

## Points of Interest

- GST Pitfalls for Residential Apartment Sales
- Building Contractor's Liability to Subsequent Owners



**Ashley Heath**  
Partner

ashleyheath@wardkeller.com.au

## GST Pitfalls for Residential Apartment Sales

A recent High Court decision, *Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49* underscores the reasons why careful consideration of GST implications is required in relation to property transactions.

The case involved the sale of 3 serviced residential apartments by South Steyne to MBI. The apartments were 3 of 83 serviced apartments leased by South Steyne Hotel Pty Ltd to Mirvac Management as part of a rental pool. It was agreed in the sale contract to treat the sale to MBI as a going concern.

The sale of the apartments subject to the leases was treated as the input taxed supply of residential premises. Input taxed supplies are not generally subject to GST but in this case an unexpected liability of the purchaser to remit GST was triggered by the 'increasing adjustment' provisions in the GST legislation.

An 'increasing adjustment' triggered in certain circumstances, including when the recipient of a supply of a going concern intends that some or all of the supplies of the enterprise will be taxable supplies that are neither taxable supplies or GST-free supplies. The ongoing supply of the leases to Mirvac Management satisfied those requirements.

**Comments & Tips:** Liability to remit GST is usually a vendor or supplier responsibility but the 'increasing adjustment' provisions make the recipient of the supply liable for the GST. The result in the MBI Properties scenario is that MBI have a liability to remit GST with no corresponding entitlement to claim an input tax credit.

This scenario could easily have been avoided by omitting the GST going concern clause from the contract in which event the sale would have been

treated as an input-taxed supply with no GST payable.

## Building Contractor's Liability to Subsequent Owners

In ***Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36*** the High Court unanimously decided that Brookfield, the builder of a strata titled apartment complex, did not owe a duty of care to the Owners Corporation to avoid causing it economic loss resulting from latent defects in the common property.

Both the design & construct contract, under which the complex was built, and the standard form contract of sale between Chelsea Apartments (the developer) and subsequent with apartment purchasers contained defects liability clauses, requiring repair of defects (including defects in the common property) notified within a specified period which had elapsed before the Owners Corporation claimed the repair costs.

The Owners Corporation took proceedings against Brookfield for the costs of repairing latent defects in the common property based on an alleged breach of duty to take reasonable care to avoid economic loss to the Owners Corporation in having to make good latent defects caused by defective design and construction.

The High Court held unanimously that Brookfield did not owe a duty of care to

the Owners Corporation to prevent such loss.

The courts' reasoning in deciding not to impose such a duty included that the Owners Corporation (as agent for the subsequent purchasers) was not vulnerable to suffering loss caused by latent defects; that it was in a position to protect itself from risk of such loss in the sale contracts; the limits of responsibility for latent defects were confined by the sale contracts and therefore the duty as proposed should not be imposed.

**Comments & Tips:** This case is a victory for building contractors who can have some confidence that their liability to make good defects under contract will not be expanded by the law of negligence. However that will not always be the case and this decision it poses some interesting questions regarding the circumstances where the courts will impose a common law duty to protect a vulnerable plaintiff unable to protect itself against a want of care.

Parties to construction contracts should take care in setting the defects liability provisions in construction contracts as the courts are unlikely to impose a higher duty to repair defects in the absence of vulnerability.