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Nerang Subdivision v Hutson

1. First I should declare an interest. I was engaged by one of the parties at an earlier stage.

2. The only insight I can share is that the documents are quite complicated and lead to a number of questions. The potential development is immense as is apparent from the cases.

1 Much litigation

3. This property development has generated a deal of litigation.

4. We will concentrate on:

   (a) the 2023 reported decision of *Nerang Subdivision Pty Ltd v Hutson* [2023] QSC 268; 2023 ATC 20-883; and

   (b) the costs decision that followed: [2024] QSC 10 (unreported).

5. Apart from the technical GST and income tax issues that arose, this is interesting because of the procedure and the cost consequences, where the Commissioner of Taxation is joined as a necessary party to litigation about a relationship.

6. I will first deal with the two earlier decisions:

   (a) *Nerang Subdivision Pty Ltd v Hutson* [2020] QSC 225 (Bond J); and

   (b) *Hutson v Nerang Subdivision* [2021] QSC 323 (Brown J).

7. Anyone studying the 2023 decision of Cooper J should glance at the earlier decisions.

1.1 2020 – Bond J

8. In 2020, Bond J dealt with an application by the developer for two declarations:

(a) under the development deed and the development lease – that the parties intended that the amount of any liability for GST on the owner's taxable supply of a lot was to be met from the owner's return; and

(b) that the amount of the "Developer's Return" payable to the developer was to be exclusive of GST.

9. Bond J refused the declarations sought. The owner had contended that the declarations claimed "should be regarded as hypothetical because they were claimed "in relation to circumstances that have not occurred and might never occur". The owner also opposed the declarations, in the alternative, on the basis that, if declaratory relief were to be given, the declarations should be formulated with greater precision and should be to the opposite effect to those sought by the developer. Bond J refused the declarations without considering the construction questions about the documents.

10. The decision is interesting because it sets out parts of these difficult documents and might be useful background for any study of the matter. A foreshadowed issue, litigated in 2023, was that the "Owner is not presently registered for GST, and does not intend to apply to register for GST now or in the future": at [34].

11. There is a useful discussion by Bond J about "hypothetical" circumstances, and the impact of that on whether a declaration should be given. His Honour declined the declaration because of that consideration. His Honour said that the application invited the Court to "go beyond its role of finally determining the rights of litigants and into the impermissible role of giving an advisory opinion in relation to hypothetical and abstract circumstances": at [53].

1.2 2021 – Brown J

12. Brown J's 2021 decision was about a different issue, expert determination. This centred on whether the proposed form of contract to be used for the sale of lots to third parties was consistent with the terms of the Development Deed and the Development Lease.

13. There was provision in the documents for expert referee determination, and one of the parties sought a stay of court proceedings about the same subject matter ending such expert determination. Brown J granted that stay: [2021] QSC 323, at [46].

2 The GST Dispute

14. In 2021, Brown J referred to a GST dispute that was already in the wings. That went to hearing in 2023, after the Commissioner of Taxation was also joined as a necessary party.

15. The four questions in dispute before Cooper J in 2023 were:

    (a) Whether the administrator of the deceased estate (as owner of the land) had to get registered (or might have to get registered in future) for GST.

    (b) A question about construction, being whether the amount of the "Owner's Return" receivable by the administrator of the estate should be reduced by any GST payable by the administrator, regardless of whether the purchaser of the lot pays GST in relation to supply under the GST withholding provisions.

    (c) Whether the Development Deed or the Development Leases resulted in the "Developer's Return" from the sale of a lot being increased by the amount of the developer's liability for GST.

    (d) Whether an adjustment that increases the amount to be paid by a purchaser at settlement of a lot because of land tax was an adjustment that had to be taken into account within the meaning of a definition of "Gross Sale Proceeds" in the Development Leases.

2.1 Registration - Enterprise

16. As to the registration: the administrator of the estate said that the business of developing the land was being undertaken by the Developer and emphasised the limits of the administrator's role (as simply realising a long-held family asset): at [40].

17. But the Developer and Project Manager said that the activities undertaken by the administrator of the deceased estate under the Development Deed and the Development Leases were "being carried on in the form of the business and (or alternatively) in the form of an adventure or concern in the nature of trade". They emphasised the scale of the development, the change in the character and physical form of the land resulting from the development, and the period over which the project was being pursued, to date and in future: at [39].

18. A fairly conventional assessment of the authorities followed. Cooper J pointed out that although the Developer and the Project Manager exercise control over the project, undertook the development work and bore the risk associated with the cost of the development, the estate administrator's role was "not entirely passive": at [51].

> *Critically, the aims of the Project cannot be achieved without the Administrator granting Development Leases and delivering up possession of the relevant parts of the Land to be developed as a Stage and, subsequently, executing contracts of sale for Lots pursuant to his obligations under the Deed and the Development Leases. I am satisfied that this conduct, which facilitates the Development and the ultimate sale of the Lots under the terms of the commercial arrangement with the Developer and Project Manager, amounts to a series of activities done in the form of a business and, accordingly, comes within the broadly express definition of enterprise in the GST Act.*
>
> *[underlining added]*

19. His Honour also had regard to the number of development leases and sale contracts, both to date and in future. This is a massive development on the Gold Coast.

20. His Honour also pointed out then that the leasing under the Development Leases was, in itself, sufficient to amount to an enterprise as "a series of activities done on a regular or continuous basis in the form of a lease": at [57].

2.2 Registration - Turnover

21. The conduct of an enterprise is not in itself sufficient to require registration. A key question here was whether the estate administrator exceeded the registration turnover threshold of $75,000.

22. The sales were likely to be vastly in excess of $75,000, but there is an exclusion in calculation where the projected GST turnover is below the threshold, and this can occur if you exclude sales of capital assets.

23. The court noted that there was no definition of "capital asset". The test under section 188-25(a) was whether sales of the Lots were supplies by way of a transfer of ownership of a capital asset, which is an unusual formulation in Australian law.

24. A secondary part of this was that the administrator of the estate had to argue apparently that sales of the lots were supplies that were not made in connection with the lease enterprise, and were thus excluded.

25. On the first question about whether it was a projected sale of a capital asset, the only decision directly in point was of Senior Member Olding in *Collins v Federal Commissioner of Taxation* (2022) 114 ATR 682. Senior Member Olding accepted that the character of an asset "must be determined at the time the relevant supply is made (or is likely to be made"). Thus, whether the taxpayer had a profit-making intention when the asset was acquired has less significance in applying section 188-25(a) than it has in the income tax jurisprudence: at [67].

26. The fact that the estate administrator, as owner, bore no risk and the development was substantially conducted by the Developer and Project Manager only led to the conclusion that there might be two enterprises, one of land development conducted by those other parties, and another by the administrator: at [88].

27. It did not compel a conclusion that the sale of lots should be disregarded when calculating the estate administrator's project GST turnover: at [88].

28. Cooper J determined the matter this way (at [89]):

    (a) His Honour considered the potential benefits gained and risks borne by the owner (administrator of the estate) under the commercial arrangements, which have facilitated the subdivision of the land.

    (b) The owner entered into that arrangement for the purpose of obtaining a greater return.

    (c) The owner's conduct in agreeing the terms of the commercial arrangement with the developer, complying with the obligation to facilitate the development and ultimately selling lots, has been "planned, organised and coherent".

29. The fact that the owner did not acquire the land for the purpose of developing and selling it did not persuade his Honour to a different conclusion: at [90].

30. So, the realisation of the land was not the mere sale of a capital asset.

31. The secondary argument under this heading involved considering whether sales of the lots were supplies made in connection with the leasing enterprise. Here, there were Development Leases.

32. This question potentially involves some subtlety and is of some importance, because not everything a person does will be done in connection with a particular enterprise.

33. His Honour was satisfied that the sale of a lot would be a supply made in connection with the leasing enterprise, and the facts were against having too detailed a discussion of this point: at [96].

2.3 Construction of deed

34. Here the Court had to turn a dispute about how the deed was worded, in terms of the net return to each of the parties. The points decided here are of less general interest, but illustrate the difficulties in drafting for new taxes.

3 Costs Decision

35. On 2 February 2024, Cooper J gave a further decision requiring the unsuccessful estate administrator to pay the costs of the Commissioner on the standard basis. The Developers succeeded on the first issue, and the balance of their application was dismissed with the result that the declarations they sought about contractual construction issues were not made.

36. The Commissioner was not a party to the contractual arrangements, but was a necessary party to the proceeding "because, as the person responsible for the administration of the GST Act, his rights and obligations relating to the assessment of tax against the Administrator are directly affected by the declaration made following determination of the GST registration issue": at [2024] QSC 10, [4].

37. There were some complexities in the costs decision, because amongst other things there had been a *Calderbank* offer between the parties (other than the Commissioner).

38. As to the Commissioner's costs, the Developers said that the estate administrator should pay those costs. The estate administrator said that the Commissioner should bear his own costs as he had in substance appeared as *amicus curiae*.

39. The Commissioner pointed to the fact that the proceeding arose from a commercial dispute in which the Commissioner had no interest. The Commissioner's presence as a party was only made necessary because that commercial dispute gave rise to the GST registration issue. The Commissioner thus submitted that the estate administrator, as unsuccessful party on that issue, should pay the Commissioner's costs.

40. I have not done full justice to any of the parties' positions, so read in full.

41. There is an interesting discussion from [31] about the Commissioner's costs, and there have been cases where public officials have been deprived of their costs, for example when exercising a statutory right to intervene in an appeal (Commissioner of Patents): at [34]. The administrator was ordered to pay the Commissioner's costs.

4 Conclusion

42. I do not know whether that is the end of this litigation.

43. I have no visibility of any appeals. The development is large with large amounts involved. Secondly, I do not know whether all questions between the parties have now been quelled, as I am not in the matter and have no visibility of that.

44. The questions about sale of a capital asset, about the relevance in this kind of structure of the continuing role of the passive owner including under development leases, and the distinction between supplies made in the course of one or other enterprises (or none) may be of enduring relevance.

45. The Commissioner was joined as an interested party, and the party which was unsuccessful in relation to the issue on which the Commissioner was joined, had to pay the Commissioner's costs on the standard basis (party and party costs).

David W Marks KC

23 February 2024