

COMMISSIONER OF STATE REVENUE v LEND LEASE DEVELOPMENT PTY LTD (M74/2014) (M75/2014) (M76/2014) (M77/2014) (M78/2014) & (M79/2014)

COMMISSIONER OF STATE REVENUE v LEND LEASE REAL ESTATE INVESTMENTS LIMITED (M81/2014)

COMMISSIONER OF STATE REVENUE v LEND LEASE IMT 2 (HP) PTY LTD (M80/2014)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2013] VSCA 207

Date of judgment: 15 August 2013

Date special leave granted: 15 August 2014

These appeals arise from objections to assessments issued under the *Duties Act* 2000 (Vic) ('the Act') by the appellant ('the Commissioner'), in respect of duty charged on the transfer of seven parcels of land around Victoria Harbour in the Docklands area of Melbourne. The land was transferred to the respondents ('LLD'), by the Victorian Urban Development Authority ('VicUrban') in various stages, between October 2006 and June 2010. The transfer of land for each stage was effected by a separate land sale contract, reflecting the terms of a generic land sale contract annexed to a development agreement between VicUrban and LLD.

The development agreement obliged LLD to make various contribution payments in respect of development works in the Dockland area, including a contribution to infrastructure in the area that was external to the stages, the remediation of an old disused gasworks site that was largely outside the boundaries of the stages, and a contribution to public art that was integrated throughout the Docklands area and not installed on any of the land transferred. The assessments issued by the Commissioner were calculated on the basis that the consideration for the transfer of the land included LLD's obligation to make payments towards infrastructure and construction works pursuant to the development agreement, as well as the agreed purchase price for the land. As a result of the assessments, LLD paid an additional \$2,460,182.70 in duty, penalty and interest in relation to the additional payments.

LLD objected to the manner in which the Commissioner had calculated the 'dutable value' of the land. When the Commissioner disallowed its objections, LLD issued proceedings in the Supreme Court of Victoria. Pagone J held that the Commissioner had properly assessed the dutable value payable on the land for each stage as including the payments made in respect of infrastructure and construction works pursuant to the development agreement.

The Court of Appeal (Warren CJ, Tate JA, and Kyrou AJA) upheld LLD's appeal. The Court found that the primary judge shifted his focus from the nature of the dutable property and in effect conflated the development of the precinct with the transfer of the land. He also erred by arriving at his conclusion that the contribution payments were part of the consideration for the transfer of the land on the basis that (1) various contribution payments were payable before the transfer of title; (2) the works were beneficial to the land or essential or necessary for the development of the land; (3) the obligations were integrated within a composite development and (4) all the amounts were 'all "for" the land in the form and state intended to be secured through development'.

The Court considered that Pagone J was wrong to conclude that each of the contribution payments was consideration for the transfer of the land. He should have held that the consideration for the transfer of the land was the stage land payment, being the price specified in the land sale contract. The Court considered that the judge was wrong in failing to recognise that the contribution payments were for matters that were separate and distinct from the transfer of the land. He ought to have held that each of the contribution payments was 'for' something other than the transfer of the land and that the consideration 'for' the dutiable transaction was solely that which moved the part of the composite whole comprising the transfer of the land.

The grounds of appeal include:

- The Court of Appeal erred in deciding that the consideration for the dutiable transaction, namely the transfer of the Dock 5 land, was confined to the amount stated as being the "Stage Land Payment" in the Land Sale Contract.
- The Court of Appeal misdirected itself:
 - (a) by asking what was the "instrument" that effected the dutiable transaction; and
 - (b) by then characterising the promises in the Development Agreement as being contained in the "wrong instrument", thereby excluding them from the consideration for the sale of the Dock 5 land.