



HIGH COURT OF AUSTRALIA

15 December 2010

TEC DESERT PTY LTD & ANOR v COMMISSIONER OF STATE REVENUE
[2010] HCA 49

The High Court of Australia today unanimously held that an agreement divesting WMC Resources Ltd ("WMC") of responsibility for power generation for its mining operations in Western Australia did not transfer any interest in land and so was not subject to stamp duty under the *Stamp Act* 1921 (WA). The Court of Appeal of the Supreme Court of Western Australia had previously determined that the stamp duty payable by the purchasers, TEC Desert Pty Ltd and AGL Power Generation (WA) Pty Ltd, was in excess of \$11 million.

In 1998, WMC entered into an agreement to sell its power generation assets to the purchasers ("Sale Agreement"). The assets of WMC dealt with by the Sale Agreement included power stations, generators, electrical wires, and transmission and distribution equipment. The Sale Agreement provided for the sale of those of WMC's assets that were chattels or personal property, but not those that were "Fixtures", for approximately \$190 million. The term "Fixtures" was defined in the Sale Agreement as items "affixed to land, and an estate or interest in which is therefore an estate or interest in land". The Sale Agreement required WMC to grant licences to the purchasers. The licences allowed the purchasers to use the power generation assets that were "Fixtures" and the areas of land on which they were located for 15 years. WMC could require prepayment of the licence fees, totalling almost \$40 million, on completion of the Sale Agreement. If the licences terminated, the purchasers were required to acquire the "Fixtures" from WMC.

The Commissioner of State Revenue assessed the Sale Agreement to stamp duty of approximately \$9 million on the basis that the chattels sold to the purchasers were mostly fixtures, in the technical sense, and so the Sale Agreement was an agreement to transfer interests in both land and chattels. Agreements of that kind are caught by s 70(2) of the *Stamp Act*, and duty is payable on the value of both the land and the chattels. The purchasers successfully appealed to a single judge of the Supreme Court, but that decision was overturned by the Court of Appeal. The Court of Appeal determined that s 70(2) applied to the Sale Agreement. It further held that the stamp duty payable should be increased to approximately \$11 million, as the licences required to be granted under the Sale Agreement also transferred interests in land.

By special leave, the purchasers appealed to the High Court. Most of WMC's power generation assets were on land not owned by WMC. WMC held mining leases and other mining tenements, under Western Australia's mining legislation, over those lands. The High Court held that the interests of WMC in mining tenements were not interests in land; they were personal property, limited to rights to work mines and take away minerals recovered. Thus, interests in the power generation assets affixed to such land were also personal property and not interests in land. As for the remaining assets located on land owned by WMC in freehold, the parties had made an agreed assumption in the Sale Agreement that WMC had title to the "Fixtures" separate and distinct from its title to the land. Accordingly, no interest in land was transferred. The High Court held further that terms in the licences requiring the purchasers to rehabilitate the area the subject of the licences,

and preventing WMC assigning its freehold without the assignee being bound by the licences, were contractual rights and obligations and did not grant any interests in land.

The High Court allowed the appeal and reinstated the decision of the Supreme Court at first instance that no duty was payable. The Commissioner was ordered to pay the purchasers' costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*