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NOVATION AND ASSIGNMENT OF CONTRACTS

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1.This paper deals with the law in relation to assignment and novation of contracts.

2.A revenue case has been granted special leave to appeal to the High Court and the case turns on whether a Deed effected an assignment or a novation of a Contract for the Sale of Land. In this paper, the case will be

used as a framework in which to explore the law in relation to assignment and novation of contracts.

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

3.At first instance[1] Gzell J held the relevant Deed effected a novation. In the NSW Court of Appeal[2], Handley AJA [with whom Allsop P and Tobias JA agreed] held the Deed did not effect a novation but rather assigned 'the benefit of the vendor's obligation'[3].

4.During the hearing of the application for special leave to appeal[4], Kiefel J observed :

'In that regard, is the critical finding or consideration in the Court of Appeal that as to whether the original, the 2003 contract had been rescinded and the parties discharged and their obligations ?'

And :

'I focus then upon whether or not the vendors' obligations were still attached to the 2003 contract. Is that how his Honour came to this tripartite view ?'

The relevant facts and findings

5. On 5 November 2003, Oakland Glen Pty Limited [Vendor] exchanged a contract [Contract 1] for the sale of the Parkway Hotel with Trust

[1] ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue [2010] NSWSC 276.
[2] Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Limited [2011] NSWCA 32.
[3] Chief Commissioner of State Revenue v ALH Group Property Holdings Pty Limited [2011] NSWCA 32 at [85].
[4] ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue {2011] HCA Trans 215 (12 August 2011). The appeal was heard by the High Court in early February 2012. Judgment is reserved.

Company Fiduciary Services Limited [Purchaser 1]. Sale price was $6,386,611.

6.Contract 1 was exempt from liability for duty as an intra-group transaction.

7. On 27 June 2008 , ALH Group Property Holdings Pty Limited [Purchaser 2] entered into a Deed of Consent and Assignment with the Vendor and Purchaser 1 [Deed of Consent and Assignment].

8.The Chief Commissioner of State Revenue assessed the Deed of Consent and Assignment as liable for duty as a transfer of an interest in land [s8(1)(a) Duties Act] assessed on an extended notion of consideration [s21(1)(a) and s22(2) Duties Act]. This characterisation was accepted by the NSW Court of Appeal.

9.Gzell J had held that duty was payable on the Deed of Consent and Assignment as an agreement for the sale of land [ie there was a 2008 Contract which was created by novation effected by the Deed of Consent and Assignment] [s8(1)(b)(i) Duties Act] assessed on agreed price for the land [s21(a) Duties Act].

10.On 24 October 2008, the Vendor and Purchaser 2 entered into a Deed of Termination [Deed of Termination].

11.The Chief Commissioner of State Revenue characterised the Deed of Termination as an Agreement to terminate the 2003 Contract. No duty was refundable because no duty had been paid on the 2003 Contract because of the exemption.
This approach was accepted by the NSW Court of Appeal.

12.Gzell J had held that the Deed of Termination was an Agreement to terminate the 2008 Contract. Accordingly, the duty that had been paid on the Deed of Consent and Assignment [which Gzell J found had created by novation the 2008 Contract] was refundable under s50 Duties Act on the basis that the Deed of Consent and Assignment was an agreement for sale which terminated as a result of the Deed of Termination.

The approach of Gzell J

13.Gzell J commenced[5] his analysis by stating that 'novation is the substitution of one contract for another' and referring to the observations of Windeyer J in Olsson v Dyson [1969] HCA 3 ; (1968-69) 120 CLR 365 at 388 :

'The ultimate distinction, in juristic analysis, between a transfer of a debt by assignment and by novation is simple enough. Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the obligations of the old contract: if the new contract is to be fully effective to give enforceable rights or obligations to a third person he, the third person, must be a party to the novated contract. The assignment of a debt, on the other hand, is not a transaction between the creditor and the debtor. It is a transaction between the creditor and the assignee to which the assent of the debtor is not needed. The debtor is given notice of it; for notice is necessary to complete an assignment pursuant to the statute or in the case of an equitable assignment to preserve priorities. But the debtor's assent is not required. He is not a party to the transaction.'

14. Gzell J then observed that 'a novation can be express or implied from the circumstances. Whether there is an implied novation ultimately depends on the intention of the parties (Vickery v Woods [1952] HCA 7; (1951-52) 85 CLR 336 at 345; Orica Ltd v Commissioner of Taxation [2010] FCA 197 at [119]).'

15. Olsson v Dyson is cited by most, if not all, cases in Australia which involve an issue of novation.

16. Olsson v Dyson [1969] HCA 3 ; (1968-69) 120 CLR 365 involved the gift of a debt. A company was indebted to Mr Dyson for 2,000 pounds with interest at the rate of 8% per annum. Mr Dyson told his wife Mrs

[5] At [6].

Dyson that she could have the 2,000 pounds and that he would tell the managing director of the company to make future interest payments to Mrs Dyson. Mr Dyson had a conversation to similar effect with the managing director of the company. Following the conversations, the company paid interest to Mrs Dyson during the lifetime of Mr Dyson and also after his death.

17.Mr Dyson's executors brought an action against the company for the sum of 2,000 pounds lent to it and for interest. Mrs Dyson claimed that she was entitled to the debt and to the interest.

18.The company interpleaded and 2,000 pounds was paid into court.

19.Findings by Kitto, Menzies and Owen JJ included :

(i) There had been no legal or equitable assignment from Mr Dyson to Mrs Dyson of the debt.
(ii) There was no tripartite agreement between Mr Dyson, Mrs Dyson and the company whereby the company would pay the debt and interest to Mrs Dyson.
(iii) There was no agreement between Mr Dyson and the company that the company would pay the debt and interest to Mrs Dyson.
(iv) Accordingly, the moneys in court should be paid out to the executors.

20. Kitto J observed at p376 :

'It would be out of the question, as the evidence stands, to hold that any tripartite agreement was made by the deceased [Mr Dyson], the widow [Mrs Dyson] and the company [the debtor], by which the deceased released the company from the debt in consideration of its promise to pay Mrs Dyson.'

21.Barwick CJ and Windeyer J dissented.

22.Barwick CJ agreed with Kitto J that there was no assignment , legal or equitable from Mr Dyson to Mrs Dyson of the debt because there was no consideration to support an inchoate assignment.

23.Barwick CJ observed at p369 :

'I also agree that there is no sound basis to infer a tripartite agreement, to which the deceased, his wife and the debtor company were parties by which a novation of that kind took place.'

24. At p372 :
'… I would conclude that upon a proper analysis and interpretation of the evidence, there was in substance a promise given to the deceased by the debtor company to pay [Mrs Dyson] the principal and interest which formerly it owed the deceased [Mr Dyson].
Upon that footing, it seems to me that the executors cannot succeed in the interpleader issue.
… The executors, in my opinion, could compel the performance of the promise to the deceased to pay the respondent; but that would result in a payment to the respondent and not in a payment to the executors; and in any case that is not the claim they were prosecuting against the debtor company.'

25. At p374 :
'I would conclude that the debtor company was willing to perform whatever obligation towards [Mrs Dyson] to which it was subject. It paid into court so that the obligation with respect to the money that the court decided it be under could be performed. It disclaims any interest in the money. Therefore, without deciding whether, if the debtor company had been unwilling to pay [Mrs Dyson] the [Executors of Mr Dyson's estate] could in equity enforce that performance, the money in court can in my opinion properly be ordered out to [Mrs Dyson] in performance by the debtor company of that promise. This to my mind is the proper course to pursue.
This result will be achieved by affirming the actual order of the Supreme Court, as distinct from that Court's findings and reasons therefor.
Accordingly, in my opinion, this appeal for these reasons should be dismissed.'

26. Windeyer J observed at p388 :

'In my view the facts establish a novation of the contract between [Mr} Dyson and the company. That the result of a novation may be the same, or much the same, as if there had been an effective assignment is not surprising. At one stage of the history of our law, when **debts** were not freely assignable at law, novation was a common method or circumventing the common law rule and accomplishing the same result as can now be accomplished directly by assignment pursuant to the statute.'

27. At p 389 :

'In that sense "novation" means simply a new contract standing in the place of the old. It may be a new contract between the parties to the old contract, A (in this case [Mr] Dyson) and B(in this case the company); or it may be a contract between them and a new party, or parties, eg between A,B and C (in this case the respondent). It is in the latter sense that the word is most often used in common law countries in connexion with the transfer of **debts** from one creditor to another.
…[CJL it seems from p393 that the novated contract Windeyer J finds is two parties Mr D and the company and the new term is to pay Mrs D]
The present case must I think be decided by seeing what was the result as a matter of contract law of the transaction between A ([Mr] Dyson) and B (the company). As I see the undisputed facts, two interpretations of them are open.

One is that [Mr] Dyson made an agreement with Francis, acting as agent for the company: that this agreement was in effect that , in consideration of [Mr] Dyson's promise to release the company of its obligation to pay him, the company promised him, he acting for both himself and his wife, that it would accept her as its creditor in his place. That seems to me to be a possible interpretation of the facts….'

28. At p391 :

'… I am not convinced that this undertaking should be regarded as having been given to him and her jointly, he being her agent in the transaction. I have said that that is a possible view of the facts, but I now put it aside. On the whole I do not think the facts warrant an inference

of a tripartite agreement. The other view, and I think the correct view of the facts, is that the transaction was between the company and [Mr] Dyson alone : that in legal effect it amounted to the company agreeing with him that in consideration of his releasing it from its obligation to him, it would hold itself bound to pay his wife any moneys on which it would have had to pay him. Considering the matter now on that basis, what then is the result ?

29. At p392 :
'Reliance upon the concept of a trust in cases of this kind has been described sometimes as a 'device' and sometimes as a 'fiction'. It is effective to overcome the rigidity of the obstacles the common law doctrine of privity of contract places in the way of justice to third parties. But this case can be decided , and I think it is best decided, according to purely common law principles.

On that view of the case the result may be stated as follows. The appellants, as Dyson's executors, can enforce his contracts, including his contract with the company that it would pay his wife the respondent. But that does not mean that they can recover from the company the sum it contracted with him to pay her. If the company had failed to perform its novated contract with Dyson while he was alive, he could have recovered damages for breach of contract. Since his death the appellant [Executor] could do so. These damages would be measured by his loss, not his wife's loss, flowing from the company's breach of its contract to with him to pay her. These damages could not I think be more than nominal in this case. Alternatively [Mr] Dyson , or he being dead his executors, could by obtaining an order for specific performance compel the company to perform its contract with him by paying his wife. Mrs Dyson could not herself have sued, nor can she now sue directly for the money – that is assuming, as I now am, that no promise was made by the company to her either directly, or indirectly, through her husband. No consideration moved from her.'

30. At p 393 :

'If, as I think, the right view of the facts is that , by novation of its contract with [Mr] Dyson , the company became bound to him to pay Mrs Dyson, then the only way in which it could perform its obligation to him would be by paying her. Of course by a further novation this

contract could have been cancelled by the parties to it and a [page 394]new arrangement made in substitution for it. But that has not occurred.'

31.At p394 :

'The issue which , by interlocutory order, the Supreme Court directed to be tried was formulated as whether the money in question was "payable to and recoverable by the plaintiffs [the present appellants] or the claimant [the present respondent]". As I see the facts, the rights of the parties being governed by a novated contract, the money was not, strictly speaking, "recoverable" by either party at common law. Dyson had ceased to become a creditor of the company; but his wife had not become a creditor in the strict sense of law. *[Commentary – this finding would seem to have precluded a finding that there was a novation .]* But the question in this case being to whom should the money in the Supreme Court go, the answer I think must be, to the person to whom the company had bound itself to pay it, Mrs Dyson. *[Commentary – the binding by the company was a binding to Mr Dyson and not a binding to Mrs Dyson. In such circumstances there seems to be no basis for a novation in favour of Mrs Dyson].*
Only thus can justice be done and the needs of justice met that promises should be honoured and bargains kept. The maxims Fides servanda est [faith must be kept] and Pacta sunt servanda [agreements must be kept] today express a principle of justice as much as they ever did; and in the facts of this case, I think they provide a sufficient answer in law to the question we have to decide. I am unable to decide it by following the path of his Honour the trial judge. *[Commentary – the Trial Judge had found at pages 374 and 375 there was a gift of the debt. However, a debt of money lent required, pursuant to section 15 Law of Property Act 1936 (SA) , a written instrument, and there is not equity to perfect an imperfect gift]*
but I reach the same ultimate conclusion *[Commentary – ie the money paid into Court was payable to Mrs Dyson]* . I would therefore dismiss the appeal.

32. Gzell J then observed [7] that 'a novation can be express or implied from the circumstances. Whether there is an implied novation ultimately depends on the intention of the parties (Vickery v Woods [1952] HCA 7;

(1951-52) 85 CLR 336 at 345; Orica Ltd v Commissioner of Taxation [2010] FCA 197 at [119]).'

33. Vickery v Woods was a stamp duty case where, at the time when the relevant contract for sale of land was made, Mr Vickery purported to act as agent for a company which had not then been incorporated. Mr Woods was the then Commissioner of Stamp Duties (NSW).

34.After formation of the company, the instruments of transfer to effect the conveyance of the land to the company were duly executed and the balance of purchase money was paid by the company.

35.The Commissioner of Stamp Duties claimed that ad valorem duty was payable upon the transfers as well as upon the original contract and a sum of money was paid as duty.

36.Mr Vickery then claimed a return of the stamp duty paid on the contract on the ground that after payment of the duty and before completion by conveyance, the contract entered into by him had been rescinded.

37.The Commissioner of Stamp Duties refused to refund the stamp duty paid on the contract.

38.The High Court held that the evidence did not establish a rescission of the original contract and consequently Mr Vickery was not entitled to a refund of the stamp duty paid on the original contract.

39.Further, the High Court upheld the New South Wales Full Court [overturning Owen J], and held that Mr Vickery was contracting so as to incur the liability of a principal. The contract for sale identified Mr Vickery as purchaser albeit 'for Gunbar Pastoral Co Pty Ltd'. "As that company had not yet been registered and so did not then exist, he must be considered as contracting so as to incur the liability of a principal; otherwise the contract would be inoperative."

40. Dixon J observed at p344 :

"The appellant … maintains that… the inference must be drawn from the transaction and the circumstances surrounding it that when the

company was incorporated a novation of the contract of sale took place by which, in consideration of the discharge of the appellant from his obligation, the company agreed to assume the obligation of the contract and the vendors agreed to the substitution of the company as the party to the contract agreeing to purchase… In support of this conclusion a number of considerations was arrayed… The purpose of the contract from the beginning, it was said, was for the appellant to occupy the temporary role of purchaser and then to drop out and this was effected in the result. To infer a novation would accord with the intention of all parties from beginning to end…

The short answer to this is an old one. It is that to a company that is brought into existence and acts upon an agreement antecedently made in its interest an intention to contract [page 345] is not to be imputed in order to give a legal basis or rationale to a transaction carried through upon an assumption, however incorrect, that no further contract was required and nothing more was necessary than to complete the transaction as initially provided in the contract.

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

... the circumstances relied on for the purpose of showing that a new contract was made with the company after its incorporation on the terms of the old contract are not necessarily referrable to and do not necessarily imply a new contract with the vendor. Even less reason is supplied by the course taken for the conclusion that the appellant was a party to a tripartite agreement involving a rescission of the contract between him and the vendor."

41. Dixon J at p343 observed :

"A vendor's obligation is to execute a conveyance of the land sold to the purchaser or as he shall direct and doubtless the appellant could therefore in any case have required the vendors to execute the transfer in favour of the company."

42. As noted above, Gzell J referred to Orica Ltd v Commissioner of Taxation [2010] FCA 197 at [119]) for the proposition that 'a novation can be express or implied from the circumstances. Whether there is an implied novation ultimately depends on the intention of the parties'.

43.Orica was an income tax case where Orica appealed against the decision of the Federal Commissioner of Taxation to disallow its objection to an amended notice of assessment. By that notice a net capital gain of $264M was included in Orica's assessable income. The issue for determination was whether the assessment was excessive.

44.Relevantly, for present purposes, there was an Assignment Deed which effected a novation of a Distribution Agreement. Because the Assignment Deed effected a novation there was a deemed disposal under s160M(3)(b) of the Income Tax Assessment Act. The rights the subject of the deemed disposal were properly valued at $250M. Therefore the inclusion of a net capital gain of $264M was excessive and the Commissioner's assessments were set aside.

45. Gzell J in ALH at [7] cited Orica at [119]. In Orica at [119], Sundberg J observed :

119. Rights and obligations can be effectively transferred by a novation; a transaction by which all parties to a contract agree that a new contract is substituted for an existing contract. It involves the extinguishment of one obligation and the creation of a substituted obligation in its place : Olsson v Dyson (1969) 120 CLR 365 at 388. A novation can be express or implied from the circumstances. Whether there is an implied novation ultimately depends on the intention of the parties : Vickery v Woods (1952) 85 CLR 336 at 345.

46.The passage in Olsson v Dyson at 388 was, as can be seen from the extract of Olsson v Dyson set out above, expressed in terms of 'a new contract between a creditor and his debtor' , that is a far narrower concept than that stated by Sundberg J.

47.The passage in Vickery v Woods at 345 about the 'intention of the parties' , needs to be understood in light of the rejection by Dixon J of

the submission of the appellant that 'to infer a novation would accord with the intention of all parties from beginning to end'.

48.Gzell J appeared to rely on the Orica judgment to conclude that in ALH "the intention of the parties to the Deed of Consent and Assignment is clear enough" [11]. This is apparent from [14] where Gzell J observed "the material terms of the assignment deed in Orica are set out at [48]. Like the present case there was no express extinguishment of the Distribution Agreement." And at [17] "As in Orica, so here, while there is no express extinguishment of the Parkway Contract it is nonetheless extinguished as all its benefits and burdens have been extinguished."

49. The critical reasoning of Gzell J in relation to why there was a novation, appears from [18] and [19]:

"[18] Novation occurs when the benefit and burden of an existing contract, in whole or in part, are replaced by the benefit and burden of a new contract. Here the Deed of Consent and Assignment replaced Trust Company's [purchaser 1's] benefits and burdens under the Parkway Contract with benefits and burdens in identical terms between Oakland [vendor] and ALH [purchaser 2].

[19] In my view, the Deed of Consent and Assignment is a novation containing a contract for sale of the land between Oakland [vendor] and ALH [purchaser 2] on identical terms to those contained in the Parkway Contract."

The approach taken by the NSW Court of Appeal

50. Handley AJA provided reasons for judgment, with which Allsop P and Tobias JA agreed.

51. Handley AJA provided the following summary at [10] of the approach taken by Gzell J. :

[10] Gzell J held that the Deed effected a novation of the 2003 contract. There was no transfer of dutiable property but the taxpayer [purchaser 2] agreed to purchase the hotel for the price and on the terms of the 2003 contract. The Commissioner submitted that the Deed was a transfer of the benefit of the 2003 contract and s50 did not apply.

52. At [14] Handley AJA commenced his analysis in the following manner:

[14] The appeal turns on the construction of the Deed, although questions of law also arise. The Deed must be construed as a whole to determine whether it effected an assignment or novation of the 2003 contract.

53.The next step is at [17] , [18] and [19] :

[17] The overall effect of the Deed was that the purchaser assigned its rights under the 2003 contract to the taxpayer (cl 3.1), the vendor released the purchaser from its obligations under that contract (cl 6), and the taxpayer assumed those obligations (cl 4.1(b)).

[18] The 2003 contract was not, in terms, rescinded and the vendor did not undertake any new or express obligation to transfer the hotel to the taxpayer on payment of the balance of the purchase money under the 2003 contract. The deposit paid by the purchaser remained in the vendor's hands for the taxpayer's benefit. No further or other deposit was paid.

[19] The source of the vendor's obligation to transfer the hotel remained the 2003 contract that had been assigned to the taxpayer.

54. Handley AJA identified "critical" features of the Deed at [28] :

[28] What, in my judgment, is critical is that the 2003 contract was not rescinded, and was the only source of the vendor's obligation to convey the hotel on receipt of the balance of the purchase price.

55. The reason why the non-rescission of the 2003 contract was critical is apparent from the authorities set out be Handley AJA at [40] to [76].

[40] The requirements for a straightforward novation are settled. In Scarf v Jardine (1882) 7 App Cas 345 , at 351 Lord Selborne LC said :

> "… novation… means this … there being a contract in existence, some new contract is substituted for it, either between the same… or different parties, the consideration mutually being the discharge of the old contract." (emphasis supplied)

[41] In Vickery v Woods [1952] HCA 7, 85 CLR 336, 345 Dixon J referred to novation as "a tripartite contract involving a rescission of the [original] contract". Kitto J agreed and at p351 Fullagar J said : 'There is no evidence that the original contract was ever rescinded or annulled."

[42] In re United Railways of the Havana and Regla Warehouses Ltd [1960] Ch 52, 84-5 Jenkins LJ delivering the judgment of the Court, said:

> "Mr Wilberforce … submitted that novation comprises two distinct elements , viz, the annulment of one debt and the creation of a substituted debt in its place … no express judicial authority was cited … to support [the] suggested dichotomy, but in our view it is right in principle. The discharge of the original debtor must precede, and is distinct from, the acceptance by or imposition upon the creditor or the substituted debtor."

These principles also apply to the assignment of the benefit of an executory obligation.'

[43] In Olsson v Dyson [1969] HCA 3, 120 CLR 365 , 376 Kitto J with whom Menzies and Owen JJ agreed, said : …
Windeyer J, otherwise in dissent, agreed on this point at pp388-9:

> "Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the obligations of the old contract :…"

[44] In Fightvision Pty Ltd v Onisforou (1999) 47 NSWLR 473, 491-2 this Court [NSWCA] said :

> "Novation is a transaction by which all parties to a contract agree that a new contract is substituted for one that has already been made… Novation involves the extinguishment of one obligation and the creation of a substituted obligation in its place. Intention is crucial to show a novation."

56. Handley AJA reviewed leading English text books [45] to [50] such as Chitty , Trietel and Williston , and concluded that the text books 'add little' to the observations in the judgments set out above. Handley AJA then considered a 'parallel line of authority which … considered the distinction between the variation of a contract and its replacement by a new contract without a change in the parties and concluded from all the above :

[55] Thus an existing contract may be varied without being rescinded but novation appears to require the rescission of the existing contract, or a severable part thereof.

57. Handley AJA noted [56] that the cases and text writers do not appear to have considered the juristic nature of a hybrid contract which assigns the benefit of an executory contract, and makes the assignee solely responsible for 'the concurrent and mutually dependent obligations'. Handley AJA considered [56] the Deed was an assignment of the benefit of the 2003 contract as varied. It was not a novation of the contract 1 because it did not impose a new obligation on the vendor to transfer the hotel and it varied contract 1 without rescinding it.

57. Handley AJA noted the different consequence for the incoming party where an assignment occurs rather than a novation :

[71] The assignment of a right from A to B transfers it to B. A novation may vest an equivalent right in B. In the first case an existing right is transferred, in the second a new one is created.

[72] The distinction is brought into focus by the different consequences for B. An assignee is bound by the "equities" of the obligor against the assignor. A new party acquiring the equivalent right by novation is not. Time, for limitation purposes, can commence to run against an obligee before an assignment, but not before a novation.

58. Handley AJA at [77] distinguished Orica. As noted above, Gzell J appeared to rely on the Orica judgment to conclude that in ALH "the intention of the parties to the Deed of Consent and Assignment is clear enough" [11]. And at [14] where Gzell J observed "the material terms of the assignment deed in Orica are set out at [48]. Like the present case there was no express extinguishment of the Distribution Agreement." And at [17] "As in Orica, so here, while there is no express extinguishment of the Parkway Contract it is nonetheless extinguished as all its benefits and burdens have been extinguished."

59. Handley AJA noted [77] that in Orica the benefit of the existing contract was not assigned to the subsidiary. [Commentary – The subsidiary was Zaneca BV. Rather, the rights and obligations under the Distribution Agreement were, under a tripartite agreement, conferred on and undertaken by Zaneca BV]. Handley AJA considered [77] that in such circumstances, Orica was 'not authority for the proposition that a hybrid transaction, such as the Deed, must take effect as a novation.'

60. Handley AJA recorded at [78] to [83] the taxpayer's reliance in the present appeal to the NSW Court of Appeal on the approach taken by Rares J in Goodridge v Macquarie Bank Ltd [2010] FCA 67 , which was said by the taxpayer to support the proposition that a hybrid contract which assigns the benefit of an executory contract and makes the assignee solely responsible for the concurrent and mutually dependent obligations, must operate as a novation. Rares J had stated at [108] to the effect, a novation can be achieved without following a set formula, in that it is possible to provide in separate clauses or in separate contracts between the same parties for an assignment of property in one and an assumption of liabilities and obligations in another. In that regard, Rares J referred to the judgment of the High Court in FCT v Sara Lee Household & Body Care (Australia) Pty Ltd [2000] HCA 35 , 201 CLR 250.

61. Handley AJA noted [80] to [83] the decision of Rares J in Goodridge was reversed on appeal [2011] FCFCA 3 and that a feature of the approach of the Full Court was that contracting parties ought be given freedom to provide for novation in an unusual way. Handley AJA stated at [79] 'The law should allow the same freedom for assignments.'

62. Handley AJA considered [82] and [83] , the plurality in Sara Lee at [58] to [64] did not decide that an assignment with an assumption of direct liability by the assignee was a novation and accordingly the judgment of the plurality in Sara Lee did not compel the Court of Appeal to characterise the hybrid contract in the Deed as a novation of contract 1. Rather, as noted above, Handley AJA at [84] considered the appropriate characterisation was 'as an assignment of the benefit of the 2003 contract to a new purchaser'.

63. Handley AJA observed at [85] that even if, contrary to such a characterisation, there was a novation, the novation was limited to the concurrent and mutually dependent obligations, and the benefit of the vendor's obligations was not novated but assigned.

64. Handley AJA observed at [86] that on either characterisation, the Deed was a transfer of dutiable property, namely the benefit of the 2003 contract and not an agreement for its sale or transfer. In such circumstances, its cancellation did not attract section 50(1) of the Duties Act 1997 and the taxpayer was not entitled to a refund.

Submissions in the High Court

65.Oral submissions, including those to the following effect, were made for ALH, the appellant :

66. ALH's principal contention is that the Deed of Consent and Assignment rescinded the 2003 contract and created a new contract for sale at the same price between Oakland (as vendor) and ALH (as the substituted purchaser). ALH contends, therefore that the Deed effected a novation of the 2003 contract.

67. The principal point of departure of the Court of Appeal from the Primary Judge's reasoning occur at [18] where the Court of Appeal found that the 2003 contract was not 'in terms' rescinded by the Deed and that the 'vendor did not undertake any new or express obligation to transfer the land to ALH on payment of the balance of the purchase money'. The findings were made in error.

68. Another point of difference between the Primary Judge and the Court of Appeal is the finding at [26] that in view of the principles which inform the doctrine of novation analysed by the Court of Appeal at [21]-[25] the fact that ALH assumed all the obligations of the purchaser under the 2003 contract and the vendor released the purchaser from all liability , did not prevent the Deed from operating as an assignment of the benefit of the 2003 contract. That finding was also made in error.

69. The source of each error of the Court of Appeal identified by ALH can be traced back to its abject refusal to recognise an implied rescission of the 2003 contract.

70. Oral submissions, including those to the following effect, were made for the Chief Commissioner of State Revenue, the respondent :

71. The respondent will advance orally eleven propositions.

72.First, it appears to be agreed, between the parties to this appeal, Trust Company could assign the benefit of the 2003 contract but not the obligations[6].

73.Second, it appears to be agreed, between the parties to this appeal, the resolution of the appeal turns on the construction of the Deed of Consent and Assignment[7].

74.Third, it appears to be agreed, between the parties to this appeal, that :

(i) if the Deed of Consent and Assignment effected a transfer of the benefit of the 2003 contract then the appeal should be dismissed[8];
(ii) if the Deed of Consent and Assignment effected a novation of the 2003 contract then the appeal should be upheld[9].

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[6] This is one of the critical steps in the judgment of the New South Wales Court of Appeal [NSWCA]. See High Court of Australia Appeal Book [AB] at 181 - Handley AJA at [20].
[7] AB at 27 – Handley AJA at [14].
[8] AB at 194 – Handley AJA at [10] and [86]
[9] AB at 25 – Handley AJA at [10].

75.Fourth, the construction of the Deed of Consent and Assignment is to be determined in accordance with the principles of contractual construction set out by this Court in Byrnes v Kendle [2011] HCA 26 at [98] and Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 25 at [40], in essence, 'the intention which the parties expressed not the subjective intention which they may have had but did not express'[10].

76.Fifth, in that regard the respondent will refer the Court to the respondent's submissions at [12] to [19] which identify and analyse more than a dozen express provisions in the Deed of Consent and Assignment which demonstrate an intention to assign and not to novate.

77.Sixth, among those matters one of the most important is that the 2003 contract was and remained (until expressly terminated by the Deed of Termination dated 24 October 2008) the only source of the vendor's obligation to convey the hotel at settlement. That is, the Deed of Consent and Assignment left intact the vendor's obligation under the 2003 contract to convey the hotel. The respondent will refer the Court to the respondent's submissions, at [15] which deal with each provision in the Deed of Consent and Assignment, to demonstrate that the 2003 contract was the only source of the vendor's obligation to convey the hotel at settlement.

78. Seventh, in that regard, another important matter is that by clause 3.1 of the Deed of Consent and Assignment, the benefit of the deposit (Trust Company's right in respect of the deposit) was transferred to ALH. In other words, the 2003 contract deposit was not repaid and was not intended by the Deed to be repaid.

79.Eighth, it appears to be agreed, between the parties to this appeal, that in order for there to be a novation of the 2003 contract, the 2003 contract must have been rescinded by the

[10] Byrnes v Kendle [2011] HCA 26 at [98].

Deed of Consent and Assignment[11]. The appellant has submitted[12] the 2003 contract was rescinded 'once Trust Company was released from it' by the Deed of Consent and Assignment dated 27 June 2008. The respondent disagrees and will refer the Court to the reasons set out at [20] to [28] of the respondent's submissions. The respondent's approach and conclusion is supported by paragraphs 3 and 9 of the Agreed Statement of Facts [AB 148][13] that the Deed of Termination dated 24 October 2008 terminated the 5 November 2003 contract. In other words, and importantly for present purposes, the 5 November 2003 contract was not terminated or rescinded by the Deed of Consent and Assignment.

80.Ninth, the appellant's reliance on the judgment in Weldwood-Westply Ltd v Cundy (1965) 50 DLR (2d) 744 and the concept of extinguishment of part of the rights under an original contract, provides no answer to the situation where, as here, no part of the 2003 contract was rescinded.

81.Tenth, the judgment in Orica Ltd v Federal Commissioner of Taxation [2010] FCA 197 does not assist the present appellant because in that case the benefit of the existing contract was not assigned to the subsidiary. Accordingly, Orica is not authority for the proposition that an agreement such as the Deed of Consent and Assignment must take effect as a novation.

82.Eleventh, the appellant's submission to the effect that a new hybrid 'doctrine' has been created by the New South Wales Court of Appeal, ought be rejected, for the reasons set out in the respondent's submissions at [36] to [49]. In essence, the word 'novation' , did not adequately describe the character of the Deed of Consent and Assignment.

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[11] Appellant's Submissions [3].
[12] Appellant's Submissions [24].
[13] The appellant's chronology filed 25 January 2012 is to the same effect.

Judgment of the High Court

12. A novation, in its simplest sense, refers to a circumstance where a new contract takes the place of the old[4]…. The enquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged.

Para 12 is important because the last sentence sets out the relevant enquiry.

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

Para 13 applies the relevant enquiry to the facts of the case.

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

Para 22, sets out as we have seen before, the view taken by Gzell J that the intention of the parties to the Deed of Consent was that ALH take the benefits and the burdens of the 2003 contract and that accordingly the Deed of Consent had the effect of extinguishing the 2003 contract.

23. The Court of Appeal allowed the Chief Commissioner's appeal from the judgment of Gzell J, with costs. The critical factors in the reasoning of Handley AJA, with whom Allsop P and Tobias JA agreed, against a conclusion that a new agreement arose between Oakland and ALH under the Deed of Consent, were that the 2003 contract "was not, in terms, rescinded" and that Oakland did not, by the Deed of Consent, undertake any new or

> express obligation to transfer the property to ALH on payment of the balance of the purchase price. The only source of Oakland's obligation to convey remained the 2003 contract**[8]**.

Para 23 records, as we have see above, the view of the NSWCA that what was critical was the in the Deed of Consent the 2003 contract was not in terms rescinded and remained the only source of the vendor's obligation to convey the property.

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

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

Para 26 is important because the High Court has now expressed apparent approval of the observations of Windeyer J in what was a dissenting judgment, albeit dissenting as to the legal conclusion.

> 27. Handley AJA was also correct to identify the rescission of the existing 2003 contract as essential to its novation. "Novation" is a term derived from the civil law, Lord Selborne LC observed in *Scarf v Jardine***[13]**, and therefore from Roman law. The term is applied to two classes of case: where the parties to a contract make a new contract, with new obligations, impliedly rescinding an existing contract**[14]**; and, more commonly, to tripartite agreements, where "the obligation of a third person is by express agreement accepted by one party to an existing contract with the consent of such third person and of the other party to the contract, in lieu of the obligation of such other party, who, by the new contract, is released from his obligation under the original contract"**[15]**.

Para 27 first sentence is important because the 'rescission' element of the novation appeared to be given little weight by Gzell J and seemed to

be treated by Gzell J as following inevitably from a finding that there was an intention to create a new contract.

> 30. Handley AJA directed attention to the absence of an express term in the Deed of Consent effecting rescission of the 2003 contract. The logic of his Honour's reasons linked that absence to the continuance of Oakland's obligation as vendor, under the 2003 contract, to convey the property to Trust**[19]**.
>
> 31. A problem for early Roman law, Windeyer J explained in *Olsson v Dyson***[20]**, was whether extinguishment of an existing obligation could be implied. Justinian, his Honour noted, met the difficulty by providing that a stipulation could not operate as a novation unless the parties, in making the new contract, expressly declared that they extinguished the prior obligation. However, as his Honour observed, the common law allows a tacit agreement to extinguish the obligations under the existing contract. So much also appears from the following statement of Dixon J in *Vickery v Woods***[21]**:
>
> "Rescission and novation ultimately depend on intention, and here none existed in fact and nothing was done from which such an intention must necessarily be implied."**[22]**

Para 31 is important because it states clearly that a novation can arise from an implied extinguishment of the prior contract. Up until now, the status of such a proposition was somewhat shaky in that it relied on the dissenting judgment of Windeyer J in Olsson and on the observation of Dixon J in Vickery v Woods which seems to be no more than a finding of fact.

> 32. Intention may be inferred from conduct, as is sometimes the case where dissolutions of partnership are concerned**[23]**. It will not be necessary to resort to conduct in this case. An intention on the part of Oakland, Trust and ALH to release and discharge the obligations of both Oakland and Trust under the 2003 contract and thereby effect a rescission of it is apparent from the terms of the Deed of Consent.
>
> 33. As Handley AJA observed, by the terms of the Deed of Consent, ALH promised that it would undertake Trust's obligations as purchaser under the 2003 contract. The promise was directed to both Trust and Oakland, and Oakland may be taken to have agreed to ALH's so promising.
>
> 34. The release and discharge given by Oakland to Trust under cl 6 amounted to a renunciation of Oakland's right to call upon Trust for performance as purchaser under the 2003 contract or to sue Trust for specific performance of that contract or for damages for its breach. There can be no doubt that it was intended that all of Trust's obligations under the 2003 contract be discharged. Moreover, Trust was permitted, pursuant to the Deed of Consent, not only to extricate itself from further obligations under the 2003

contract, but also to be restored to its pre-contractual position, by the repayment of monies advanced by it to Oakland and the reimbursement of deposit monies by ALH.

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

Paras 34 and 35 : minds will differ as to whether this reasoning is superior to that of the NSWCA. The provisions in the Deed of Consent did not provide expressly for such an outcome. That may well be why the High Court did not set out any specific provisions but simply stated that the Deed 'provided' the answer.

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

Para 37 : 'it may be taken as having been intended' seems a little weak given that the alternative view taken by the NSWCA was to the effect that the 2003 contract remained on foot and that was why no fresh deposit was paid.

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

Para 38 : adopts the approach of Gzell J to the effect that on the proper construction of the Deed of Consent there was an implied rescission of the 2003 contract. And that in such circumstances there was a novation.

Conclusion and orders

39. A new agreement came into existence between Oakland and ALH upon the execution of the Deed of Consent. That agreement was for the sale and transfer of the property the subject of the 2003 contract on the terms and conditions therein contained. The agreement so made was cancelled by the Deed of Termination. Section 50(2) of the *Duties Act* applies. The Commissioner is liable to refund the duty paid to it by ALH.
40. The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside, and in lieu thereof it should be ordered that the appeal to that Court be dismissed with costs.

41. HAYNE J. I agree with French CJ, Crennan, Kiefel and Bell JJ that the appeal to this Court should be allowed and consequential orders made in the form proposed. I agree generally with their Honours' reasons.
42. The determinative question in the appeal is whether a Deed of Consent and Assignment ("the Deed") between Oakland Glen Pty Ltd ("Oakland"), Trust Company Fiduciary Services Limited ("Trust") (formerly called Permanent Trustee Company Limited) and the appellant, ALH Group Property Holdings Pty Limited ("ALH"), was "an agreement for the sale or transfer of dutiable property" within the meaning of s 8(1)(b)(i) of the *Duties Act* 1997 (NSW). If it was an agreement of that kind, because the Deed was later cancelled, s 50 of the *Duties Act* was engaged and no duty was payable on the Deed.
43. Oakland had previously agreed, by a contract made in 2003 ("the 2003 contract") to sell to Trust the land which later became the subject of the Deed. The 2003 contract was never completed. Oakland, Trust and ALH made the Deed on 27 June 2008.
44. The Court of Appeal of the Supreme Court of New South Wales held**[27]** that the Deed was not an agreement for the sale or transfer of dutiable property because it was not a new contract for the sale of the relevant land by Oakland to ALH. The Court of Appeal concluded that the Deed was a "hybrid tripartite contract"**[28]**, not "a mere novation which would have rescinded the original contract [the 2003 contract] and replaced it with a new one"**[29]**.
45. The hinge about which the reasoning of the Court of Appeal turned in this respect was the proposition**[30]** that "[t]he Deed was a tripartite contract which did not impose on the vendor [Oakland] any new or direct obligation to transfer the [land] to [ALH] on receipt of the balance of the purchase price". Rather, it was said**[31]** that "the 2003 contract was not rescinded, and was the *only* source of the vendor's obligation to convey the [land] on receipt of the balance of the purchase price" (emphasis added).
46. It is no doubt right to observe that the 2003 contract was not expressly rescinded by the Deed. It does not follow, however, that "the only source" of Oakland's obligation to convey the land was the 2003 contract.

Para 46 : the 2003 contract not being expressly rescinded is a stand alone point in the approach of the NSWCA. To say, as para 46 does that 'it does not follow' says nothing as to the 'expressly rescinded' point.

> 47. … Second, and of determinative importance in the present matter, the effect of the provisions made by the Deed was to discharge the 2003 contract. By the Deed, Trust assigned its rights under the 2003 contract to ALH and Oakland consented to that assignment. But the provisions of the Deed went further. Oakland (and for that matter ALH) expressly released and discharged Trust from liability under the 2003 contract. And by the Deed, ALH promised Oakland that it would perform the obligations that Trust had had, as purchaser, under the 2003 contract.

Para 47 : to say 'the effect of the provisions made by the Deed was to discharge the 2003 contract' is to state a conclusion rather than to provide a process of reasoning. The NSWCA has, with respect a preferable reasoning process ie there was no express term rescinding the 2003 contract and so we accept the parties did not intend to rescind the 2003 contract.

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

Para 48 : phrases such as 'because of the way in which the Deed was drafted' do not add anything further to the reasoning process set out in para 47.

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

The importance of the judgment is found in paras 26, 27 and 31 for the reasons I have identified.

C.J. LEGGAT S.C.

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