation of a contractual right to performance and the corresponding entering into of a contractual obligation to perform; and a supply which occurs at the time of contractual performance, even if contractual performance involves nothing more than the supplier observing a contractual obligation to refrain from taking some action or to tolerate some situation during a contractually defined period.

36 That general observation applies as much to a lease as to another executory contract. There will in general be a supply which occurs at the time of entering into the lease. That supply will involve a grant within the scope of s 9-10(2)(d) combined (as contemplated by s 9-10(2)(h)) with the creation of contractual rights within the scope of s 9-10(2)(e) and with the entry into contractual obligations within the scope of s 9-10(2)(g). There will then be at least one further supply which occurs progressively throughout the term of the lease. That supply will occur by means of the lessor observing and continuing to observe the express or implied covenant of quiet enjoyment under the lease. The thing of value which the lessee thereby receives is continuing use and occupation of the leased premises. The special attribution rule in s 156-5, made applicable to a supply by way of lease by s 156-22, does not alter those aspects of the general operation of the GST Act.

37 In observing and continuing to observe the express or implied covenant of quiet enjoyment under the lease, the lessor is appropriately characterised, for the purposes of the GST Act, as engaging in an "activity" done "on a regular or continuous basis, in the form of a lease". The result is that, whether or not the lessor might also be engaged in some other form of enterprise, the lessor makes the supply of use and occupation of the leased premises in the course of the lessor carrying on an enterprise as defined in s 9-20(1)(c).

38 Once the general operation of the GST Act is understood in that way, it is apparent that there is no warrant in the text or policy of the GST Act for reading the reference in the special rule in s 40-35 to a supply of "residential premises" that is a supply "by way of lease" as referring to the supply which occurs at the time of entering into the lease but not as referring to the further supply which occurs by means of the lessor observing and continuing to observe the express or

implied covenant of quiet enjoyment under the lease. The reference encompasses both, and both are therefore input taxed.

39 The text of s 40-35 supports the view that the Full Court was wrong to focus exclusively on the grant of the lease as the relevant supply. Section 40-35(1) describes the circumstances in which "[a] supply of premises that is by way of lease, hire or licence" is input taxed. A lease (which operates as a grant of an estate) and a hiring and a licence (which do not) are all treated by s 40-35 as species of supply. That treatment suggests that the circumstance that a lease characteristically operates as a grant of an estate (as well as an executory contract) is no reason to deny that observation of obligations to provide the use of premises over time is a supply of the premises.

40 In the circumstances which gave rise to the present appeal, there was an input taxed supply of residential premises by way of lease which occurred at the time of the grant of each apartment lease by South Steyne to MML. There was then a further input taxed supply of residential premises by way of lease which occurred by means of South Steyne observing its express obligation under the lease to provide MML with use and occupation of the leased premises. MBI's assumption of that express obligation by operation of law on its purchase of the premises from South Steyne resulted in MBI becoming obliged to continue to make the same further input taxed supply of residential premises by way of lease to MML throughout the remaining term of the lease. MBI intended at the time of purchase to observe that ongoing obligation. MBI intended to do so through an enterprise which was the same enterprise as that in which South Steyne had previously engaged and which MBI, by purchasing the premises subject to the lease, had acquired from South Steyne as a going concern.

41 The Full Court in the present case was wrong to reason that the only relevant supply was on the grant of the lease by South Steyne to MML, and the Full Court in *South Steyne* was wrong to conclude that MBI made no supply to MML.

Was MBI's intended supply for a price?

42 The definition of price in s 9-75 (referring to the consideration for a taxable supply) and the definition of consideration in s 9-15(1)(a) (extending to any payment in connection with a supply of anything) contain nothing to suggest a need to establish an exclusive connection between a particular payment and a particular supply for the amount of that payment to be the price for that supply within the general operation of the GST Act.

43 Establishment of such an exclusive connection is not required in order to avoid double taxation. The general operation of the GST Act avoids double taxation not by establishing an exclusive connection between a particular amount of consideration and a particular supply but rather by establishing an exclusive connection between a particular amount of consideration and a particular tax period. The scheme of the GST Act is that, subject to the operation of any applicable special rule, it is s 29-5 which makes GST payable only once, in the tax period of the first payment or invoice.

44 That explanation of the role of s 29-5 was adopted in *Qantas Airways*[30]. Earlier observations in *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd*[31] were directed to the operation of special rules applicable to a deposit held as security for the performance of an obligation[32], not to the general operation of the GST Act.

45 MBI's intended supply of residential premises by way of lease to MML was for a price: the rent to be paid to MBI by MML in observance of MML's continuing obligation under the apartment lease. That is so whether or not that rent can be said also to have been payable in connection with South Steyne's grant of the apartment lease to MML.

Conclusion

46 The conditions for the operation of s 135-5 were met, and the Commissioner was correct to assess MBI to an increasing adjustment under that section. MBI's appeal from the disallowance of its objection to that assessment should have been dismissed.

47 The Commissioner having undertaken not to seek to disturb the orders for costs made by the Full Court and to pay the costs of MBI irrespective of the outcome of the appeal, the appropriate orders are:

(1) Appeal allowed.

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30 (2012) 247 CLR 286 at 290 [5], 293-294 [19].

31 (2008) 236 CLR 342 at 346 [4]-[5], 347 [12], 356 [41]-[42]; [2008] HCA 22.

32 Division 99.

(2) Set aside orders 1 to 4 of the orders made by the Full Court of the Federal Court of Australia on 18 October 2013 and, in their place, order that the appeal to that Court be dismissed.

(3) The appellant pay the respondent's costs of the appeal to this Court.