

11/13; [2013] VSC 36

SUPREME COURT OF VICTORIA

DUOEDGE PTY LTD v LEONG & ANOR

Dixon J

23 October 2012; 13 February 2013

CIVIL PROCEEDINGS – CONTRACT – CONSTRUCTION OF TERMS – CONTRACT FOR SALE OF REAL ESTATE – OBLIGATION TO REMIT ANY GST ON THE SALE – WHETHER 1/11TH OF THE CONTRACT PRICE REFUNDABLE BECAUSE NO TAXABLE SUPPLY – WHETHER TERMS OF CONTRACT AMBIGUOUS OR SUSCEPTIBLE TO MORE THAN ONE MEANING – MAGISTRATE FOUND IMPLIED TERM – RECTIFICATION OF CONTRACT ORDERED – WHETHER FINDING OF AGREEMENT OR COMMON INTENTION NOT REFLECTED IN WRITTEN TERMS MADE OR OPEN TO BE MADE – WHETHER MAGISTRATE ERRED IN LAW.

L. purchased a property from DP/L for a price specified in the contract as "\$916,000 GST inclusive". Later, DP/L provided L. with a tax invoice for the sale which set out the purchase price of \$832,727.27 plus GST of \$83,272.73 making a total of \$916,000.00. Subsequently a Business Activity Statement was lodged by L. with the ATO claiming a GST input tax credit of \$83,272.00. Later, the ATO rejected the claimed entitlement. L. issued proceedings claiming from DP/L a refund of one eleventh of the purchase price. The Magistrate held that the contract contained an implied term entitling L. to a refund and ordered rectification of the contract. Upon appeal—

HELD: Appeal allowed. Magistrate's order quashed and the claim dismissed.

1. It was not open to the magistrate to find that there was an implied term of the contract that, if GST did not apply to the sale, DP/L would refund the GST amount of \$83,272.73 and then to rectify the contract to give effect to the implied term. A contract is either rectified to accord with the true agreement, or properly construed to identify the true agreement it records.

2. The plain meaning of the contract was that the GST risk lay with the vendor. That this was the contractual intention appeared from the particulars of sale that the agreed contract price was GST inclusive, although adding those words after the price was not the correct way to complete the standard form of contract. The absence of the words 'plus GST' in the box confirmed the handwritten addition of the words 'GST inclusive'. The parties expressed the intention that the purchaser had no obligation to make a further payment in respect of any GST assessment that might later follow. In other words, the parties plainly intended that the risk that GST might need to be remitted to the Tax Office lay with the vendor. If the transaction did not involve a taxable supply, that risk was abated to the benefit of the vendor, who retained the full price that it contracted to receive for the property. Objectively assessed, this was what the terms relating to GST showed to be the intention of the contracting parties. This construction was neither uncertain nor ambiguous.

3. The magistrate erred in finding that the vendor DP/L breached the contract by not refunding \$83,272.73 when it was determined that the sale was not a taxable supply because there was no term to be implied into the contract that the vendor was so obliged.

4. Rectification was pleaded and was an issue at trial. L. bore the onus to show that the clearly predominant intention of both the vendor and the purchaser was of an actual agreement as described. The magistrate's finding that the parties 'effectively took the view' that the agreed price inclusive of GST was not a finding of a clear predominant intention that the vendor had agreed not to retain any more than \$832,727.27 as the price. That the agreed price was inclusive of GST could only support an inference that the common intention was the purchaser had no further obligation to pay if the transaction was a taxable supply. Such a finding could not sustain an entitlement to rectification of the contract.

5. Not having made appropriate findings, it was not open to the magistrate to rectify the written contract and in so ordering, the primary court fell into error.

DIXON J:**Background**

1. On 3 September 2009, Mr Simon Leong purchased from Duoedge Pty Ltd a property at 196 Hull Road, Mooroolbark for a price specified in the contract as '\$916,000 GST inclusive'.

Mr Leong is the director of OCMC Pty Ltd which intended to develop the land. OCMC was later nominated by Mr Leong as purchaser.

2. On 27 October 2009, at OCMC's request, Duoedge provided it with a tax invoice for the sale of the property which specified the following breakdown:

To Contract/Purchase Price \$832,727.27
PLUS GST \$ 83,272.73
Total payable \$916,000.00

3. On 10 November, 2009 the contract settled.

4. OCMC commenced its development and in 2010 submitted a Business Activity Statement (BAS) for the 2009 fourth quarter that claimed a GST input tax credit of \$83,272.00. On 12 May 2010, the Australian Taxation Office revised OCMC's BAS rejecting its claimed entitlement to an input tax credit for the GST component of the purchase from Duoedge.

5. Mr Leong and OCMC contended successfully before a magistrate for an entitlement to a refund from Duoedge of one eleventh of the purchase price. The magistrate held that the contract contained an implied term entitling Mr Leong and OCMC to that refund and ordered rectification of the contract and payment of the sum of \$83,272.73 by Duoedge to OCMC.

6. Duoedge now contends that the magistrate erred and appeals to this court under s109 of the *Magistrates' Court Act* 1989.

Issues

7. Duoedge's Notice of Appeal raises many grounds, but the issues are these:

(a) The magistrate erred in law in finding that there was an implied term of the contract that, if GST did not apply to the sale, Duoedge would refund the GST amount of \$83,272.73.

(b) There was insufficient foundation for rectification of the contract and the magistrate erred in law by granting rectification on the basis that both parties believed at the time of execution of the contract that GST was applicable to the transaction.

(c) The magistrate erred in concluding the contract was ambiguous or susceptible to more than one meaning such that the court was entitled to have regard to evidence of the parties' pre-contractual and post-contractual intentions, statements, and correspondence.

(d) The magistrate erred by failing to conclude that OCMC had suffered no loss as its rejected claim an input tax credit enabled OCMC to utilise the margin scheme on the sales of the developed units.

(e) The magistrate failed to provide adequate, or written, reasons for judgment.

Relevant circumstances

8. In August 2009, Duoedge Pty Ltd appointed Mavro Pty Ltd (trading as Methven Croydon) to act as the exclusive real estate agent to sell its property at 196 Hull Road, Mooroolbark. Mr David Mavro, the director of Duoedge, oversaw the promotion of the sale of the Hull Road property. It had planning permission for a development of eight units. Mr Leong was a developer and OCMC was his building company. Mr Leong agreed to purchase the property.

9. The key terms of the contract, which was in the form of the standard Real Estate Institute of Victoria Contract of Sale of Real Estate, were:

(a) The particulars of sale stated the sale price as '\$916,000 GST inclusive' (handwritten addition).

(b) The particulars of sale also stated 'GST: (refer to General Condition 13) - The Price includes GST (if any) unless the words "plus GST" appear in this box.' The box contained a hand written strike through its centre.

(c) General condition 13 stated:

13. GST

13.1 The Purchaser does not have to pay the Vendor any GST payable by the Vendor in respect of a taxable supply made under this Contract in addition to the price unless the Particulars of Sale specify that the Price is 'plus GST'. However the Purchaser must pay to the Vendor any GST payable by the Vendor—

- (a) solely as a result of any action taken or intended to be taken by the purchaser after the day of sale, including a change of use; or
 - (b) if the Particulars of Sale specify that the supply made under this Contract is a farming business and the supply does not satisfy the requirements of section 38-480 of the GST Act; or
 - (c) if the Particulars of Sale specify that the supply made under this Contract is a going concern and the supply does not satisfy the requirements of section 38-325 of the GST Act.
- 13.2 The Purchaser must pay to the Vendor any GST payable by the Vendor in respect of a taxable supply made under this Contract in addition to the Price if the Particulars of the Sale specify that the Price is 'plus GST'.
- 13.3 If the Purchaser is liable to pay GST, the Purchaser is not required to make payment until provided with a tax invoice, unless the margin scheme applies.
- 13.4 If the Particulars of Sale specify that the supply made under this Contract is a 'farming business':
- (a) the Vendor warrants that the property is land on which a farming business has been carried on for the period of 5 years preceding the date of supply; and
 - (b) the Purchaser warrants that the Purchaser intends that a farming business will be carried on after settlement on the property.
- 13.5 If the Particulars of Sale specify that the supply made under this Contract is a 'going concern':
- (a) the parties agree that this Contract is for the supply of a going concern; and
 - (b) the Purchaser warrants that the Purchaser is, or prior to settlement will be, registered for GST; and
 - (c) the Vendor warrants that the Vendor will carry on the going concern until the date of supply.
- 13.6 If the Particulars of Sale specify that the supply made under this Contract is a 'margin scheme' supply, the parties agree that the margin scheme applies to this Contract.
- 13.7 This General Condition will not merge on either settlement or registration.
- 13.8 In this General Condition:
- (a) 'GST Act' means *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and
 - (b) 'GST' includes penalties and interest.
 - (d) Clause 2 of the special conditions (added in handwriting) stated 'Vendor to provide purchaser a tax invoice of the sale'.

10. Clause 18 permitted the purchaser to nominate a substitute or additional purchaser, but the named purchaser remained personally liable for the due performance of all the purchaser's obligations under the contract. Mr Leong nominated OCMC as purchaser.

11. Although Duoedge provided a tax invoice to OCMC, it did not remit any GST collected on the sale or otherwise account for its receipt, later explaining to OCMC that it completed its GST remittances to the ATO on a yearly basis. In its business activity statement for the last quarter of 2009, OCMC claimed an input credit for GST paid on the purchase.

12. OCMC's business activity statement was audited by the ATO and the claimed input credit of \$83,272 was disallowed on the ground that the acquisition of residential property is not a creditable acquisition under Sub-Division 40-C of the GST Act. On 17 May 2010, OCMC informed Duoedge of the ATO's decision and requested an immediate refund from Duoedge of the GST component of the sale, which it incorrectly stated to be \$91,600. OCMC knew Duoedge had not remitted GST on the sale to the ATO.

13. Duoedge contended to OCMC that the ATO ruling was incorrect because the property was sold with the permit for eight units and to be developed, and was a taxable supply that would be accounted for to the ATO in its yearly return. From its correspondence, there was no doubt that the ATO had considered and rejected contentions that Duoedge put to OCMC. On the day of sale, the existing residence remained on the property occupied by tenants. The ATO rejected the suggestion that, because some trees had been removed, development had started. The ATO was not prepared to reconsider the audit.

14. On 17 August 2010, OCMC reviewed the ATO's decision, but the ATO disallowed its objection to the assessment. That decision has since stood unchallenged and was an accepted fact before the magistrate. On 11 November 2010, Duoedge issued an 'adjustment note' to OCMC, a revised tax invoice that reflected the ATO ruling. The only finding that was open to the magistrate on the evidence was that the sale of the property was not a taxable supply under s9-5 of the GST Act as there was not a creditable acquisition by the contract.

15. In the proceeding, OCMC claimed a refund of \$83,272, contending it was not part of the purchase price but paid on account of GST.

The judgment of the Magistrate

16. The orders of the primary court were as follows:

- (a) The Contract of Sale dated 3 September 2009 is rectified as follows: (a) The purchase price of \$916,000 GST inclusive is amended to read \$832,727.27 plus GST of \$83,272.73; (b) the words 'Plus GST' be inserted into the GST box on Page 2 of the Particulars of Sale;
- (b) The defendant pay the first plaintiff the sum of \$83,272.73 with a stay until 27 March 2012;
- (c) The defendant pay the plaintiff's costs to be taxed on Scale G in default of agreement;
- (d) The plaintiffs pay the defendant's costs occasioned by the plaintiff's amended statement of claim dated 14 February 2011 and further amended statement of claim dated 19 May 2011.

The reasoning of the magistrate

17. The magistrate delivered oral reasons for judgment on 27 February 2012, a transcript of which was available on this appeal. His Honour reasoned:

- (a) There was no real issue that pursuant to clause 18 of the contract of sale Mr Leong nominated OCMC as purchaser, enabling that company to pursue the GST claim as a contracting party together with Mr Leong.
- (b) The magistrate found that although the agreement did not specifically quantify the GST component, the purchase price of \$916,000 could comprise \$832,727.27 as the purchase price and \$83,272.73 as the anticipated GST component. After settlement in November 2009, OCMC proceeded to develop the land and sold the eight developed properties. OCMC claimed an input tax credit of \$83,272.73 for the tax period ended 2009. Many months later (September 2010), the Australian Taxation Office (after appeals) decided that OCMC was not entitled to claim the said input tax credit.
- (c) The magistrate stated he had endeavoured to apply *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,^[1] particularly at pages 346 and following.
- (d) He accepted that it was arguable that the language used in the contract of sale was ambiguous or susceptible to more than one meaning, as he had previously explained. That previous explanation was not evident in the transcript of his reasons for decision. The magistrate declared that the court was entitled to take in to account 'surrounding circumstances' to interpret the contract.
- (e) The magistrate then identified his task as being to determine the objective intention of the parties in order to give effect to what the parties are objectively to be taken to have intended by the agreement. To this end, the magistrate stated he looked at the language used, the commercial circumstances the contract for sale addressed and the objects intended and, with care, at what can be classified as 'surrounding circumstances'.
- (f) The magistrate identified what he regarded as some of the relevant surrounding circumstances, but not in any particular order:
- (i) Simon Leong, the director of OCMC and David Mavro, a director of Duoedge, were both experienced in land and property developments and Mr Mavro was an experienced real estate agent;
- (ii) The object of any transaction would, for each of them, involve making a profit, after all expenses, including taxes;
- (iii) Both OCMC and Duoedge were GST registered at the relevant time;
- (iv) Duoedge, through Mr Mavro, had purchased the property in July 2008 for \$546,000 (which price included any GST); and
- (v) The reference to 'GST inclusive' in the Contract of Sale was written close to the purchase price of \$916,000. The document makes it clear that initially its terms were an offer by Mr Leong (and/or nominee) as purchaser to the vendor made on 2 September 2010. Mr Mavro signed or initialled the acceptance by Duoedge of the offer without demur on 3 September 2009.
- (g) The magistrate then reasoned that in the circumstances he needed to ask what a reasonable observer in the situation of the parties would conclude was the purpose and object of the transaction, particularly in respect of GST. In answering that question, the magistrate considered the reference to '\$916,000 GST inclusive' and clause 2 of the special conditions requiring provision of a tax invoice, was inconsistent with the reference to GST in the particulars of sale, that is, the absence of the words 'plus GST'. The contract has a line drawn in that box and six other lines appear in like boxes relating to other issues. As the words 'plus GST' are not included in the box, there is an argument that the stated price includes GST.
- (h) The magistrate then stated that he had no hesitation in accepting that the reasonable observer, having regard to all the circumstances, would conclude that the parties contracted on the basis that the purchase price included GST. The reasonable observer would not have concluded that the purchase price included GST, if any (emphasis added for clarity). The objective view that the purchase price of \$916,000 was inclusive of anticipated GST is strengthened by special condition 2. There is no qualification to that condition, such as 'subject to GST applying' or similar.
- (i) The magistrate found that Mr Mavro considered \$916,000 was a very good price and contracted on the basis that the vendor would need to account in full for the GST. The court accepted that some

trees had been cut down and it appears that the magistrate preferred a finding that the development was underway to the conclusions reached by the ATO.^[2]

(j) The court accepted that at the time of execution of the contract of sale both Mr Leong and Mr Mavro believed that GST was applicable to the sale. The magistrate rejected a suggestion that Mr Leong ought to have known that GST did not apply to the transaction. The magistrate found that Mr Leong and OCMC took all reasonable steps over a lengthy period to persuade the ATO to reconsider its determination. His Honour found that Mr Leong believed a GST input credit could be claimed and was not interested in purchasing the property without it. The court rejected any suggestion that the vendor's agent went beyond the ambit of her authority in drawing up the conditions of the contract of sale, or overlooked or omitted a reference to the margin scheme to be used in assessing GST. The court thought it ironic that the first identifiable written calculation of GST of \$83,272.73 was made by Duoedge when providing the tax invoice required by special condition on or about 27 October 2009 to OCMC.

(k) A breach of the contract was found against the appellant, being breach of an implied term that if the purchaser paid to the vendor a total price that included provision for GST of \$83,272.73, and it was later discovered that GST was not assessable on the transaction, the GST component was refundable to the purchaser on demand. The magistrate accepted that such a term ought to be implied, describing the claim as an action for monies had and received. The defendant had effectively received \$83,272.73 to the use of the plaintiff. The magistrate expressed himself as mindful that a court should be slow to imply terms when there has been a written contract (albeit a written contract lacking proper preparation by agents of the defendant).

(l) The magistrate identified the conditions necessary to ground the implication of a term from *Codelfa* (at 347) before announcing, without further findings or reasoning, that each condition was met. One, the term must be reasonable and equitable. The magistrate added that Duoedge would be unjustly enriched if it retained \$83,272.73. Two, the term must be necessary to give business efficacy to the contract so that no term would be implied if the contract is effective without it. Three, it must be so obvious that it goes without saying. Four, it must be capable of material expression. Five, it must not contradict any express terms of the contract.

(m) The magistrate then stated that it follows that the court found in favour of the plaintiff and, in the court's discretion, rectification of the contract to give effect to the intention of the parties would be ordered.

What were the terms of the contract?

18. I am satisfied that the magistrate erred in law. It was not open to the magistrate to find that there was an implied term of the contract that, if GST did not apply to the sale, Duoedge would refund the GST amount of \$83,272.73 and then to rectify the contract to give effect to the implied term. A contract is either rectified to accord with the true agreement, or properly construed to identify the true agreement it records.

19. The magistrate was right to seek the applicable principles in *Codelfa*, as the Court of Appeal has recently affirmed in *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd*.^[3] However, it is clear that the magistrate has confused the distinction between implication of a term and rectification of a contract that Mason J explained in *Codelfa*:^[4]

The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it – it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention.

Mason J later in his judgment^[5] observed that:

The importance of this evolution of the law as it affects the construction of contracts is that it centres upon the presumed, rather than the actual, intention of the parties. Once it is accepted that in the construction of the contract account is taken of the presumed intention of the parties it naturally follows that account should also be taken of their presumed intention when the court is called upon to decide whether a term is to be implied. The existence of the remedy of rectification and the purpose which it serves makes it obvious that the actual intention of the parties cannot constitute the basis of an implied term.

However, it is equally obvious that in making the inquiry whether a term is to be implied the court

is no more confined than it is when it construes the contract. For the implication of a term is an illustration of the process of construction, though differing from the more orthodox ascertainment of the meaning of a contractual provision.

20. In this case, the contract was said to be partly written and partly implied. The first inquiry was whether there was any deficiency in the expression of the consensual agreement in the written terms. As the written terms did not include any obligation to refund moneys paid by the purchaser on account of GST, an implied term to that effect was said to arise from the conduct of the parties and the need to give business efficacy to the agreement. The magistrate identified an ambiguity, a susceptibility to more than one meaning, in respect of the contractual obligations concerning GST and this conclusion seems necessarily to be founded on his consideration of the 'surrounding circumstances'.

21. The correct approach to evidence of surrounding circumstances in the interpretation of contracts is evident from *Codelfa*.^[6] In an oft quoted and well-known passage of that judgment, Mason J said:

The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.

It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parole evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.

22. In my view, the language of the contract used in respect of GST has a plain meaning. The magistrate found that there was no assessment of the liability to remit GST at the time of contracting, merely beliefs on the part of the participants in negotiations about a possible GST assessment. What the parties needed to negotiate was the allocation of the risk that GST might need to be remitted to the ATO if the sale was a taxable supply. This is a common consideration as the printed terms of the standard form of contract in use in Victoria for property transactions makes clear.

23. The plain meaning of this contract is that the GST risk lay with the vendor. That this was the contractual intention appears from at least two places. It is clear from the particulars of sale that the agreed contract price was GST inclusive, although adding those words after the price is not the correct way to complete the standard form of contract. The absence of the words 'plus GST' in the box confirms the handwritten addition of the words 'GST inclusive'. The parties have expressed the intention that the purchaser has no obligation to make a further payment in respect of any GST assessment that might later follow. In other words, the parties plainly intended that the risk that GST might need to be remitted to the Tax Office lay with the vendor. If the transaction did not involve a taxable supply, that risk was abated to the benefit of the vendor, who retains the full price that it contracted to receive for the property. Objectively assessed, this is what the terms relating to GST show to be the intention of the contracting parties. This construction is neither uncertain, nor ambiguous. To reverse the allocation of that risk to the purchaser, the words 'plus GST' are added to the box.

24. General condition 13 deals at length with the mechanics of the allocation of risk that the transaction might involve a taxable supply creating an obligation to pay GST. There is nothing in general condition 13 that is inconsistent with the presumed intention identifiable from the completion of the particulars of sale, as I have described. Where the price includes GST, the purchaser pays the price and no more and if the transaction involves a taxable supply, the vendor must remit the GST to the Tax Office. Where the price is plus GST, the purchaser must, when provided with a tax invoice, pay an additional amount for GST.

25. The magistrate was troubled by the terms of special condition 2, which he considered introduced ambiguity. In my view, special condition 2, like the words 'GST inclusive' inserted after the price, is surplus verbiage, added to the contract unnecessarily. In each case, the terms of the contract being made do not appear to have been carefully considered. Clause 13.3 of the contract already provides an obligation on the vendor to provide a tax invoice to the purchaser liable for GST. Although a special condition takes priority over a general condition in interpreting the terms of this contract, the obligations are consistent and no call on concepts of priority is required.

26. The purpose of a tax invoice needs to be recalled. The GST Act requires that a vendor must issue a tax invoice for any taxable sale it makes above a certain limit where the purchaser requests it and a purchaser making taxable purchases for business purposes requires a valid tax invoice to claim the correct amount of GST credits for those purchases. A tax invoice does not determine whether a taxable supply has occurred. It does not allocate between the parties to a transaction the liability to remit GST if the transaction is a taxable supply. These are matters for parties to a transaction that may involve a taxable supply to negotiate between themselves.

27. In this context, special condition 2 says nothing about whether this contract involved a taxable supply. In particular, the special condition does not affect the obligation to remit GST either to the ATO or to the purchaser. The obligation it creates on the vendor is consistent with and in substance identical to the obligation under general condition 13.3. The words, present in clause 13.3 that are absent from special condition 2 are, in substance, 'if the Purchaser is liable to pay GST'. In its effect, the tax invoice and the special condition 2 obligation to supply it are meaningless, devoid of content, if, as the ATO has ruled, the sale is not a taxable supply. The magistrate erred in reasoning that the unqualified nature of special condition 2 was relevant in any way.

28. As I have said, it is unambiguously clear that the parties agreed that the purchaser is not liable to pay GST. If the transaction was a taxable supply and the parties intended that the purchaser was to be liable to pay GST but pay no more than a total of \$916,000 including GST, the true agreed price needed to be \$832,727.27. It was a simple matter to complete the particulars of sale accordingly. Plainly, under the particulars for 'Payment' a different price, deposit and balance would have been inserted and in the box for 'GST' the words 'plus GST' inserted. I will return to the issue of whether there was a common mistake in the written contract.

29. While it is clear that the magistrate identified the conditions necessary for the implication of a term in a contract that were summarised by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*,^[7] his Honour fell into error in identifying whether those conditions have been satisfied in this case, probably because he did not expose his reasons for accepting that each condition has been satisfied. A term cannot be implied into this contract that the sum of \$83,272.72 is refundable to the purchaser, because it is on account of GST, if the transaction does not involve a taxable supply because such an implied term is, as I have explained, contradicted by the express terms of the contract. The price was expressed to be \$916,000, not \$832,727.27, and the GST risk expressly lay with the vendor, not the purchaser, who was not obliged to repay GST of any part of the price if the sale was not a taxable supply. That is why, when the magistrate came to declare the implied term he did so by changing the express terms, rather than by declaring an implied term consistent with the written contract. The contradiction was rectified.

30. Apart from the fact that the proposed implied term contradicts express terms, the contract is effective without an implied term, and the magistrate made no finding of fact to the contrary, and it was not submitted to me that there was evidence that compelled such a finding.

31. Viewed as a matter of business or commercial efficacy, the position of the purchaser is opportunistic. If the order of the magistrate stands, and is successfully executed, the consideration received by the vendor will be reduced. On the other hand, while the purchaser may be obliged to submit amended GST assessments, the ATO has already determined that the initial purchase was not a taxable supply, for reasons that are not affected by any finding of the magistrate. OCMC would likely retain both the benefit of the margin scheme, which I will shortly explain, and the refunded 'input credit'. The expressed conclusion that the implied term was reasonable and equitable appeared to be founded on the conclusion that Duoedge would be unjustly enriched if

it retained \$83,272.73. Again the magistrate made no findings that supported such a conclusion. It was not open to the magistrate on the evidence.

32. It was submitted, with some force, that the implied term was neither reasonable nor equitable because of the impact of the margin scheme on OCMC's GST liability on completing the development. Section 75.5 of the GST Act permits application of the margin scheme to reduce the GST payable on a taxable supply of real property. Where the margin scheme applies, the quantum of GST payable is assessed on the margin, that is the difference between the purchase price and the sale price of the property. The subsequent sales of the developed units was a taxable supply in respect of which OCMC was liable to remit GST. The effect of the legislative provisions for GST is that OCMC's financial position is ultimately unaffected by the inability to claim an input credit for its purchase of the property. That consequence in turn, brings into question how the magistrate concluded, it not being apparent in his reasons, that Mr Leong would not have entered into the transaction unless he could claim a GST input credit, other than because he said so at trial.

33. As the evidence before the primary court could demonstrate, if the sale was assumed contrary to the fact to have been a taxable supply, GST is assessed without reference to the margin scheme as follows:

Total sales (GST inclusive) \$2,883,000
GST payable (1/11th) \$262,090.91
Input credit received on purchase \$83,272.73
Net GST paid on project \$178,818.18

34. In fact what occurred was that the ATO ruling was that the sale was not a taxable supply and OCMC was enabled to, and did, utilise the margin scheme in accounting for the sales of the developed units.

Total sales (GST inclusive) \$2,883,000
Price for property acquisition \$916,000
Margin \$1,967,000
GST payable (1/11th of the margin) \$178,818.18

35. Confusion between the parties about their obligations was evident in their later conduct, when the vendor supplied a tax invoice on demand from OCMC. The magistrate may have been distracted by the tax invoice supplied at settlement. It was irrelevant to the interpretation of the obligations of the parties under the contract because there was no inquiry open as to which of two or more possible meanings was to be given to special condition 2.

36. The magistrate erred in finding that the vendor breached the contract by not refunding \$83,272.73 when it was determined that the sale was not a taxable supply because there was no term to be implied into the contract that the vendor was so obliged.

Rectification

37. Rectification is an equitable remedy. The first observation to be made is that the magistrate appears to have ordered rectification when intending to declare that on its proper construction there was an implied term of the agreement. This conclusion follows not only from the sequence of reasoning of the magistrate but also from the absence of findings about a proper basis for granting rectification.

38. The order for rectification confusingly followed on the magistrate's reasoning that the vendor was in breach of the proposed implied term. The implied term found by the magistrate was that 'if it was later discovered that GST was not assessable on the transaction, the implied GST component was refundable to the purchaser on demand'. For rectification to be an appropriate remedy in the circumstances, a finding was needed that the parties' common intention was that their written contract would provide that the contract price was \$832,727.27, and the words plus GST would have been added in the box. Had the particulars of sale been in those terms, then:

- (a) the parties would have specified a lesser deposit, as the industry practice of 10% deposit was clearly adopted;
- (b) the vendor would have received a lesser residue of purchase price on settlement; and
- (c) OCMC would have retained the sum of \$83,272.73 and clause 13 would operate to govern the obligation of OCMC to pay GST if the transaction was a taxable supply.

There would not have been any breach of the suggested implied term. Such a common intention would be of an actual agreement to a different contract price and a different allocation of the risk that the sale was a taxable supply that was, by a common mistake, not recorded in the written agreement. Given the fundamental character of 'price' in negotiations to sell land, the existence of the common intention and the circumstances of the common mistake in making the written contract ought to be readily identifiable.

39. As the form of the primary court's order is rectification, the issue is whether, despite the magistrate's reasoning, the purchaser was entitled to rectification as such a finding about the actual agreement intended was made or was open to the magistrate.

40. The magistrate's findings about what was commonly intended but not embodied in the written agreement, as expressed in the transcript of his oral judgment, are limited, mostly of marginal or no relevance:

- (a) Both parties to the contract 'believed' that the sale was a taxable supply;
- (b) The court did not accept that Mr Leong knew or ought to have known that GST did not apply to the transaction;
- (c) Mr Leong was not interested in purchasing the property without a GST input credit, which he believed could be claimed;
- (d) Each of Mr Leong and Mr Mavro 'effectively took the view that the total purchase price of \$916,000 was \$832,727.27 for the sale of the property, plus 83,272.73 for GST';
- (e) Mr Mavro considered \$916,000 was a very good price and contracted on the basis that the vendor would need to account in full for the GST;
- (f) The court rejected any suggestion that the vendor's agent went beyond the ambit of her authority in drawing up the conditions of the contract of sale, or overlooked or omitted a reference to the margin scheme to be used in assessing GST; and
- (g) The first identifiable written calculation of GST of \$83,272.73 was made by Duoedge when providing the tax invoice to OCMC required by special condition 2 on or about 27 October 2009.

41. It does not appear from his reasons that the magistrate directed himself properly as to the principles for rectification. In *The Club Schanck Resort Company Limited v Cape Country Club Pty Ltd*,^[8] the Court of Appeal regarded as unexceptional the following statement from Dr ICF Spry's *The Principles of Equitable Remedies*:^[9]

Where all parties who execute a document intend that the provisions of the document should accord with an agreement entered into by them, or with a common intention possessed by them, but due to a mistake shared by all of them it does not do so, rectification is ordered by the court, in the absence of special circumstances that make this course unjust.

42. In his reasons for judgment, Tadgell JA, observed:

One of the authorities cited by Dr Spry for the proposition is *Slee v Warke*, in which the High Court took the opportunity to approve the following statement of Simonds J in *Crane v Hengeman-Harris Co Inc*: "... let it be clear that [in a claim for rectification] it is not sufficient to show that the written instrument does not represent [the parties'] common intention unless positively also one can show what their common intention was." A logical corollary is that rectification will be ordered only to give effect to the common intention so shown. So, since the equitable doctrine of rectification exists for the purpose, in effect, of ordering actually or notionally the textual amendment of a document, it will not be available to achieve the amendment of a particular document just because the document is shown not to conform with a common intention of the parties to it. It must be shown further that words or expressions or other text inserted into or deleted from the document would give effect to the common intention.^[10] (Citations omitted)

43. The magistrate was satisfied that the parties were under a mistaken impression that the sale was a taxable supply. That was no more than a common belief. It was not an actual agreement. The findings are not to the effect that the common intention of the parties was that the actual contract price was \$832,727.27, although it is the case that the magistrate so expressed himself. The finding set out at sub-paragraph (d) of the preceding paragraph is a conclusion that is not supported by primary fact finding or reasoning. The factual inquiry needed to be directed to the pre-contractual negotiations that settled the price between the parties. Although, the object of the parole evidence rule is to exclude evidence of prior negotiations, the prior oral agreement of the parties being inadmissible in aid of construction, such evidence is admissible in an action for rectification.^[11]

44. Mr Leong and OCMC did not submit that there was evidence of an actual intention of the parties that the price agreed for the transaction was \$832,727.27, and the magistrate's finding that the negotiators 'effectively took a view' falls well short of an actual agreement to a price that was subsequently mistakenly stated in the written contract as \$916,000. To suggest that finding (d) can be so interpreted makes it inconsistent with other finding expressed by the magistrate, particularly those at sub-paragraphs (e)–(g).

45. The proposed common mistake in the written contract is either as to the agreed price, or it is about the allocation of the risk of a future obligation to remit GST to the ATO if the transaction is a taxable supply. There was no evidence that the true intention was that the agreed price was \$832,727.27 and that it was grossed up to \$916,000 because the parties believed that the sale was a taxable supply and the vendor was liable to remit the GST to the ATO. As Morris LJ said in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd*,^[12] 'the fact that they were under a mistaken impression as to what their agreement would achieve does not disturb the clarity and the fixity of the agreement which they in fact made'. The magistrate's findings do not amount to any more than finding the existence of a common belief, not an agreement, that, in an apparent state of mutual uncertainty about the characterisation of the sale for GST purposes, there might be a GST liability and, if there was, the purchaser ought to have a tax invoice. These findings fall short of an actual agreement that first, the true agreed price payable for the properly, net of GST, was \$832,727.27 and second, the GST risk lay with the purchaser.

46. A party seeking an equity of rectification of a written contract bears a heavy onus.^[13] This case falls into the category described by Hodgson J (as he then was) in *Bush v National Australia Bank*.^[14]

It will often be the case that each party will have conflicting intentions as to the document. It may well be the case that each party intends to give effect to the document as it is worded, but also intends to enter into a transaction with a particular legal effect, which is not the true legal effect of the document as worded. The problem is not unlike that in the case of a mistake as to the identity of a person with whom one is making a contract: one may intend to contract with a person with a particular name and description, but also intend to contract with the very person who is present; and in subsequent legal proceedings, a decision may have to be made as to which intention should prevail. So it may also be with this type of rectification, with the additional complication that the intention and mistake must be clearly proved. So one needs to be able to say that, although in a sense the parties intended to be bound by a document which included certain words, nevertheless their intention to achieve a legal effect which was not the true legal effect of those words was somehow predominant over that other intention, and clearly predominant.

47. Rectification was pleaded and was an issue at trial. OCMC and Mr Leong bore the onus to show that the clearly predominant intention of both the vendor and the purchaser was of an actual agreement as I have described. The magistrate's finding that the parties 'effectively took the view' that the agreed price inclusive of GST was not a finding of a clear predominant intention that the vendor had agreed not to retain any more than \$832,727.27 as the price. That the agreed price was inclusive of GST can only support an inference that the common intention was the purchaser had no further obligation to pay if the transaction was a taxable supply. Such a finding cannot sustain an entitlement to rectification of the contract.

48. Not having made appropriate findings, it was not open to the magistrate to rectify the written contract and in so ordering, the primary court fell into error. The remaining issue is whether the proceeding should be sent back to the magistrate to be determined in accordance with these reasons. Unless it was open to the magistrate to find the actual agreement or common intention that Mr Leong and OCMC contend for, to do so would be a futile exercise exposing the parties to unnecessary expense?

49. The evidence given by the agent concerning the negotiations was accepted by the magistrate. One Susan Pettifer stated that the property was marketed at 900+ and the offer made by Mr Leung was \$916,000. The offer 'included GST' but not by reason of any statement to her by Mr Leong. Ms Pettifer had dealt with Mr Leong over several years and his offers were always 'including GST', as that was the way he worked. Ms Pettifer had no conversation with Mr Mavro because 'well he knew that that's what it was including on the contract of sale, yeah'. Ms Pettifer completed the particulars of sale in her handwriting. She added special condition 2 because Mr Leong requested it because he told her he wanted a tax invoice to claim the GST back. When cross-examined, Ms

Pettifer recalled that the question whether the sale was subject to GST came up with Mr Mavro and he responded that it was 'including GST'. This conversation was at the time that he signed the contract that so provided. It seems clear on Ms Pettifer's evidence that the parties agreed on a price of \$916,000 and the vendor bore the GST liability. On her evidence, these negotiations were not open to an interpretation that an agreed price was grossed up for GST, to be refunded if not remitted to the ATO, when the contract was prepared and signed.

50. Mr Leong gave evidence that before signing the contract he turned his mind to a breakdown of the purchase price into a component for GST and a component representing the value of the property. He did not give evidence of any discussion with Mr Mavro or the agent from which an agreement with the vendor different from that which he signed might be found. The only conclusion open was that an offer of \$832,727.27 plus GST was never put or discussed. If it was Mr Leong's intention to reach an agreement with the vendor that he would not pay any more than \$832,727.27 for the property and would get the benefit of an input credit for the balance of \$916,000, he did not reveal it in negotiations.

51. Accepting Mr Leong's evidence and that of relevant witnesses, there was not revealed by it an actual agreement entered into, or a common intention possessed, that was by common mistake recorded incorrectly in the written contract.

Other grounds

52. In the light of my conclusions, it is unnecessary to consider the other grounds of appeal that were argued.

Disposition

53. For the reasons I have given, both the claim for rectification and the claim for breach of an implied term of the agreement were bound to fail had the magistrate correctly identified or applied the proper principle in each case. Once the claim to rectification is dismissed, the just and proper disposition of the proceeding turns on the proper construction of the written contract. In the interests of justice, the expense of a rehearing is unwarranted. A different outcome is not open.

54. Subject to any further submission from counsel, I will allow the appeal with costs and the judgment of the magistrates' court will be set aside, save that the costs order in respect of amended pleadings will not be disturbed. The respondent's claim in the proceeding will be dismissed with costs. The respondent can have an indemnity certificate under s4 of the *Appeal Costs Act* 1998.

^[1] [1982] HCA 24; (1982) 149 CLR 337; (1982) 41 ALR 367; (1982) 56 ALJR 459.

^[2] If that were so, an issue arose whether the ATO ruling was wrong and the vendor was obligated to remit the GST to the ATO. However, as I have noted, the magistrate seems to have proceeded on the basis that the ATO ruling determined that there was no obligation to remit GST on the transaction.

^[3] [2012] VSCA 134 (22 June 2012).

^[4] [1982] HCA 24; (1982) 149 CLR 337 at 346; (1982) 41 ALR 367; (1982) 56 ALJR 459.

^[5] *Ibid*, 353.

^[6] *Ibid*, 352.

^[7] [1977] HCA 40; (1977) 52 ALJR 20, 26; (1977) 16 ALR 363; (1977) 45 LGRA 62; (1977) 52 ALJR 20, 26; 32 ALT 41.

^[8] [2001] VSCA 2; (2001) 3 VR 526 (6 February 2001).

^[9] 5th ed. (1997), 610.

^[10] see also *Franklins Pty Ltd v Metcash Pty Ltd* [2009] NSWCA 407; (2009) 264 ALR 15; (2009) 76 NSWLR 603; 4 BFRA 351.

^[11] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 352; (1982) 41 ALR 367; (1982) 56 ALJR 459.

^[12] [1953] 2 QB 450 at 463; [1953] 2 All ER 739, an observation approved of by Phillips JA in *The Club Schanck Resort Company Limited v Cape Country Club Pty Ltd* [2001] VSCA 2; (2001) 3 VR 526, at 536 [31].

^[13] *The Club Schanck Resort Company Limited v Cape Country Club Pty Ltd* [2001] VSCA 2; (2001) 3 VR 526 at 530-531 [14].

^[14] (1992) 35 NSWLR 390.

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