



# Property developments, duty and consideration

A High Court decision is a warning to property developers that, in complex developments, the dutiable consideration will rarely comprise merely the purchase price in the contract of sale. **BY SIMON TISHER**

In December 2014, the High Court allowed an appeal by the Commissioner of State Revenue in relation to the construction of s20(1)(a) of the Duties Act 2000 (Vic) (DA). In *Commissioner of State Revenue v Lend Lease Development Pty Ltd; Commissioner of State Revenue v Lend Lease IMT 2 [HP] Pty Ltd; Commissioner of State Revenue v Lend Lease Real Estate Investments Limited* (2014) 315 ALR 170; [2014] HCA 51 (*Lend Lease*), the High Court held that duty had been correctly assessed by the Commissioner not just on the “Stage Land Payment” identified in several land sale contracts, but on other expenditure and contributions made by the

purchaser, principally in relation to infrastructure, site remediation and public art.

The High Court’s decision was the final say in a trilogy that has divided judges along the way. The Commissioner was successful at first instance in the Supreme Court of Victoria, but then the Victorian Court of Appeal unanimously allowed Lend Lease’s appeal. In the final chapter, the High Court unanimously allowed the Commissioner’s appeal.

The High Court decision will provide more certainty as to how the expression “the consideration (if any) for the dutiable transaction” in s20(1)(a) of the DA will be construed and applied in the future.

That clarification, however, is not good news for property developers as the decision confirms a more expansive view of what “consideration” entails.

## The law

The dispute concerned the meaning of “the consideration (if any) for the dutiable transaction” in s20(1)(a) of the DA. There was no dispute that the facts resulted in a “dutiable transaction” in relation to “dutiable property” or that duty was to be charged on the dutiable value of the property. According to s20(1) of the DA, the “dutiable value” is the greater of:

- the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration), and
  - the unencumbered value of the dutiable property.
- The *Lend Lease* case only concerned the meaning of s20(1)(a).

## Background

The subject of the dispute was seven parcels of land in the Victoria Harbour precinct of Docklands, Melbourne. In 2001, the Victorian Urban Development Authority (VicUrban) entered into a development agreement (the agreement) with Lend Lease Development Pty Ltd (Lend Lease). The agreement was complex and was varied and restated (without consequence) in 2006 and 2008.

The agreement provided for the sale of land in stages in conjunction with the development of the land under the agreement. It obliged Lend Lease and VicUrban to enter a Land Sale Contract for the purchase by Lend Lease of the land the subject of each stage. Lend Lease was to design, construct and sell large residential and commercial buildings on the land it acquired. VicUrban was to share in the gross revenue Lend Lease would receive from the sale of the properties.

Each parcel of land was to be purchased for the Stage Land Payment on the terms and conditions contained in a Land Sale Contract and the agreement. This effectively required Lend Lease to make payment at the practical completion of each stage. Importantly, the Stage Land Payment was to be adjusted after the land was transferred having regard to the gross proceeds to be received on sale to third parties. Each Stage Land Payment was to total 2.74 per cent of the projected gross revenue for each stage.

Clause 4.7 of the agreement stipulated that Lend Lease was required to make other contributions and payments. This included infrastructure such as road works, a bridge, transport connections and other public infrastructure that would link the

### SNAPSHOT

- The dispute concerned the meaning of “the consideration (if any) for the dutiable transaction” in s20(1)(a) of the *Duties Act*.
- Lend Lease contended that only that part of the Stage Land Payment as identified in the relevant Land Sale Contract and transfer was consideration for the transfer of each parcel of land. In contrast, the Commissioner contended that the additional payments were also part of the consideration for the respective transfer.
- The High Court allowed the Commissioner’s appeal and found that the consideration which moved the transfer by VicUrban to Lend Lease of each stage was the performance, by Lend Lease, of the several promises recorded in the agreement.

Docklands area to the central business district of Melbourne. It also included the installation of public art and the remediation of the eight-hectare West Melbourne gasworks site. Some, though not all, of the infrastructure and art was to be built on the land that would be transferred. Like the Stage Land Payment, the contributions that Lend Lease had to pay were to constitute a percentage of the gross proceeds of sale. Like the Stage Land Payment, these contributions were to be made or adjusted after each parcel of land was transferred, having regard to the gross proceeds to be received on sale to third parties.

Within the agreement, these contributions and expenses were described as “Minimal External Infrastructure Contribution”, “Minimum Gasworks Site Remediation Contribution”, “Stage Integrated Public Art Contribution”, “Final Land Payment”, “Additional Land Payment” and “Additional Authority Payment” (the additional payments).

For each of the seven parcels of land, the Commissioner assessed for duty the amount paid for the Stage Land Payment together with the additional payments and GST. After its objections were disallowed, Lend Lease challenged the assessments, by requesting the Commissioner to treat the objection as appeals to the Supreme Court of Victoria.

## The arguments

In essence, Lend Lease contended that only that part of the Stage Land Payment as identified in the relevant Land Sale Contract and transfer was consideration for the transfer of each parcel of land. It relied on the decision in *Bambro (No 2) Pty Ltd v Commissioner of Stamp Duties* [1963] 63 SR (NSW) 522 (*Bambro*) and sought to distinguish the majority in *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496 (*Dick Smith*).

The Commissioner contended that the additional payments were part of the consideration for the respective transfer. He sought to distinguish *Bambro* and relied on the decision of the majority in *Dick Smith* that the criterion of consideration “for” the transaction “looks to what was received by the Vendors so as to move the transfers to the Purchaser as stipulated in the Agreement”.<sup>2</sup>

As was the case in *Dick Smith*, the Commissioner contended in *Lend Lease* that there were “several promises” in the agreement that moved the transfers.<sup>3</sup>

## The Supreme Court

Pagone J dismissed Lend Lease's appeal. His Honour articulated the "fundamental inquiry" to be what was received as consideration "for" the dutiable transaction.<sup>4</sup> This required the identification of "that which moves the transfer".<sup>5</sup> His Honour identified that an interdependence of mutual promises was not sufficient to determine whether a payment was "for" the dutiable transaction.

Pagone J found that the infrastructure, remediation, art and other works regulated by the agreement were "beneficial, essential and part of the redevelopment of the land".<sup>6</sup> His Honour concluded that they were part of what Lend Lease "sought to acquire from the authority as part of the land at the relevant stage".<sup>7</sup>

Unlike the case in *Bambro* where the sale of land and subsequent construction of buildings were found to be genuinely separate, the Court stated that much of the development and work to which the additional payments related was to improve the land before transfer; Lend Lease was not acquiring land other than as improved by the works and the development. The fact that the amounts were separately identified and allocated did "not make the individual items any less part of the whole and of consideration 'for' the land".<sup>8</sup>

For these reasons, Pagone J concluded that the obligations were "wholly integrated with one composite development project undertaken by the Authority and Developer".<sup>9</sup>

## Victorian Court of Appeal

Lend Lease's appeal to the Court of Appeal from the judgment of Pagone J was allowed unanimously. The leading judgment was given by Tate JA, with whom Warren CJ and Kyrou AJA agreed.

Lend Lease's primary challenge on appeal was that the trial judge had failed to adopt the "correct conception of the complex arrangement between the parties and its distinct parts".<sup>10</sup> This, it was alleged, resulted in a "misplaced reliance on the interdependence of the obligations" and to the drawing of "erroneous inferences from the uncontested proposition that the contribution payments made by LLD (Lend Lease) enhanced the value of the Docklands area".<sup>11</sup>

Tate JA found that Pagone J had erred in that he:

- shifted his focus from the nature of the dutiable property transferred to the land as developed
- treated the interdependence of the obligations, and the integration of the development, as determinative
- regarded the questions of causation and attribution as significant
- was inconsistent in his approach to timing

- failed to appreciate the significance of the profit-sharing arrangement
- drew mistaken inferences in relation to specific payments.<sup>12</sup>

The Court noted that the transfer of the parcels of land did not occur when the precinct was a place suitable for people to live, work and find recreation. To determine that the totality of the additional payments should be included as part of the consideration for the transfer was to "inappropriately" treat the land "as though it had already become successfully transformed".<sup>13</sup>

Tate JA concluded that the additional payments related to matters that were separate and distinct from the transfer of the land itself. In relation to the external infrastructure, there was no more than a "nominal or inchoate connection" between it and the land acquired.<sup>14</sup> The analysis of Pagone J, according to Tate JA, gave the agreement "such primacy" that it was almost "tantamount to treating the Development Agreement as the instrument that effected the dutiable transaction".<sup>15</sup> Her Honour found that primacy ought to have been given to the Land Sale Contract and rejected the Commissioner's submission that the agreement identified the dutiable transactions.

Her Honour also considered that Pagone J failed to appreciate the ongoing nature of the relationship between the parties. This was not, as was the case in *Dick Smith*, a "one-off transaction with a single objective".<sup>16</sup> Rather, the parties were in a commercial relationship that would endure over some years with payments of various kinds to be made over that time at separate intervals.<sup>17</sup> On this basis, the Court concluded that "the fact of the transfer of the land loses much of its essential character within the arrangement".<sup>18</sup>

The Court also concluded that Pagone J failed to appreciate the principles enunciated in *Bambro*. That failure was an appreciation that an interdependence of mutual promises is not sufficient to determine whether a payment is made "for" a dutiable transaction and that a "single, integrated and indivisible character of a transaction" does not preclude that transaction from containing or relating to several distinct matters, only one of which may attract duty.<sup>19</sup>

Finally, Tate JA observed that Pagone J had "made much" of the timing of those additional payments that were made before transfer but had not given equal significance to additional payments that were "post-transfer payments"; Pagone J concluded that such payments did not alter its character as consideration for the transfer.<sup>20</sup> Tate JA concluded that the significance of the timing of a payment "ought not be overstated" and was not decisive.<sup>21</sup>

The Court found that Pagone J 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 concluded that Pagone J was wrong in failing to recognise that the additional payments were for matters separate and distinct from the transfer of the land. All of Lend Lease's appeal grounds were allowed.

## High Court

The High Court, in a joint judgment (French CJ, Hayne, Kiefel, Bell and Keane JJ), unanimously allowed the Commissioner's appeal.<sup>22</sup>

The High Court found that the state or condition of the land was irrelevant to identifying the consideration "for" its transfer.<sup>23</sup> The Court also found that determining whether the consideration for the transfer only included the Stage Land Payments was not assisted by presupposing that the "multiple interrelated obligations" in the agreement should be divided up between a "sale and transfer of the land" on the one hand and the "ongoing development of the land" and its "ultimate realisation" on the other.<sup>24</sup>

Rather, the High Court endorsed the decision of the majority (Gummow, Hayne and Kirby JJ) in *Dick Smith* and held that the statutory criterion of consideration "for" the transaction "looks to what was received by the Vendors so as to move the transfers to the Purchaser as stipulated in the Agreement".<sup>25</sup>

Having identified the criterion, the High Court held that the consideration which moved the transfer by VicUrban to Lend Lease of each stage was the performance, by Lend Lease, of the several promises recorded in the agreement:

"It was only in return for the promised payment of that total sum, by the various steps recorded in the applicable agreement, that VicUrban was willing to transfer to Lend Lease the Land comprising the relevant Stage".<sup>26</sup>

In reaching its conclusion, primacy was given to the agreement made by the parties. In approving the judgment of the majority in *Dick Smith*, the High Court stated that the search is for what was received by the vendor so as to move the transfers to the purchaser "as stipulated in the Agreement".<sup>27</sup>

In construing the agreement, the High Court found that the Stage Land Payment was only one of the sums which Lend Lease was obliged to pay VicUrban on or before Lend Lease took title to a stage. In addition to the Stage Land Payment, the agreement stipulated that Lend Lease would also pay the additional payments.

The High Court agreed that the transaction

was "single, integrated and indivisible". The transaction took this character not merely because it was recorded in a single set of transaction documents, but because the rights and obligations provided in the documents were interlocked.<sup>28</sup> This was demonstrated by reference to the provisions in respect of default. Those provisions showed that it was the performance of all of the stipulations and several promises about payments that moved the transfer of the relevant land. The transaction was not to be divided as it was by the Court of Appeal.

## Implications of the High Court's decision

The main implication is that duty can, and in some scenarios will, be imposed on amounts and/or contributions other than the stated purchase price if such amounts or contributions form part of what moves the transfer of the land to the purchaser. Clearly, as was the case in *Lend Lease*, this can include amounts expended by a developer on items such as public art, remediation of premises and infrastructure. It can also include profit sharing from the proceeds of sale of the land in question. This is likely to be encountered in large scale developments.

The contractual documents to the relevant transaction will be critical. The High Court stated that its conclusion was reached "... after an inquiry that begins in the agreements the parties made".<sup>29</sup>

In a transaction based duties regime, it is clear that it is all relevant agreements that courts will have regard to when determining exactly what has moved the vendor to transfer the land to the purchaser. More than ever, careful drafting of the relevant transaction documents will be essential. In *Lend Lease*, the fact that the obligations to make the extra payments were interlocked, especially in the event of default, proved critical.

The *Lend Lease* decision is a clear endorsement of the majority of the High Court's decision in *Dick Smith*.

Finally, additional payments which relate to land other than the land that is transferred may yet form part of the consideration for the transfer of the land that is transferred. ■

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1. *Duties Act*, ss7, 10 and 18.
2. *Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496 at 518 [72].
3. Note 2 above, at 519 [75].
4. *Lend Lease Development Pty Ltd v Commissioner of State Revenue* (2012) 87 ATR 504; [2012] VSC 108 at [12].
5. Note 4 above, at [13].
6. Note 4 above, at [16].
7. Note 4 above, at [24].
8. Note 4 above, at [24].
9. Note 4 above, at [26].
10. *Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2013] VSCA 207 at [174].
11. Note 10 above, at [174].
12. Note 10 above, at [202].
13. Note 10 above, at [208].
14. Note 10 above, at [216].
15. Note 10 above, at [218].
16. Note 10 above, at [241].
17. Note 10 above, at [220].
18. Note 10 above, at [220].
19. Note 10 above, at [226].
20. Note 10 above, at [237].
21. Note 10 above, at [238].
22. *Commissioner of State Revenue v Lend Lease Development Pty Ltd* (2014) 315 ALR 170; [2014] HCA 51.
23. Note 22 above, at [44].
24. Note 22 above, at [46].
25. Note 22 above, at [49].
26. Note 22 above, at [50].
27. Note 22 above, at [51].
28. Note 22 above, at [53].
29. Note 22 above, at [51].