IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S47 of 2012**

BETWEEN

COMMISSIONER OF TAXATION

Appellant

And

QANTAS AIRWAYS LIMITED

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

1) The Respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues on Appeal

2) The sole issue throughout these proceedings[1], has been whether the Respondent ever made the supply for which the consideration was prepaid, given that the flight which the customer paid for was not taken. Without a "*supply for consideration*", there is no taxable supply within s 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (**the GST Act**)[2] in return for that pre-paid fare.[3] On current facts, there is no other candidate for such a taxable supply, or certainly none that can be said to relate to the fare as a whole.

3) There are three aspects to this, all related to the concepts of "supply" and "consideration": (i) the contemplated supply (the flight) did not occur, (ii) there is no other identifiable supply for which the fare was paid and (iii) in certain cases the contract operated so as to render consideration paid refundable. The Commissioner says none of the three points matter, and that the Respondent's liability to pay GST was fixed permanently when the fare was paid, irrespective of what later transpired (ie,

[1] See paragraph [10] of the Appellant's submissions before the Tribunal and Paragraph [18] of the Commissioner's Statement of Facts Issues and Contentions filed with the Tribunal.
[2] All statutory references in these submissions are to the GST Act, unless otherwise stated.
[3] Commissioner's Submissions dated 9 March 2012 (**Commissioner's Submissions**) at [26].

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the lack of any flight's being taken). Indeed, he says that it is not even necessary to characterise the nature of the supply contracted for.[4] His case is simple: by reason of the offer and acceptance process having resulted in mutual contractual rights (evidenced by tickets, and recorded internally as bookings), a complete supply was thereby made, to which supply the *entirety* of the fare irrevocably related (even where later refundable). It is an analysis which is entirely independent of the subject matter of the contract.[5] It would apply to any contract, since the exchange of mutual promises (and resultant grant of rights) is of the essence of contracts. Therefore (if the Commissioner is correct) every time a contract is made, a completed supply occurs, even if the contract remains executory and even if the consideration becomes refundable.

4) The Full Court had to choose between these two approaches (at [41], AB 238.27): one focussed solely on the act of making the contract (i.e the reservation /booking), the other founded on a combination of assessing the true substance of the bargain and the extent to which it was actually performed. The Full Court found the correct approach, was to begin by properly characterising the transaction between Qantas or Jetstar and the respective passenger so as to identify the promised taxable supply, being the "*supply for consideration*" within s 9-5(a), followed by looking at all the facts as they turned out. The Full Court correctly identified such taxable supply as the flight, being the supply for which the fare was pre-paid, rather than the mere making of the contract of carriage *per se* (at [44]-[49], AB 239.25-240.31; [58], AB 245.13) . It did not blinker itself to any aspect of the facts: it considered whether there was some other supply for the fare that could be found to have occurred, absent the flight (at [56]-[57], AB 244.21-245.11). It reasonably concluded that there was none. It followed that no taxable supply was made and no GST liability was incurred (at [46], AB 239.49). These findings establish that the assessments were excessive.

5) Underlying such an approach lies the fact that the GST concepts of "*supply*" and "*taxable supply*" will tend to concern performed contracts,[6] rather than executory contracts. The decision of the Full Court reflects the contractual and restitution position in the wake of the no-show by the passenger. Viewed contractually (see Notice of Contention, ground 4, AB 256.29), no, or no substantial, performance of the contract, being an entire contract,[7] occurred. The contract, being executory, left either

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[4] Commissioner's Submissions at [26].

[5] Hence the Commissioner's suggestion that the nature of the supply contemplated by the contract is irrelevant.

[6] Including contracts performed other than according to their terms, eg in breach. One effect of the Commissioner's approach would be that the GST status of the supply would be frozen at the stage of mutual promises (since he says the supply was then completed). If, actual performance occurred, which differed in its GST status from the promised performance, on his case it would come too late to alter matters. This cannot be right. It would also be a licence for manipulation.

[7] Being one in which the consideration for the payment of money is entire and indivisible: *Baltic Shipping Company v Dillon* [1993] HCA 4; (1993) 176 CLR 344 per Mason CJ at 350.

no further rights or only a right to reclaim money paid for a failed purpose (where a refund was available). That right (like the flight) was unused.

Part III: Section 78B of the Judiciary Act 1903

6) The Respondent certifies that it has considered whether any notice should be given to Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* and has concluded that no such notice should be given.

Part IV: Facts

7) The Respondent agrees that the factual context was not in dispute but contends that the Tribunal should not have made the following findings:

   a) that the recording of the reservation and processing of the reservation for check-in involved the provision of services (at [23], AB 205.17); and

   b) that what Qantas has done for the passenger in return for the fare is hold itself ready to carry the passenger (at [24], AB 205.31).

   In addition to the paragraphs referred to in the Commissioner's Submissions at [8], reference should also be made to the reasons of the Tribunal at [7] and [10], AB 201.36 and 202.28 and of the Full Court at [37], AB 236.45.

8) The Respondent submits that the "material" conclusions to be drawn from the Conditions of Carriage for both Qantas and Jetstar were outlined by the Full Court at [32]-[36], AB 228.48-236.42. The process of 'making a reservation' is just repeating the fact that a contract is made. Ticket issue, likewise, is merely evidencing the contract. Neither is capable of constituting supply.

9) Further, there were two broad classes of fares: (a) fares that were fully refundable to the passengers when they cancelled their reservation/booking and/or failed to show for the scheduled flight;[8] and (b) partly refundable fares, which were only non-refundable if the passenger did not take the flight.

10) The Respondent objected to the assessments for the monthly tax periods from July 2000 to June 2008 on the grounds, *inter alia*, that GST was not payable by the Respondent in respect of pre-paid fares paid for flights that were not taken.[9]

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[8] Business/First/Fully flexible fares.

[9] Notice of Objection at Grounds 3(a), 3(f) and 3(J), AB 33.46, 35.33, 35.47. The "no-show fares" were for flights which did not occur due to the passenger cancelling the flight or failing to show for the flight and there was no entitlement to a refund, or where a refund was available no refund was claimed.

Part V: Respondent's Argument

11) This case involves an interaction between concepts of contract law and fiscal law (the latter being statutory). Unless these are managed with exactitude, error will result. The Commissioner's approach to the supply question confuses both sets of concepts. It plucks out the creation of mutual rights (common to all contracts), notes the admitted width of the statutory concept of 'supply' (s 9-10), and then simplistically concludes that the making or recording of a contract was therefore the supply (see eg Full Court at [5]-[6], AB 222.19-222-42).

12) All GST/VAT systems have a similarly wide 'supply' concept.[10] But none has yet deemed the making of every contract *ipso facto* to be a supply - much less a completed supply that accounts for the whole of the price payable. While there can be contracts which require no act of performance other than the exchange of mutual promises (and so are never truly executory), most contracts are not like that, contracts of carriage included.[11] Yet, the core submission of the Commissioner is that the exchange of promises made at the booking stage constituted a completed taxable supply, which was of such predominance, for GST purposes, that it (i) related to the entirety of the price payable and (ii) rendered inconsequential the subsequent lack of any enforcement or performance. In other words, once the contract was made, the supply contemplated by the contract was conclusively made. It is striking that such an analysis is independent of both the subject-matter of the contract and of the fact of the pre-payment: (on the Commissioner's case) the mutuality of promises will suffice to constitute the concluded supply of a grant of rights.

13) By contrast, the correct approach acknowledges that, although as a matter of contract law, consideration needs to pass in both directions in order to bind a contractual promise, that does not answer the GST question as to the act of supply, much less taxable supply. GST is not a tax on concluded contracts *per se,* nor does it depend on binding promises having been exchanged [see s 9-5(a) read with 9-15(2) & (2A)]. Therefore, the exchange of contractual promises amounting to consideration at common law is not a conclusive factor, in a GST supply analysis. Neither '*supply*' nor '*consideration*' are used by the Act in a common law sense. '*Taxable supply*', ie, a supply for consideration, simply seeks to capture reciprocity of performance – whether pursuant to a binding agreement or no agreement at all[12] – such that there is an evident exchange of value for supply. It is that exchange that attracts the charge to tax, being a

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[10] See *Value Added Tax Act 1994* (UK), s 5(2)(a): a supply *'includes all forms of supply, but not anything done otherwise than for a consideration'; Goods and Services Tax Act 1985* (NZ), s 5(1): "*...the term* ***supply*** *includes all forms of supply."*

[11] Contracts of carriage are usually entire contracts [Chitty on Contracts 30 ed para [21-034]; *Baltic Shipping* pg 378, 386] and their performance does not begin until passenger or luggage is presented for transport Chitty para [36-076]: *'Beginning and end of transit'* and cases cited. That did not occur here.

[12] A *quantum meruit* (where services are performed under a void agreement) would be an example.

'*supply for consideration*'. A more useful contract law meaning of 'consideration' in the current context is found in the judgment of Deane and Dawson JJ of this Court in *Baltic Shipping,*[13] where it is used in the sense of actual performance of the promise, rather than just the initial giving of the promise: "*Thus, the consideration for which Mrs Dillon paid the fare was the substance of Baltic's contractual promise, namely, the actual provision of the components of the promised fourteen day pleasure cruise.. . If all that Mrs Dillon had relevantly received had been Baltic's bare promise, unperformed and unenforced, the consideration for the whole of the fare would have wholly failed.*" Mindful of the fact that it is the statutory concept of *supply* (not consideration) that is in issue herein, it is noteworthy that even the law of contract does not confuse the mere exchange of promises with performance (ie, supply) (especially in contracts of carriage). The Full Court had to construe the contractual obligations as part of the supply analysis. The conclusion it reached was wholly in line with the above approach. No other conclusion was possible.

14) Viewed in this light, the enormity of the Commissioner's contention becomes evident: if one makes a contract to make a supply, the exchange of promises would *ipso facto* be the supply. Since rescission *ab initio* is a rarity, the making-of-the-contract supply will usually be irreversible and uncancellable. No such supply could ever be unwound or cancelled; Division 19 would have little work to do, since one cannot cancel what has already been done. Since promises are mutual, it would follow that in every case, *both* parties make instant supplies, simply by exchanging promises, in consideration for each other. Further, every contract would become a two-way barter supply of mutual promises and GST would apply to each side of the transaction. Promises by customers (eg of co-operation, or to submit to arbitration, etc.) would all be supplies – made in full at the moment of contract conclusion.

15) By contrast, the approach of looking for the substance of the transaction, as adumbrated in (*inter alia*) *Travelex* (see below) and adopted by the Full Court, avoids such outcomes. It focuses on the anticipated performance of that which was being paid for, rather than the mere exchange of promises. It is not prevented from weighing any acts of actual performance that do occur, even if different from that anticipated. But if there is no relevant performance or enforcement at all, then it does not invent a 'supply' of mutual promises.

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[13] *Baltic Shipping Company v Dillon* [1993] HCA 4; (1993) 176 CLR 344 at 376

There must be a "supply for consideration"

16) The GST is not a tax on payments; much less is it a tax on contracts or mutual promises *per se.*[14] Those promises have to eventuate into a supply for the charge to tax to bite.

17) Further, ss. 9-10 and 9-15 do not mean that **every** legal act automatically answers the statutory description of "supply", or that the mere making of a payment gives rise to a taxable supply, without ascertaining the precise linkage between the two: the GST Act requires the identification of "the supply for consideration". As has been pointed out judicially: '*...it can be seen that...a linkage between supply and consideration is requisite to the imposition of the tax...There is a practical necessity for a sufficient connection between the payment and the supply.*'.[15]

18) Consistent with this approach, in its proper context, the definition of "taxable supply" and the requirement that there be a "supply for consideration" involves, with respect to consideration, the notion of recompense, namely a payment or benefit to recompense the supplier for a supply made by it.[16] The words require there to be a substantial relation, in a practical business sense, between the consideration and the supply.[17]

Characterisation of the transaction and identification of the "taxable supply"

19) In order to identify the taxable supply (ie, the "supply for consideration"), the facts and circumstances of each transaction or arrangement need to be investigated and properly characterised. The scope of this task was identified by this Court in *FC of T v Reliance Carpet Co Pty Ltd:*[18]

> *The composite expression "a taxable supply" is of critical importance for the creation of liability to GST. In the facts and circumstances of a given case there may be disclosed consecutive acts each of which answers the statutory description of "supply", but upon examination it may appear that there is no more than one "taxable supply".*

20) In characterising the fare as consideration "for" the flight, rather than as consideration "for" just the booking, the Full Court had specific regard to the terms and conditions

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[14] In determining this question, the only matter in dispute is whether the Respondent made a "supply for consideration" within s 9-5(a). It is not in dispute that that paragraphs (b) – (d) are otherwise satisfied and that the fares in question were not input taxed or GST-free.

[15] *C of IR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 at 13,193 (in the context of the equivalent New Zealand requirement): cited with approval by the Federal Court in *TT-Line Company Pty Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 982; [2009] FCA 658 at [30]. The Full Court referred to this passage (at [38] AB 237.35) and found that the terms of the Conditions of Carriage suggested that, contractually at least, the fare had a connection or 'linkage' with the flight rather than with the entry into the contract (the making of the reservation or the booking).

[16] *Commissioner of Taxation of the Commonwealth of Australia v Scully* (2000) 201 CLR 148 at 166 at [25] per Gaudron A-CJ, McHugh, Gummow and Callinan JJ.

[17] *Berry v FC of T* (1953) 89 CLR 653 at 659 per Kitto J.

[18] (2008) 236 CLR 342 at [5].

pursuant to which both Qantas and Jetstar supplied flights to passengers[19] and had regard to each of the following criteria (at [45]-[48], AB 239.34-240.25):

a) the Tribunal found that the "actual carriage of the passenger" was "obviously the purpose of each reservation" – an inevitable conclusion in the case of a contract of carriage;

b) in *Travelex Ltd v FC of T*[20] this Court conducted the self-same enquiry. French CJ and Hayne J (at [32]) supported recourse to the purpose of the transaction as identifying the relevant supply:

Observing that rights attach to currency, and pass upon negotiation of the currency by delivery, does not constitute any "juristic disaggregation and classification of rights" that fails to reflect "the practical reality of what is in fact supplied". On the contrary, recognising that a sale of foreign currency transfers to the purchaser the rights to the notes does no more than recognise the evident purpose of the transaction. [emphasis added]

c) concurring, Heydon J relied on "*the legal substance of the transaction*" as characterising and answering the question of what was supplied in that case. At [47] his Honour stated:

The trial judge and the majority in the Full Court of the Federal Court treated the supply of the pieces of paper as being "the supply", and the rights as being merely a consequence or incident of that supply. The transaction should be characterised differently. The legal substance of the transaction was the supply of rights. [emphasis added]

d) dissenting (Crennan and Bell JJ) nonetheless similarly looked to "*the direct object of the supply*" as determining what is supplied. At [99] their Honours stated:

From both the language of s 9-10(2)(e) and its placement in s 9-10(2), it is clear that "right" for the purposes of the GST Act can exist independently of goods, services or other things or forms of supply. A right can be a "thing" within the meaning of the legislation and must itself be capable of "creation, grant, transfer, assignment or surrender". The language of s 9-10(2)(e) also indicates that a right which is created, granted, transferred, assigned or surrendered by a supplier is the direct object of that supply. [emphasis added]

The Full Court then referred to decisions of the Full Federal Court and the Administrative Appeals Tribunal which supported the approach of characterising a transaction by reference to its legal or economic substance.[21]

21) The Full Court acknowledged that there were potentially "consecutive acts of supply" and other "anterior suppl[ies]" which could fall within the definition of "supply" in

[19] Full Court at [32]-[36], AB 228.48-236.42.
[20] (2010) 241 CLR 510.
[21] At [50]-[52], AB 240.33-241.32 referring to *Saga Holidays v Commissioner of Taxation* (2005) 149 FCR 41 (affirmed on appeal at (2006) 156 FCR 256); at [53]-[55], AB 241.34 – 244.19 referring to *Re AGR Joint Venture and Federal Commissioner of Taxation* (2007) 70 ATR 466; At [57], AB 244.33 referring to *Westley Nominees Pty Ltd v Coles Supermarkets Pty Ltd* (2006) 152 FCR 461.

s 9-10 (at [42] and [44], AB 238.39 and 239.25). What the Full Court embarked upon was the enquiry required by s 9-5, namely to identify the taxable supply. In doing so the Full Court described the supply for consideration (i.e. the taxable supply) as the "relevant supply".[22]

22) The approach adopted by the Full Court is consistent with the settled approach of other common law jurisdictions (with similarly wide definitions of supply) to the characterisation of transactions for VAT purposes. The approach is to focus on the objective substance of the transaction, rather than conducting an artificial dissection of the contract, in determining whether an agreement or transaction involves a single supply or a number of independent supplies.[23] The Federal Court,[24] the Courts in Canada[25] and the Commissioner[26] have all adopted this same practical and substantive approach.

23) These various formulations referred to above are all saying the same thing, namely that one approaches the question of the nature and number of supplies with common sense and commercial reality in mind – what is the "act" for which the customer prepaid the fare. Mutual promises are not to be confused with acts of performance, on either side. Having regard to those principles, the Full Court found that the "act" for which the customer prepaid the fare was the flight. This was the essence, and sole purpose, of the transaction. If there were any doubt as to what the fare was prepaid for, it is confirmed in the conditions of carriage for both Qantas and Jetstar which state "*Your fare covers the flight(s) for you and your Baggage Allowance*".[27]

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[22] See the heading above paragraph [40]. AB 238.19.

[23] *British Airways v CEC* [1990] STC 643, 647-8; *Wellington Hospital v CEC* [1997] STC 445, 460g-462h *United Biscuits v CEC* [1992] STC 325, 329 *Card Protection Plan v Customs Comr (No.2)* [2002] 1 AC 202 per Lord Slynn at 212G.*Beynon and Partners v Commissioner of Customs and Excise* [2004] 4 All ER 1091; [2005] 1 WLR 86 per Lord Hoffman (at 94 [31])

[24] In *Saga Holidays v Commissioner of Taxation* (2005) 149 FCR 41 (at 56 at [30] and 88-89 at [108]-[111]) Conti J found that what is supplied under a contract is to be determined by commercial reality and the essential features of the transaction, rather than by artificially splitting the contract into components. In affirming the decision on appeal [(2006) 156 FCR 256] Stone J at [43] (Gyles J agreed) found that the approach of looking at the "social and economic reality" of the transaction adopted by Lord Hoffman in *Beynon and Partners v Commissioner of Customs and Excise* was relevant to this issue.

[25] *O.A. Brown v Canada* [1995] GSTC 40 where Rip J at 40-5 said: "*The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transactions to determine the tax consequences.*" This approach was approved by the Federal Court of Appeal in *Hidden Valley Golf Resort Assn v The Queen* [2000] GSTC 42.

[26] See GSTR 2002/2 at [235] to [250]; GSTR 2006/9 at [65] which states "*a supply that contains a dominant part, but also includes something that is integral, ancillary or incidental to that part is a 'composite supply', being the supply of a single thing*"; GSTR 2001/8 at [40]-[44], including [41] which states: "*We agree with the line of reasoning which has emerged from the overseas cases and with the commonsense approach used to objectively assess the characteristics of a supply. This means that you should take an overall view of the circumstances of a transaction that comprises a bundle of features and acts. This will enable you to determine whether you should regard the supply as having several distinct parts or whether it is the supply of a single thing.*"

[27] Qantas cl 5.1, AB 87.20; Jetstar cl 5.1, AB 162.44.

24) The Full Court made no error of law, its having had regard to the facts and to established legal principles.

Part VI: Reply to the Commissioner's submissions

The Commissioner's submission in summary (at [18]-[20])

25) The Commissioner's focus on the "attribution" of GST by the Respondent is misplaced. The only question in this proceeding is whether the Respondent made a taxable supply and thereby had a liability for GST. Liability for GST arises on taxable supplies that you "*make*". In the absence of a taxable supply, there is no liability for GST.

The statutory scheme for payment of GST (at [21]-[31])

26) The statutory scheme outlined by the Commissioner at [21]-[25] focuses on the accounting details of how the GST is administered, (including monthly reporting and payments (or refunds) of "net amounts"), rather than the charge to tax, which is the real issue herein. However, as acknowledged at [25], the only criterion of liability is the existence of a taxable supply, namely a "supply for consideration". Consistent with this, the "*GST*" component of a taxpayer's "*net amount*"[28] is "*the sum of all the GST for which you are liable on the taxable supplies that are attributable to the tax period.*" [emphasis added]. This cannot be side-stepped.

27) At [27]: The identification of the supply and the characterisation of the transaction should not be "put aside" in this appeal. As noted by this Court in *Reliance Carpet,*[29] to apply the GST Act properly it will be necessary to determine what the relevant "taxable supplies" are. This is the case irrespective of whether the transaction involves taxable, GST-free or input taxed supplies.[30]

28) At [29]: Section 9-80 requires taxpayers to identify if a supply has more than one component.[31] The Commissioner's continued focus at [28]-[31] on the "attribution" of GST is misplaced. This proceeding is (and has always been) about liability, not the accounting technicalities of attribution. [32]

29) The Commissioner falls into further error by contending that a taxpayer's "net amount" is "fixed" (at [31]) or "determined" (at [33]) by, and the measure of the taxpayer's GST **liability** is "occasioned" (at [34]) by, the amount of consideration first paid or invoiced in a tax period. That is not what the section says. A taxpayer's net

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[28] 17-5(2).
[29] (2008) 236 CLR 342 at [5].
[30] The decision in *Federal Commissioner of Taxation v Secretary to the Department of Transport* [2010] FCAFC 84; (2010) 188 FCR 167 provides a ready example, see also [44] of these submissions.
[31] See *Commissioner of Taxation v Luxottica Retail Australia Pty Ltd* [2011] FCAFC 20; (2011) 191 FCR 561 which involved a single supply of spectacles but the issue was the allocation of the value between two separate components of the supply, being the GST-free supply of lenses and the taxable supply of frames.
[32] Including during the objection process, before the Tribunal and before the Full Court.

amount is "the sum of all the GST for which you are **liable on the taxable supplies**..." [emphasis added].

A self-assessed tax (at [32]-[34])

30) The Commissioner's reference to the assessment regime does not advance his case. Firstly, as the Commissioner points out, GST is not a self-assessing tax and assessment is dealt with separately and at a different time from the initial payment of the tax. In the present case, many of the assessments were raised specifically for the purposes of enabling the Respondent to dispute its liability for GST on no-shows and in all cases at different times to when the tax was initially paid.

31) The Commissioner ignores the fact that by the time the assessment and objection decision came to be made, it was known for certain that there never had been, and never was to be, any taxable supply (ie, the flight). Accordingly, when the assessments were raised the sums paid by the Respondent to the Commissioner could not be associated with taxable supplies. Had the Commissioner accepted the Respondent's refund request, the assessments should have been raised to reflect a net amount which no longer included a liability for taxable supplies that did not, in fact, occur. This is the basis on which the Commissioner has put his case until now (that is the sole issue is whether there is a taxable supply in circumstances of a no-show or cancelation).

32) Furthermore, the Commissioner also fails to have regard to no-show events which occurred in the same tax period in which the fare was paid (eg, a cancellation of the supply).[33] In this circumstance there is no "adjustment", simply an overpayment of tax, to be adjusted accordingly, irrespective of whether the net amount is determined when the business activity statement is lodged or an assessment is raised. The Commissioner's contention is in direct conflict with that outcome.

33) In other cases there will be an adjustment to the Respondent's net amount through the adjustment provisions found in Division 19. Similarly, as a consequence of the no-show or cancellation there is no taxable supply and s 19-40 requires there to be an adjustment to the Respondent's net amount. As the Commissioner stated before the Full Federal Court, the adjustment provisions in s 19-40 and Division 19: "*... leads back to the central issue in appeal, whether the applicant makes a taxable supply*".[34] Accordingly, the attribution point is without merit.

34) Finally, the Commissioner should not be permitted to raise the issue of attribution for the first time before this Court. The application of Division 19 and the identity of the tax periods to which the Respondent objected was not raised by the Commissioner in

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[33] Such events would have occurred in this matter, where no-shows or cancellations occurred in the same tax period in which the fare was paid.

[34] Paragraph 37 of the Commissioner's outline of submissions before the Full Federal Court.

the objection decision, or before the Tribunal or before the Full Court.[35] As a consequence, the Respondent has been denied the opportunity to address any evidential enquiry as to: (i) the extent of same month no-show amounts; and (ii) what difference (if any) it might have made to the figures in the claim or the assessment for the trans-month no-show amounts. As a result, the Respondent is prejudiced if the Commissioner is now allowed to pursue this new argument. The Respondent is arguably now out of time to object to most of the tax periods in question on any alternate basis.[36] Further, a related extension of time issue between the parties was settled on the basis that the assessments and the objections lodged thereon would resolve the Respondent's refund claim. To allow the Commissioner to raise this new point following that resolution only seeks to reinforce the further prejudice that the Respondent would suffer. This is not a matter where special leave was granted to the Commissioner on terms that, irrespective of the result, the Commissioner pay the taxpayer costs of the appeal.[37] In such circumstances, it would not be in the interests of justice to allow the Commissioner to now rely on a new line of argument for the first time in this Court.[38]

35) The central question before this Court therefore remains the same as before the Full Court and the Tribunal – ie, whether the Respondent made a taxable supply.[39] If not, the Respondent is not liable to GST, the assessments are excessive and the Commissioner is not entitled to retain that overpaid GST.

The taxable supply by the Respondent (at [35]-[38])

36) At [35]: The respondent did not make reservations "in performance" of the contract between Qantas and its customers: the reservation was part of the formation of the contract. Agreeing the obligations and performing them are two different things: until a passenger comes to the gate, at the earliest, no actual performance of a contract of carriage can begin.

37) At [36]: The making of the reservation/booking cannot have disclosed acts answering the statutory definition of "supply": they are acts made either in the course of the offer and acceptance process, or simply a record of the already made contract. As to this, upon examination of the facts and circumstances, and making proper reference to decisions of this Court in *Reliance Carpet* and *Travelex,* the Full Court correctly

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[35] The Respondent has raised the application of Division 19 as a ground in its Notice of Contention and the matters raised in support of that ground are at [66]-[68] of these submissions.
[36] Assuming the Commissioner now contends that the adjustment issue is not sufficiently covered by the respondent's notice of objection.
[37] *Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation)* [2005] HCA 20; (2005) 220 CLR 592 at [80].
[38] *Water Board v Mostakas* [1988] HCA 12; (1994) 180 CLR 491 at 497; *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418 at 438 referring to *Connecticut Fire Insurance Co v Kavanagh* (1892) AC 473;
[39] For the Commissioner's previous position see [1], [2], [5], [37] and [39] of the Commissioner's outline of submissions before the Full Court.

decided that there was only one "taxable supply", being the supply of the air travel for the pre-paid fare. The supply of air travel did not take place, so the taxable supply was not made. No other taxable supply occurred in the event.

38) The "acts" of the making of the reservation or booking were not what the passenger prepaid the entire fare "for".[40] Further, the acts identified,[41] are not "supplies" as they are not things which result in anything being provided to another party.[42]

39) If the supply of travel is to be atomised into supposed sub-elements, there are more obvious elements than those relied on by the Commissioner (and found by the Tribunal). These include things such as, baggage handling and carriage, lounge access and onboard catering. However, (i) none of this actually occurred and (ii) even these are things that the Commissioner correctly accepts form part of a "*single supply of air transportation...*".[43]

The alleged errors of the decision of the Full Court

(i) the statutory issue (at [39(a)] and [40]-[42])

40) At [39(a)]: The "statutory issue" referred to the Tribunal for review was not whether the GST was "attributable" to the tax period in which the fares were received. At no stage during the history of this proceeding did the Commissioner raise such an argument. The "statutory issue", as recognised by the Full Court and as stated by the Commissioner was whether the Respondent made a taxable supply.[44]

41) At [40]: To conclude that the assessments were excessive, as found by the Full Court, it must be found that there was in the event no taxable supply made by the Respondent. The statutory issue is not determined solely by whether there was a mere payment in connection with the anticipated performance of a promise , but whether, upon the proper characterisation of the events of the transaction, there was a "supply for consideration".

42) At [41]: The Commissioner purports to focus on the "statutory question" supposedly posed by ss 9-75 and 9-15. The sole statutory question in this case is posed by s 9-5(a) – whether there is a "supply for consideration".

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[40] For example, in the case of Ansett the Commissioner required businesses to adjust their GST as the supply, being the domestic air travel, had been cancelled. The Commissioner did not seek to argue, as he now does, that the customers had received a supply of a booking or reservation – see Media Release 2001/77.

[41] For example, the making of the reservation, internal seat allocation, preparations for seat check-in.

[42] *Westley Nominees Pty Ltd v Coles Supermarkets Pty Ltd* (2006) 152 FCR 461at [16].

[43] For example, see GST Private Ruling GST/SYD/5974753 issued to the Respondent and dated 18 June 2008; Cf *British Airways v CEC* [1990] STC 643 – airline meal is integral to the flight, and not a separate supply.

[44] See paragraph [18] of the Commissioner's Statement of Facts Issues and Contentions filed before the Tribunal, AB 135.40

(ii) the "relevant" supply (at [39(b)] and [43]-[46])

43) At [39(b)]: Far from being "repugnant", the Commissioner uses the concept of "relevant supply" in his own submissions.[45] The words refer to the outcome of the characterisation of the transaction, namely identification of the "supply for consideration". The identified supply may be one of a multitude of acts or events, each of which may fall within the statutory definition of supply in s 9-10.[46]

44) At [45]: These cases show that characterisation of a transaction is a fundamental part of the GST – it does not matter whether the transactions are taxable, GST-free or input taxed. In any event, in *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* it was not established or conceded that there was a supply, as the issue was whether the lease gave rise to one or two supplies.[47] The decision of the Full Federal Court in *Federal Commissioner of Taxation v Secretary to the Department of Transport*[48] provides a ready example of a case where the Court was required to determine whether the transaction, properly characterised, gave rise to one or two taxable supplies.[49]

45) At [46] the Commissioner again misstates the statutory question. He says that there only need be "a taxable supply *in connection with* which the amount is received". The statutory question presupposes the conclusion, that there is a taxable supply. The statutory question asked by paragraph 9-5(a) is whether there is a "supply **for** consideration".

(iii) the decision in Reliance Carpet (at [47]-[53])

46) The decision in *Reliance Carpet* was correctly applied below. That case concerned the GST treatment of a deposit, and whether the forfeited deposit was consideration for any supply at all, not being the whole supply. The present case concerns the GST treatment of the *pre-payment of the whole consideration* and whether that consideration is for the whole supply. No issue of forfeiture arises. It is impossible to align the case factually with *Reliance Carpet*.

47) Further, in *Reliance Carpet* this Court emphasised the importance of interests in land as being what the contract concerned and of the related effect of an interest in land (in rem) coming into existence.[50] In the context of that case, it meant that there was (if only for a time) delivery of part of the very thing that the contract was designed to

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[45] At [27], AB 227.41.
[46] See *Reliance Carpet* at [5].
[47] (2006) 152 FCR 461 at [34] and [58].
[48] [2010] FCAFC 84; (2010) 188 FCR 167.
[49] In dismissing the Commissioner's application to this Court for Special Leave to appeal, the Chief Justice found that the application bore on matters of characterisation: *Commissioner of Taxation of the Commonwealth of Australia v Secretary of the Department of Transport (Victoria)* [2010] HCATrans 330 at lines 725-730, also lines 32-37. See also lines 85-95 where Counsel for the Commissioner discussed the different ways in which the Full Court characterised the transaction.
[50] (2008) 236 CLR 342 at [17], [38].

deliver – ie, an enforceable interest in land. There is no analogue in the present case: no right of property or in equity arises.

48) Given that the question in *Reliance Carpet* was the GST treatment of a deposit and its forfeiture, that case was about Division 99. In finding that the forfeited deposit was consideration for a supply, this Court found that Division 99 operated as a "wait and see" provision,[51] whereby the task of identifying what the deposit was paid "for" was deferred until such time as the contract was completed or the purchaser defaulted.

49) In the present appeal, the entirety of the fare has been pre-paid and Division 99 has no application. The characterisation of the transaction and the identification of the supply that the pre-paid fare is paid "for", must therefore take place at the time the fare is paid. Upon the proper characterisation of the transaction as a single supply of air travel, the fare must be taken as being paid "for" that supply, giving rise to a single taxable supply of air travel. It is by reference to that contractual agreement that the enquiry as to the subsequent making of a taxable supply is to be carried out.

50) When regard is had to the entirety of paragraph [13] of this Court's judgment in *Reliance Carpet*, the phrase '*nothing more nothing less*' was considered in the context of the definition of real property in the GST Act and to the particular subject matter of the contract, namely the title or estate of the vendor in land. Also, as disclosed at [28] of that judgment, this Court was looking at the issue of whether a deposit satisfied the statutory criterion of consideration. It is not sufficient to establish a payment as consideration, one must go further and identify a supply, and then relevantly link that payment as consideration *for that supply (that being the taxable supply)*.

51) It should also be noted that the Contract of Sale in *Reliance Carpet* was entered into pursuant to the exercise of an option to purchase[52] and was itself an act of performance of the prior option agreement. It is a far step to suggest that the case is authority for the proposition that the act of making of every contract is to be treated as a self-standing supply. The context in which that contract was made (involving the sale of land) meant that the sale contract did not remain wholly executory and there was (if only for a time) delivery of part of the very thing that the contract was designed to deliver – ie, an enforceable (though defeasible) equitable interest in land, and other seller's obligations related to it.

(iv) implications of the Full Court decision (at [54]-[56])

52) Contrary to the Commissioner's submissions, the scheme for the collection of GST is in no way disrupted by the decision of the Full Court. Nothing in the decision of the Full Court affects the normal operation of the tax, whereby GST is "attributed" on receipt of payment (including pre-payments received on the entry into executory

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[51] Ibid at [35].
[52] (2008) 236 CLR 342 at [17].

contracts for taxable supplies that have not yet occurred). It is simply an advance payment provision. The decision of the Full Court is solely about liability for GST and it does nothing to alter the obligation on taxpayers to attribute GST in the usual course[53] and offers no excuse to a trader who receives a pre-payment to defer "attribution" of GST.

53) As the supply paid for was, in truth, the flight, which did not happen, the Respondent has no liability to pay GST and it is clear that the assessments issued for each tax period were excessive, and there should be a refund of that GST.

54) The GST Act requires taxpayers to attribute GST on the receipt of payment, rather than on the making of a taxable supply. Such attribution is necessarily provisional where performance has yet to occur. When it comes, it may not be the anticipated performance, and may fall into a different GST category, for example. Or it may never come. Accordingly, where a pre-payment is received by a taxpayer in respect of an executory contract, the taxpayer is required to initially account for a GST liability that will crystalise if the taxable supply is made (ie, on the implicit assumption the executory contract will ultimately be executed or performed according to its terms). In such circumstances, it is to be expected that subsequent events may prevent the substantive liability from ever crystalising, eg if the contract remains executory. Established mechanisms naturally exist for adjusting taxpayers' GST liabilities to reflect the impact of subsequent events, eg, if the supply does not occur, and/or the price alters (including refunds). The existence of those mechanisms, such as Division 19,[54] show that it is the underlying policy of the GST Act that, in situations such as this, no net GST burden should remain on the taxpayer. The real threat to the integrity of the GST system is the suggestion that a taxable supply is made every time mutual promises are exchanged.

55) A taxpayer's obligation to *pay* an amount on account of GST is not dependent upon the issue of an assessment, but by reference to the "net amount" which is reported for a particular tax period.[55] The *Taxation Administration Act 1953* **(the TAA)** contains provisions whereby the Commissioner can subsequently make assessments of net amounts[56] and objections can be made to those assessments on the basis that they are excessive[57] (as was done by the Respondent). That is the usual process whereby

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[53] Section 29-5; see the Commissioner's Submissions at [23].
[54] Which the Commissioner has publically confirmed applies to cancelled flights: Media release 2001/77 GST adjustments for cancelled airline travel.
[55] The "GST" component of a taxpayer's "net amount" is "the sum of all the GST **for which you are liable** on the taxable supplies that are attributable to the tax period": s 17-5(1).
[56] Section 105-5 of Schedule 1 to the TAA.
[57] Section 14ZU of the TAA.

taxpayers agitate their rights against the Commissioner. The decision of the Full Court has no impact on this process.[58]

Part VII: Matters raised in the Respondent's Notice of Contention

Ground 1: refundable and non-refundable

56) The Tribunal ignored the clear distinction drawn in the Respondent's objection and submissions between those fares that were fully refundable and those that had restrictions on the payments of refunds (partly refundable).[59] The Full Court found that there was "considerable force" in the submissions put by the Respondent, but having regard to the conclusion it reached, it was not necessary to address them.[60]

57) There are fundamental differences (contractually) between the fully refundable fares and the partly refundable fares. In the fully refundable cases, the absence of performance of the substance of the contract, and the resultant defeat of any right to retain the monetary consideration, mean that no supply for the pre-paid consideration has occurred and the contract has come to an end with no substantial performance having taken place. The parties are returned to the *status quo ante* the booking.

58) In the context of a fare that is fully refundable, where the passenger cancels their flight (or fails to show, which is implicitly the same thing) the passenger is entitled to claim a refund of the prepaid fare. Where the Respondent retains the fare, it does so not because of what it has done, but because of the failure of the passenger to claim a refund.

59) Where the passenger cancels the flight or fails to show, there is a complete non performance. This concept was very recently considered by this Court in *Equuscorp Pty Ltd v Haxton*[61] where it was described as "*the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself*".[62] Further, the concept is not confined by contractual principles and it can arise where there is no failure of performance of promises made by the party receiving the payment.[63] In this case, the purpose of the pre-payment of the fare was the flight, which failed to occur. Qantas did not fail to perform any part of its contract with the passenger, and at the time of the no-show may have stood ready to perform

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[58] In any event, as was noted by French CJ and Hayne J in *Travelex* at [36], that the decision of the Full Court may cause practical difficulties in administering the relevant provisions of the GST Act does not provide any basis for reading down the provisions or for reading the expression "supply for consideration" in a way that departs from the construction that has been identified and applied by the Full Court.

[59] Respondent's Notice of Appeal to the Full Court, Grounds 4(m) and (n), AB 213.47-214.13.

[60] The Full Court summarised the Respondent's submissions at [59], AB 245.21 and noted its view at [60], AB 245.38.

[61] [2012] HCA 7.

[62] [2012] HCA 7 at [31] per French CJ, Crennan and Kiefel JJ.

[63] Ibid at [32], referring to *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 556-557 at [103]-[104] per Gummow J.

the contract, but that does not detract from the finding that there was a failure of consideration.

60) The position is analogous the findings of Gzell J in *TAB Ltd v Commissioner of Taxation.*[64] In that case the Court considered that payments made for a purpose which had failed and as a consequence of which were refundable, but unclaimed, were not consideration for a supply. His Honour stated (at [28]-[29]):

'TAB raises an alternative argument. There is no gambling supply in terms of the GST Act, s 126-35(1) unless there be a taxable supply. That term is defined in s 9-5(a) to require the making of a supply for consideration. TAB argues that the events giving rise to an entitlement to a refund deny the existence of a supply in relation to the bet. Or, put another way, there is a total failure of consideration for the bet.

*Failure of consideration is not limited to non-performance of a contractual obligation, although it may include that. The concept embraces payment for a purpose that has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared (*Roxborough v Rothmans of Pall Mall *(2001) 208 CLR 516 at 525).'*

His Honour agreed with the contention and (at [35]) said as follows:

'A bet on a horse that is scratched from a race is, however, ineffective. If it is ineffective it no longer relates to the outcome of a gambling event or the consideration for the bet wholly fails, there is no supply for which the bet is consideration and, in consequence, there is no taxable supply in terms of the requirement of the GST Act, s 9-5(a).'

61) In *TAB* Gzell J also considered the argument that at the time the bet was placed, TAB gave consideration for the bet as it was obliged to act in accordance with the *Totaliser Act 1997* and the TAB Rules, and accordingly at that time there was a taxable supply (see [36]). His Honour observed that the supply (ie, the obligations) was conditional on an outcome of a gambling event and that "*if there is no outcome, or the bet ceases to relate to an outcome, the gambling supply and the taxable supply cease to exist.*"[65] These findings are irreconcilable with the Tribunal's findings (and the Commissioner's contention) that the respondent made a supply of a right or obligation (pursuant to s 9-10(2)(e) and (g)).

Ground 2: apportionment

62) Having found that the prepaid fare was for the supply of various obligations, as well as for the purpose of the actual travel, the Tribunal erred in failing to consider or give reasons why, contrary to the Respondent's submission, the fare should not be apportioned between the two supplies.

63) If (as found by the Tribunal and contended for by the Commissioner) the Respondent does make a supply to the passenger on the making of a reservation or booking for

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[64] (2005) 192 FLR 189; (2005) 223 ALR 309.
[65] Ibid at 195 at [37].

which the fare is consideration (which is denied), the Respondent must make a separate supply to the passenger, namely of the air travel, for which the fare is also consideration. To hold otherwise would make GST a tax on contracts and not a tax on supplies and would be contrary to the context, purpose and scheme of the GST Act. The making of a reservation or booking must necessarily involve two distinct supplies, namely the supply of rights and obligations on contract and the supply of air travel (if and when it occurs).

64) In the context of characterising a taxable supply (or taxable supplies) by reference to what the parties actually bargained for (which must be determined at the time of making the reservation), and accepting (*quod non*) that some portion of the fare is to be attributed to something other than the prospective travel, it is clear that the passenger paid the vast majority of the fare, if not all (in the case of fully refundable fares), "for" the contemplated supply of air travel and not the supply of certain rights and obligations on making the reservation.

65) Adopting a practical and commonsense approach, the portion of the prepaid fare which could reasonably be ascribed to the supply of the booking/reservation must be negligible. Accordingly, the amount of any GST liability with respect to that supply must also be negligible.

Ground 3: adjustment event

66) If the Respondent does make a supply to the passenger on the making of a reservation or booking (which is denied), upon the no-show there was an "adjustment event" for the purpose of s 19-10(1)(a) and an "adjustment" for the purpose of s 19-40. Whether refunds were actually paid by the Respondent to passengers does not impact this result.

67) The concept of "adjustment event" in s 19-10(1) extends to events "having the effect of" cancelling a supply and of changing in consideration[66]. Accordingly, there will be an adjustment event upon cancellation irrespective of whether there is a change to the consideration, and vice versa. In fact, both occurred here:

a) *Cancellation:* If the booking supply was made, the no-show is an event which "has the effect of" cancelling that supply. The customers' actions in not turning up, speak louder than any letter of cancellation.

b) *Variation of consideration:* Where the fare is rendered fully refundable, even if by reason of a pre-agreed clause, upon the no-show there is an alteration in the consideration (to zero) payable for the booking supply. The accounting position (ie, lack of actual refund claim and repayment) does not alter this fiscal analysis.

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[66] The Commissioner has confirmed that such an adjustment arises in the context of cancelled airline travel – see Media Release 2001/77.

68) The concept of "adjustment" in s 19-40 extends to supplies for which you are liable to GST and to supplies for which you "would be liable to pay GST" if they were taxable supplies. This stresses the provisionality of the initial attribution. Taking each of the paragraphs in s 19-40 in turn:

a) An adjustment event (being the no-show) occurred in relation to the booking supply;

b) GST on the booking supply was attributable to an earlier tax period (being the tax period in which the pre-paid fare was paid);

c) As a result of the adjustment event, and "taking into account any change of circumstances giving rise to an adjustment of the supply…", GST is not payable in respect of the booking supply and the GST attributed to the booking supply *no longer correctly reflects the correct amount of GST*. Therefore, "the corrected GST amount" is zero.

When applying the adjustment provisions, it is not a question of whether the applicant has attributed GST on a taxable supply, but what is the correct GST to be accounted for, taking into account the fact that an event has occurred which had the effect of cancelling the supply (ie, the travel). There should be no distinction between events having the effect of changing the consideration (eg, through a reduction in consideration in response to non-use of the prospective supply) or cancelling the supply. Each are examples of adjustment events under s 19-10. If an event having the effect of changing consideration satisfies the requirements of s 19-40, so must an event having the effect of cancelling the supply.

Ground 4: contract at an end

69) The analysis of the Full Court is mirrored by a contractual and restitutionary one. It is clear that the customer has cancelled the contract, being an "entire contract"[67] and wholly executory, before any or any substantial act of performance has occurred on either side - the pre-payment is open to being unwound. The GST question is to be determined at that point in time.

70) The contractual position at that moment can be viewed as one or more of: an abandonment or cancellation,[68] an agreement to rescind,[69] an accepted repudiation, failure of consideration,[70] or a failure of a condition, precedent or subsequent, in the

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[67] Being one in which the consideration for the payment of money is entire and indivisible: *Baltic Shipping Company v Dillon* [1993] HCA 4; (1993) 176 CLR 344 per Mason CJ at 350.

[68] *Wallera Pty Ltd v CGM Investments Pty Ltd* [2003] FCAFC 279; *Ryder v Frohlich* [2004] NSWCA 472; BC200408897 at [136]; *Hudson Investment Group Ltd v Australian Hardboards Ltd* [2005] NSWSC 716 at [350]-[351]; *Summers v The Commonwealth* (1918) 25 CLR 144; *DTR Nominees Proprietary Limited v Mona Homes Proprietary Limited* (1978) 138 CLR 423; *Fitzgerald v Masters* (1956) 95 CLR 420 at 432; *Andre v Marine Transocean* [1981] 2 QB 694.

[69] *Halsburys' Laws* (Fourth Ed Re-issue) vol 9(1) para [1014-5].

[70] *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [31]-[32] discussed in these submissions at [59] above.

shape of the customer's not presenting themselves for carriage and/or prevention of performance.

In any case, no nor no substantial performance occurred.[71] The contract, being executory, left only a right to reclaim money paid for a failed purpose. Whatever the correct contract law label, this was an event which had the effect of cancellation under Division 19 (see [67] above).

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[71] *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 54 ATR 1; [2003] FCA 1025 at [51]; *Baltic Shipping Co v Dillon* [1993] HCA 4, (1993) 176 CLR 344 at 350; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Stocznia Gdanksa SA v Latvian S.S. Co.* [1998] 1 WLR 574 at 588; *Rover International Ltd v Cannon Film Sales Ltd (No.3)* (1989) 1 WLR 912 (C.A.) at 932 and 936-7.