SUPREME COURT OF QUEENSLAND

CITATION:	*Nerang Subdivision Pty Ltd v Hutson* [2020] QSC 225
PARTIES:	**NERANG SUBDIVISION PTY LTD** ACN 129 469 254 (first applicant) **KANAYA HOLDINGS PTY LTD** ACN 098 864 905 (second applicant) **PACIFIC VIEW FARM (QUEENSLAND) PTY LTD** ACN 114 561 081 (third applicant) **v** **ROBERT HUTSON IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF NANCY ULLMAN LOESKOW** (respondent)
FILE NO/S:	BS 3114 of 2020
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	28 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2020
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. The application is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE - STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY - DECLARATIONS - JURISDICTION - ADVISORY OPINIONS AND HYPOTHETICAL QUESTIONS - where the applicants seek declaratory relief to determine which party to a development deed is responsible for meeting the cost of GST - where it is presently unclear whether any liability for GST will arise - where there are numerous contingencies to be satisfied before the development reaches a stage where there may be a taxable supply - whether granting declaratory relief would amount to answering a hypothetical question *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; [1992] HCA 10, considered *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9, considered

Re Tooth & Co Ltd (1978) 31 FLR 314; [1978] FCA 10, considered

COUNSEL: D Kelly QC, with P Somers, for the applicants
S Doyle QC, with M May, for the respondent

SOLICITORS: Mills Oakley for the applicants
Cooper Grace Ward for the respondent

Introduction

[1] When Nancy Ullman Loeskow died on 22 May 2008, she was the registered proprietor of 312.3 hectares of land on the western side of the Pacific Highway on the Gold Coast.

[2] On 30 September 2009, the then executors of Mrs Loeskow's estate (**the Owner**) entered into a development deed (**the Deed**) with the first and second applicants (jointly and severally, **the Developer**) which recorded the parties' mutual desire to associate together to carry out the development of that land, the sale of the separate parcels created upon its staged subdivision and the distribution of the proceeds in accordance with the Deed.[1]

[3] On 21 September 2018, the original executors of Mrs Loeskow's estate were replaced by the respondent by order of the Court. For all present purposes, the respondent is now the party who has acceded to the rights and obligations of the Owner under the Deed and further references to "the Owner" are references to him.

[4] The planned development is to be known as Pacific View Estate. It is to be a large greenfield master planned community and it is anticipated that, when fully developed, it will comprise approximately 3,500 dwellings, a village centre, and an industrial precinct. It is anticipated that the development will likely take 10 to 15 years to complete, that it will be developed and sold in approximately 27 stages, and that it will ultimately involve the expenditure of in excess of $750 million in development costs.

[5] The Deed contemplates that the Owner and the Developer will obtain their pecuniary recompense from the development via their entitlements to receive, respectively, the "Owner's Return" and the "Developer's Return". The Owner's Return is the amount which will be payable to the Owner under a contemplated series of "Development Leases", which, if events occur in a particular way, the Deed will oblige the Owner to grant to the Developer (or its nominee) for each stage of the development. Each such lease will have to be in the form set out in Schedule 1 to the Deed (**the Lease**). Under each Lease, the lessor will be the Owner (referred to as **the Landlord**) and the lessee will be the Developer or its nominee (referred to as **the Tenant**).[2]

[6] The development is not yet at a stage where the Owner has become obliged to grant any such leases. Rather, development has only progressed to the stage of preparation of the applications under the *Planning Act* 2016 (Qld) seeking approval for its initial stages. Those

---

1 The Deed was subject to a condition precedent that an existing development deed between Mrs Loeskow and the third applicant dated 2 June 2005 would be terminated. I infer that that condition precedent was met.

2 Literally, the form of Schedule 1 provided for a lease between the Owner (defined in the Lease as the Landlord) and the third applicant (defined in the Lease as the Tenant), but I am satisfied that a reasonable businessperson standing in the shoes of the parties at the time of the execution of the Deed would conclude that the identification of the third applicant as the Tenant was merely an artefact of a previous version of the Deed, and that the contractual intention was that the Lease would be a lease between the Owner as Landlord and the Developer (or its nominee) as Tenant.

applications are to be lodged in the coming months with the Gold Coast City Council. There is no evidence before me as to whether and, if so, within what time frame the Gold Coast City Council will approve the applications which will be before it.

[7] A dispute has arisen between the Owner and the Developer concerning how the possible incidence of GST pursuant to the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (**the GST Act**) might impact upon the calculation of the returns to which the Owner and the Developer might eventually become entitled. Whether the GST Act will impact at all and, if so, how it might impact is presently unclear.

[8] By an amended originating application, the Developer seeks the following declarations:

(a) Under the Deed and the Lease, the parties intended that the amount of any liability for GST on the Owner's taxable supply of a Lot to a third party is to be met from the Owner's Return; and

(b) The amount of the Developer's Return payable to the Developer is exclusive of GST.

[9] For his part, the Owner's primary position is that both declarations should be refused.[3] The Owner contends that the relief claimed by the Developer should be regarded as hypothetical because it is claimed in relation to circumstances that have not occurred and might never occur. The Owner's alternative position is that if, contrary to his primary position, declaratory relief is to be given, the declarations should be formulated with greater precision and to the opposite effect to those sought by the Developer.

[10] For reasons which follow, in my view the present case is not apt for the exercise of the Court's power to make declaratory orders. The application must be dismissed without seeking to answer the questions of construction which would govern the formulation of any declaratory relief.

The relevant contractual obligations

[11] It is appropriate to turn first to a consideration of the relevant pattern of contractual obligations.

[12] By cl 2.1 of the Deed, the Owner and the Developer record their agreement to associate together to carry out the "Project". By cl 2.2, they agree that the aims of the Project are to obtain necessary "Approvals", to carry out the "Development", and to sell the subdivided "Lots" and distribute the proceeds in accordance with the "Development Documents".

[13] The scope of the agreement so recorded is given meaning by the following defined terms in cl 17.1:

(a) "Project" means:

> to undertake the Development, sell the Lots and distribute the proceeds in accordance with [the Deed]

(b) "Development" means:

> the development of the Land to create a master planned community with various uses such as residential lots for detached and non-detached dwellings and other uses in accordance with [the Deed], the Development Leases the Master Plan, Master Program, GCCC Approval and other Approvals and includes the undertaking of the Works and other activities defined as development under the *Integrated Planning Act*.

---

[3] The Owner's initial stance as expressed in his written submissions was that a declaration could be made in relation to the subject matter of the second proposed declaration, but during the course of oral argument before me that position changed.

(c) "Lot" means:

each separate parcel of land created upon subdivision of each Stage, and being in a final and developed state intended for sale. The term includes parcels or lots created or intended for community title.

(d) "Development Documents" means:

- [the Deed];
- the Master Plan and Master Program;
- a [Lease];
- the GCCC Approval and any other applicable Approval;
- any instrument which the Owner and the Developer acknowledge to be a Development Document.

(e) "Approval" means:

all development approvals as that term is defined in [Schedule 2 of the *Planning Act* 2016].[4]

[14] The Deed differentiates very clearly between the Owner's essentially passive but facilitative role and the Developer's controlling and active role. Thus:

(a) Each party accepts obligations to act in good faith in its dealings with the other (cl 2.4.2 and cl 17.1 "Good Faith") and to co-operate with the other to bring about the successful performance and completion of the Project (cl 2.4.3), but it is the Developer (not the Owner) who is subject to the express obligation to undertake the Development in accordance with the Development Documents and its obligations under the Deed (cl 7.3).

(b) The Developer is to prepare a Master Plan and Master Program for the Project, the latter document including timeframes for obtaining requisite approvals, for start and finish dates for works in each stage, and for other relevant activities: cll 4.1 and 4.2. The Owner must not unreasonably refuse approval to the Master Plan and Master Program and may only require changes within a limited ambit: cl 4.4.

(c) With only limited exceptions, it is the Developer's responsibility to pay rates and charges and Land Tax levied in respect of the land, with the Owner's role being to send the requisite rates notices and invoices to the Developer for payment and to provide the requisite authorities with an address for service as required by the Developer: cll 5.4, 5.5, 5.5A and 5.6.

(d) The Developer is obliged (at its cost) to apply for all requisite Approvals for the Development, the Owner's task being to cooperate with the Developer, sign requisite documents and to allow requisite access: cll 6, 7.10 and 7.11.

(e) By cl 7.2, the Developer (and any project manager it appoints) is given "the sole and exclusive right to exercise overall control of the Project", which right is stated to include:

7.2.1 managing and carrying out the Project;

7.2.2 making all day to day decisions;

---

[4] The Deed actually refers to Schedule 10 of the *Integrated Planning Act* 1997 (which was the dictionary schedule to that statute), but cl 17.2.3 operates so that reference to a statute includes a reference to amending, consolidating or substituting statutes, so that reference should now be taken as a reference to the dictionary schedule in the *Planning Act* 2016.

7.2.3 determining the design, development program and timeframe for the Project and each separate Stage of the Development;

7.2.4 determining the type, style, size, configuration and number of Lots to be achieved;

7.2.5 obtaining all consents and Approvals for the Project;

7.2.6 the engagement of contractors, consultants and other persons;

7.2.7 the incurring of Project Costs;

7.2.8 the marketing and sale of the Lots (including the price at which they will be offered for sale to third parties, the manner of sale, whether by auction or private treaty, contract terms, executing and completing contracts for the sale of Lots);

7.2.9 commencing or defending proceedings in relation to the Project and expending money for those purposes.

(f) By cl 7.5, the Developer accepts "all risks relating to the undertaking of the Development on the Land" including risks that actual costs might be greater than estimated by the Developer and that actual revenue and profit might be less than estimated by the Developer.

[15] The Deed contemplates that the parties are to obtain their respective pecuniary returns from the Project out of the proceeds of sale of the subdivided Lots which may be created by the Development.

[16] The starting point is set out in cll 5.1 and 5.7 of the Deed, which relevantly provide:

5.1 The Owner is to receive the Owner's Return in accordance with the terms of each Development Lease.

...

5.7 The Developer is entitled to receive and be paid the Developer's Return.

[17] Clause 17.1 of the Deed provides the following relevant definitions:

Owner's Return means the amount payable to the Owner under a Development Lease, excluding rent, outgoings and monies paid by a tenant on account of GST.

Developer's Return means all of the proceeds of sale of Lots and all other monies received in respect of the Project but excluding the Owner's Return.

[18] One incident of the fact that the Deed articulates the two central statements of pecuniary entitlement in the passive voice is that the Deed does not directly identify who is the subject of any obligation to pay monies. In order to understand the pattern of rights and obligations in relation to the two types of return, it is necessary to look more closely at the parties' obligations in relation to the Lease and then to the terms of the Lease.

[19] The Owner's obligation to grant a Lease is subject to both explicit and implicit contingencies.

[20] As to the explicit contingencies:

(a) Clause 8.5 of the Deed provides:

8.5 The Owner is under no Obligation to grant a Development Lease until:

8.5.1 An Approval allowing development to commence has been obtained to the extent applicable to the relevant Stage;

8.5.2 there is no subsisting unremedied Event of Default under [the Deed].

(b) I have already identified the definition of "Approval" and the Developer's obligation to seek to obtain those which were requisite.

(c) "Event of Default" is defined in cl 9.2 and is a reference to either a repudiation by the Developer, an Insolvency Event occurring in respect of the Developer, or a failure by the Developer to comply with any Material Obligation.

[21] As to the implicit contingencies, it is only necessary to note that the Deed provides a mechanism which in certain circumstances might operate in such a way as to forestall the possibility of a Lease ever being granted. Thus, cl 6.7 permits the Developer to give a "Viability Notice" in the event that, amongst other things, the Developer is notified of an approval or likely approval of an application which contains "terms and conditions not satisfactory to the Developer in its absolute discretion" or in the event there is an objection or appeal lodged against any of the applications the Developer has lodged or approvals it has obtained. If such a Viability Notice is given, then cll 6.16A and 6.16B become relevant. Those clauses provide avenues by which the Deed might be terminated or the Developer's rights bought out by the Owner or sold at auction, in the following terms:

> 6.16A If the Developer gives a Viability Notice, a Referee appointed pursuant to clause 12 shall determine whether proceeding with the Project is commercially viable for the Parties. If the Referee determines the Project not to be commercially viable, the provisions of clause 6.16B apply. If the Referee determines the Project still to be commercially viable, then by a notice in writing given to the Owner within 30 days after the Referee's determination the Developer may elect to either:
>
> 6.16A.1 continue with the Project; or
>
> 6.16A.2 terminate this Deed, in which event clause 6.17 applies.
>
> For the purpose of this clause, the Referee must be a Senior Counsel experienced in planning and development law.
>
> 6.16B In the event no Approval is obtained by the Approval Date or, if the Approval Date is extended by the Developer to the Extended Approval Date or if the Referee under clause 6.16A determines that the Project is not commercially viable (as the case may be) (the Relevant Date):
>
> (a) the Owner may elect (**the Owner's Election**) to pay the Developer 50 per cent of the fair market value of the Land, such payment to be made within 60 days of the Relevant Date;
>
> (b) for the purpose of sub-clause (a) above, "fair market value" has the meaning given by clause 11.3 and the amount of the "fair market value" is to be determined by the Valuer in accordance with the procedure in clause 11.3;
>
> (c) within 30 days after the Relevant Date, the Owner will notify the Developer in writing whether it has decided to exercise the Owner's Election;
>
> (d) if the Owner does not make the Owner's Election within the time specified in the preceding sub-clause (c) above, the Land will be sold at a price and on terms to be agreed between the parties, or, failing agreement, by public auction;
>
> (e) if the Land is sold under sub-clause (d) above, the Developer, to the extent it is lawfully able to do so subject to any other restrictions, will assign to the purchaser, its right, title and interest in all Protect Material and any Developer Payments which it has previously made;
>
> (f) the net proceeds of sale referred to in sub-clause (e) above shall be divided equally between the Owner and the Developer;
>
> (g) this document is terminated upon payment of the amount in sub-clause (a) above by the Owner to the Developer or upon sale of the Land pursuant to sub-paragraph (d) above and distribution of proceeds thereof to the parties (as the case may be) and the provisions of clause 6.17 shall thereupon apply (except to the extent that the Project Material and Developer Payments may have been assigned to the purchaser under sub-clause (e) above).

[22] If none of the explicit or implicit contingencies come to pass, then cl 8.1 of the Deed renders the Owner subject to the obligation to grant a separate Lease to the Developer (or to its nominee) for each stage of the development and in the form set out in Schedule 1 to the Deed.

[23] Clauses 5.1 to 5.4 of the Lease provide:

> 5.1 The Tenant will use reasonable endeavours to promote, market and sell Lots.
>
> 5.2 In order for the Tenant to satisfy its obligations under clause 5.1, the Landlord authorises the Tenant to:
>
> 5.2.1 engage real estate agents and lawyers;
>
> 5.2.2 negotiate contracts of sale on behalf of the Landlord;
>
> 5.2.3 collect and distribute the proceeds of settlement of Lots; and
>
> 5.2.4 do all [other] things reasonably necessary to satisfy the Tenant's obligations under clause 5.1.
>
> 5.3 The Tenant will pay the Landlord on the date of settlement of each Lot, an amount equal to 25% of the Gross Sale Proceeds for that Lot.
>
> 5.4 The Tenant is entitled to receive and be paid all the proceeds of sale of Lots and other monies received in respect of the Works and the Development for the Stage, after payment of the amounts due to the Landlord under clause 5.3.

[24] I observe that there is no material difference between the definition of "Lot" for the purpose of the Lease and for the purpose of the Deed. "Gross Sale Proceeds" is defined in the Lease to mean:

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

[25] It is not presently known what form the contracts to sell the Lots will take, if the development does progress to the stage of Lots being sold to third parties. In this regard, it will be recalled that by cl 7.2 of the Deed, the Developer (and any project manager it appoints) is given "the sole and exclusive right to exercise overall control of the Project", which right is stated to include, amongst other things, the marketing and sale of the Lots (including the price at which they will be offered for sale to third parties, the manner of sale, whether by auction or private treaty, contract terms, executing and completing contracts for the sale of Lots). Thus, the form of any contracts for sale will be a matter for the Developer or its project manager.

[26] At least the following possibilities would seem to be open and consistent with the contemplation of the Lease:

(a) A contract of sale between the Owner/Landlord and the third party purchaser which obliges the third party purchaser on settlement to pay the Tenant the contract price in return for the Owner/Landlord transferring title to the third party purchaser.

(b) A contract of sale in the same form as (a), but to which the Tenant is also party.

(c) A contract of sale between the Tenant and third party purchaser which obliges the third party on settlement to pay the Tenant the contract price in return for the Tenant causing the Owner/Landlord to transfer title to the third party purchaser.

[27] Under those options, having received the monies at settlement, the Tenant could then comply with its cl 5.3 obligation and, in exercise of its cl 5.4 entitlement, retain the balance. That would result in the Owner/Landlord having received the Gross Sale Proceeds under

the Lease (and, accordingly, the Owner/Landlord would be regarded as having received the Owner's Return under the Deed). If the Lease had been granted to the Developer, that would also mean that the Developer had received the Developer's Return under the Deed. But if the Developer had nominated someone else as Tenant, whether the Developer would be regarded as having received the Developer's Return would depend on the relationship between the Developer and the nominee Tenant.

[28] Another possibility might be a contract of sale between the Owner/Landlord and the third party purchaser which obliged the third party purchaser on settlement to pay the Owner/Landlord the contract price in return for the Owner/Landlord transferring title to the third party purchaser. Although a monetary adjustment could be done to bring about the same outcome as described in the previous paragraph, it would be difficult to see how the cll 5.3 and 5.4 obligation and entitlement could be met in terms, unless the Owner/Landlord remitted to the Tenant the whole amount he received from the third party purchaser, permitting the Tenant then to comply with cl 5.3 and retain the balance. Why that would be done is difficult to fathom.

[29] The actual direction of cash payments and how the contracts create debts and require them to be discharged could be significant in relation to GST.

[30] Clause 15.6 of the Deed provides:

> 15.6 Unless otherwise specified, any payment made by one Party to another under this document is exclusive of GST and:
>
> 15.6.1 A Party must pay to the other [Party] an amount equivalent to the GST at the time that that Party is required to make the payment.
>
> 15.6.2 The Party making the Taxable Supply must give to the other a tax invoice. If the Party does not provide a tax invoice then the other Party is not required to make any payment of GST under this clause until it has received a tax invoice.
>
> 15.6.3 When calculating the amount of:
>
> (a) a Project Cost,
>
> (b) any other reimbursement from one Party to the other under this document;
>
> (c) any expense, loss or liability incurred or to be incurred by one Party under this document,
>
> then that Party may include GST payable on the Taxable Supply giving rise to that amount but must deduct the amount of an input tax credit to which that Party is entitled.

[31] Clause 20 of the Lease relevantly provides:

> 20.1 The amount of rent and all other amounts payable under this Lease are exclusive of GST.
>
> 20.2 If the rent or any other payment obligation under or in connection with this Lease is a Taxable Supply, then the consideration for the Supply is increased by an additional amount equal to the amount of that consideration multiplied by the relevant GST rate. The additional amount is payable on receipt of a tax invoice.
>
> 20.3 Unless otherwise stated in this Lease, if a party is entitled to be reimbursed or indemnified by another party for an expense, claim, loss, liability or cost incurred in connection with this Lease, the reimbursement or indemnity payment must not include any GST component of the expense, claim, loss, liability or cost for which an Input Tax Credit may be claimed.

The possible incidence of GST

[32] Liability for paying or remitting GST is governed by the GST Act and Subdivision 14E of Schedule 1 to the *Taxation Administration Act* 1953 (Cth) (**the GST Withholding Provisions**).

[33] For a GST liability to arise, there must be a "taxable supply".[5] For there to be a taxable supply,[6] the person making the supply must either be registered[7] for GST or required[8] to be registered for GST.

[34] It is uncontroversial that the Owner would be a person making a taxable supply in the case of a sale of a Lot to a third party purchaser. However, the Owner is not presently registered for GST, and does not intend to apply to register for GST now or in the future. That is because the Owner, who is a partner in the advisory firm KordaMentha, has formed the following opinions:[9]

> 17. Based on the above investigations, the Estate is not, and has not ever been, registered for GST.
>
> 18. For the reasons set out below, I do not intend to apply to register the Estate for GST now or in the future.
>
> 19. I have considered whether the Estate is likely to be required or permitted to be registered for GST now or in the future. In order to be permitted to be registered for GST, the Estate must be carrying on an 'enterprise' within the meaning of section 9-20 of the GST Act. In order to be required to be registered for GST, the Estate must be carrying on an 'enterprise' and also have (or expect to have within its first year of operation) 'GST Turnover' of $75,000 or more.
>
> 20. My view is that the Estate is not carrying on an 'enterprise', and thus is not permitted to be registered for GST. In particular:
>
> (a) I do not consider that the Estate (as opposed to the Developer) is carrying on activities, or a series of activities, in the form of a business. Under clause 7.2 of the Development Deed, it is the Developer who has the sole and exclusive right to carry out the development and market and sell the resulting lots to third parties.
>
> (b) Similarly, I do not consider that the Estate (as opposed to the Developer) is carrying on activities, or a series of activities, in the form of an adventure or concern in the nature of trade.
>
> (c) While I consider that the Estate is carrying on activities, or a series of activities, in the form of grants of leases (pursuant to the Development Deed) for $1, that activity is not one that I believe has any reasonable expectation of profit or gain.
>
> (d) I do not consider any other activities described in s 9-20 of the GST Act apply.
>
> (e) My solicitors Cooper Grace Ward have provided me copies of the Commissioner of Taxation's public rulings TR 97/11 (relating to businesses), TR 92/3 (relating to profit-making undertakings and therefore adventures or concerns in the nature of trade) and MT 2006/1 (relating to enterprises), which relate to these issues. I have taken into account these public rulings in forming my above views.
>
> 21. My view is that even if the Estate were carrying on an enterprise and thus permitted to be registered for GST, it would not be required to be registered for GST because:

---

5 GST Act s 9-40.

6 See GST Act s 9-5.

7 A person is only permitted to be registered if they are carrying on an "enterprise": GST Act s 23-10. "Enterprise" is defined in s 9-20.

8 A person is only required to be registered if they are carrying on an "enterprise" and their "GST turnover" exceeds $75,000: GST Act ss 23-5 and 23-15(1)(b) and *A New Tax System (Goods and Services Tax) Regulations* 2019 (Cth) reg 23-15.01. "GST turnover" does not include amounts for a supply made "by way of transfer of ownership of a capital asset": GST Act s 188-25.

9 Affidavit of Robert Hutson sworn 8 May 2020.

(a) the Estate is not currently required to be registered for GST because it has:

(i) no current GST turnover as it has not made, and will not make, any supplies for the months from June 2019 to May 2020 inclusive; and

(ii) no projected GST turnover as it has not made, and will not make, any supplies for the months from May 2020 to April 2021 inclusive; and

(b) the Estate will not be required to be registered for GST in the future because any sales that the Estate will make in the future in accordance with the Development Deed will be supplies of capital assets, which are disregarded for the purpose of calculating projected GST turnover.

[35] If the Owner's opinion is correct, then there is no point to the present application.

[36] The Developer does not ask me to proceed on an assumption as to the incorrectness of the opinion. Nor does it ask me to determine the correctness of that opinion. Rather, the Developer asks me to proceed on the basis that there is no certainty as to whether GST would arise or apply to sales of Lots on behalf of the Owner/Landlord.

[37] One further complexity would arise if GST did apply to sales of Lots on behalf of the Owner/Landlord. The GST Withholding Provisions apply to supplies for which any of the consideration is first provided (relevantly) on or after 1 July 2018.[10] Unless there is any alteration to the GST Act or to the GST Withholding Provisions, the GST Withholding Provisions will apply to all sales of Lots under the Deed, assuming the development progresses to that stage. Under the GST Withholding Provisions, the person who receives a taxable supply that includes new residential premises or potential residential land (i.e. the third party purchaser) would be the person liable to pay the Commissioner an amount in respect of GST at the time of settlement.[11] The person who makes the taxable supply (i.e. the Owner) would be entitled to a credit in respect of the third party purchaser's payment.[12]

[38] I have described the nature of the controversy between the parties concerning the incidence of GST at a high level of generality at [7] to [9] above. Correspondence between the parties developed and explained their respective views as to how GST might impact upon their respective pecuniary returns on various hypothetical scenarios. Written submissions before me developed the arguments. It is not necessary to examine the content of the argument at this time. It is sufficient to appreciate that the arguments addressed the question of which party had to bear, out of its share of the proceeds of a sale, the ultimate burden of GST.

Relevant legal principles

[39] This Court has both inherent power[13] and express statutory power[14] to hear an application which seeks declaratory orders only and to make declaratory orders without granting any other relief as a result of making the orders.

[40] The classic statement of general principle governing the exercise of the inherent power is that made by the High Court in *Ainsworth v Criminal Justice Commission* in the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ, as follows:[15]

> It is a discretionary power which "[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise." **However, it is confined by the considerations which mark out the boundaries**

---

10 *Treasury Laws Amendment (2018 Measures No 1) Act* 2018 (Cth) sch 5 items 26 and 27.

11 *Taxation Administration Act* 1953 (Cth) sch 1 s 14-250.

12 *Taxation Administration Act* 1953 (Cth) sch 1 s 18-60.

13 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 per Mason CJ, Dawson, Toohey and Gaudron JJ.

14 *Civil Proceedings Act* 2011 (Qld) s 10.

15 (1992) 175 CLR 564 at 581-2, citations omitted and bold emphasis added.

> **of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions.** The person seeking relief must have "a real interest" and **relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen"** or if "the Court's declaration will produce no foreseeable consequences for the parties".

[41] There is no reason to think that those principles do not also govern the exercise of the statutory power.

[42] The High Court subsequently re-examined the considerations which mark out the boundaries of judicial power in *Bass v Permanent Trustee Co Ltd* in the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in the following passage:[16]

> The purpose of a judicial determination has been described in varying ways. But central to those descriptions is the notion that **such a determination includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy**.
>
> ...
>
> **Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions.** The jurisdiction with respect to declaratory relief has developed with an awareness of that traditional attitude. In *In re F (Mental Patient: Sterilisation)*, Lord Goff of Chieveley said that:
>
> > "a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument, eg in default of defence or on admissions or by consent."
>
> By "not a real question", his Lordship was identifying what he called the "hypothetical or academic". The jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law and such a declaration will not be hypothetical in the relevant sense. Barwick CJ pointed this out in *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd.* However, that is not the present case.
>
> It is true that some have seen the use of the declaratory judgment as little more than the giving of an advisory opinion. **However, one crucial difference between an advisory opinion and a declaratory judgment is the fact that an advisory opinion is not based on a concrete situation and does not amount to a binding decision raising a res judicata between parties.** Thus, the authors of one recent text on declaratory judgments emphasise that, where the dispute is divorced from the facts, it is considered hypothetical and not suitable for judicial resolution by way of declaration or otherwise. They say:
>
> > **"If ... the dispute is not attached to specific facts, and the question is only whether the plaintiff is *generally* entitled to act in a certain way, the issue will still be considered theoretical.** The main reason for this is that there may be no certainty that such a general declaration will settle the dispute finally. Subsequent to that declaration a person (the defendant himself or someone else) may be adversely affected by a particular act of the plaintiff. It may then be doubtful whether this act is covered by the declaration. In such a case the affected person will probably be entitled to raise the issue again on its special facts. Indeed, such a declaration will in effect be a mere advisory opinion."

[43] Despite the unqualified nature of the statement in *Ainsworth v Criminal Justice Commission* that relief will not be granted if relief is "claimed in relation to circumstances that [have] not occurred and might never happen", it is apparent that relief is sometimes granted in such circumstances: see the discussion in Zamir & Woolf, *The Declaratory Judgment* (4th ed, Sweet & Maxwell) at [4-137] to [4-160]. As Brennan J (then a judge of the Federal Court) observed in the earlier case of *Re Tooth & Co Ltd* (1978) 31 FLR 314 at 332, "mere futurity does not establish that the question is hypothetical in the relevant sense". The difficulty, his Honour

---

16 (1999) 198 CLR 334 at 355-7, citations omitted and bold emphasis added.

went on to observe (at 333), is "to determine whether a particular case falls on one side or the other of the line which divides the hypothetical from the non-hypothetical cases."

[44] His Honour went on to explain that the difference between the two cases may only be one of degree in the following passage:[17]

> In the United States, where federal courts are limited (pursuant to Art. III of the U.S. Constitution, and by the *Declaratory Judgment Act*) to granting declaratory relief only in "a case of actual controversy", the Supreme Court has held that the difference between such a case and an hypothetical case is one of degree:
>
> > **"The difference between an abstract question and a 'controversy' contemplated by the *Declaratory Judgment Act* is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy.** Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (*Maryland Casualty Co. v. Pacific Coal and Oil Co.*).
>
> **The immediacy and reality of a controversy are factors to which weight must be given in applying the principle expressed by Lord Radcliffe in delivering the judgment of the Judicial Committee in *Ibeneweka v. Egbuna*:**
>
> > **"... it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realization that judicial pronouncements ought not to be issued unless there are circumstances that call for their making".**
>
> A controversy as to the lawfulness of future conduct cannot be said to be immediate and real if it is unlikely that the applicant will engage in the conduct (*Golden, Acting District Attorney of Kings County v. Zwickler*). **If the prospects of the applicant engaging in the conduct are uncertain, the uncertainty may deprive the controversy of a *sufficient* immediacy and reality to warrant the making of a declaration** (*Steffel v. Thompson*). **The degree of uncertainty as to whether the applicant will engage in the conduct proposed will usually determine whether the circumstances call for the making of a declaration.**

[45] Although Brennan J's observations were expressed in a case in which a declaration was being sought as to the lawfulness of proposed future conduct, they are helpful in the present context in which what is at issue is the contractual consequences of possible future conduct in relation to the possible incidence of GST. Although made before *Bass v Permanent Trustee Co Ltd*, his Honour's observations are consistent with the High Court's emphasis that a declaratory judgment must be based on a concrete situation and capable of amounting to a binding decision raising a *res judicata* between parties.

Discussion

[46] This is not a case in which there is doubt as to whether a genuine dispute between the parties does exist. Correspondence between the parties evidences the existence of such a dispute.

[47] Nor is this a case in which there is a question about whether the party seeking declaratory relief has a sufficient interest in the outcome. The answer to the questions of construction are plainly important commercial considerations, at least to the Developer.

[48] The crucial question in this case is whether the application falls on the wrong side of the line which divides the hypothetical and the abstract from the non-hypothetical and the concrete.

[49] For the following reasons, my view is that the application does fall on the wrong side of that line.

---

17 (1978) 31 FLR 314 at 333-4, formatting altered for clarity, citations omitted and bold emphasis added.

[50] The Developer's application seeks to have this Court resolve a controversy about the way in which the incidence of GST might impact upon the Tenant's obligation under cl 5.3 of the Lease to pay a money sum and the Tenant's entitlement under cl 5.4 of the Lease to receive a money sum, when:

(a) The obligation and the entitlement can only ever exist if there is a Lease. But under the Deed, the Owner is not yet under any obligation even to grant a Lease.

(b) Before the Owner becomes subject to an obligation to grant a Lease, the Developer would have had to obtain all the requisite approvals. There is no evidence before me as to the likelihood that approvals will be obtained. The applications for initial approvals have not even yet been made.

(c) Even if the requisite approvals are obtained, there is always the possibility that they might contain conditions affecting the viability of the Project from the point of view of the Developer, thereby giving rise to the possibility of a Viability Notice being issued and cll 6.16A and 6.16B becoming relevant. By that mechanism, the obligation on the Owner to grant a Lease might be forestalled. Objections and the outcome of any planning appeals could lead to the same outcome. There is no evidence before me as to the likelihood of the occurrence of such events.

(d) Even if the Owner became subject to the obligation to grant a Lease, the identity of the legal person who might become the Tenant depends on the Developer having exercised its right to nominate. Presently, the identity of the Tenant cannot be known.

(e) And even if the identity of the Tenant were known, the Tenant's obligation under cl 5.3 of the Lease to pay a money sum and the Tenant's entitlement under cl 5.4 of the Lease to receive a money sum come into existence for the first time only after –

(i) the Owner/Landlord grants the Tenant a Lease;

(ii) the Tenant negotiates a contract of sale on behalf of the Owner; and

(iii) a contract of sale settles and a third party purchaser pays monies pursuant to its terms.

(f) At present, neither the terms of any contract of sale nor the parties can be identified. And because the terms of the contract cannot be identified, the payer and payee of monies under the contracts cannot be identified.

(g) Quite apart from all that uncertainty, the incidence of GST is itself uncertain, such that GST in respect of any supply by the Owner might never have any impact on the obligation and entitlement. And if it did have any impact, the question of how it might do so might well depend upon the terms of requisite contracts of sale.

[51] In other words, the application seeks to have this Court resolve a controversy which may not have to be determined at all about an obligation and an entitlement which do not presently exist and which might never exist at all. Because the dispute is not attached to specific facts, it must be considered theoretical.

[52] In *Bass v Permanent Trustee Co Ltd*, the High Court suggested that the crucial difference between an advisory opinion and a declaratory judgment is the fact that an advisory opinion is not based on a concrete situation and does not amount to a binding decision raising a *res judicata* between parties. As I have demonstrated above, the present circumstances are not based on a concrete situation, and for that reason alone, the making of the declaratory orders

would not amount to a binding decision raising a *res judicata*. But another complication lies in the fact that the legal person who might be nominated as the Tenant may not presently be before the Court. And though it may be arguable that any future nominee of the Developer should be regarded as a privy of the Developer and bound by any declaration given in the current proceeding, that conclusion can hardly be regarded as certain: cf *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [33] per French CJ, Bell, Gageler and Keane JJ and [94]-[98] per Nettle J.

[53] In my view, the present application invites 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.

Conclusion

[54] The application must be dismissed. I will hear the parties as to costs.