IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M74, M75, M76, M77, M78 & M79 of 2014

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant
and
LEND LEASE DEVELOPMENT PTY LTD
Respondent

No. M80 of 2014

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant
and
LEND LEASE IMT 2 (HP) PTY LTD
Respondent

No. M81 of 2014

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant
and
LEND LEASE REAL ESTATE INVESTMENTS LIMITED
Respondent

APPELLANT'S REPLY

Part I: Publication

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II:

2. (**Introduction**): The parties are in agreement that it is ultimately a question of objective fact whether or not each disputed payment ought properly be characterised as part of the consideration for the relevant dutiable transaction. In addition, the parties recognise the importance of evaluating the terms of each version of the Development Agreements in the resolution of the controversy.

3. There are two principal strands in the argument of the Respondents:

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(a) first, the Respondents contend that, for LLD, the "*core obligation*"[1] and the "*primary obligation*"[2] under the Development Agreement was to "*design and construct the Developer's Project and to carry out the Works*"[3];

(b) second, in that circumstance, the Respondents contend that the respective disputed payments were made "for" or "in return for" VicUrban undertaking the infrastructure works, the gasworks remediation and the artworks, and also, more generally, for LLD to obtain rights to carry out the Developer's Project and to derive profits from so doing[4].

4. By focusing on LLD's design and construction obligations under the Development Agreement, and describing them as the "core" or "primary" subject matter of the Development Agreement, the Respondents seek to cast the transfers of the land as but small and discrete components of a much wider commercial relationship whose true focus lay elsewhere.

5. (**Duties Act, s 20(1)(a)**): s 20(1)(a) requires identification of consideration for the transfer of each parcel of land, but the approach of the Respondents proceeds on the premise that, in situations involving interdependent rights and obligations, the statutory question is to be approached by identifying the various "matters" dealt with by the contract and attaching payments made on that basis.[5] That approach departs from the statutory question posed by s 20(1)(a) of the Act and repeats the *Bambro*-related error that informed Tate JA's reasoning below.[6]

6. The consideration for a transfer is what "moves" the transfer[7]; and that requires an evaluation both of what the Respondents obtained, and what they gave (in the form of money or promises).[8] What the Respondents obtained was land. VicUrban contracted (in the Development Agreement) to transfer title to the several parcels of land. Without

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1 Respondents' submissions at [5(a)].
2 Respondents' submissions at [7].
3 Respondents' submissions at [7].
4 Respondents' submissions at [14(b)]. See also Respondents' submissions at [9], [45], [47].
5 Respondents' submissions at [9], [14(b)], [19], [45] and [47]. In relation to the submission at [19], it should be recalled that s 25 does not apply in this case where each dutiable transaction (being the transfer of title) does not also "relate to" property that is not dutiable property.
6 The Respondents point to s 261 of the Act as justifying the continued application of the *Bambro* approach notwithstanding that the Act now relevantly levies duties on transactions. Section 261 is a section necessitated by the residual application of the Act to certain instruments, eg pre-2004 mortgages (s 148) and instruments declaring a trust over Victorian property which is not dutiable property (s 37(1)). See also provisions such as ss 241-246 levying duty on written documents in connection with the sale of cattle, sheep, goats and pigs, and also Chapter 8 duties on policies of insurance. Cf s 7(1) which relevantly imposes duty on certain transfers and transactions, and to which s 261 has no application.
7 *Archibald Howie* at 152.3 (per Dixon J); *Dick Smith* at [75] 519 (per Gummow, Kirby and Hayne JJ). Contrary to the Respondents' submissions (at [34]), to ask what the vendor required in order to transfer title (in accordance with the majority reasoning in *Dick Smith*) does not entail mixing up considerations of motive or economic consequences, contrary to *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)* (1958) 100 CLR 392 (***Davis***).
8 Contrary to the Respondents' submissions at [14(c)], the Appellant does not contend for an analysis of subjective motives, but instead contends that the question of what moved the transfer (including the question of what the Vendor required in order to pass title) is to be assessed by an objective analysis.

the land, the Respondents would have had nothing to develop and then sell. They obtained no benefit from the external infrastructure works, the remediation works or the artwork capable of being divorced from the transfer of land to them.

7. The Respondents contend that the payments in issue were "distinct from the obligation to pay for the transfer of the undeveloped land comprising each Stage"[9], and the Respondents in consequence contend that the payments in issue were "for" other things. Those other things had no meaning, value or relevance to the Respondents outside of the acquisition of the parcels of land for development purposes. The Respondents' contention that the payments were "for" other things is but a conclusionary assertion. Moreover, they make that assertion without undertaking a careful analysis of the whole of the Development Agreement. The Appellant says that to identify the consideration moving the transfer there necessarily must be such an analysis.

8. And so, turning to the Development Agreement, what did the Respondents give; and what did VicUrban receive?[10]

9. The answer, in substance, is that the Respondents gave (and VicUrban received) all of the payments provided for by cl 4.7 of the Development Agreement. The Stage Land Payment (the "price" specified in each Land Sale Contract) was merely part of the *first instalment* of what VicUrban was entitled to receive under cl 4.7. Clause 4.7 of the 2001 Development Agreement provided for LLD to make the first set of payments "on or before" each Stage Release Date, the second set of payments after the Initial Reconciliation Date, the third set of payments two years after Stage Practical Completion. None of those payments was any less consideration moving the transfer for being contingent, for being payable after title passed, or for being calculated by reference to the Actual Gross Proceeds of Sale realised by the Respondents. (Clause 4.7 of the 2006 and 2008 Development Agreements operates in a like manner, but in each case provides for a further set of payments on the Interim Reconciliation Date.)

10. Focusing on the Land Sale Contracts permits the Respondents to side step clause 4.1 (giving LLD the right to call for title) and clause 4.7 (identifying the payments LLD was required to make). The Respondents do not accept that the consideration for the transfer of each title was the series of payments set out in clause 4.7, referring instead to the "price" recorded in each Land Sale Contract. This dichotomy is the true crux of the controversy.

11. **(Duties Act, s 20(1)(b))**: As a matter of statutory construction, the Respondents contend that:

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9 At [14(b)].

10 Eg, in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (Court of Final Appeal of the Hong Kong Special Administrative Region, 4 December 2003) at [91]-[92], Lord Millett NPJ (with whom Li CJ, and Bokhary, Chan and Ribeiro PJJ agreed) applied the analysis of the majority in *Shop and Store Developments Ltd v Commissioners of Inland Revenue* [1967] AC 472 in identifying the consideration to be that which Shiu Wing (the vendor) "got for the Development Land".

(a) for the purposes of s 20(1)(a) of the Act, the presence of s 20(1)(b) "implicitly recognises" that the consideration for a dutiable transaction is *prima facie* determined by the parties;[11]

(b) further, the use of unencumbered value as a comparator "also shows" that the focus is on the nature of the dutiable property in its condition at the time of the transfer[12];

(c) applying s 20(1) to each Transfer of Land, the "sole objective" of the provision (and not merely sub-section (b)) is to identify the "value" of the fee simple estate "in undeveloped land" that VicUrban transferred to the relevant Respondent[13].

12. Each of these contentions should be rejected. When duty is assessed on the basis of s 20(1)(a), the analysis of what consideration passed for a transfer cannot be informed by an analysis of the unencumbered value of the property transferred. There is no basis for the Respondents' approach which construes "consideration" in s 20(1)(a) by reference to notions of "value".

13. (**The issue of valuation**): On the topic of valuations, one further matter requires a response. At [17], the Respondents says that:

(a) the Appellant has not disputed any of the valuations (the ***first valuation contention***); and

(b) it was not in dispute below that the unencumbered value of the land transferred was substantially less than the consideration sought to be assessed by the Appellant (the ***second valuation contention***).

14. The Appellant did not, and does not now seek to, assess duty under the unencumbered value limb of s 20(1) (ie under s 20(1)(b)). The first valuation contention is thus inapposite. There has never been an occasion for the valuations to be "disputed".

15. Next, in order to evaluate the second valuation contention, it is necessary to look at the valuations obtained. Each of the seven valuations is contained in the Appeal Book[14]. The valuation for Dock 5 is illustrative[15]. The valuer was instructed to assume that the contributions (here in issue) were financial encumbrances on the land[16]. And so, the

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11 Respondents' submissions at [23].

12 Respondents' submissions at [23].

13 Respondents' submissions at [20]. The Respondents again and again say that the land as transferred is undeveloped – see at [6(a)], [20], [33], [46], [49(d)], [50] – but why is it suggested (repeatedly) that the state of development of the land informs the construction, or application, of s 20(1)(a) of the **Duties Act**? Under the Act, duty is levied on the transfer of an "estate in fee simple".

14 Dock 5 valuation AB3 at 1294; Mosaic valuation AB4 at 1429; C3/C4 valuation (conducted on an improved site value basis) AB4 at 1522; C10 valuation AB4 at 1679; C9 valuation AB5 at 2072; V4 valuation AB6 at 2276. $3,717,000 is 63% of the valuation of $5,900,000; V5 valuation AB7 at 2715.

15 AB3 at 1288 – 1306.

16 AB3 at 1306; 1291; 1293. *A fortiori*, in later valuations the valuer was told to assume not only the deduction, but also an arbitrary all in cost; see, for example, the C9 valuation at AB5: 2061. It may be

amounts set out by the Respondents in paragraph [11] of their submissions in fact represent the value of the land having deducted the cost of the encumbrances[17].

16. Adding a column to the Respondents' table, the true position is then as follows:

Stage	Purchase price ($)	Valuation (after deducting the costs of the disputed payments)	Valuation (without deductions)	Assessed Dutiable value
Dock 5	4,323,364	2,575,000	7,341,750	9,738,698.83
Mosaic	1,228,979	1,600,000	5,050,000	2,575,660.30
C3/C4	924,800	less than 924,800	12,100,000	2,248,166.99
C10 (Montage)	1,539,966.57	3,900,000	8,000,000	6,164,104.92
C9 (Myer)	4,761,821	700,000	13,850,000	22,556,030.53
V4 (MKWH)	956,758.50	2,047,500	3,717,000	2,738,318.11
V5 (Convesso)	7,697,764	6,650,000	25,907,000	21,275,135

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noticed that the Respondents said the opposite in the Court of Appeal. See Court of Appeal's Reasons at [285]. (AB7 at 2982).

17 In fact, and to the contrary, under clause 4.7 of the Development Agreement, save for payments falling due after each Stage Release Date, it is provided that each of the External Infrastructure charge, Gasworks Remediation charge and Public Artwork charge will have been paid with (or prior to) the passing of title.