DISTRICT COURT OF QUEENSLAND

CITATION:	*McEwans Australia Pty Ltd v Brisbane City Council* [2016] QDC 347
PARTIES:	**McEWANS AUSTRALIA PTY LTD** **(applicant)** **v** **BRISBANE CITY COUNCIL** **(respondent)**
FILE NO/S:	BD2470/2016
DIVISION:	
PROCEEDING:	Hearing
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2016
JUDGE:	McGill SC DCJ
ORDER:	**Application dismissed with costs.**
CATCHWORDS:	CONTRACT – Interpretation – indemnity in respect of GST on supply of land under the Margin Scheme – whether "GST" extends to increasing adjustment for input credit on acquisition of part of land supplied. *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ss 7-1, 7-5, 17-5, 17-10, 33-5, 75-5. 75-10, 75-22, 195-1. *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 – applied. *Brady King Pty Ltd v Commissioner of Taxation* [2008] FCAFC 118 – cited. *Commissioner of Taxation v MBI Properties Pty Ltd* (2014) 254 CLR 376 – cited. *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 – applied. *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 – applied. *Sterling Guardian Pty Ltd v Commissioner of Taxation* (2006) 149 FCR 255 – applied. *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2012] FCAFC 112 – cited. *Watson v Scott* [2015] QCA 267 – applied.

COUNSEL:	DW Marks QC and RJ Gordon for the applicant
	RM Derrington QC for the respondent
SOLICITORS:	Warlow Scott Lawyers for the applicant
	Minter Ellison for the respondent

[1] On 27 August 2009 the applicant and the respondent entered into an agreement in writing dealing with arrangements between them in relation to a financial contribution and land contribution, referred to as an "infrastructure agreement", in connection with a development approval granted by the respondent on 2 June 2009 for the subdivision of certain land owned by the applicant. A further agreement, which amended that agreement, was entered into by the parties on 9 January 2012, which set out the relevant amendments and the terms of the agreement as amended, referred to as the "amended infrastructure agreement". The applicant claims that, under certain provisions of the amended infrastructure agreement, an amount became payable to it by the respondent. The respondent admits that an amount was payable, and has paid that amount, but the applicant alleges that the respondent's liability is for a larger amount, and has brought this proceeding to recover the difference, and damages.

[2] The proceeding was commenced by an originating application, subsequently amended, and on 3 August 2016 I ordered by consent that pleadings be filed and served. On 23 September 2016 I ordered that evidence in chief be by way of affidavit, and affidavits have been filed by the applicant pursuant to that order, and were read on the hearing. No affidavit was read on behalf of the respondent, and no witness was required for cross-examination. Ultimately the matter resolved into a dispute about the correct interpretation of the amended infrastructure agreement.

Background

[3] The applicant is a property developer which about 10 years ago became interested in developing land at Upper Kedron.[1] This involved the subdivision of two particular parcels of land, Lot 2 on registered plan 805394 (the Levitt Road land) and Lot 2 on registered plan 20593 (the Ross Road land).[2] An application was made to the respondent for approval to subdivide this land on 22 May 2006, with the consent of the then owners.[3] On 22 December 2007 the applicant entered into a contract to purchase the Levitt Road land for a purchase price of $3,300,000 plus GST.[4] That contract provided expressly in Clause 12.1(b) of Annexure A that:

> "The margin scheme under *A New Tax System (Goods and Services Tax) Act*[5] is to be applied by the seller for the purposes of calculating the GST payable on the supply of the property to the buyer."

The contract settled on 25 March 2008, and the applicant was registered as proprietor of an estate in fee simple in the land on 1 April 2008.[6]

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1 Affidavit of Neate filed 2 June 2016 ("first Neate affidavit"), para 2.
2 Affidavit of Neate filed 11 November 2016 ("second Neate affidavit") Exhibits DWN-6 and 7.
3 First Neate affidavit, para 4.
4 Ibid, Exhibit DWN-2.
5 Referred to below as "the GST Act".
6 Statement of claim, para 8, 9; defence para 8, 9; second Neate affidavit Exhibit DWN-6

[4] On 24 January 2008, the applicant entered into a contract to purchase the Ross Road land for a purchase price of $3,550,000, on the basis that, if the seller became liable for GST on the sale, the purchase price would increase by the amount of GST, and the applicant could at its election apply the margin scheme.[7] In the event, the vendor under that contract did become liable for GST, but the applicant did not elect to apply the margin scheme to that purchase, so the purchase price under that contract increased by $355,000. The contract settled on 22 July 2008, and the applicant was registered as proprietor of an estate in fee simple in the land on 2 September 2008.[8]

[5] In its September 2008 business activity statement, the applicant claimed an input tax credit for the GST which it paid on the acquisition of the Ross Road land.[9] Because of the application of the margin scheme to the acquisition of the Levitt Road Land, no input tax credit was claimed by the applicant in respect of the acquisition of that land. Development approval was granted on 2 June 2009, subject to conditions.[10]

[6] It is usual for approvals of subdivisions to require, relevantly, a financial contribution to be provided by the developer to the local authority for infrastructure, generally outside the subdivided land, to be used by the future residents on the subdivided land in common with the broader local community. Sometimes however, the local authority's plans for the area being subdivided make it more convenient for some of the land being subdivided to be acquired by the local authority for use as community infrastructure. When that happens, the parties agree on the value of the land to be acquired, and that value is deducted from the financial contribution otherwise required as a condition of the approval of the subdivision. In some cases, such as the present, where the amount of land being acquired is substantial, the value of the land is in excess of the amount required by way of financial contribution, and in that situation a balance is payable by the local authority to the developer.

[7] These were the matters agreed between the parties in the amended infrastructure agreement, which provided for the respondent to acquire a parcel of land with an area of over 8 ha for use as a sports park.[11] This consisted of part of the Levitt Road land and part of the Ross Road land. One of the things agreed in the amended infrastructure agreement was that this land was valued at $7,370,402.29.[12] The agreement provided that the respondent would pay to the applicant this amount less the community purposes infrastructure contribution applicable to the subdivision, calculated by reference to the value of an infrastructure contribution unit applying at the date of payment.[13] It is agreed that this was $1.63, and the amount to be deducted for the infrastructure contribution in respect of the subdivision was $300,917.56.[14] This left a balance payable, in accordance with Clause 6.4(a), of $7,003,024.41.[15]

Amended infrastructure agreement

[8] The relevant provisions of the amended infrastructure agreement were as follows:

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7 First Neate affidavit Exhibit DWN-3, Annexure A, Clauses 16, 16.5.
8 Second Neate affidavit Exhibit DWN-6.
9 Statement of claim, para 12; defence para 12(a); second Neate affidavit para 10; Exhibit DWN-10.
10 First Neate affidavit Exhibit DWN-4.
11 First Neate affidavit Exhibit DWN-5.
12 Ibid, Clause 6.1(b), a curiously precise figure.
13 At any time, this is a standard amount for a local authority.
14 First Neate affidavit, para 13.
15 Ibid, para 16. Clause 6.1(b)(i) provided for the agreed value of the land to be reduced in certain circumstances, which did not in fact arise, so this part of the agreement can be ignored.

4.3 Payment of GST

If GST is payable on any supply made by a party (or any entity through which that party acts) (Supplier) under or in connection with this document, the recipient will pay to the Supplier an amount equal to the GST payable on the supply.

4.6 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this document, the amount payable by the recipient under clause 4.3 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.

5.1 Financial Contributions

(a) The Applicant must pay Infrastructure Contributions for the community purposes network identified in an applicable Infrastructure Planning Instrument which at the Commencement Date is the Infill Community Purposes Infrastructure Contributions Planning Scheme Policy (Financial Contribution).

5.2 Land Contributions

(a) The Applicant must make a Land Contribution for community purposes that is the provision to the Council of part of the Land identified in the Ferny Grove/Upper Kedron Local Plan applicable at the Commencement Date as District Sports Park.

6.1 Application of an Infrastructure Offset

(a) The Council has identified that an Infrastructure Offset is to apply to the Land Contribution.

(b) The Council has determined that the monetary value of the Infrastructure Offset will be $7,370,402.29 reduced by the following:

(i) The value of any part of the Land Contribution provided by the Council or any person other than the Applicant or Owner;

(ii) The parties agree that GST shall not apply to the Infrastructure Offset nor any amount payable for the provision of the proposed Lot 90 under the Conditions of Approval, however, if for any reason Commissioner for Taxation does not accept that the Infrastructure Offset and any amount payable for the provision of the proposed Lot 90 under the Conditions of Approval is a GST free payment of infrastructure charges, the Council, the Applicant and the Owner agree in accordance with Division 75-5 of the GST Law, that the Margin Scheme shall apply to the provision of proposed Lot 90 under the Conditions of Approval. **Despite any other term, the Council shall pay, in addition to the Agreed Balance an amount equal to the GST that the Applicant will have to pay on account of GST associated with the receipt of the Agreed Balance.** (*emphasis added*)

6.2 Set off against a Financial Contribution

> (a) The Council agrees to set off the Infrastructure Offset against the Applicant's liability to provide to the Council a Financial Contribution which is for:
> (i) the community purposes infrastructure network; and
> (ii) required under Stage 1A. 1B and 1C of the Conditions of Approval.
> (b) The set off specified in clause 6.2(a)(ii) above shall be at the option of the Applicant.
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> 6.4 Payment of Agreed Balance
> (a) The Council agrees to pay the Agreed Balance according to the following -
> Agreed Balance = Infrastructure Offset - (184,612ICU's x ICU Value)
> Where the -
> Infrastructure Offset is $7,370,402.29 reduced in accordance with clause 6.1(b)
> ICU Value is the value of an ICU as determined by the Council as applying at the date of payment.
> 184,612 ICU's is the community purposes infrastructure contribution applicable to Stage 1A, 1B and 1C of the Conditions of Approval.

[9] Some of these provisions are worded in a way which suggests that the contract was based on a draft agreement which assumed that the value of the land contribution would be less than the value of the financial contribution. That however is not the case with this subdivision. There is also a curious feature that, although subparagraph 6.1(b)(i) follows logically from the introductory words of para (b), subparagraph (ii) does not, and probably should have been made para 6.1(c). The reference in this clause to "be proposed Lot 90" was a reference to the land to be transferred to the respondent for a sports park.

[10] The effect of the introductory words of subparagraph (ii), which was not controversial, was that the parties agreed that GST would not be payable by the applicant in respect of the transfer to the respondent of the land for the sports park. Parties to a transaction cannot however contract out of any liability that actually exists under the GST Act, and the clause went on to contemplate the possibility that the Commission of Taxation might take the view that this was a taxable supply for the purpose of that legislation, and provided what was to happen if that occurred. First, the margin scheme was to apply to that supply, and then the final sentence of the clause was to operate. Just what effect it had was the principal matter in dispute before me. Before turning to that question however I should say something about the margin scheme provided for under the GST Act.

The margin scheme

[11] The legislative provisions governing the margin scheme are in division 75 of the GST Act. Fortunately for me, the basic operation of these provisions has been the subject of authoritative exposition. In *Sterling Guardian Pty Ltd v Commissioner of Taxation* (2006) 149 FCR 255, the Full Federal Court, after briefly outlining the basic scheme of the GST Act said at [16]:

> "However, the drafters of the Act recognised that this system might operate unfairly on some forms of business activity. Thus special rules were provided in Chapter 4 of the Act. The special rule with which

> the present case is concerned was directed towards developers. Very commonly developers acquire land from private owners. Those owners are not liable for GST on the supply of land to the developer because the supply is not made in the course of furtherance of an enterprise and the owners are not registered or required to be registered under the Act. Because the owners are not liable for GST on their supply, application of the general scheme of the Act would mean that the developer, as acquirer, would not be entitled to any input tax credit on the acquisition of the land. The developer would have to pay GST on the whole value of the developed property that it supplied to the ultimate purchasers. (In the present case no input tax credits would have been available for another reason: the supply was before 1 July 2000.) Hence Division 75 provided an optional basis for taxpayers supplying real estate of a kind referred to in s 75-5(1)(a),(b) or (c). They can elect to pay GST on the "margin" as defined in s 75-10(2). Of course the margin scheme would not be appropriate for all land transactions. If A sells his factory to B, A would be liable to GST on the value of that supply and B would be entitled to an input tax credit."

[12] That explanation was endorsed by the Full Federal Court in *Brady King Pty Ltd v Commissioner of Taxation* [2008] FCAFC 118, and in the joint judgement in *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2012] FCAFC 112. As noted in that case by Dowsett J, the margin scheme changed as a result of the *Tax Laws Amendment (2005 Measures No. 2) Act 2005*, particularly in that prior to the amendment the supplier had a choice whether to apply the margin scheme, whereas under the amended Act the application of the scheme had to be agreed between the supplier and the recipient. The majority judges at [212] said:

> "From 29 June 2005, the taxpayer's choice, as the event under the *GST Act* engaging the application of the margin scheme, was removed in favour of the application of the margin scheme by operation of s 75-5(1) if the supplier and the recipient had agreed in writing that the margin scheme is to apply."

[13] The explanation for this change may be found in the more recent decision of the Full Federal Court in *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [94]:

> "The *Explanatory Memorandum* ("EM") for the *Tax Laws Amendment (2005 Measures No. 2) Bill* 2005 (Cth), before the House of Representatives, circulated by the Treasurer, explains that one of the vices of the unilateral choice available to a supplier under s 75-5 as it stood prior to 29 June 2005 (and prior to 17 March 2005 as applied by s 28 of Schedule 6 of the Amending Act No. 78/2005), was that purchasers of real property under the margin scheme were not necessarily aware whether the margin scheme had been applied by the supplier and whether they were able to claim input tax credits on their acquisition. Plainly enough, purchasers had an interest in knowing whether, at the date of acquisition by them (at least by completion or settlement), being the date of taxable supply by the supplier, the margin scheme had been applied as that question determined whether input tax credits were then available to the purchasers. Buyers of real property under the margin scheme are not entitled to claim input tax

> credits for GST remitted by the supplier. These considerations are reflected at EM, paras 6.4, 6.7 and the Comparative Table at p 40."

[14] This is consistent with the fact that under s 75-20 of the GST Act, input tax credits cannot be claimed in respect of the acquisition of land where the margin scheme applies to that acquisition. It had been said that as a result the margin scheme may not be attractive to a registered purchaser.[16] As might be expected in the light of its origin, one of the requirements for being able to apply the margin scheme is that the land which is being sold under it was not acquired through a supply which was a taxable supply on which GST was worked out without applying the margin scheme: the GST Act s 75.5(2), (3)(a). So if land was acquired in circumstances where GST was paid by the original vendor, the purchaser cannot then apply the margin scheme when the land is resold.

[15] The position however is more complicated when the land being sold was acquired under more than one transaction, if the GST position was different, as was the case here. The relevant section then is s 75-22(1) which provides:

> "You have an increasing adjustment if:
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> (a) You make a taxable supply of real property under the margin scheme; and
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> (b) An acquisition that you made of part of the interest, unit or lease in question was made through a supply that was ineligible for the margin scheme; and
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> (c) You were, or are, entitled to an input tax credit for the acquisition.
>
> The amount of the increasing adjustment is an amount equal to the previously attributed input tax credit amount for the acquisition."

[16] The practical effect of this is that, if the supplier claimed an input tax credit in respect of the acquisition of part of the land, and the land was then sold under the margin scheme, the input tax credit which (at least notionally) the supplier obtained from the Commissioner of Taxation on acquiring the land has to be repaid. That is what happened in this case.

The audit and assessment

[17] Between July 2013 and November 2014 the Australian Taxation Office conducted an audit of the applicant.[17] As a result of that audit, the Commissioner of Taxation did not accept that the transfer of the sports park to the respondent was a GST free payment of infrastructure charges, and assessed GST payable on that transfer, on the basis that the margin scheme applied.[18] The GST so assessed was $250,881.[19]

[18] In addition, because part of the land (part of the Ross Road land) had been obtained by a transaction in respect of which an input tax credit had been obtained, there was an increasing adjustment in accordance with s 75-22 of the GST Act, in an amount of $161,116.[20] The Commissioner of Taxation also imposed on the applicant a general interest charge in respect of the amount by which the June 2013 activity statement

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16 Woellner et al., Australian Taxation Law, 25th Edition, 2015, p 1,563.
17 Affidavit of Luttrell filed 1 June 2016, paras 4-7.
18 Ibid, Exhibit DL-1.
19 Ibid, p 5.
20 Ibid, p 6.

understated the amount payable, $411,997, in effect to deprive the applicant of the benefit of the use of that money since the time when it should have been paid as tax.

[19] On 12 February 2015 the applicant sent the respondent a tax invoice which referred to $411,997 as the GST payable in respect of the transfer of the sports park, but also claimed an amount of $63,720 as "Interest charges".[21] The respondent sought particulars of how the amounts claimed had been arrived at, and in response the applicant sent another tax invoice on 18 March 2015.[22] Particulars of the amount claimed were provided in an email on 30 March 2015,[23] but no proper tax invoice was provided. Nevertheless, in April 2016 the respondent paid the applicant $250,881.[24]

Applicant's submissions

[20] The applicant relied on Clause 6.1(b)(ii) as imposing a separate obligation on the respondent to pay the disputed amount, apart from the provisions in Clause 4 of the agreement, dealing with GST generally. The applicant's submission was that the increasing adjustment was, or was part of, "GST associated with the receipt of the agreed balance" for the purpose of Clause 6.1(b)(ii). Counsel for the applicant sought to divide this into two questions, whether the increasing adjustment was "GST" for the purpose of the clause, and whether, if it was, it was "associated with the receipt of the agreed balance."

[21] It was submitted that the effect of the GST Act was that an entity was liable to pay GST on the taxable supply, and was entitled to an input tax credit on any creditable acquisition, so that for each tax period there will be a net amount payable as a result of setting off these two amounts, which may then be subject to further adjustment to produce the amount which must be paid to the Commonwealth, or paid by the Commonwealth to the entity.[25] The tax levied under the Act is the net amount as adjusted, and accordingly the presence of an increasing adjustment affects the amount payable under the GST Act in the same way as the making of a taxable supply. By s 195-1 of the GST Act, "GST" is defined as the tax that is payable under the GST Act and imposed by the relevant imposition Acts. Clause 4.1(a) of the amended infrastructure agreement provides that words with a defined meaning in GST law have that same meaning, but, at least expressly, only for the purpose of Clause 4.

[22] In the present case, the consequence of the application of the margin scheme to the supply of the land transferred to the respondent was that the increasing adjustment became payable under Clause 75-22, and in this way, the imposition on the applicant of the increasing adjustment came to be associated with, and indeed flowed directly from, the supply of the land under the margin scheme. I was taken through the basic provisions of the GST Act, which supported this outline of the operation of the system. Section 195-1 of the GST Act defines "GST" as meaning "tax that is payable under the GST law and imposed as goods and services tax" by any of a list of statutes,

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21 Ibid, Exhibit DL-2.

22 Ibid Exhibit DL-3. This document was just wrong, on any view of the matter.

23 Ibid Exhibit DL-5.

24 Affidavit of Jenkinson filed 1 June 2016 paras 9 – 13. There was some delay in presenting the cheque because it was initially tendered subject to a condition.

25 *Commissioner of Taxation v MBI Properties Pty Ltd* (2014) 254 CLR 376 at 382.

each of which is an imposition Act.[26] The term "GST law" is itself defined as meaning the GST Act and various related Acts, including the imposition Acts and the *Taxation Administration Act* 1953, so far as it relates to one of the other Acts.

[23] Section 7-1 provides that GST is payable on taxable supplies and taxable importations, whereas entitlements to input tax credits arise on creditable acquisitions and creditable importations. Section 7-5 provides that these amounts are set off against each other to produce a net amount for a tax period, which may be altered to take account of adjustments. The provisions of s 7-5 are expanded slightly in s 17-5, but still provide the net amount may be increased or decreased for adjustments for the tax period. How this is done is specified in s 17-10: relevantly by adding to the net amount calculated without adjustments the sum of all increasing adjustments attributable to the period, and subtracting the sum of all decreasing adjustments attributable to the period. What has to be paid for a tax period under the GST Act is identified in s 33-5(1) as the net amount, if it is greater than zero.

[24] Hence the amount payable under the GST Act is the net amount, derived after taking into account by way of addition any relevant increasing adjustment. If, therefore, the term "GST" where it is used in s 6.1(b)(ii) carries the same meaning as that term in the GST Act, it follows that it is an amount which is calculated in a way which includes any increasing adjustment which is payable under the GST Act. Although the term "GST" is defined as having the meaning given to it by the GST Act expressly only for the purposes of Clause 4, there is no reason to depart from that meaning where the same term is used in this Clause, particularly in circumstances where there is no express provision identifying any other particular meaning for use in this section.

[25] The second question is whether this is associated with the receipt of the agreed balance. The applicant referred to dictionary definitions of the word "associated", as "to connect by some relation… anything usually accompanying or associated with another"[27] or "in classification (with); occurring in combination."[28] The term "associated" is not defined in the amended infrastructure agreement. It was submitted that in the present circumstances, the increasing adjustment came about under s 75-22 of the GST Act automatically, from the transfer of the land and the application of the margin scheme. Accordingly, the increasing adjustment imposed under that section was associated with the receipt of the agreed balance, because it flowed automatically from the applications of the margin scheme to the transaction by which the land was transferred under the agreement in return for the payment by the respondent of the agreed balance.

Respondent's submissions

[26] It was submitted for the respondent that the incorporation of the definitions from the GST law only applied to Clause 4, and that in Clause 6.1 the expression "GST" had its ordinary meaning, which did not include an amount payable by way of an increasing adjustment. Further, it was submitted that this was not GST which was "associated with the receipt of the agreed balance", since the increasing adjustment was not something associated with the receipt of the agreed balance, but something

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26 No doubt formulated in this way because of the practice, for constitutional reasons, of having separate legislation dealing with the imposition of a Commonwealth tax and the process of working out the basis upon which tax so imposed is to be applied, and how it is to be calculated.

27 Macquarie Dictionary.

28 Oxford Dictionary.

associated with the amount paid on the purchase of the land by the applicant. It was submitted that the only amount associated with the receipt of the agreed balance was the additional GST payable on the transfer of the sports park land, which the respondent had paid.

[27] It was further submitted that, in circumstances where the relevant agreement was between the parties, it would not be expected that one party would be accepting responsibility for an amount payable in relation to a different transaction, between one of the parties and the supplier to that party. This provision in Clause 6.1(b)(ii) was a specific provision to deal with a particular situation, namely any GST payable by the applicant on the transaction between the parties, and provided that the burden of that would fall on the respondent, but mitigated by the application of the margin scheme. In this context, the indemnity clause relates to the transfer to the respondent of the sports park land and nothing else.

[28] The wording of the clause also defines the liability of the respondent, by reference to the "GST that the applicant will have to pay on account of GST associated with the receipt of the agreed balance" and that refers specifically only to an amount of GST the plaintiff is required to pay. It did not extend to capture an amount payable at a repayment of a deduction previously obtained. It was further submitted that as a contract of indemnity, any doubt or ambiguity in the interpretation of the clause should be resolved in favour of the indemnifier, namely the respondent.[29] This approach is inconsistent with the application of an expanded meaning of the term "GST" which goes beyond its ordinary or popular meaning.

Consideration

[29] There is a useful summary of the rules applicable to the interpretation of a commercial contract in the judgment of McMurdo P in *Watson v Scott* [2015] QCA 267 at [30]. The paragraph is too long conveniently to quote, and I believe it is unnecessary to do so; I respectfully accept it as a correct statement of the law, and am seeking to apply it in the interpretation of the amended infrastructure agreement. The only additional thing that I would say is that, to the cases cited by her Honour, there may be added what was said by three Justices of the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46] – [52]. I do not apprehend that what was said in this High Court judgment is inconsistent with anything said by her Honour.

[30] I am not confident that breaking up the relevant phrase as occurred in the applicant's analysis is a useful way of determining the correct interpretation of the phrase. It is necessary to determine the correct interpretation of the relevant sentence in Clause 6.1(b)(ii) and that I think is best achieved by looking at the contentious expression in the context of the sentence as a whole, and in the context of the agreement as a whole. The clause provides that, in the circumstances that have occurred, the margin scheme shall apply and the respondent shall pay the "amount equal to the GST that the applicant will have to pay on account of GST associated with the receipt of the agreed balance". Section 75-10 of the GST Act provides as follows:

1. If a taxable supply of real property is under the margin scheme, the amount of GST on the supply is 1/11th of the margin for the supply.

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29 *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at [17] – [23].

2. Subject to subsection (3) and s 75-11, the margin for the supply is the amount by which the consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question.

[31] Subsection (3) deals with certain situations where the margin is calculated not by reference to the consideration for the acquisition of the interest, unit or lease, but an approved valuation of that interest unit or lease. None of those situations applied here. Section 71-11 sets out a list of circumstances where the application of margin scheme is modified or excluded, none of which applies in the present case. Hence in this case the amount of the GST under the margin scheme was 1/11th of the agreed balance minus the consideration for the acquisition by the applicant of the land in question.[30] The amount of GST calculated in accordance with s 75-10 was therefore directly referable to the amount of the agreed balance, though that was subject to a deduction as provided by the section.

[32] By way of contrast, the increasing adjustment under s 75-22 was not calculated in any way by reference to the agreed balance, but based on the input tax credit for the acquisition of the interest which was part of the interest unit or lease which was supplied under the margin scheme. I consider that the applicant's argument would have had more force if the relevant provision had required the Council to pay the GST associated with the land contribution, or associated with the provision to the Council of the land which constituted the infrastructure offset, or simply, to follow the words of Clause 4.3, the GST associated with the supply of the land offset by the applicant.

[33] There is also the consideration that Clause 4.1 makes the interpretation of words defined in the GST Law applicable only in Clause 4. The difficulty here is that the interpretation of "GST" as defined in the GST Act s 195-1 is not consistent with the popular or common meaning of that expression, something which is shown even by the use of that term within the GST Act. For example, s 7-1 uses "GST" as the tax payable on taxable supplies and taxable importations, rather than the "net amount" on which tax is payable, which includes adjustments. GST is used in the same popular sense in s 17-5. Indeed, the same applies within Division 75, in ss 75-5(1), (3)(a), and 75-10(1). I note that, where the term "GST" is used in these various sections, it is not marked with an asterisk, the process used in the GST Act to denote defined terms.

[34] In this popular usage, GST means 1/11th of the consideration for a taxable supply, which in practice will equate to 1/10th of the consideration for the taxable supply if expressed as an amount "plus GST". Where, as happened with Clause 4, the contract provides expressly that the recipient has to pay the GST on the taxable supply, that would mean an additional 10 per cent of the amount otherwise payable. Indeed, despite the terms of clause 4.1(a) and the definition of "GST" in the GST Act, it appears to me that, when the term "GST" is used in clause 4.2 and 4.3, the context suggests that the popular meaning of the term GST was intended.[31] In the case of a supply under the margin scheme, "GST" is 1/11th of the value of the margin: s 75-10(1). Accordingly, if the expression "GST" is given its ordinary or popular meaning, that would apply to the amount of "GST" payable as calculated in s 75-10(1) by

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30 That was in fact calculated by the Commissioner of Taxation on a pro rata basis in respect of the proportions of the two parcels of land, parts of which made up the land transferred to the respondent: Affidavit of Luttrell Exhibit DL-1 p 5.

31 Indeed, the same may apply to the term "GST" in clause 4.1(c), but that is not so clear.

reference to the value of the margin, when, as occurred in Clause 6.1(b)(ii), by agreement the margin scheme is made applicable to the transaction.

[35] There is the further consideration that the margin scheme will only be available in respect of the sale of land where the vendor did not claim input tax credits in respect of the acquisition of the land, or at least part of the land. If input tax credits were claimed in respect of the acquisition of the land, it is ineligible for sale under the margin scheme. If input tax credits were payable in respect of the acquisition of part of the land there is, in relation to that part, no advantage to the vendor in selling under the margin scheme, because the input tax credits claimed in respect of that part will be, in effect, refundable by way of the increasing adjustment.

[36] Whether and to what extent the transfer of the land under the amended infrastructure agreement produces an increasing adjustment pursuant to s 75-22(1) will depend on matters solely within the knowledge of the applicant. At the time of entering into the contract, the respondent might reasonably anticipate that there was a risk of the indemnity being activated, but in such circumstances could also have reasonably anticipated that the amount payable would be kept to a minimum by the operation of the margin scheme.

[37] The effect of s 75-22(1) is, in substance, that if land which is obtained in circumstances where an input to tax credit is claimed in relation to the acquisition of the land and that land is subsequently part of the land the subject of a transaction under the margin scheme, the supplier in relation to the latter transaction is to be put in the same position as if the input tax credit on the relevant land had never been claimed. In effect, what the applicant is seeking here is to be insulated by the respondent from this aspect of the operation of the GST Act, as well as to have the respondent pay the GST levied immediately on the transaction under the margin scheme. There is nothing in the agreement itself which indicates an intention for the indemnity to extend that far.

[38] For these reasons, and for the reasons in the submissions for the respondent, which I generally accept, in my opinion the ordinary and natural meaning of the words used in Clause 6.1(b)(ii) was that what was payable by the respondent under the clause was the GST, that is to say the GST imposed on the transfer of the sports park land and calculated by reference to the receipt of the agreed balance by the formula provided in s 75-10(1) of the GST Act. Such an interpretation is supported by the applicant of the principle in *Ander Transport* (*supra*). The amount payable is the amount that the respondent has already paid. On the interpretation that I adopt of the amended infrastructure agreement, no other amount was payable by the respondent pursuant to this provision.

Damages for breach of contract

[39] The applicant also submitted that the respondent, by failing to pay the amount properly payable under the indemnity clause, had breached the contract and was therefore liable to the applicant for damages for breach of contract in respect of amounts said to be payable by way of the general interest charge incurred by the applicant. In the circumstances it is not necessary for me to say anything about this, since on the findings that I have made there was no breach of the amended infrastructure agreement by the respondent. The respondent was entitled to a tax invoice before the obligation to pay arose, under Clause 4.5, and before a proper one

was provided the amount which, on the view that I take of the agreement, was the amount payable under Clause 6.1(b)(ii) was paid. There was therefore no breach of contract and no question of damages for breach.

[40] In case a different view may be taken elsewhere, however, I should say something about the quantum of any claim for damages for breach on a precautionary basis. In the first place, it seems to me that there cannot be any obligation to indemnify the applicants in relation to any liability for the general interest charge arising prior to the time when, under the amended infrastructure agreement, the amount payable under the indemnity in Clause 6.1(b)(ii) operated. Indeed, as I apprehend the matter, senior counsel for the applicant conceded as much during submissions. In relation to liability thereafter, it appears that what happened is that a related company drew on a line of credit it had available in order to obtain funds which were lent to the applicant so as to meet the payments required under a repayment plan negotiated with the ATO to cover this and another tax liability.[32]

[41] The respondent submitted that there was no evidence the applicant was not able to make payment of the extra amount to the ATO from its own resources, and that in those circumstances it would not be appropriate to award damages for breach of contract because of delay in payment, a matter which was appropriately dealt with by the statutory entitlement to interest in the *Civil Proceedings Act* 2011 s 58. The amended infrastructure agreement does not, so far as I can see, contain any provision for payment of interest on monies not paid on time under that contract. Once the amount payable to the ATO became payable, it is not obvious that any further general interest charge arising from late payment was caused, in the relevant sense, by the respondent's breach of contract, assuming there was one.

[42] If it were necessary for the applicant to borrow money in order to pay this, the cost of borrowing that money would properly be recoverable as damages, or be a matter properly taken into account when assessing the interest payable under s 58. The fact that the money was borrowed through a related company does not, in my opinion, matter for this purpose, at least as long as the terms of the transaction were such that the related company was not profiting by that arrangement. If there had been some delay in making a payment which was payable under this contract, I would have allowed interest under s 58 at the rate at which the applicant in fact borrowed money. In the event however, that issue does not arise.

[43] The application will therefore be dismissed with costs.

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32 Affidavit of Neate filed 11 November 2016 (third Neate affidavit) paras 3 – 13.