The Tax Institute

Local Tax Club – Melbourne & Geelong

GST and real property – When things go wrong

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1. Introduction

The *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) has now been in operation for 25 years. A great many issues have been resolved or at least greatly enlightened in that time – we can now, more or less, explain the GST treatment of a birthday cake – but there is still a great potential for GST issues or uncertainties to "foul up" a commercial deal.

Australian businesspeople now have a good working knowledge of GST, particularly in their own industries, but that can lead to a confidence that is not always well-founded. Sometimes commercial counterparties can be equally confident about what GST outcome they expect, and yet be diametrically opposed. If that is not properly ventilated during the negotiation process (and all too often, it isn't) then it can fall to "boilerplate" contractual clauses or drafting that is at least not closely considered to resolve the issue. Advisers at all stages of the process from drafting to dispute resolution should be aware of the some of the common pitfalls and have an eye always to avoiding them where possible.

This paper essentially sets out a number of case examples that have thrown up these sorts of commercial issues which have arisen from erroneous or uncertain approaches to the GST.

I wish to record my thanks to my colleague at the Victorian Bar, Chris Sievers, who was originally to present this session but had to unavoidably withdraw. I have drawn heavily on his paper 'Contractual and Commercial Disputes and GST – learnings from recent cases', presented at TTI's GST Conference in Melbourne in October 2024, in writing this paper.

2. When Contracts Go Wrong

It is common for land sales in Victoria to use the LIV/REIV standard contract for the sale of land, often with additional special clauses. The standard contract is designed to be easy to use and accommodates several different GST treatments of the sale. Nevertheless, disputes arise about the operation of those provisions, either because of the way in which the standard contract is completed or where the actual GST treatment of the transaction differs from what the parties (or at least one of the parties) envisaged.

2.1 *A&A Property Developers Pty Ltd v MCCA Asset Management Ltd*

The LIV/REIV standard contract is a bit like a "choose your own adventure" book. Various provisions of the contract are present but are only engaged, or switched off, if certain choices are made in the particulars, such as choice of the margin scheme or going concern exemption.

The first choice in respect of GST simply states "[t]he price includes GST (if any) unless the words '**plus GST**' appear in this box" next to a box for that purpose. Depending on the choice made, general condition 13 (about GST) has a different effect.

One might not be surprised that errors can occur because the parties do not understand how their transaction will be treated for GST purposes (which will be addressed below). But what if the box simply says "GST"?

In *A&A Property Developers Pty Ltd v MCCA Asset Management Ltd*,[1] that is what the Court of Appeal had to decide. That case concerned a sale of uninhabitable land (and for that reason did not meet the definition of "residential premises" in the GST Act).

The particulars of sale were extracted in the Court's reasons:

Payment (general condition 11)					
Price	$ 2,900,000				
Deposit	$ 290,000	10% by	(of which $5K has been paid)		
Balance	$ 2,610,000	payable at settlement			
GST (general condition 13)					
The price includes GST (if any) unless the words 'plus GST' appear in this box					**GST**
If this sale is a sale of land on which a 'farming business' is carried on which the parties consider meets requirements of section 38-480 of the GST Act or of a 'going concern' then add the words 'farming business' or 'going concern' in this box					

[1] [2017] VSCA 365.

If the margin scheme will be used to calculate GST then add the words 'margin scheme' in this box		

The purchaser argued that the requirement for "plus GST" was clear and that the contractual machinery which relied on its use required strict compliance. On the other hand, the vendor argued that the addition of "GST" in the box had to have some meaning and that the only commercial interpretation was that it intended to add GST to the price.

Consistent with other authority, the Court of Appeal held that the default position under the standard form contract was that the risk of GST applying or not was on the vendor (i.e., the vendor gets paid their price and has to meet the GST if it is a taxable supply).[2] That default position is reversed by including "plus GST" in the particulars.[3]

The Court concluded that the meaning of "GST" in the "plus GST" box, understood in context, was to engage the gross-up mechanism in general condition 13. Other boxes in the particulars were either left blank or completed as relevant. The fact the box was not felt blank was more significant as an objective indicia than the missing "plus".[4]

2.2 *Duoedge Pty Ltd v Leong*

Tax invoices are a vital part of the GST system, but it must be remembered that they only record taxable supplies; they do not dictate the GST treatment of a transaction. When parties' understanding of their transaction, and the tax invoice issued for it, proves to be wrong, disputes can result.

In *Duoedge Pty Ltd v Leong*,[5] residential land with planning permission for units was sold. In the contract:

- the price was stated in handwriting as "$916,000 GST inclusive";
- the box for "plus GST" did not contain those words and was struck through in hand;
- standard condition 13 was in the usual form; and
- special condition 2, in hand, stated that "Vendor to provide purchaser a tax invoice of the sale".

The vendor issued an invoice which purported that the purchase price was $832,727.27 plus a GST component of $83,272.73, totalling $916,000. Despite that, the vendor did not remit any GST amount to the Commissioner. However, the purchaser did claim an input tax credit as part of its development enterprise.

The Commissioner concluded that the sale was an input taxed supply of residential premises and disallowed the claim for a credit. Consequently, the purchaser sought a refund of the purported GST component from the vendor.

[2] *A&A Property Developers Pty Ltd v MCCA Asset Management Ltd* [2017] VSCA 365, [47] (Tate JA).
[3] *A&A Property Developers Pty Ltd v MCCA Asset Management Ltd* [2017] VSCA 365, [48] (Tate JA).
[4] *A&A Property Developers Pty Ltd v MCCA Asset Management Ltd* [2017] VSCA 365, [58]-[59] (Tate JA), [91] (Kaye and Osborn JJA).
[5] [2013] VSC 36.

Initially, the purchaser succeeded before a magistrate who held that the contract should be rectified to reflect what he held was the meaning a reasonable observer would give the contract in all the circumstances, and that a term should be implied that the vendor would refund the purported GST component.

On appeal to a single judge of the Supreme Court, that was overturned. Whatever the belief of the parties about what the GST treatment would be, the contractual provisions simply allocated the risk of that GST treatment. They did so in clear terms: the $916,000 price included GST *if any*.[6]

Although the magistrate was troubled by special condition 2, that clause duplicated part of general condition 13 and, importantly, by requiring a tax invoice said nothing about the GST treatment of the transaction. In that regard, Dixon J said:

> 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.[7]

His Honour concluded that no term for a refund of the purported GST component could be implied because it was contrary to the express terms of the contract (i.e., the clear references to "GST inclusive" and not filling in the "plus GST" box). Nor was there a common intention between the parties that any such amount would be refunded, which would support rectification of the contract. That both parties believed the sale would be a taxable supply is not the same thing as having reached agreement about a refund if that belief was wrong, or having agreed a price that was different to that stated in the contract.

2.3 *Shimden Pty Ltd v Park Pty Ltd*

Similar issues arose in *Shimden Pty Ltd v Park Pty Ltd*.[8] It concerned a dispute about whether monthly rent of a service station included GST (amongst other issues). Additionally, the way the tax invoices described what was paid were said to support an estoppel.

As is usual, the amount of rent was stated as an item in a schedule to the lease agreement. It stated an annual dollar figure, without reference to GST, to be paid monthly. There was no dispute that the rent was consideration for a taxable supply.

Clause 10(4) of the lease agreement was a general GST gross-up clause. It read:

> Notwithstanding any other provision of this lease, the Lessee agrees that, if any tax in the nature of a goods and services tax or like impost ("GST") is assessed or imposed on the Lessor in respect of anything supplied by the Lessor to the Lessee under or in connection with this Lease or in connection with the grant, assignment, or surrender of this Lease ("GST amount"), then the Lessee must pay to the Lessor an amount on account of all GST amounts at the same time as making any payments in respect of which the Lessor is liable to pay the relevant GST amount such that the net amount received by the Lessor under this Lease

[6] *Duoedge Pty Ltd v Leong* [2013] VSC 36, [22]-[23].
[7] *Duoedge Pty Ltd v Leong* [2013] VSC 36, [25].
[8] [2022] NSWSC 267.

> remains the same whether the Lessor is liable to pay GST or not. For the purposes of calculating the GST amount, any entitlements that the Lessor may receive or be entitled to receive in the nature of import [sic] tax credits or other credits or reimbursements (however described) in respect of any GST paid or payable whether arising under or in connection with this Lease or otherwise, are to be excluded. The Lessee covenants to keep the Lessor fully indemnified in respect of any GST liability arising in connection with the grant, assignment or surrender of this Lease.

Justice Darke approached the issue in a conventional way as one of interpreting the contract in a way a reasonable businessperson would understand it.[9] On that approach, absent cl 10(4), the tenant would not have to pay an additional amount for GST (i.e., the stated price was GST-inclusive). The concepts of "value" and "price" in ss 9-70 and 9-75 of the GST Act supported that conclusion.[10]

However, the effect of cl 10(4) was that the tenant was obliged to pay an additional amount on account of GST at the same time as the payment of rent.

The point that makes this case a little unusual is the estoppel argument raised against the landlord. Since the beginning of the lease, the landlord had issued invoices for only that amount of rent stated in the schedule (i.e., the rent excluding a GST amount that was otherwise payable). Those invoices purported to record a GST component of that rent and officers of the tenant gave evidence that it was always their understanding that the amount stated in the schedule was the total, GST-inclusive amount payable, consistently with the invoices they received.

The tenant argued that this estopped the landlord form asserting its full right to payment under the lease agreement. That argument was rejected. His Honour considered that the invoices did not suggest that the landlord would not enforce its rights under the lease agreement.

[9] *Shimden Pty Ltd v Park Pty Ltd* [2022] NSWSC 267, [39] citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46]-[52]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, [16].
[10] *Shimden Pty Ltd v Park Pty Ltd* [2022] NSWSC 267, [42].

3. When Developments Go Wrong[11]

The *Nerang Subdivision* dispute involved five proceedings in the Supreme Court of Queensland between 2020 and September 2024. The decisions illustrate the complex GST issues that can arise where an owner of land enters into an agreement with a developer to subdivide land and sell lots to purchasers for profit or gain.

Development arrangements of that kind typically have some or all of these features:

- The owner remains the registered proprietor of the land.
- The developer undertakes the development and incurs the costs of the development, with the owner taking an essentially passive role in the development. The developer will recover input tax credits with respect to the costs of the development.
- Upon the sale of the lots, the proceeds of sale will be shared between the owner and the developer in a manner set out in the development agreement.
- If the owner is registered for GST, or is required to be registered, the sale of the subdivided lots will be a taxable supply by the owner, with the owner liable to pay GST.
- The proceeds distributed to the developer will often be described as the "developer's fee", with the proceeds representing consideration for a taxable supply by the developer to the owner of development services. The developer will pay GST with respect to the proceeds and the owner (if registered or required to be registered) will be entitled to an input tax credit.

In Victoria, there are now a number of variations on those themes due to the impact of duty imposed on economic entitlements.[12]

As a further complication, given the introduction of the GST withholding rules that apply to supplies made on or after 1 July 2018:[13]

- the purchasers of the subdivided lots will be required to withhold a proportion of the contract price on account of GST (1/11th or 7% if the margin scheme is to be used) and to pay that amount to the Commissioner;[14] and
- the owner will be entitled to a credit in respect of the purchaser's payment.[15]

The decisions illustrate the various pitfalls that can arise if GST is not properly considered when drafting contractual documents. Given the scope of the development, which the Court observed was expected to generate more than $2 billion in revenue, the financial impact of GST was significant for the parties.

[11] Parts of this section have been taken from Chris Sievers' paper 'Contractual and Commercial Disputes and GST – learnings from recent cases', presented at TTI's GST Conference in Melbourne in October 2024. It ably canvassed the issues and background in a way I was unable to improve.
[12] *Duties Act 2000* (Vic) Ch 2 Pt 4B.
[13] *Taxation Administration Act 1953* (Cth) sch 1 ss 14-250 and 15-255.
[14] *Taxation Administration Act 1953* (Cth) sch 1 s 14-250.
[15] *Taxation Administration Act 1953* (Cth) sch 1 s 18-60.

3.1 The Background Facts

The property comprised 312.3 hectares on the western side of the Pacific Highway on the Gold Coast. On 22 May 2008, the registered proprietor of the property died and on 30 September 2009 the executors of the estate (**Owner**) entered into a development deed (**Deed**) with two development companies (**Developer**). The planned development was to comprise approximately 3,500 dwellings, a village centre, and an industrial precinct. It was anticipated that the development would likely take 10 to 15 years to complete, that it would be developed and sold in approximately 27 stages, and that it would ultimately involve the expenditure of in excess of $750 million in development costs and revenue of more than $2 billion.

The Deed contemplated that the Owner and the Developer would obtain their pecuniary recompense from the development via their entitlements to receive, respectively, the "Owner's Return" and the "Developer's Return". Despite the parties' agreement to associate together to carry out the Project, clause 2.3.1 of the Deed provided that the document did not create a partnership, joint venture, agency or fiduciary relationship between the Developer and the Owner.

The Development was to be undertaken on a staged basis. A "Stage" referred to that part of the Land that was designated as a stage of the Development in the Master Program. The Owner was required to grant a "Development Lease" for each Stage. The form of the Development Lease was prescribed in a schedule to the Deed.

Under the Deed, the Developer's obligations included:

- Subject to limited exceptions, to pay rates and charges and land tax levied on the Land.
- To seek to obtain (at its cost) the approvals required to undertake the Development.
- To undertake the Development in accordance with the Development Documents and its obligations under the Deed, and for that purpose could engage and instruct all necessary advisers, consultants, contractors and agents in connection with the exercise of its rights and the performance of its obligations under the Deed.
- To provide a detailed report to the Owner on the progress of the Project within 14 days after the end of each quarter.
- To provide a marketing and sales plan to the Owner, which included a list of Lots to be released for sale and their proposed sale price, prior to commencing marketing and selling of Lots.

The Deed further provided that:

- The Developer had the sole and exclusive right to exercise control of the Project.
- The Developer accepted all risks relating to the undertaking of the Development, including risks relating to the actual costs of the Development exceeding the cost estimated by the Developer, and the actual revenue and profit to be derived by the Developer from the Development being less than the revenue and profit estimated by the Developer.
- The Owner agreed to co-operate fully with the Developer and use its best endeavours to bring about the successful performance and completion of the Project, to do all acts and things which were required for the purposes of carrying out and completing the Project in accordance with the terms of the Deed, including by allowing access to the Land and, as and when the Developer required full possession and use of a Stage to undertake the

development work, to deliver up possession of the Stage and grant a Development Lease for it.

Under the Development Leases, between the Owner (as "Landlord") and the Project Manager (as "Tenant" and nominee of the Developer):

- The Project Manager was required to prepare a subdivision plan for the Lots to be created from the Stage and lodge that plan for registration, prepare a partial surrender of the Development Lease so far as it relates to the sale of a Lot to a third party and pay the Owner's Return to the Owner upon settlement of the sale of each Lot.
- The Owner was required to sign and return the subdivision plan to the Project Manager and do all things necessary to assist the Project Manager in obtaining approval and registration of that plan and sign and return to the Project Manager the partial surrender of the Development Lease relating to the sale of a Lot.

A dispute arose between the Owner and the Developer concerning how the possible incidence of GST might impact the calculation of the returns to which the Owner and Developer might eventually become entitled.

3.2 Opening Skirmishes

There were two preliminary proceedings brought before the substantive dispute. One sought declarations about the GST treatment of land sales and the Developer's Return,[16] whilst the other concerned a claim that proposed sale contracts were contrary to the Deed and that payments to the Developer should not be grossed-up for GST, with a cross-application for a stay.[17]

The proceeding for declarations came at the planning stage, at a time before the Owner was obliged to grant any Development Leases. The Owner argued that, amongst other things, it would not be required to register for GST because sale of the subdivided lots was sale of capital assets which are not included in projected GST turnover.[18]

Ultimately, as the questions at issue would be impacted by the Development Lease (which did not yet exist) and the sale contracts for subdivided Lots (which did not yet exist), the Court refused to make the declarations about hypothetical controversies.

In the second proceeding, the Developer sought to stay the Owner's application because of a dispute resolution clause in the Deed which provided for expert determination, at least on the appropriateness of the proposed contracts with third parties. As the GST gross-up question was likely to depend on the form of third party contracts, the Court thought it appropriate to stay the proceeding for the expert determination to take its course.

Although those opening skirmishes illustrate some of the issues that can arise, because they did not ultimately decide the GST issues, I have not devoted much attention to them here.

[16] *Nerang Subdivision Pty Ltd v Hutson* [2020] QSC 225.
[17] *Hutson v Nerang Subdivision Pty Ltd* [2021] QSC 323.
[18] This was before the decision in *Collins and Commissioner of Taxation* [2022] AATA 628.

3.3 Substantive Proceeding

In 2023, further proceedings were issued.[19] At the time the proceedings were issued, the Owner and Developer were parties to four Development Leases over different parts of the Property that reflected different stages of the Project.

The proceeding raised the following relevant issues for determination:

- Whether the Owner is presently required (or, alternatively, will in the future be required) to register for GST pursuant to s 23-5 of the GST Act.
- Whether the amount of the Owner's Return which the Owner will receive on the sale of each Lot is to be reduced by any GST payable by the Owner on that sale, regardless of whether the purchaser of the Lot pays GST in relation to the supply under the GST withholding provisions in subdivision 14E of schedule 1 to the *Taxation Administration Act 1953* (Cth).
- Whether the Deed or the Development Leases bring about the result that the Developer's Return from the sale of a Lot is to be increased by the amount of the Developer's liability for GST.

There was a further issue about the effect of ordinary adjustments in contracts of sale with third parties which is not dealt with in this paper.

The Commissioner was joined to the proceeding because the first issue concerned the application of the GST Act. In this context, the role of the Commissioner was identified as being:

> … limited to making submissions on the proper construction of the relevant provisions of the GST Act and the application of principles derived from relevant authorities to assist the court to determine whether to make the declarations sought in respect of the first issue and to ensure that such declarations as might be made do not inhibit the discharge of the Commissioner's statutory duties in connection with the administration of the GST Act.[20]

Joining the Commissioner as a party to the proceeding addressed the concerns identified by Gzell J in *CSR Ltd v Hornsby Shire Council* [2004] NSWSC 946 where the Court concluded that, in the absence of the Commissioner as a party to the proceedings, a declaration should not be granted that CSR was obliged to provide a tax invoice to the Council with respect to a compulsory acquisition of land. An issue between the parties was whether the compulsory acquisition of land gave rise to a taxable supply and an entitlement to an input tax credit.

The decision was upheld on appeal to the Queensland Court of Appeal.[21]

3.3.1 Registration for GST

Enterprise

The Developer submitted that the activities undertaken by the Owner under the Deed and the Development Leases were being carried on in the form of the or an adventure or concern in the nature of trade. The Developer emphasised the scale of the Development, the change in the character and the physical form of the Land resulting from the Development, as well as the period

[19] *Nerang Subdivision Pty Ltd v Hutson* [2023] QSC 268.
[20] *Nerang Subdivision Pty Ltd v Hutson* [2023] QSC 268, [10].
[21] *Nerang Subdivision Pty Ltd v Hutson* [2024] QCA 174.

over which the Project had been pursued to date and for which it will be pursued in future. The Owner submitted that the business of developing the Land was being undertaken by the Developer and not by the Owner, whose role was limited to realising a long-held family asset.[22]

The Court looked beyond the income tax authorities dealing with the carrying on of a business and noted the decisions[23] which recognised the definitions of "enterprise" and "carrying on an enterprise" in the GST Act appear on their face to be substantially broader than the concept of "carrying on a business" for the purpose of income tax. The Court observed that the parties' agreement to undertake the Project was a commercial arrangement and that it was reasonable to infer that the Owner had entered it and agreed to accept the fixed percentage of the Gross Sale Proceeds in return for the Developer and Project Manager developing the Land with the intention of ultimately receiving more than would have been realised from a sale of undeveloped Land. Further, although the Developer exercised control over the Project, undertook the development work and bore the risk associated with the cost of the development, the Owner's role in the commercial arrangement was not entirely passive. The aims of the Project could not be achieved without the Owner granting the Development Leases and delivering up possession of the relevant parts of the Land to be developed as a Stage and, subsequently, executing contracts of sale for Lots pursuant to his obligations under the Deed and the Development Leases. The Court was satisfied that this conduct, which facilitated the Development and the ultimate sale of the Lots under the terms of the commercial arrangement with the Developer, amounted to a series of activities done in the form of a business and, accordingly, came within the broadly expressed definition of enterprise in s 9-20(a) of the GST Act.

The Court also found that the Owner satisfied the definition of enterprise through carrying on activities in the form of a lease.[24] The Court rejected the Owner's argument that as the rent paid under each Development Lease was $1.00, this activity was done "without a reasonable expectation of profit or gain" so that it was excluded from the definition of enterprise by the operation of s 9-20(2)(c) of the GST Act. The Court considered that looking at the broader arrangement, the Owner entered into the Development Leases in the expectation that the amount of the Owner's Return from the sale of Lots, following development facilitated by the Development Leases, would exceed the proceeds of selling the undeveloped Land. In those circumstances, the activity comprised by the observation of the covenant of quiet enjoyment was done with a reasonable expectation of gain and was not excluded from the definition of enterprise under s 9-20(2)(c) of the GST Act.

GST turnover threshold

As no sale of lots had taken place, it was common ground that the Owner's current turnover did not meet the current GST turnover threshold. The Developer sought a declaration that the Owner would be required to register for GST at the time of the sale of the first of the lots – thereby satisfying the projected GST turnover test. The Owner submitted that this was not the case on two grounds:

- The sales of the lots are supplies by way of a transfer of ownership of a capital asset and therefore, pursuant to s 188-25(a) of the GST Act, are to be disregarded in working out the Owner's projected GST turnover.
- The sales of the lots are supplies that are not made in connection with the lease enterprise carried on by the Owner and therefore, pursuant to s 188-20(1)(c) of the GST Act, are excluded from the aggregated value of the supplies which comprises the Owner's projected GST turnover.

[22] For a recent example of these issues in the income tax context see *Morton v FCT* [2025] FCA 336.
[23] *FCT v Swansea Services Pty Ltd* [2009] FCA 402; *Toyama Pty Ltd v Landmark Building Developments* (2006) 197 FLR 74.
[24] GST Act s 9-20(c).

The Court observed that the first contention had been considered by the Tribunal in *Collins and Commissioner of Taxation* (2022) 114 ATR 682. As in that case, the parties made detailed submissions on the application of s 188-25(a) by reference to the capital/revenue dichotomy addressed in the income tax jurisprudence. The Owner also argued that he agreed to sell the Land in exchange for a fixed percentage of the Gross Sale Proceeds which was not dependant on the success or otherwise of the business conducted by the Developer and Project Manager – all the risks and benefits otherwise lay with the Developer.

The Court accepted that the Owner was not engaged in the same business as the Developer, but nevertheless concluded that having regard to both the commercial nature of the arrangement with the Developer and the character, scale and duration of the Project, he was satisfied that, by making the Land available for the Development, the Owner had committed that land to a profit-making scheme or undertaking. Therefore, the lots which were to be sold in pursuit of the Owner's profit-making scheme and did not fall within the term "capital assets" in s 188-25(a) of the GST Act.

The Court also rejected the Owner's submission that the sales of the Lots would not be supplies made in connection with the lease enterprise. On the basis that the Owner granted the Development Leases and observed their terms for the purpose of achieving a gain from the sale of Lots following development facilitated by those leases, the Court was satisfied that the sales of Lots would properly be characterised as supplies made in the course or furtherance of the lease enterprise and therefore, even on the Owner submission, would be supplies made in connection with the lease enterprise.

The Court concluded by finding that it was satisfied that (when calculated from the date of the hearing), the sum of the values of all the supplies that the Owner had made, or was likely to make, during that month and the following 11 months exceeded $75,000. The Owner's GST turnover therefore met the registration turnover threshold.

3.3.2 Calculation of the Owner's Return

The parties' return from the proceeds of sale was addressed in cll 5.3 and 5.4 of each Development Lease:

> **Return**
>
> 5.3 The Tenant will pay the Landlord on the date of settlement of each Lot, an amount equal to 25% of the Gross Sale Proceeds for that Lot.
>
> 5.4 The Tenant is entitled to receive and be paid all the proceeds of sale of Lots and other monies received in respect of the Works and the Development for the Stage, after payment of the amounts due to the Landlord under clause 5.3."

"Gross Sale Proceeds" was defined in cl 22.1 of each Development Lease to mean:

- in the case of a vacant unimproved Lot the actual amount received at settlement from the sale of the Lot comprising the sale price plus or minus any adjustments to it (eg Rates or Charges) pursuant to the contract for the sale of the Lot less any GST payable on that amount;
- in the case of any Lot which is sold or disposed with Building Improvements, an amount equal to that part of the sale price attributed to the unimproved value of the Lot (ie without any Building Improvements) as agreed between the parties, or failing agreement within 7 days after the contract or agreement for the sale of the Lot is signed, then as determined by the Valuer, and in either case less any GST payable on that amount.

The Developer submitted that the effect of these clauses was that under clause 5.3 the Owner received 25% of the "Gross Sale Proceeds", being the sale price less GST, but due to clause 5.4 not adopting the concept of "Gross Sale Proceeds" the balance of "all the proceeds of sale" to be distributed to the Developer necessarily excluded any deduction on account of GST payable by the Owner's taxable supply of the lots. This effectively left the Owner to pay the GST from his share of the sale proceeds – from which an amount equal to the GST had already been deducted.

The Court did not accept the Developer's construction of the clauses. The Court considered that a reasonable businessperson in the position of the parties would have understood that the Owner's Return was an amount calculated after payment of GST to the Commissioner. Further, although clause 5.4 was drawn in broad terms, the entitlement created by that clause for the Developer to receive an amount calculated "after payment of the amounts due to the [Owner] under clause 5.3" was properly understood to mean an amount remaining after payment of 25% of the Gross Sale Proceeds and after payment of GST to the Commissioner. That also accorded with the express exclusion of the Owner's Return from the definition of Developer's Return in cl 17.1 of the Deed.

The Court provided the following examples that would arise on the Developer's construction – whereby the amount received by the Owner from the sale of the Lot would be reduced, and the amount of the Developer's Return would be increased, by the GST payable on the sale:

- A sale of a Lot for a GST inclusive price of $220,000 with GST payable at the rate of 10%:
    - the Gross Sale Proceeds would be $200,000, being the GST inclusive price received at settlement less the $20,000 GST payable on that amount;
    - the Owner's Return would be $50,000, being 25% of the Gross Sale Proceeds;
    - the Developer's Return would be $170,000, being the GST inclusive price received at settlement less the Owner's Return;
    - the Owner would then be required to pay $20,000 GST to the Commissioner from the Owner's Return, effectively reducing that sum by the amount of GST payable on the sale of the Lot.

- The result would be no different where the purchaser pays the GST amount of $20,000 to the Commissioner pursuant to the GST withholding provisions:
    - the Gross Sale Proceeds would be $200,000, being the GST inclusive price less the $20,000 GST paid to the Commissioner by the purchaser;
    - although the Owner's Return would notionally be $50,000, being 25% of the Gross Sale Proceeds, the amount actually received by the Owner would be reduced by the $20,000 GST payable on the sale of the Lot, with that amount being included in the Developer's Return even though GST had in fact been paid by the purchaser;
    - the Developer's Return would be $170,000, being the GST inclusive price received at settlement less the (notional) Owner's Return.

It might be observed here that it is not uncommon to include a worked example of the profit share or profit waterfall in a development agreement as a schedule. If that is thoroughly prepared, that process may well have revealed these issues in the negotiation stage rather than to be decided by the Court.

3.3.3 Grossing up the Developer's Return for GST

It was common ground that, in providing development services pursuant to the Deed and each Development Lease, the Developer made a taxable supply to the Owner, with the "Developers Return" being consideration for that taxable supply. The question was whether the Deed or the Development Leases provided for that amount to be increased on account of GST.

Clause 15.6 of the Deed provided as follows:

> 15.6 Unless otherwise specified, any payment made by one Party to another under this document is exclusive of GST and:
>
> > 15.6.1 A Party must pay to the other [Party] an amount equivalent to the GST at the time that that Party is required to make the payment.
> >
> > 15.6.2 The Party making the Taxable Supply must give to the other a tax invoice. If the Party does not provide a tax invoice then the other Party is not required to make any payment of GST under this clause until it has received a tax invoice.

Clause 20 of the Development Leases provided as follows:

> **Rent and outgoings exclusive of GST**
>
> 20.1 The amount of rent and all other amounts payable under this Lease are exclusive of GST.
>
> **Payment of GST**
>
> 20.2 If the rent or any other payment obligation under or in connection with this Lease is a Taxable Supply, then the consideration for the Supply is increased by an additional amount equal to the amount of that consideration multiplied by the relevant GST rate. The additional amount is payable on receipt of a tax invoice.

The Developer submitted that the effect of these clauses was that the Developer's Return was exclusive of GST and the Owner must, upon receiving a tax invoice from the Developer, gross-up payment of the Developer's Return by the amount of GST payable on that taxable supply. The Owner submitted that this argument should be rejected because the clauses applied upon the making of a payment, or an obligation to make a payment, by one party to the other. He argued that the process for distribution of the proceeds of sale of a Lot did not involve the Owner making, or being required to make, a payment to the Developer.

The Court observed that the issue turned on whether a reasonable business person in the position of the parties would have understood the Developer's Return to be either: a payment made by the Owner to the Developer within the meaning of cl 15.6 of the Deed; or an amount payable by the Owner, or a payment obligation on the part of the Owner, within the meaning of cll 20.1 and 20.2 of each Development Lease.

The Court considered there to be significant force in the Owner's submission that the words used in cl 5.7 of the Deed—that the Developer is "entitled to receive and be paid" the Developer's Return—do not create an obligation on the part of the Owner to pay the Developer's Return. In this context, under the mechanism agreed for the collection and distribution of the proceeds of sale of Lots, the Developer controlled the distribution of sale proceeds. By cl 5.2.3 of each Development Lease, the Project Manager (as the Developer's nominee) was authorised by the Owner to collect and distribute the proceeds of sale. Consistently with that authority, the sales contracts for Lots included a requirement that the buyer pay the balance of the purchase price to the Project Manager in accordance with the Owner's authority. The consequence of the Developer (through the Project Manager) controlling the distribution of the sale proceeds was that there is no occasion where the Owner was called upon or obliged to pay the Developer's Return to the Developer. The only monies

the Owner received from the sale of a Lot was the Owner's Return and through clause 5.7 of the Deed and clause 5.4 of the Development Lease the Owner had expressly ceded its right to receive the proceeds of sale from a Lot beyond the amount of the Owner's Return.

The Court also observed that at the time the Deed was executed, it would have been apparent to the parties that the provision of development services would be a taxable supply which would attract a GST liability. In those circumstances it would be expected that if the parties intended that either clause 15.6 of the Deed or clauses 20.1 and 20.2 of each Development Lease would be engaged to increase the Developer's Return by the amount required to meet the Developer's liability for GST they would have used clear language to signify that the Developer's Return was a payment made by the Owner to the Developer.

Ultimately, the Court was not persuaded that a reasonable businessperson in the position of the parties would have understood the Developer's Return to be either: a payment made by the Owner to the Developer within the meaning of clause 15.6 of the Deed; or an amount payable by the Owner or a payment obligation of the Owner, within the meaning of clauses 20.1 and 20.2 of the Development Lease.

3.4 Costs Proceeding

The final proceeding before the primary judge addressed the question of which party was to pay costs.[25] The Court observed that the Commissioner was a necessary party to the proceeding because, as the person responsible for the administration of the GST Act, his rights and obligations relating to the assessment of tax against the Owner were directly affected by the declaration made following determination of the GST registration issue.

The Developer submitted that in in circumstances where both they and the Owner had enjoyed mixed success in respect of discrete issues which involved broadly equal time and cost in the proceeding, the Court should make no order as to costs between those partis such that the parties are left to bear their own costs. Further, the Owner should be ordered to pay the Commissioner's costs of the proceeding.

The Owner submitted that as between himself and the Developers, he was the successful party to the proceeding such that the Developer should pay his costs. Alternatively, if the Court determined that the Developers' success on the GST registration issue makes it appropriate to apportion costs between the parties, the Owner should pay 1/3 of the Developers' costs of the proceeding and the Developers should pay 2/3 of his costs of the proceeding. As to the costs of the Commissioner, the Commissioner should bear those costs himself on the basis that, in substance, he appeared as *amicus curiae*. Alternatively, if the Court determined that the Commissioner was entitled to his costs, those costs should be paid by the Developers

The Commissioner submitted that he should not have to bear his costs of the proceeding which arose from the commercial dispute between the Developers and the Owner in which the Commissioner had no interest and where his presence as a party was only made necessary because that commercial dispute gave rise to the GST registration issue. The Commissioner's primary position was that his costs should be paid by the Owner as the unsuccessful party on the GST registration issue. Alternatively, the Commissioner submitted it would be open to the Court to order that the Developers pay his costs or that the Developers and the Owner bear an equal share of his costs.

[25] *Nerang Subdivision Pty Ltd v Hutson* [2024] QSC 10.

As between the Owner and the Developer, the Court concluded that the exercise of the discretion to order costs should reflect the parties' mixed success in respect of those different events. The appropriate exercise of the costs discretion as between those parties was to set-off their respective entitlement to be paid 50% of their costs with the result that no order was made for costs as between those parties and they were each left to bear their own costs.

The Court observed that the Commissioner did not seek to appear on his own initiative or at the suggestion of the Court. Although he had no interest in the commercial dispute, the Commissioner was joined as a necessary party because his rights and obligations relating to the assessment of tax against the Owner were directly affected by the declaration made following determination of the GST registration issue. The Court did not accept the Owner's submission that the Commissioner appeared as *amicus curiae*.

The Court was of the view that the Commissioner should not have to bear his costs of the proceeding in those circumstances. As between the Developers and the Owner, fairness dictated that it should be the Owner, as the unsuccessful party on the GST registration issue upon which the Commissioner was joined, to bear the Commissioner's costs.