GST and Multiple Party Transactions

Kevin O'Rourke
Partner and National Indirect Tax Leader
PricewaterhouseCoopers
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> 'It is I think no coincidence that many of the cases which have caused difficulty in the VAT field, causing resolution by the higher courts, have concerned situations involving three parties.': *Customs and Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588 at 595 per Laws J.

The difficulty referred to in the opening quotation has largely arisen through a failure to correctly characterise the transaction under review rather than from some underlying structural weakness of the VAT. This will also hold true for multiple party transactions under the Australian GST.

This paper will deal with multiple party transactions where the parties have entered into one or more contracts, whether orally or in writing, which regulate, or purport to regulate, the relationships between them. For convenience, this paper will only discuss relationships involving three parties, though the analysis applies equally to transactions involving four or more parties. This paper will also avoid the repetitious use of the cumbersome expression 'goods and services', and will talk of 'services' only, though the analysis is again of equal application.

It has been said that 'the scheme of the goods and services tax (GST) law is largely drafted on the assumption that transactions take place between two parties – a supplier, who supplies goods and services to a recipient, who pays the supplier for the goods and services acquired'.[1] With respect, that does not seem to be quite right, as the GST law was not drafted on the assumption that transactions take place between two parties. Rather, the GST law was drafted on the basis that a supply takes place between two parties, or entities, in full knowledge that any given transaction may comprise multiple parties and multiple supplies. The GST law could hardly have been drafted otherwise. And, as the English cases discussed below highlight, a single course of conduct by one party may constitute two or more supplies to different persons.

None of this should be surprising. There are two essential elements of a binding contract: agreement and consideration. An intention to create legal relations is also necessary but is arguably not separate from the requirement for consideration.[2] The promise or promises constituting an offer are the consideration for the promise, promises or act constituting the acceptance, and vice versa.[3]

In the absence of a document under seal, a plaintiff has to show that a defendant's promise is supported by consideration if the plaintiff is to succeed in enforcing the promise in contract. It is fundamental that the consideration move from the promisee, though it need not move to the promisor, as a contract of guarantee amply demonstrates.

In drafting contractual documentation for multiple party transactions, therefore, it is of first importance to make clear which party makes what promise to whom, and whether that promise is supported by consideration. In advising upon such transactions 'after the event', it is important to undertake the same analysis.

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1 Stacey and James, 'The GST Treatment of Tripartite Arrangements' (2002" 31 A T Rev 192.

2 Starke, Seddon and Ellinghaus, *Cheshire & Fifoot's Law of Contract* (6th Aust ed, 1992), at [103].

3 Ibid.

Multiple party transactions do not take some generic form. The two leading House of Lords authorities involving three parties are only superficially alike. In *Redrow*,[4] there were three separate bilateral contracts between the three parties, but only one of them was liable to pay the consideration and accordingly there was only one taxable supply. In *Plantiflor*,[5] by contrast, the three parties entered into two separate but related bilateral contracts. Each transaction must therefore be analysed by reference to the bilateral arrangements which exist within it.

Before proceeding to the English authorities, I shall first take a brief detour into the structure of the Australian GST to demonstrate what might otherwise seem self-evident, namely, that for every supply there is a corresponding acquisition, and that for every supply there is both a supplier and a recipient. Once this is accepted, it is reasonable to infer that the notion of consumption contemplated by the GST Act is defined by reference to the fact of supply. In other words, the fact that a supplier makes a supply to a recipient who has acquired it means that the recipient is the consumer of that supply and that consumption has taken place. While this might seem self-evident, it is contrary to the position taken in Europe.

The structure of the Australian GST

'Broadly speaking, the GST is a tax on private consumption in Australia' which 'taxes the consumption of most goods, services and anything else in Australia, including things that are imported'.[6] The expression 'consumption' is not defined in the GST Act and is not one of the 'basic rules' contained in Chapter 2. The word appears in several places in the GST Act but invariably for a specific purpose, such as defining the boundaries of GST-free food,[7] GST-free drugs and medicines,[8] and GST-free exports and other supplies for consumption outside Australia.[9]

The taxing of private consumption in Australia is generally achieved by:

- imposing tax on supplies made by entities registered for GST; but
- allowing those entities to offset the GST they are liable to pay on supplies they make against input tax credits for the GST that was included in the price they paid for their business inputs.[10]

In this way GST is effectively a tax on 'final' private consumption in Australia.[11]

In Europe, it has been held that the notion of consumption operates to limit the meaning of supply. Under the Sixth Directive, a 'supply of goods' means 'the transfer of the right to dispose of tangible property as owner',[12] and a 'supply of services' means 'any transaction which does not constitute a supply of goods'.[13] Such transactions expressly include obligations to refrain from an act or to tolerate an act or situation.[14]

In *Mohr v Finanzamt Bad Segeberg*,[15] the plaintiff was the owner of an agricultural holding on which he kept a herd of dairy cattle. He applied to the Federal Office for Food and Forestry for a grant for discontinuing milk production based on a German regulation fixing compensation for the definitive

4 *Customs and Excise Comrs v Redrow Group plc* [1999] 1 WLR 408.
5 *Commissioners of Customs and Excise v Plantiflor Ltd* [2002] UKHL 33.
6 Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, Executive Summary, at 6.
7 GST Act, subdivision 38A.
8 GST Act, section 38-50.
9 GST Act, subdivision 38E. See also draft Goods and Services Tax Ruling GSTR 2002/D8, paragraph 23.
10 Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, Executive Summary, at 6.
11 Ibid.
12 Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes – common system of value added tax: uniform basis of assessment (OJ 145, 13.6.1977) ('Sixth Directive'), Article 5.1.
13 Sixth Directive, Article 6.1.
14 Sixth Directive, Article 6.1.
15 [1996] All ER (EC) 450.

discontinuation of milk production. He undertook in the application to discontinue milk production, he sold his cattle and converted the business into a riding centre, and then ceased all milk production.

One of two questions referred to the European Court of Justice was: 'Does a farmer who is a taxable person and definitively discontinues milk production thereby make a supply of services within the meaning of Article 6(1) of the Sixth Directive?'

Advocate General Jacobs noted that 'VAT is a general tax on consumption of goods and services' and that it ensures 'the broad application of the tax to all forms of consumption'.[16] However, he added as follows:

> The scope of the tax is nevertheless limited by its character as a tax on consumption. A trader must supply goods or services for consumption by identifiable customers in return for a price paid by the customer or by a third party. In the present case, that requirement is not met. . . [T]he Community, by compensating farmers through the medium of the competent national authorities for the loss of income resulting from discontinuation of milk production, does not acquire goods or services for its own use but acts in the common interest of promoting the proper functioning of the Community milk market. The present case is, therefore, plainly distinguishable from cases which, it has been argued, are analogous, for example the case where the vendor of a business gives an undertaking to the purchaser not to set up business in competition; there, the purchaser receives a service of personal benefit to him in the form of an undertaking to refrain from certain acts. It is also distinguishable from cases in which a public authority is the direct recipient of a supply of goods or services which it uses for its public activities, for example, where it purchases materials and equipment for office use or obtains land by compulsory purchase for a road building scheme. In such cases, the public authority is a consumer as in a private transaction. In the present case, the public authorities, whether Community or national, cannot be regarded as consumers of a service.[17]

The European Court of Justice agreed with the Advocate General and expressly approved the paragraph set out above.[18] No VAT was payable.

The notion of consumption favoured by the Advocate General appears to be one in which a recipient must acquire goods or services for its own use, rather than for some wider public purpose or common interest.

The issue arose again in *Landboden-Agrardienste GmbH & Co KG v Finanzamt Calau*.[19] Landboden was granted compensation by a local authority in order to promote a reduction in agricultural production. The compensation was granted in return for a 20% reduction in Landboden's annual potato production. The German Government challenged the correctness of the decision in *Mohr*, but was not successful in doing so. Advocate General Jacobs again affirmed that 'if there is no consumption then there should be no VAT.'[20] He added as follows:

> In that regard, it is necessary to distinguish between supplies of goods and supplies of services. . . [A] supply of goods by a taxable person always entails consumption regardless of the use, if any, to which the goods are put. Consumption in the context of VAT does not mean actual use but merely the acquisition of the right to dispose of the goods as owner. Where goods pass down the commercial chain, they must be subject to VAT – it would be unworkable if tax authorities had to inquire whether there was actual enjoyment of the goods.

16 Id at [26].
17 Id at [27].
18 Id at [20]- [22].
19 [1998] STC 171.
20 Id at [21].

Thus, if a public authority acquires land with a view to the construction of a motor way but in the event does nothing with it, there is still a supply of goods. Moreover, the fact that the purchase is made in the public interest of a sound transport policy does not remove it from the scope of VAT. As already mentioned, in the German Government's example of a purchase of goods by the Commission or by an intervention agency, there is undoubtedly a supply of goods.

The position regarding services is, however, more complex. Services are defined residually in Art 6 of the Sixth Directive as "any transaction which does not constitute a supply of goods". The acquisition of a service is more difficult to verify than the acquisition of goods. Any payment, except perhaps a gift, will have conditions attached to it whose performance might, by creative use of language, be described as a service.

In order to determine whether a service has been provided within the meaning of the Sixth Directive, however, it is necessary to examine the transaction in the light of the aims and characteristics of the common VAT system. Article 2 of EC Council Directive 67/227 of 11 April 1967 on the harmonisation of legislation of member states concerning turnover taxes (JO L71 14.4.67 P1301 (S Edn 1967 P 14)) provides:

> "The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged. On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components."

The transaction in the present case does not fit in with that definition. There is no consumption. The farmer does not supply goods to a consumer, he does not provide services to an identifiable consumer and he does not provide any benefit capable of forming a cost component of the activity of another person in the commercial chain.[21]

The European Court of Justice again affirmed the opinion of the Advocate General.[22]

The Commissioner has taken the view that *Mohr* and *Landboden* would be decided differently in Australia, by reference to the wide definition of 'supply'.[23] The Commissioner's conclusion is in my view correct though, with respect, his conclusion is best supported by reference to the structure of the Australian GST.

I suggested above that under the Australian GST every supply has a corresponding acquisition, and that for every supply there is both a supplier and a recipient. This conclusion can be drawn from three related propositions. Firstly, for every supply there is a supplier. Secondly, for every acquisition there is a recipient. Thirdly, for every supply there is a corresponding acquisition. I shall deal with each proposition in turn.

Firstly, for every supply there is a supplier. I shall deal with the meaning of 'supply' below. For present purposes, as noted earlier, there is no definition of 'supplier' in the GST Act.[24] But it nevertheless follows as a matter of ordinary language that it is a supplier who makes a supply, and this language is used in various places throughout the GST Act, including the basic rules.[25]

21 Id at [22]-[26].
22 Id at [23].
23 Goods and Services Tax Ruling GSTR 2001/4, para 36.
24 In New Zealand, by contrast, the term 'services supplier' is used and 'in relation to any supply of goods and services means the person making the supply': *Goods and Services Tax Act* (NZ), section 2(1).
25 See, for example, GST Act, sections 9-15(2B), 9-25(3) and 9-90(3)(a).

Secondly, for every acquisition there is a recipient. I shall deal with the meaning of 'acquisition' below. We have seen that the GST Act defines the term 'recipient' by reference to a supply and as meaning 'the entity to whom the supply was made.'[26] Again it would follow as a matter of ordinary language that it is a recipient who acquires a supply, and this language is also used in various places throughout the GST Act, including the basic rules.[27]

Thirdly, for every supply there is a corresponding acquisition. In other words, the concepts of supply and acquisition are really two sides of the same coin. The mirror image between supply and acquisition is evident in the preceding paragraph which noted that for every 'acquisition' there is a recipient, and that the term 'recipient' is itself defined by reference to the term 'supply'.

Before proceeding, it is worthwhile observing that Part 2-2 of the GST Act is headed 'Supplies and acquisitions' and contains only Division 9, headed 'Taxable supplies', and Division 11, headed 'Creditable acquisitions', so that there is at the outset some correspondence between 'supply' and 'acquisition'.[28] Let us turn then to the definitions of these two terms.

According to the GST Act, 'a supply is any form of supply whatsoever.'[29] The Explanatory Memorandum states that this definition 'is defined broadly and is intended to encompass supplies as widely as possible.'[30] The ordinary meaning of the term 'supply' is then expanded by the statute to include:

(a) a supply of goods;
(b) a supply of services;
(c) a provision of advice or information;
(d) a grant, assignment or surrender of *real property;
(e) a creation, grant, transfer, assignment or surrender of any right;
(f) a *financial supply;
(g) an entry into, or release from, an obligation;
    (i) to do anything; or
    (ii) to refrain from anything; or
    (iii) to tolerate an act or situation;
(h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).[31]

The GST Act also provides that 'an acquisition is any form of acquisition whatsoever.'[32] The Explanatory Memorandum also states that this definition 'is defined broadly and is intended to encompass acquisitions as widely as possible.'[33] The ordinary meaning of the term 'acquisition' is then expanded by the statute to include:

(a) an acquisition of goods;
(b) an acquisition of services;
(c) a receipt of advice or information;
(d) an acceptance of a grant, assignment or surrender of *real property;
(e) an acceptance of a grant, transfer, assignment or surrender of any right;
(f) an acquisition of something the supply of which is a *financial supply;
(g) an acquisition of a right to require another person:

26 GST Act, section 195-1.
27 See, for example, GST Act, sections 29-25(2) and 153-25(2).
28 The headings to Parts and Divisions form part of the Act: GST Act, section 182-1(1).
29 GST Act, s 9-10(1). This is similar to New Zealand where the term 'supply' includes 'all forms of supply': see *Goods and Services Tax Act* (NZ), section 5(1). Similarly in the United Kingdom where the term 'supply' includes 'all forms of supply, but not anything done otherwise than for a consideration.': *Value Added Tax Act* 1994 (UK), section 5(2)(a).
30 Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, para 3.6.
31 GST Act, s 9-10(2).
32 GST Act, s 11-10(1).
33 Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, para 3.21.

(i) to do anything; or
(ii) to refrain from an act; or
(iii) to tolerate an act or situation;

(h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).[34]

With one exception these definitions are mirror images. Paragraph (d) in the definition of 'supply' refers to the 'creation' of a right, which is not mirrored in the definition of 'acquisition'. It is not immediately apparent why this is so but would not, of itself, appear to be a sufficient justification for departing from the mirror concept.

The Commissioner considers that section 9-10(2) refers to two aspects of a supply: the thing which passes, such as goods, services, a right or obligation; and the means by which it passes, such as its provision, creation, grant, assignment, surrender or release.[35] He therefore appears to accept that, within the context of the Australian GST, the 'creation' of a right must still involve the right passing from one party to another.

The fact that a supply is illegal has no bearing on whether that supply will be subject to GST. The GST Act provides that 'it does not matter whether it is lawful to do, to refrain from doing or to tolerate the act or situation constituting the supply.'[36] It may well be that this provision merely confirms the effect of the basic rules and so avoids any doubt. This might have been thought prudent given the European position that certain illegal activities, such as the supply of prohibited drugs, are not subject to VAT.[37]

There is no counterpart in the definition of 'acquisition' declaring that the fact a supply is illegal has no bearing on whether the acquisition gives rise to a creditable acquisition. One can only speculate why this might be so, but Parliament might well have balked at the prospect of facilitating a claim for input tax credits by a drug dealer (assuming of course that the dealer is able to obtain a tax invoice from the supplier).

I shall leave aside the interesting question whether the drug dealer who acquires prohibited drugs might be entitled in any event to an input tax credit under the basic rules. There has been little difficulty in subjecting illegal activities to Australian income tax. For present purposes it is sufficient to note that the special rule on illegality is unlikely to have any bearing on the general correspondence between supply and acquisition.

There is a special rule also in relation to livestock that 'the delivery of: (a) livestock for slaughtering or processing into *food; or (b) game for processing into *food; under an arrangement under which the entity making the delivery only relinquishes title after the food has been produced, is the supply of the livestock or game (regardless of when the entity relinquishes title). The supply does not take place on or after the subsequent relinquishment of title.'[38] The special rule was inserted into the GST Act by amendment.[39]

Again there is no counterpart in the definition of 'acquisition'. But the special rule is expressed to be 'for the avoidance of doubt' and was inserted to overcome concerns voiced in the media by farmer groups. Practitioners had not seriously doubted that the basic rules were sufficient to achieve the same result. The special rule on livestock is therefore unlikely to have any bearing on the general correspondence between supply and acquisition.

34 GST Act, s 11-10(2).
35 Goods and Services Tax Ruling GSTR 2001/4, para 25.
36 Section 9-10(3).
37 See, for example, *Coffeeshop Siberie* [1999] STC 742.
38 GST Act, section 9-10(3A).
39 Act No 92 of 2000, section 3 and Schedule 11, item 3.

Finally, the GST Act provides that 'a supply does not include a supply of *money unless the money is provided as *consideration for a supply that is a supply of money.'[40] Conversely, 'an acquisition does not include an acquisition of *money unless the money is provided as *consideration for a supply that is a supply of money.'[41] There is an obvious correspondence between these provisions designed to ensure that the payment of money as consideration for goods, services, rights or other things, is not itself a supply or acquisition unless, for example, it forms part of a foreign exchange transaction.

It is suggested that there exists a strong case for stating that every supply has a corresponding acquisition within the context of the Australian GST. Further, for every supply there exists both a supplier and a recipient. The correspondence between supply and acquisition is evident from the language used to define those concepts. That correspondence is not broken by the reference to the 'creation' of a right within paragraph (d) in the definition of 'supply'. Nor is it broken by the special rules dealing with illegality and livestock.

It is also suggested that the notion of consumption contemplated by the GST Act is to be found in the structure of the Act itself. Crucial to this is the notion that for every supply there is an acquisition and also a supplier and a recipient. Once this notion is accepted, it is reasonable to infer that consumption is defined by reference to it.

In other words, the fact that a supplier makes a supply to a recipient who has acquired it means that the recipient is the consumer of that supply and that consumption has taken place.

The English Cases

Reed Personnel

A convenient starting point for discussion purposes is *Customs and Excise Commissioners v Reed Personnel Services Ltd*,[42] not least because of the analysis provided by the Commissioner's counsel. Reed carried on the business of providing nurses, and thus their services, to hospitals. All or most of the nurses were National Health Service (NHS) employees who came to Reed to get extra work not covered or required by their contracts of employment.

The Commissioners submitted that the supplies which Reed made to the hospitals were supplies of nursing services and so exempt under the *Value Added Tax Act* 1983. Reed submitted that it merely acted as a recruitment agency and did not provide nursing services as such. Since such supplies would not be exempt Reed would be entitled to deduct input tax from its VAT bill.

The Commissioner's counsel identified three types of contractual relationships involving three parties: (1) Where A is contractually obliged to provide services to B, but does so by means of the acts of a third party, C. This was described as the 'vicarious performance' situation. (2) Where C as agent for A enters into a contract obliging A to provide services to B. This was described as the 'agency' situation. (3) Where A acts no more than as an intermediary between C and B, introducing the two so that C may enter into a contract by which he undertakes to provide services to B. This was described as the 'intermediary' situation.[43]

Some of these expressions are apt to confuse and mislead. In particular, the expressions 'agency' and intermediary' can mislead as some intermediaries will be agents, though not in the sense used by the Commissioner's counsel. And, as will be discussed below, the expression 'vicarious performance' might, in some circumstances, be better phrased as 'arranged performance'. Nevertheless, the expressions used by the Commissioner's counsel will be retained in this paper.

40 GST Act, section 9-10(4).
41 GST Act, section 11-10(3).
42 [1995] STC 588 (QBD).
43 Id at 590-591.

In the 'vicarious performance' situation, the Commissioners submitted that the services factually performed by C were, both as a matter of contract and the law of VAT, supplied by A to B. So also in the agency situation. In the 'intermediary' situation, the services factually given by C to B are also legally supplied by C: A makes an entirely different supply to B, constituted by the service of making the introduction between C and B.[44] Laws J stated that:

> . . . the concept of making a supply for the purposes of VAT is not identical with the performance of an obligation for the purposes of the law of contract, even where the obligation consists in the provision of goods or services . . . [and], in consequence, the true construction of a contractual document may not always answer the question – what was the nature of the VAT supply in the case?[45]

Laws J continued:

> In my judgment, the contractual documents in this case, though not expertly drafted, are not in the end ambiguous. Broadly, the obligations which they place on Reed's shoulders are clear. They are to make available the nurses, and therefore in common sense the services which the nurses provide, to the hospitals. It does not, however, follow, that for the purposes of the 1983 Act Reed, as opposed to the nurses themselves, supplies nursing care.[46]

His Honour rejected a premise in the Commissioner's argument that the contracts inevitably concluded the issue as to Reed's supplies:

> First, . . . the concept of 'supply' for the purposes of VAT is not identical with that of contractual obligation. Secondly, in consequence, it is perfectly possible that although the parties in any given situation may conclude their contractual arrangements in writing so as to define all their mutual rights and obligations arising in private law, their agreement may nevertheless leave open the question what is the nature of the supplies made by A to B for the purposes of A's assessment of VAT. In many situations, of course, the contract will on the facts conclude any VAT issue, as where there is simple agreement for the supply of goods or services with no third parties involved. In cases of that kind there is no space between the issue of supply for VAT purposes and the nature of the private law contractual obligation. But that is a circumstance, not a rule. There may be cases generally (perhaps always) where three or more parties are concerned, in which the contract's definition (however exhaustive) of the parties' private law obligations nevertheless neither caters for nor concludes the statutory question, what supplies are made by whom to whom. Nor should this be a matter for surprise: in principle, the incidence of VAT is obviously not by definition regulated by private agreement. Whether and to what extent the tax falls to be exacted depends, as with every tax, on the application of the taxing statute to the particular facts. Within those facts, the terms of contracts entered into by the taxpayer may or may not determine the right tax result. They do not necessarily do so. They will not do so where the contract, though it tells all the parties everything that they must or must not do, does not categorise any individual party's obligations in a way which inevitably leads to the conclusion that he makes certain defined supplies to another. In principle, the nature of a VAT supply is to be ascertained from the whole facts of the case. It may be a consequence, but it is not a function, of the contracts entered into by the relevant parties.
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> It is I think no coincidence that many of the cases which have caused difficulty in the VAT field, causing resolution by the higher courts, have concerned situations involving three parties. *Customs and Excise Comrs v Music and Video Exchange Ltd* [1992] STC 220 and

44 Id at 591.
45 Ibid.
46 Id at 594.

Customs and Excise Comrs v MacHenrys (Hairdressers) Ltd [1993] STC 170, both of which were cited to me, are examples. In my view the reason they have caused difficulty is that in such cases the correct VAT result does not flow inevitably from the true construction of the contract or contracts in play in the case. Where the facts involve only two parties there is necessarily little or no room for argument over who supplies what to whom. Where there are three (or more), the position may be very different. It should in my judgment be recognised that in that situation the parties' contractual arrangements, even though exhaustive for the purposes of their private law obligations, may not – as indeed they need not – define and conclude issues arising as to supplies made under the 1983 Act; and where they do not, the resolution of such issues remains a question of fact for the tribunal.

In my judgment the present case falls within this class. The contracts to which I have been referred conclude the parties' private law obligations but do not determine the nature of supplies made by Reed, and I reject Dr Lasok's submission to the contrary. They did not need to do so; precisely because (as I have explained) the concept of VAT supply is not coterminous with the concept of contractual duty, contracts which fully distribute the latter may be silent about the former. So it is here. In fact I would incline to accept Mr Milne's argument that taken as a whole the documents indicate that Reed was supplying nurses, not nursing services. However, for the reasons I have given the case is not resolved in Mr Milne's favour, any more than in Dr Lasok's, simply upon the correct construction of other contracts. Although the contracts fully distribute parties' private law duties and rights, they do not put beyond question the nature of supplies made by Reed, nor was it their function to do so. What those supplies were was accordingly a matter of fact for the tribunal.[47]

What Laws J has to say about contractual obligations should not be misunderstood. While the concept of 'supply' for the purposes of VAT may not be identical with that of contractual obligation, the contract remains the logical starting point. As will appear below, Lord Mackey may well have fallen into this error in his dissent in *Plantiflor*.[48] Laws J himself used the contract to determine who was making a supply to whom, even though the contract could not go the next step and answer whether the services were exempt. *Reed* is essentially a classification case, so it is hardly surprising that the contract did not determine the outcome. A contract to sell food would usually have little to say about the classification of that food for GST purposes, and could not, in any event, conclude the answer to the statutory question.

Redrow

In *Customs and Excise Commissioners v Redrow Group plc,*[49] Redrow was the representative member of a group of companies almost all of which were involved in constructing new houses for sale in the private sector. Redrow operated a sales incentive scheme in order to expedite sales of its homes to prospective purchasers, most of whom had to sell their existing homes before they could proceed to purchase a new home. The scheme was also intended to provide the prospective purchasers with a financial incentive to purchase their homes from Redrow.

The scheme assumed that the services of an estate agent would be needed if a buyer for the existing home was to be found. In order to expedite the sale Redrow selected the estate agent, instructed the agent to value the existing home and handle the sale and monitor progress in the marketing of the property to maintain pressure on the agent to achieve a sale. As an incentive to the prospective purchaser, Redrow entered into an agreement with both the agent and the prospective purchaser that it would pay the estate agent's fee plus VAT if the prospective purchaser completed on the purchase of a home from Redrow. The instructions to the agent could not be changed without Redrow's agreement. But the agreement provided that Redrow was not liable to pay the agent's fee if the prospective

47 Id at 595.

48 *Commissioners of Customs and Excise v Plantiflor Ltd* [2002] UKHL 33.

49 [1999] STC 161.

purchaser did not proceed with the purchase of a home from Redrow. The agent was advised by Redrow on being recruited into the scheme to enter into a separate agreement in the normal terms with the prospective purchaser, to provide cover in the event that Redrow was not liable to pay the fee because the prospective purchaser had decided to go elsewhere to buy a new home.

The question at issue was whether Redrow was entitled to an input tax credit in respect of the VAT charged by the estate agent on the supply of its services. Lord Hope stated:

> I do not see how the transactions between Redrow and the estate agents can be described other than as the supply of services for a consideration to Redrow. The agents were doing what Redrow instructed them to do, for which they charged a fee which was paid by Redrow. . . The name or description which one might apply to the service is immaterial, because the concept does not call for that kind of analysis. The service is that which is done in return for the consideration. . . The fact that someone else, in this case, the prospective purchaser, also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction.[50]

Lord Millett stated:

> The solution lies in two features of the tax . . . The first is that anything done for a consideration which is not a supply of goods constitutes a supply of services. This makes it unnecessary to define the services in question. The second is that unless the services are rendered for a consideration they cannot constitute the subject matter of a supply. . . In my opinion, these two factors compel the conclusion that one should start with the taxpayer's claim to deduct tax. He must identify the payment of which the tax to be deducted formed part; if the goods or services are to be paid for by someone else he has no claim to deduction. Once the taxpayer has identified the payment the question to be asked is: did he obtain anything – anything at all – used or to be used for the purposes of his business in return for that payment? This will normally consist of the supply of goods or services to the taxpayer. But it may equally well consist of the right to have goods delivered or services rendered to a third party. The grant of such a right is itself a supply of services.
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> In the present case, Redrow did not merely derive a benefit from the services which the agents supplied to the householders and for which it paid. It chose the agents and instructed them. In return for the payment of their fees it obtained a contractual right to have the householders' homes valued and marketed, to monitor the agents' performance and maintain pressure for a quick sale, and to override any alteration in the agents' instructions which the householders might be minded to give. Everything which the agent's did was done at Redrow's request and in accordance with its instructions and, in the events which happened, at its expense. The doing of those acts constituted a supply of services to Redrow.[51]

Lords Steyn, Goff and Hutton agreed with the reasons given by Lords Hope and Millett.

Redrow is an example of the 'vicarious performance' situation, though this might better be described as an 'arranged performance' situation: A (Redrow) was contractually obliged to arrange for services to be provided to B (the prospective purchaser), and did so by means of the acts of a third party, C (the real estate agent).

50 Id at 166.
51 Id at 171-172.

Plantiflor

In *Commissioners of Customs and Excise v Plantiflor Ltd*,[52] Miss Brierley ordered some bulbs from Plantiflor. She received an invoice which specified that the price of the goods she had ordered was £52.00. There were other charges of £2.50 ("Postage (£1.63) plus packing (£0.87)") and £0.25 transport insurance. The total was thus £54.75. The total VAT was stated to be "£53.12 17.50% = £7.91". The difference between £53.12 and £54.75 is £1.63, the postage charged. Thus Plantiflor charged no VAT on the postage, and the Commissioners disagreed. Much of the case was taken up with ascertaining the precise contractual relationships between the parties.

Plantiflor contended that it was acting as agent for its customer, and relied upon the terms of its catalogue which stated, relevantly: 'We will happily arrange delivery *on your behalf* via Royal Mail Parcelforce . . . We will . . . advance all postal charges to Royal Mail *on your behalf*.' (emphasis added).

Plantiflor had entered into a contract with Parcelforce in relation to the carriage of Plantiflor's products. The agreement recited that 'Plantiflor has agreed to send a certain number of items and Parcelforce has agreed to deliver them for Plantiflor at the prices set out below.' Plantiflor's obligation was to send a minimum of 400,000 parcels a year, with an average weight of 3.4 kg. It can readily be seen that this contract was not consistent with the contract between Parcelforce and Miss Brierley.

The Court of Appeal considered the Commissioners to have conceded there were two supplies – one of the sale of goods by Plantiflor and one of the service of arranging delivery of the goods via Parcelforce. There was also a supply of services by Parcelforce to the customer in the actual delivery of the goods. The Court of Appeal refused to allow the Commissioners to go back on the concession and to argue that there was only one integral supply of the sale of delivered plants. Lord Slynn seemed unimpressed with this chain of events. Citing his decision in *Customs and Excise Commissioners v British Telecommunications plc*,[53] his Lordship stated, obiter dictum:

> . . . it seems to me on the contractual documents between Plantiflor and the customer which are before the House that these arrangements constituted a single supply. What the customer wanted and what Plantiflor agreed to provide was bulbs delivered to the home.
>
> There was a separate supply consisting of the delivery of the bulbs from Plantiflor to Parcelforce, under a distinct contract. However, under the contract between the customer and Plantiflor arranging the delivery is ancillary to the making available of the bulbs . . . The reality is that Miss Brierley paid one total sum for one supply of delivered bulbs.[54]

Notwithstanding his Lordship's own view of the matter, he proceeded on the basis that the contractual documents between Plantiflor and its customer disclosed two supplies.[55] As to the agreement between Plantiflor and Parcelforce, his Lordship thought it plain from the terms of that agreement that Parcelforce was to deliver parcels 'for Plantiflor': 'There is nothing in that agreement to express or even indicate that the two contracting parties were not acting as principals, in other words that Plantiflor was acting as agent for its customers. There is no link between Parcelforce and the customer.'[56]

Accordingly, Lord Slynn held that VAT was payable on the postage.

52 [2002] UKHL 33.
53 [1999] 1 WLR 1376 at 1382-1383.
54 [2002] UKHL 33 at [23]-[24].
55 Id at [25].
56 Id at [29].

Lord Millett commenced with the observation that: 'Tripartite arrangements which result from two or three separate but related bilateral contracts call for close analysis in order to determine their tax consequences.'[57] He further observed that in *Redrow*,[58] there were three separate bilateral contracts between the three parties, but only one of them was liable to pay the consideration and accordingly there was only one taxable supply. In *Plantiflor*, by contrast, the three parties entered into two separate but related bilateral contracts.

Like Lord Slynn, Lord Millett observed that the contract between Plantiflor and Parcelforce was a contract *for* delivery and not a contract *of* delivery.[59]

The proposition that a single course of conduct by one party may constitute two or more supplies to different persons was also supported by Lord Millett, who stated:

> When Parcelforce made delivery of a parcel pursuant to its contract with Plantiflor, then like the estate agents in the *Redrow* case it made two different supplies. One was the supply to Plantiflor's customer of the service of delivering his goods to his order, that is to say to the addressee. The other was the supply to Plantiflor of the service of delivering its customer's goods to the addressee.[60]

Lord Millett observed that the terms of the contract between Plantiflor and the customer supported an agency analysis, as they were intended to do:

> The difficulty with this analysis, however, is that it does not fit the facts. As Laws J correctly held, Parcelforce does not deliver the goods pursuant to any contract with the customer or his agent. It makes delivery pursuant to its contract with Plantiflor, which both parties entered into as principals. This is plain from the terms of the contract, which was to last for a term of five years, contained an obligation on the part of Plantiflor to deliver a minimum number of parcels in each year, and provided for the annual indexation of postal charges. . . The conclusion is inescapable that neither party entered into the contract as agent for Plantiflor's future customers as undisclosed principals; and the contrary has not been suggested.[61]

His Lordship concluded that there were three distinct supplies, and that it was necessary to identify the particular supply for which the payment made by the customer was the consideration:

(i) The supply by Parcelforce to Plantiflor of the service of delivering its customer's goods. This was supplied pursuant to a contract for delivery made between Parcelforce and Plantiflor and was for a consideration payable by Plantiflor. It is (or would if Parcelforce were a private carrier be) a taxable supply.

(ii) The supply by parcelforce to the customer of the service of delivering his goods to him or his order. This supply was also made pursuant to the contract for delivery between Parcelforce and Plantiflor. It was made in circumstances in which the customer incurred no liability to Parcelforce to pay a consideration and was not (and would not even if Parcelforce were a private carrier be) a taxable supply.

(iii) The supply by Plantiflor to the customer of an arrangement service for which Plantiflor charged £1.63 per parcel. Whatever else was included in this supply, it was not the service of actual delivery. That was supplied by parcelforce. What the customer received for his money was the benefit of the arrangements which Plantiflor had made with

57 Id at [49].
58 *Customs and Excise Comrs v Redrow Group plc* [1999] 1 WLR 408.
59 [2002] UKHL 33 at [53].
60 Id at [55].
61 Id at [61].

> Parcelforce to deliver its customer's goods to his order without charging him in the normal way. Since Plantiflor made this supply for consideration, it was a taxable supply.'[62]

Lords Hobhouse and Scott each agreed with the opinions of Lord Slynn and Lord Millett. Lord Mackey dissented, referring approvingly to the following passage in the judgment of Laws J in *Reed*:[63]

> There may be cases, generally (perhaps always) where three or more parties are concerned, in which the contract's definition (however exhaustive) of the parties' private law obligations nevertheless neither caters for nor concludes the statutory questions, what supplies are made by whom to whom.[64]

The majority had concluded that the customer incurred no liability to Parcelforce to pay a consideration. Lord Mackey concluded that there was a consideration, being £1.63 paid by Plantiflor to Parcelforce. With respect to his Lordship, he has read too much into the statement by Laws J. This was not a case of identifying the nature of the supply, as might be important in a classification case; this was a case where the parties' private law obligations did answer the question of who was liable to pay a consideration.

Plantiflor is illustrative of the difference between the 'intermediary' situation and the 'vicarious performance' situation. Plantiflor had essentially submitted, in different terms, that it was an 'intermediary' situation where A (Plantiflor) acted no more than as an intermediary between C (Parcelforce) and B (Miss Brierley), introducing the two so that C (Parcelforce) could enter into a contract by which it undertook to provide services to B (Miss Brierley).

However, according to their Lordships, the contractual relationships disclosed instead a 'vicarious performance' situation, which again is better described here as an 'arranged performance' situation: A (Plantiflor) was contractually obliged to arrange for services to be provided to B (Miss Brierley), and did so by means of the acts of a third party, C (Parcelforce).

British Airways

British Airways plc v Commissioners of Customs & Excise,[65] is a straightforward application of *Redrow*, but notable because the Tribunal Chairman, Mr de Voil, rejected 'control', and the contractual right to exercise control, as factors which would decide in favour of the Commissioner. A passenger of a delayed British Airways flight could present a boarding pass and voucher to a participating restaurant in exchange for food. The restaurant would periodically invoice British Airways for the value of the food, and British Airways would pay the invoices and deduct input tax. The Chairman stated:

> In the instant case, the delayed passengers, treated like any others, choose the restaurant and the meal, and can no doubt have that meal cooked and garnished in accordance with their instructions. However, in *Redrow* the extent of the control was not the reason for the decision; it merely reinforced the decision to which Lord Millett had already come. . . In *Redrow* the Appellant was getting something more than a bare contractual right to have something supplied to someone else – it was paying for the contractual right to exercise control over the estate agents. Once again (even assuming that this is a correct analysis of the facts) I cannot see that that was a deciding factor in the *Redrow* decision. Did the Appellant in the instant case obtain anything – anything at all? Yes – it obtained the right to have its delayed

62 Id at [67].
63 [1995] STC 588 at 595.
64 Id at [44].
65 (1999) VAT Decision 16446.

> passengers fed at its expense – and that was clearly for the purpose of its business. That is enough to enable it to succeed.[66]

British Airways is another example of the 'vicarious performance' or 'arranged performance' situation: A (British Airways) undertook to arrange for services to be provided to B (the delayed passenger), and did so by means of the acts of a third party, C (the restaurant).

Ashfield District Council

In *Ashfield District Council v Customs and Excise Commissioners*,[67] the Council was a local authority charged with the administration of a scheme for 'grant-aiding' the renewal of private sector housing. In some cases the Council paid builders for 'grant-aided' work done by them. VAT was included in those payments and the Council claimed a refund. The question was to whom did the builders supply their services: the person whose application for a grant had been approved by the Council or the Council as the person who paid the builders? In the VAT Tribunal,[68] the Chairman, Mr Demack, stated:

> I am unable to accept [counsel's] claim either that in paying a contractor engaged on grant works the Council does so "out of its own resources", or that the award of a grant does not confer on the applicant any rights or lien on the moneys. In my judgment, once the Council has notified a house owner of the success of his grant application, provided the necessary conditions for the making of the grant are met, he or she is legally entitled to the grant moneys. They are funds provided by statute for a particular purpose, and which the Council is merely responsible for distributing. In my judgment, such funds never form part of the Council's own resources; it can never allocate and deal with them in a way in which it could if they did form part of those resources.[69]

On appeal, Sir Andrew Morrit VC concluded the Tribunal was right for substantially the same reasons Mr Demack gave, and stated, at paragraphs 24-25:

> The first question posed by Lord Millett in *Redrow* is what is 'the payment of which the tax to be [refunded] formed part?' It is true that in the cases to which this appeal applies the builders' invoices were rendered to and paid direct by the Council. But it is not uncommon for a single movement of money to achieve the satisfaction of two or more liabilities. In my view it is quite clear that is what happened in these cases. The Council was not liable to the builder, only the applicant/owner. The applicant/owner was liable to the builder on the contract made between them through [the agency which handled applications]. In addition the applicant/owner was entitled to receive the grant from the Council unless the Council paid the builder direct. There could be no such direct payment unless the applicant/owner had agreed to or at least acquiesced in the Council having the power to do so. The direct payment by the Council to the builder with the consent of the applicant discharged both liabilities.
>
> This analysis leads to the conclusion that the relevant payment was made by the applicant through the Council as its agent.[70]

On the facts, the Council was merely an agent for payment. The appeal was therefore dismissed. This situation was neither 'vicarious performance', 'agency' nor 'intermediary'.

66 Id at [8]-[9].
67 [2001] STC 1706 (Ch).
68 (2001) VAT Decision 17097.
69 Id at [43].
70 [2001] STC 1706 (Ch) at [24]-[25].

London Borough Council

In *London Borough of Camden v Commissioners of Customs & Excise,*[71] the dispute concerned whether the appellant could recover VAT on legal fees for a prospective adopter in connection with adoption proceedings which were funded by the appellant.

The Tribunal considered that it was considerably hampered by a lack of facts, and was forced to proceed on the basis that the solicitor's bill of costs was the only evidence of the transaction. Since adoption is a legal process, it was necessary for prospective adopters to instruct solicitors. It was in the appellant's interests to pay for such representation in cases where legal aid was not available in order to assist the adoption process. The solicitors were instructed by the adopters and the appellant had agreed either with the adopters or the solicitors (or both) that they would fund the bill.

The question in the appeal was whether this resulted in the solicitors' service being supplied to the appellant, with the result that the appellant would be entitled to recover the VAT on the bill. The appellant relied on *Redrow*. The Tribunal stated:

> The Redrow principle is that if A contracts with B to perform a service it does not matter that the service is supplied to C. . . In our view, this case is far away from *Redrow*. The Appellant did not contract with the solicitors for the service to be supplied by the solicitors. The adopters contracted with the solicitors of their choosing, subject to the solicitors being acceptable to the Appellant, and the adopters gave them instructions. . . In return for the payment, the Appellant obtained no right to anything from the solicitors . . . The Appellants were merely payers . . .[72]

It has been said of this case that: 'Put simply the Council did not deserve to win.'[73] While there is some truth in that statement, it is not the basis for the decision. The Tribunal made sufficient findings of fact to enable a conclusion to be reached: the Council obtained nothing at all from the solicitors. To adopt the language of the Australian GST, the Council acquired nothing from the solicitors and, hence, had no entitlement to an input tax credit.

On the facts, the Council merely paid money. This situation was neither 'vicarious performance', 'agency' nor 'intermediary'. One suspects that if the case had been run differently, and additional evidence led, it might have become apparent that the solicitors supplied to the Council a right to have services rendered to adopters. This would then have been a 'vicarious performance' or 'arranged performance' situation: A (Council) should have undertaken to arrange for services to be provided to B (adopter), by means of the acts of a third party, C (solicitor). Nevertheless, on the facts as presented, the Tribunal was unable to reach this conclusion.

Summary

The main points which emerge from the above discussion may be summarised as follows:

1. The GST law is drafted on the basis that a supply takes place between two parties, or entities, in full knowledge that any given transaction may comprise multiple parties and multiple supplies.

2. Each transaction must be analysed by reference to the bilateral arrangements which exist within it. Compare the three separate bilateral contracts between the three parties in *Redrow* with the two separate but related bilateral contracts between the three parties in *Plantiflor*.

71 (2001) VAT Decision 17211.
72 Id at [8]-[9].
73 Stacey and James, 'The GST Treatment of Tripartite Arrangements' (2002" 31 A T Rev 192 at 209.

3. The structure of the Australian GST is that for every supply there is a corresponding acquisition, and both a supplier and a recipient.

4. Under the Australian GST, the fact that a supplier makes a supply to a recipient who has acquired it means that the recipient is the consumer of that supply and that consumption has taken place.

5. While the concept of 'supply' for the purposes of GST may not be identical with that of contractual obligation, the contract remains the logical starting point, especially for determining who is making a supply to whom.

6. Where the classification of a supply is in issue, the contract will usually not of itself conclude the answer to the statutory description.

7. Once a taxpayer has identified a payment inclusive of GST, the question to be asked is: did the taxpayer obtain anything – anything at all – used or to be used in the course or furtherance of the taxpayer's enterprise in return for that payment? This might well consist of the right to have goods delivered or services rendered to a third party.

8. A single course of conduct by one party may constitute two or more supplies to different persons.

Conclusion

At the beginning of this paper I suggested that the difficulties with multiple party transactions had largely arisen through a failure to correctly characterise the transaction under review.

In *Redrow*, the Commissioners had failed to identify within the transaction a bilateral contract pursuant to which Redrow obtained a contractual right to have to have certain real estate services performed. *British Airways* was to like effect.

In *Plantiflor*, the taxpayer had failed to identify within the transaction a bilateral contract which precluded a relationship of agency, notwithstanding a separate bilateral contract which purported to state otherwise.

In *Ashfield*, the taxpayer had failed to identify the true character of a legal relationship as one of payment by agent.

In *London Borough Council*, the taxpayer failed to prove that it had even made an acquisition.

It should be apparent that the difficulties in multiple party transactions have largely arisen from a failure to correctly characterise the transaction under review, rather than from some underlying structural weakness in the tax system. It is therefore a matter of first importance to examine carefully each of the bilateral contracts which exist within the transaction to determine the correct GST outcome.

It might be helpful to consider whether the transaction under review can be described as a 'vicarious performance' or 'arranged performance' situation (*Redrow, Plantiflor, British Airways*), an 'agency' situation or an 'intermediary' situation (as the taxpayer submitted in *Plantiflor*). Care should be taken to distinguish those situations where one of the parties merely pays money (*London Borough Council*) or is a mere agent for the payment of money (*Ashfield District Council*). It is doubtful that this is an exhaustive list of all possible situations, so some care must be taken to avoid 'forcing' the facts into one or other of the situations mentioned. Nevertheless, most situations will be covered by the foregoing analysis.