## [274] *Shaw (No 2)* - A problem for Draft GSTR 2000/D23

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The *Shaw* case, reported at para [273] of this *Bulletin*, revisits the vexed question of whether payment of damages under Court order by the unsuccessful defendant results in a supply, for GST purposes, by the successful plaintiff. Underwood J held that it did not.

The plaintiff said that his damages ought to be increased - or, at least, that there should be a declaration that the defendants must indemnify the plaintiff should the plaintiff have to pay GST. The submissions were rejected. Underwood J was unpersuaded that there was a substantial risk that GST would be payable when the defendant paid the judgment sum to the plaintiff.

In my previous note on this point, I pointed out that the Commissioner faces a difficulty here. The relevant parts of the definition of "supply" only speak of certain voluntary acts of the supposed supplier. This is so, for example, if the Commissioner were to rely on the word "release" in this context: see Marks "*Interchase* - the meaning of 'supply' in GST" at 2000 WTB 31 [1297].

A judgment debt might be extinguished or discharged by payment. The question is whether this constitutes a "release" or "surrender", the words used in the GST definition of "supply".

Obviously *Shaw (No 2)* was not available to the authors of the Commissioner's Draft GST Ruling GSTR 2000/D23 about GST consequences of court orders and out-of-court settlements. The *Interchase* decision, with which Underwood J agrees, was available. It is interesting to see how that earlier decision was dealt with in the draft ruling.

In the draft ruling, the ATO "respectfully agrees" with only part of the critical segment of White J's judgment in *Interchase Corporation Ltd v A.C.N. 010 087 573 Pty Ltd* (2000) 45 ATR 445. The draft ruling quotes the part of the judgment where White J says that it was not easy to see how "a Court giving judgment or the payment of a judgment sum or the granting of a stay of execution could constitute a 'supply'".

Curiously, the Commissioner's "respectful agreement" is hedged. The Commissioner only agrees with those statements "to the extent they relate to the Court itself not making a supply": draft ruling, para 59. I may be wrong, but this appears to be polite way of disagreeing with the remainder of White J's judgment. Also, Draft GSTR 2000/D23 does not deal with White J's substantive analysis of the matter.

Now the Tasmanian Supreme Court has also considered the issue, agreeing with White J's analysis. Indeed, Underwood J takes that analysis further.

It should first be said that Underwood J was dealing with a claim for damages in relation to actions occurring many years

*before* the commencement of GST. Nevertheless, it was seriously argued before his Honour that the payment of damages by the defendants to the plaintiff might result in a supply by the plaintiff to the defendant, resulting in GST.

Underwood J did not deal with issues of remoteness of damages (cf White J, in *Interchase*), nor with transitional issues. His Honour dealt with the interpretational issue head on. (In *Interchase*, White J disposed of the matter on other bases as well, and therefore her Honour's comments about GST were arguably *obiter dicta*.)

Underwood J looked back to the historical, legal meaning of "release" in conveyancing law. A conveyance by release would not occur without the voluntary action of the releasor.

In more modern times, the term "release" also referred only to something that occurred by the voluntary act of the releasor. There was an exception in some statutory contexts, where the statute used the word "release" in a context where the word "extinguishment" might instead have been used. For example, there is a statutory "release" of a bankrupt's debts. Nevertheless, at least when dealing with the part of the GST definition of "supply" which uses the word "release", it appeared that some voluntary act on the part of the releasor was required for the act to constitute a "release".

Consultation on the draft GST ruling officially closed on 19 February 2001. The judgment in *Shaw (No 2)* was delivered on 8 February 2001, but has only now received wider circulation. Given that the judgment is now available, it may be well for the authors of the draft GST ruling to take *Shaw (No 2)* into account when finalising the ruling.