

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

---

COMMISSIONER OF STATE REVENUE

APPELLANT

AND

PIONEER CONCRETE (VIC) PTY LTD

RESPONDENT

*Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd*  
[2002] HCA 43  
4 October 2002  
M13/2002

## ORDER

1. *Appeal allowed with costs.*
2. *Set aside orders made by the Court of Appeal of Victoria on 2 May 2001 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.*
3. *Remit the matter to the Supreme Court of Victoria for consideration of the outstanding issues.*

On appeal from the Supreme Court of Victoria

### Representation:

C M Maxwell QC with R R Boaden for the appellant (instructed by the Solicitor for the Commissioner of State Revenue)

H M Wright QC with S G E McLeish for the respondent (instructed by Cornwall Stodart)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd**

Taxes and duties – Stamp duty – *Stamps Act* 1958 (Vic) – Valuation of property – Transfer of estate in fee simple in land – Contract of sale reserved to transferor rights to use land for particular purposes for a certain time – Instrument of transfer transferred estate in fee simple without exceptions or reservations – Relevance of contractual rights to valuation of subject property.

*Stamps Act* 1958 (Vic), ss 17(1), 63.

*Transfer of Land Act* 1958 (Vic).



- 1 GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. This appeal concerns the assessment of stamp duty, under the *Stamps Act* 1958 (Vic) ("the Act"), upon an instrument of transfer of real property. The contract of sale, pursuant to which the transfer was executed, provided that, following settlement, the transferor would have certain rights to use the subject land for particular purposes. The issue is whether those contractual rights were relevant to a determination of the value of the real property for the purpose of assessing duty on the transfer.

The legislation

- 2 Duty is charged, by s 17(1) of the Act, upon the instruments specified in the Third Schedule. Heading VI of the Third Schedule covers conveyances of real property and land transfers. In the case of a land transfer under the *Transfer of Land Act* 1958 (Vic), ad valorem duty is payable at rates expressed (so far as presently relevant) as a percentage of the value of the real property. Consistently with s 63 of the Act, the Third Schedule provides that a reference to the value of real property in the case of a conveyance on sale is a reference to the consideration for the sale, or to the amount for which the real property might reasonably have been sold if it had been sold, free from encumbrances, in the open market on the date of sale, whichever is the greater.

- 3 Section 63 provides:

"63

...

- (3) Except as otherwise provided in this Act -

...

- (b) a reference in this subdivision or in the provisions of the Third Schedule under Heading VI to the value of real property or property is a reference -

- (i) in relation to a conveyance on sale of the real property or property -

- (A) to the sum of the consideration for the sale and the consideration for the transfer of chattels included in the real property or property by reason of paragraph (a); or

*Gleeson CJ*  
*Gummow J*  
*Kirby J*  
*Hayne J*

2.

(B) to the sum of the amount for which the real property or property and the amount for which such chattels might reasonably have been sold if they had been sold, free from encumbrances, in the open market on the date of the sale -

whichever is the greater."

4 The term "real property" is defined in s 63(1) to include any estate or interest in real property. "Conveyance" is defined to include transfer.

5 No question of the value of chattels arises. The dutiable instrument described "the estate and interest transferred" as all the transferor's estate in fee simple in the land in certain Certificates of Title. As the case was argued in this Court, the critical question concerns the meaning and effect of s 63(3)(b)(i)(B). In assessing duty, the appellant valued the real property the subject of the instrument of transfer by estimating the amount for which the estate in fee simple might have been sold in the open market. The respondent contends that allowance should have been made for the contractual rights which, it is said, diminished that amount.

6 The transfer was executed in November 1995. The Act was amended in 1997. The respondent seeks to rely on the amendments in aid of an argument as to the construction of the legislation. It will be necessary to refer to the amendments and the argument in due course. However, the operative legislation at the relevant time is as set out above.

#### The transaction and the dutiable instrument

7 Amatek Limited ("Amatek") was the owner of some 35 hectares of land at Clayton in Victoria, on which there was a partly worked out quarry. By a contract of sale dated 21 November 1995, Amatek agreed to sell, and the respondent ("Pioneer Concrete") agreed to buy, the land, which was described in the contract of sale by reference to the Certificates of Title. The price was as calculated in accordance with a formula set out in Special Condition 3 of the contract. It worked out at \$1,731,053.

8 General Condition 1 of the contract of sale provided that the sale was subject to the purchaser "assuming liability on the Settlement Date" for certain "encumbrances and restrictions" listed in a Schedule. The Schedule referred to:

3.

- "(1) All restrictions disclosed in the Vendor's Statement to the Purchaser of Real Estate pursuant to section 32 of the *Sale of Land Act* 1962 ...
- (2) The retention of certain rights by the Vendor to itself (as trustee for Thomas Street Pty Ltd as beneficial owner of Land) as provided for in Special Condition 5 of this Contract."

9 Paragraph (1) may be disregarded. Paragraph (2) is of present relevance. Its effect was that, on and from the Settlement Date, Pioneer Concrete assumed contractual liability in respect of the rights provided for in Special Condition 5. The Settlement Date was defined as the date of acceptance of title and payment of the first instalment of the purchase price.

10 There was also a separate contract, referred to as a "grant agreement", which was executed at the same time as the contract of sale. The parties to the grant agreement were Amatek, Pioneer Australian Waste Management Pty Ltd ("Pioneer Waste") and Pioneer International Ltd. Under that agreement Amatek assigned to Pioneer Waste certain rights in relation to the tipping of waste on those portions of the land which had been quarried and were suitable as sites on which to dump waste materials. Pioneer Waste and Pioneer Concrete are related companies. The so-called "tipping rights" assigned by Amatek to Pioneer Waste were the rights which, as will appear, were "retained" by Amatek pursuant to Special Condition 5.2 of the contract of sale. In relation to some parts of the land, the assignment took effect as a grant; in relation to other parts options were created. The consideration payable by Pioneer Waste to Amatek under the grant agreement was \$1,503,794 plus further amounts calculated in accordance with a formula. It is common ground that, if there had been no retention of the tipping rights by Amatek, and those rights had simply been granted by Pioneer Concrete to Pioneer Waste upon or after completion of the sale, the present problem would not have arisen. The respondent would have had no case. However, the commercial reasons for the arrangement were explained in evidence, and it is not suggested that there was any intention to avoid stamp duty.

11 Special Condition 5 of the contract of sale between Amatek and Pioneer Concrete provided:

"5. RETENTION OF RIGHTS TO POSSESS USE AND OCCUPY THE LAND

5.1 The Vendor retains to itself as trustee for Thomas the right to possess, use and occupy (excluding Tipping Rights):

- (a) Land Areas 1 and 3A for nil years;

*Gleeson CJ*  
*Gummow J*  
*Kirby J*  
*Hayne J*

4.

- (b) Land Area 2 until 30 June 1996;
- (c) Land Area 3 for 5 years from the Settlement Date;
- (d) Land Area 4 for 7 years from the Settlement Date;
- (e) Land Area 5 for 8 years from the Settlement Date; and
- (f) Land Area 6 for 12 years from the Settlement Date.

5.2 The Vendor retains to itself as trustee for Thomas Tipping Rights in respect of:

- (a) Land Areas 1 and 3A for 2 years from the Settlement Date;
- (b) Land Area 2 for 5 years from the Settlement Date;
- (c) Land Area 3 for 7 years from the Settlement Date;
- (d) Land Area 4 for 8 years from the Settlement Date;
- (e) Land Area 5 for 12 years from the Settlement Date; and
- (f) Land Area 6 for 15 years from the Settlement Date.

5.3 Without limiting the generality of sub-clause 5.1 of this Special Condition 5, the retention by the Vendor to itself as trustee for Thomas of the right to possess use and occupy a Land Area excludes Tipping Rights but includes (without limiting the generality of the words 'the right to possess use and occupy') the retention of the following specific rights during the relevant period of possession use and occupation by the Vendor:

- (a) the right to occupy and possess the relevant Land Area to the exclusion of third parties;
- (b) the right to use, sell or otherwise supply Cover Material and tailings on or from the relevant Land Area;
- (c) the right to use the relevant Land Area for any purpose whatsoever including but not limited to quarrying operations.

5.4 Without limiting the generality of sub-clause 5.2 of this Special Condition 5, the retention by the Vendor to itself as trustee for



5.

Thomas of the Tipping Rights includes the retention of the right to occupy possess and use the relevant Land Area to the exclusion of third parties for the purpose of Tipping Operations only.

5.5 The Purchaser accepts and acknowledges the retention of rights referred to in Special Condition 5.1 and 5.2.

5.6 At the conclusion of the period of Tipping Rights in respect of a Land Area by the Vendor, the Vendor shall, if it remains at that time in possession of the Tipping Rights:

- (a) vacate the Land Area but shall be under no obligation whatsoever to reinstate or repair the Land Area in respect of any damage or destruction caused by quarrying operations, Tipping Operations or other activities of the Vendor or any other person in the Land Area; and
- (b) use its best endeavours to excise that Land Area from the relevant Extractive Industry Licence, if not already excised, so that it ceases to have any application to that Land Area.

5.7 The Purchaser hereby consents to the grant of Tipping Rights to Pioneer in accordance with the Grant Agreement.

5.8 Retained Rights and Tipping Rights shall terminate at the expiration of the relevant period in respect of each Land Area set out respectively in Special Condition 5.1 and 5.2 above."

12 The terms "Tipping Operations" and "Tipping Rights" were defined as follows:

"'Tipping Operations' means the bringing on to the Land of waste, tipping and disposing of, treating compacting and covering the same, in conformity with the EPA Works Approval and the Proposed EPA Licence.

'Tipping Rights' means the right to conduct Tipping Operations."

13 The EPA is the Environmental Protection Authority.

14 It is the "tipping rights" the subject of Special Condition 5.2 that gave rise to the present dispute.

Gleeson CJ  
Gummow J  
Kirby J  
Hayne J

6.

15       The rights the subject of Special Conditions 5.1, and 5.3, referred to in argument as "extraction rights", related, we were told, to sand. Although they also were at one stage a matter of contention, that is no longer so. As will appear, the appellant accepted Pioneer Concrete's argument about those rights.

16       The dutiable instrument was a Transfer of Land under the *Transfer of Land Act* 1958 (Vic) entitled "Transfer of Land". It stated that the transferor transferred to the transferee the estate or interest specified in the land described for the consideration expressed and subject to the encumbrances affecting the land including any created by dealings lodged for registration before the lodging of the transfer. No such dealings were mentioned in evidence. The land was described by reference to the Certificates of Title. The estate and interest was said to be "all [Amatek's] estate in fee simple." The consideration was said to be \$1,731,053. The transferor was identified as Amatek. The transferee was identified as Pioneer Concrete. The date was 28 November 1995. The instrument was executed under the common seal of Amatek and Pioneer Concrete.

17       The transfer made no reference to the contract of sale, or to any tipping rights.

18       The argument was conducted on the assumption that the combined effect of Special Condition 5.2 of the contract and of the grant agreement was that, upon settlement, Pioneer Concrete was contractually bound to permit Amatek and (to the extent to which they were assigned by Amatek to Pioneer Waste) Pioneer Waste, to exercise the rights referred to in Special Condition 5.2. A valuer gave evidence that use for landfill was the highest and best use of the land, and constituted its major source of market value. He valued the land at \$7,140,000, and explained the difference between that amount, and the price of \$1,731,053 paid by Pioneer Concrete, mainly by reference to the tipping rights. Beyond that, there was no analysis in argument of the precise nature of the rights, save that it was contended by the appellant, and not denied by the respondent, that they rested solely in contract and created no proprietary interest in Amatek or Pioneer Waste. In that respect, it may be noted that the right of possession to the exclusion of third parties referred to in Special Condition 5.4 was for the purpose of tipping operations only.

19       In the Court of Appeal of the Supreme Court of Victoria, Tadgell JA gave the following summary of the general effect of the retained rights:

"The effect of the contract of sale and the [g]rant [a]greement in combination, so far as is now relevant, was to reserve to the vendor, Amatek, rights to occupy and extract sand from defined portions of the

7.

subject land and to retain tipping rights in relation to those portions until sand extraction was completed. Thereafter, Pioneer Waste had the right, by virtue of the [g]rant [a]greement, to conduct tipping operations on such of the land as was worked out as a quarry."

The assessment

20 In order to assess stamp duty on the transfer, the appellant obtained from the Valuer-General a valuation of the land, disregarding the effect of Special Condition 5 of the contract of sale. The land was valued at \$7,710,000, and duty was assessed accordingly at \$424,050. (The difference between the figures of \$7,710,000 and \$7,140,000 appears to have been solely referable to differences in the opinions of valuers. As will appear, some valuation issues remain outstanding.) The respondent objected to the assessment, contending that the value for duty purposes of the real property was the consideration for sale, which was \$1,731,053.

21 The appellant allowed the objection in part, excluding from the dutiable value of the property an amount of \$570,000, which was regarded as the value of the extraction rights. Stamp duty was reduced to \$392,700. The distinction thus made between rights the subject of sub-cll 5.1 and 5.3, on the one hand, and sub-cl 5.2 on the other hand, caused some forensic embarrassment to the appellant. At first sight, it appears to involve inconsistency. In this Court, counsel for the appellant took the approach that, although it was now too late to increase the amount of the assessment, the concession made in relation to the extraction rights was erroneous. Alternatively, he argued that it could be justified on the basis that the effect of sub-cll 5.1 and 5.2 was that there was an exception or reservation of the sand the subject of the extraction rights and, although they were not referred to in the instrument of transfer, it was appropriate to assess duty on that basis. In any event, if there is an inconsistency in the appellant's approach to the assessment of duty, that suggests a need for caution in weighing the appellant's arguments, but it does not absolve the Court of the obligation to decide the question as to the tipping rights.

22 The respondent, pursuant to s 33B(1)(b) of the Act, requested that the objection be treated as an appeal to the Supreme Court of Victoria. The matter came before Balmford J.

The decision of Balmford J<sup>1</sup>

23 The parties were in dispute, not only as to the question of principle identified above, but also as to the proper valuation of the subject land if the Commissioner's arguments on the question of principle were to be accepted. Balmford J decided that she would first determine all issues other than the issue of valuation; and that issue remains outstanding. If the respondent succeeds, it does not arise. If the appellant succeeds, the matter will have to be remitted to the Supreme Court for further consideration.

24 Balmford J noted, and rejected, an argument advanced on behalf of the appellant under s 63(3)(b)(i)(A). The argument was that the consideration for the sale was the sum of the purchase price paid for the land by Pioneer Concrete to Amatek and the consideration paid by Pioneer Waste to Amatek under the grant agreement for the benefit of the tipping rights. That argument was not pursued in this Court, and may be disregarded. It should be added that at no stage has the appellant advanced an argument that, for the purposes of s 63(3)(b)(i)(A), the consideration for the sale was the sum of \$1,731,053 together with the value of the agreement by Pioneer Concrete that Amatek should retain the tipping rights.

25 Having thus confined the issue to the operation of s 63(3)(b)(i)(B), Balmford J (who dealt with the matter in stages) then formulated the following questions, to which she gave the following answers:

- "(a) In determining the amount for which the real property might reasonably have been sold free from encumbrances in the open market on the date of the sale for the purposes of Section 63(3)(b)(i)(B) of the *Stamps Act* 1958 ("the Act"), is the property described in the transfer to be treated as subject to the reservation to the vendor of tipping rights as specified in the contract of sale dated 21 November 1995?
- (b) If question 1 is answered in the affirmative, and without prejudice to the ... contention that this question has already been fully argued and decided ..., should the instrument of transfer of the fee simple estate in the land and the grant agreement be aggregated pursuant

---

1 *Pioneer Concrete (Vic) Pty Ltd v Commissioner of State Revenue* (1999) 41 ATR 496; *Pioneer Concrete (Vic) Pty Ltd v Commissioner of State Revenue* (1999) 42 ATR 645.

9.

to the provisions of section 68 of the *Stamps Act* 1958 for the purpose of assessing the stamp duty payable?

- (c) If question 1 is answered in the affirmative and question 2 is answered in the negative, should the appeal be allowed pursuant to Rule 47.05 of the Supreme Court Rules and the assessment ... reduced to \$95,208.00, being the stamp duty payable upon the consideration of \$1,731,053.00 stated in the transfer?

The answer to the first question is No. It is not necessary to answer the second and third questions."

26 The form of question 1 is significant. It identified the issue that arose under s 63(3)(b)(i)(B) as one concerning the manner in which the property described in the transfer was to be treated; that is to say, as an issue about the nature of the property the subject of the dutiable instrument. Furthermore, presumably in the light of the way the argument proceeded, it was framed on the basis that the case for Pioneer Concrete was that the property the subject of the transfer was (or was to be treated as) subject to a reservation to the transferor of tipping rights.

27 As will appear, the Court of Appeal disagreed with that approach to the problem, and with that manner of putting Pioneer Concrete's case. Whether or not it fairly reflects the way the case was argued, at least it identifies the focus of the statutory provisions. Additionally, it exposes a weakness in Pioneer Concrete's position. What exactly is meant by asking whether the property was "to be treated as" subject to a reservation is unclear.

28 In giving her reasons, Balmford J said that the subject of the transfer was real property, which was the whole of Amatek's estate in fee simple in the land. The tipping rights were not property rights, but were contractual rights. The property the subject of the transfer being unqualified by the contractual rights as to tipping, s 63(3)(b)(i)(B) was to be applied without regard to those rights.

#### The decision of the Court of Appeal

29 Pioneer Concrete appealed successfully to the Court of Appeal<sup>2</sup>. In its Notice of Appeal, Pioneer Concrete sought orders that the questions asked by Balmford J should be answered:

---

2 *Pioneer Concrete (Vic) Pty Ltd v Commissioner of State Revenue* (2001) 3 VR 667.

Gleeson CJ  
Gummow J  
Kirby J  
Hayne J

10.

- "1. Yes
2. No
3. Yes."

30 In the Court of Appeal, Tadgell JA, with whose reasons Batt JA and Chernov JA agreed, said that, if it were necessary, he would answer the questions in that way, but considered it more appropriate simply to order that Pioneer Concrete's appeal upon the objection to the assessment be allowed.

31 Tadgell JA considered that Balmford J had erred in treating the essential question to be resolved as one concerning the nature of the property the subject of the transfer. Rather, he said, "[t]he question that mattered was the value of that estate in real property to a reasonable hypothetical purchaser in the open market on the day". He said:

"The position was that although, on that day, the vendor was agreeable to sell its estate in fee, it would do so only if there were to be reserved to it by contract over a specified protracted period the right to exploit or to allow the exploitation of the tipping capacity of the land. That was an ineluctable fact with which, on the day, the reasonable hypothetical purchaser was faced."

32 Tadgell JA went on to observe that both before Balmford J and in the Court of Appeal, (as in this Court), it was common ground that the tipping rights were not an encumbrance within the meaning of s 63(3)(b)(i)(B)<sup>3</sup>. They were therefore not required to be disregarded on that account. However, there remained the question as to the justification for paying regard to them, unless they amounted to an exception or reservation from the property transferred. The answer, Tadgell JA said, lay in the valuation process:

"The evidence indicates that the land was not in fact available in the open market for purchase on the footing that the purchaser could use it for its highest and best use. There is nothing in paragraph (B) to require that the concept of a hypothetical sale in the 'open market' should disregard the basis on which the vendor successfully offers to sell, save that any encumbrance is in any event to be disregarded. It follows, in my opinion, that the relevant suppositious amount contemplated in paragraph (B) is the

---

3 cf *Commissioner of State Revenue v Bradney Pty Ltd* (1996) 34 ATR 233.

11.

price that might reasonably have been obtained for the real property had it been sold (a) free from encumbrances (b) in the open market (c) on the day of the date of the actual sale but (d) otherwise on the terms on which the vendor did actually sell it, save for the price."

33 The corollary appears to be that, when duty is assessed under s 63(3)(b)(i)(B) on a transfer of land made pursuant to a contract of sale, any condition of the contract of sale which diminishes the price a purchaser would otherwise be willing to pay must be taken into account, except a condition that the land will be transferred subject to an encumbrance. Since a condition of the last mentioned kind, in the ordinary case, would obviously diminish the price a purchaser would otherwise be willing to pay, but must be disregarded, it is not easy to discern the legislative policy behind the construction of par (B) adopted by the Court of Appeal.

The meaning of s 63(3)(b)(i)(B)

34 In considering the true construction of s 63(3)(b)(i), and, in particular, par (B), two principles must be kept in mind. First, the statutory provisions in question in this case impose a duty on instruments, not on transactions. Secondly, liability to duty arises because the dutiable instrument transfers an estate or interest in real property, and it is by reference to the value of that which is transferred that duty is imposed.

35 Those two principles were applied by Mason J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*<sup>4</sup>:

"It is a fundamental principle of the law relating to stamp duties that duty is levied on instruments, not on the underlying transactions to which they give effect ... [I]n the case of a conveyance the statutory command is that it attracts duty on the property conveyed; in the case of the declaration it attracts duty on 'the property comprised therein'. Consequently the issues are: (1) What was the property conveyed by the transfer?; and (2) What was the property comprised in the declaration? The decision on these issues hinges on the interpretation of the two instruments, that is, on the description given by them of the relevant estate or interest as applied to the facts of the case. It is a matter of ascertaining what is the property with which each instrument deals, according to its terms.

---

4 (1982) 149 CLR 431 at 449.

We cannot substitute for the issues prescribed by the statute a different issue having no foundation in the statutory provisions. Nor can we substitute for the property which the parties have chosen by their instruments to convey and make the subject of a declaration of trust the interest in property which in a practical sense represents the alteration in [the transferor's] position brought about by the combined operation of the two instruments."

36 Mason J went on to illustrate the practical consequences of the above principles by giving the following example<sup>5</sup>:

"A conveys an absolute estate in fee simple to B and takes from B a lease back for fifty years. If the appellant is correct, A has conveyed, not an absolute estate in fee simple, but the reversion expectant on the determination of a lease for fifty years and the conveyance is to be assessed for duty on this footing. How the lease is to be assessed on this approach does not emerge. Fortunately we do not have to solve this problem for the true position is that each instrument is to be separately assessed, the conveyance being assessed to duty on the property conveyed, viz an absolute estate in fee."

37 That was said in relation to s 66 of the *Stamp Duties Act* 1920 (NSW), which was not relevantly different in effect from the statutory provisions presently under consideration. If the argument accepted by the Court of Appeal in the present case were correct, and if, (as would be likely), the contract for sale in the example given by Mason J had stipulated for the lease back, then the result would have been different. In that respect, it should be noted that there is a difference between the case of a pre-existing lease, and a conveyance of the reversion, on the one hand, and a conveyance of an absolute estate in fee simple with a lease back to the vendor. In its effect upon the financial position of a purchaser, the difference may be immaterial; but in considering liability to stamp duty it may be crucial.

38 An accurate identification of the estate or interest in real property that is conveyed or transferred by a dutiable instrument is required. As Mason J pointed out, this is not necessarily the same thing as a summary of the net effect upon the transferee of the transaction pursuant to which the instrument was executed. This is exemplified by *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co*

---

5 (1982) 149 CLR 431 at 450.



*Ltd (Quigley's Case)*<sup>6</sup>. A person was beneficially interested in certain real and personal property. Another person had a life interest in part of it. The first person, by a deed of settlement, conveyed the property (which was subject to the outstanding life interest) to a trustee to be held in trust for himself for life with remainders over in favour of others. The taxpayer claimed that either no ad valorem duty was payable on the deed of settlement because no beneficial interest was conveyed by it or alternatively that duty should be assessed only on the value of the remainder expectant on the death of the settlor. This Court rejected both arguments. The second argument had succeeded in the Supreme Court of New South Wales. In dealing with it, Knox CJ, Gavan Duffy and Starke JJ said<sup>7</sup>:

"The learned Judges of the Supreme Court, however, were of opinion that the life interest limited to the settlor was within the exemption contained in [s] 73(1)(b) of the Act, because it was a beneficial interest that had previously existed and in substance remained unaffected; but this is inaccurate unless the limitation of a life interest to the settlor is regarded as a reservation to himself of that interest out of the property conveyed by him to the trustee upon the trusts of the settlement. Neither in form nor, in our opinion, in substance did the settlor make any such reservation. He granted and assigned unto the trustee the whole of his property, and then proceeded to create new interests including a beneficial interest for himself. He held that interest under the settlement and under no other title."

39 An example (since reversed by legislation) of a provision in a dutiable instrument qualifying, and thus affecting the value of, the subject property is to be found in *Stanyforth v Inland Revenue Commissioners*<sup>8</sup>, where a deed of partial resettlement of certain estates contained a power of revocation and new appointment. The House of Lords considered that in ascertaining the value, on a sale in the open market, of the property transferred or conveyed, it was necessary to consider the property "with all its incidents, including provisions for defeasance either in whole or in part, powers vested in persons not controlled by the vendor to create charges taking precedence of the property sold, and so

---

6 (1926) 38 CLR 272.

7 (1926) 38 CLR 272 at 277-278.

8 [1930] AC 339.

forth"<sup>9</sup>. The power of revocation contained in the deed affected the nature, and therefore the value, of the subject matter of the conveyance or transfer.

40 In the present case, there was no reference in the transfer to any exception or reservation of any kind. The meaning, in ordinary conveyancing usage, of "exception" and "reservation" was explained by Hope JA in the New South Wales Court of Appeal in the *DKLR Holding* case<sup>10</sup>. By an exception, a transferor excludes some part of that which is transferred, so that it remains with the transferor. It does not pass to the transferee. A reservation is of something newly created and involves a re-grant of something that did not previously exist. In *Chirnside v The Registrar of Titles*<sup>11</sup>, it was held that a transfer under the *Transfer of Land Act* 1915 (Vic) could validly "except" and "reserve" all coal and lignite and mines thereof under a depth of 50 feet below the surface of the land transferred. As was noted above, the appellant may have assessed Pioneer Concrete as though sand was excepted from the transfer. Whether the nature of the "tipping rights" was such that it might have been possible to deal with them by way of reservation in the transfer is a question that need not be decided; for no attempt was made to do so.

41 Hope JA also pointed out, in *DKLR Holding*<sup>12</sup>, that in some cases it may be necessary to look outside the instrument of conveyance or transfer in order to identify the property conveyed by the instrument. He gave as an example land under common law title which is subject to an easement created by a registered deed. A subsequent conveyance of the fee simple would be subject to the rights created by the previously registered deed. It may be necessary to look beyond a dutiable instrument to identify the property which the conveyor has available to convey. Again, that is not this case. The tipping rights rested in contract. So long as the land was vested in Amatek, there were no separate tipping rights; they were merely an aspect or incident of Amatek's rights of ownership. When the land was transferred to Pioneer Concrete the provisions of the contract of sale and the grant agreement subjected Pioneer Concrete to contractual obligations to Amatek and Pioneer Waste, but they did not create any proprietary interest which

---

9 [1930] AC 339 at 344.

10 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 522; cf *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 194.

11 [1921] VLR 406.

12 [1980] 1 NSWLR 510 at 523.

qualified its title to the land. And they did not qualify Amatek's title to the land on the date of the sale, which is the time to which par (B) directs attention.

42 An acceptance of the need, in some cases, to look outside an instrument of conveyance or transfer to identify the property conveyed is consistent with the decision of this Court in *Commissioner of Stamp Duties (NSW) v Buckle*<sup>13</sup>. There the dutiable instrument was a supplemental deed varying a deed of settlement under a discretionary trust. In identifying, for valuation purposes, the interests vested by the supplemental deed, the Court held that they must reflect the structure created by the deed of settlement, and accepted the argument that the property conveyed by the supplemental deed, which comprised certain beneficial interests in remainder, was to be valued taking into account liabilities which were incidents of the underlying trust property. The Court decided that, in valuing the interest of beneficiaries vested by the supplemental deed, there was no "encumbrance" which the statute required to be disregarded; the trustee's right to be indemnified out of the assets bound by the trust was a right conferred by law and was a prior proprietary interest to that of the beneficiaries rather than an encumbrance upon that interest<sup>14</sup>. *Buckle* does not bear upon the situation in the present case.

43 It is one thing to have regard to matters not referred to in a dutiable instrument for the purpose of understanding the legal effect of the instrument; it is another thing to do so for the purpose of considering the net effect of the transaction pursuant to which the instrument was executed. The example given by Mason J, of a transfer of an estate in fee simple accompanied by a lease back from the transferee to the transferor, which is in some respects analogous to the present case, illustrates the difference, and the significance of the fact that stamp duty is a tax on instruments, not on transactions.

44 Once it is accepted that the real property to be valued is an estate in fee simple in the land referred to in the relevant Certificates of Title, unqualified by any exception or reservation, or any other outstanding proprietary interest, then it follows that the exercise required by par (B) is a determination of the amount for which such an estate might reasonably have been sold if it had been sold, free from encumbrances, in the open market on the date of the sale. The determination of such an amount is a familiar task, to be carried out in

---

13 (1998) 192 CLR 226.

14 (1998) 192 CLR 226 at 246-247 [48]-[51].

Gleeson CJ  
Gummow J  
Kirby J  
Hayne J

16.

accordance with the principles stated in *Spencer v The Commonwealth*<sup>15</sup>. The subject of the valuation is the unencumbered estate in fee simple. In determining the value there is no warrant, either in the language of the statute or in principle, for departing from the hypothetical inquiry as to the point at which a desirous purchaser and a not unwilling vendor would come together. The purpose of making the inquiry hypothetical is to isolate the value of the estate or interest to be transferred from factors that are extraneous to the purpose for which such a value is to be ascertained. To introduce into the exercise a special condition for which, on a particular occasion, a particular vendor chose to stipulate, and to which a particular purchaser chose to agree, is to depart from the statutory requirement, which is to determine the value of that which was transferred. It is, rather, to value the net benefit which the transaction conferred upon the purchaser. It is to treat stamp duty as a tax on a transaction.

45 The Court of Appeal, having decided in favour of Pioneer Concrete for the reasons considered above, found it unnecessary to deal with an alternative argument based upon the 1997 amendments to the Act. Since we are unable to accept the reasoning of the Court of Appeal, it becomes necessary to turn to the argument based on the amendments.

#### The 1997 amendments

46 The *State Taxation (Amendment) Act* 1997 (Vic), by s 19, added three new sub-sections to s 63 of the Act. They were as follows:

"(3A) For the purposes of sub-section (3)(b), in determining the amount for which real property, property or chattels might reasonably have been sold free from encumbrances, there must be disregarded subject to sub-section (3B), any interest, agreement or arrangement (other than an encumbrance) granted or made in respect of the real property, property or chattels, that has the effect of reducing the value of the real property, property or chattels.

(3B) An interest, agreement or arrangement referred to in sub-section (3A) is not to be disregarded if the Comptroller is satisfied that it was not granted or made as part of an arrangement or scheme with a collateral purpose of reducing the stamp duty otherwise payable on the conveyance of the real property, property or chattels.

---

15 (1907) 5 CLR 418 at 432.

17.

- (3C) In considering whether or not he or she is satisfied for the purposes of sub-section (3B), the Comptroller may have regard to -
- (a) the duration of the interest, agreement or arrangement before the conveyance of the real property, property or chattels; and
  - (b) whether the interest, agreement or arrangement has been granted to or made with an associate, a related corporation or a trustee of the transferor or transferee; and
  - (c) whether there is any commercial efficacy to the granting of the interest or the making of the agreement or arrangement other than to reduce stamp duty; and
  - (d) any other matters he or she considers relevant."

47 We were informed that this was a legislative response to the decision of O'Bryan J in *Commissioner of State Revenue v Bradney Pty Ltd*<sup>16</sup>.

48 *Bradney* concerned premises in the central business district of Melbourne which were subject to a 50 year lease expiring in 2036. In 1994 the taxpayer purchased the freehold, subject to the lease, for \$380,000. The value of the freehold, if there had been no lease, was \$11,700,000. The Commissioner of State Revenue assessed the transfer of the freehold estate to duty, under s 63(3)(b) of the Act, on the basis that the lease was an encumbrance within the meaning of the Act, and was therefore to be disregarded. The taxpayer objected, and succeeded before the Administrative Appeals Tribunal. The Commissioner appealed to the Supreme Court of Victoria. We have been provided with a copy of the Notice of Appeal, which identified as the questions of law raised on the appeal the meaning of the expressions "encumbrance" and "free from encumbrances", and whether a lease is an encumbrance within the meaning of s 63(3)(b). O'Bryan J dismissed the appeal, holding that the lease was not an encumbrance, which should be understood as "something in the nature of a mortgage or charge"<sup>17</sup>. The correctness of that conclusion is presently irrelevant. It has not been suggested that the tipping rights constituted an encumbrance.

49 The assumption upon which the argument proceeded is consistent with what was said by Mason J in *DKLR Holding*. It was not a case of a transfer and a

---

16 (1996) 34 ATR 233.

17 (1996) 34 ATR 233 at 237.

lease back. What was sold was the freehold interest subject to a pre-existing lease; the reversion. The pre-existing lease qualified the nature and extent of the proprietary interest that was available to be transferred. Subject to the possibility that it might be said to be an encumbrance, it was to be taken into account in considering the nature, and therefore the value, of the property that was transferred.

50 It was suggested in argument in this Court that what occurred in *Bradney* either constituted, or opened the way to the possibility of, stamp duty avoidance. As to the facts in *Bradney*, there is nothing that appears from the report of the case that suggests it had anything to do with avoidance of duty. However that may be, the amendments to s 63 enacted in 1997 widened the operation of the section, but only in relation to arrangements or schemes with a collateral purpose of reducing stamp duty. The present case, it is agreed, is not in that category.

51 Pioneer Concrete contends that, although the new provisions, which operated from 10 October 1997, have no direct application to the present case, they show an acceptance by the Victorian Parliament that, apart from encumbrances, the only interests, agreements or arrangements that should now be disregarded for the purpose of assessing duty under par (B) are those granted or made as part of an arrangement or scheme with a collateral purpose of reducing stamp duty. That, it is said, assumes that there may be interests, agreements or arrangements (other than encumbrances) having the effect of reducing the value of the real property within par (B), which must not be disregarded unless they fall within the amendments. Pioneer Concrete contends that this amounts to a legislative recognition of the very principle for which it argues in the present case, and seeks support from what was said by Dixon J in *Grain Elevators Board (Vict) v Dunmunkle Corporation*<sup>18</sup>.

52 It is unnecessary to explore the difficulties involved in using an amending Act to construe earlier legislation<sup>19</sup>. In any event, the 1997 amendments, properly understood, do not advance Pioneer Concrete's argument. The amendments only touch interests, agreements or arrangements that reduce the value of the subject property. The pre-existing lease in *Bradney* was such an interest. For the reasons already explained, the tipping rights in the present case

---

18 (1946) 73 CLR 70 at 85-86.

19 cf *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539 per McHugh J; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255 per Dawson J.

19.

were not. They did not reduce the amount for which the relevant real property, that is, the estate in fee simple in the land the subject of the relevant Certificates of Title, might reasonably have been sold free from encumbrances at the date of sale. The amendments have work to do, even assuming the correctness of the appellant's argument in the present case, and are not inconsistent with that argument.

### Conclusion

53           The appeal should be allowed with costs. The orders made by the Court of Appeal should be set aside, and, in place of those orders, the appeal to that Court should be dismissed with costs. The matter should be remitted to the Supreme Court of Victoria for consideration of the outstanding issues.

- 54 CALLINAN J. I agree with the reasons and conclusion of Gleeson CJ, Gummow, Kirby and Hayne JJ subject to one qualification only. I would not for myself accept that subsequent amendments to legislation may not on occasions be used as an aid to the construction of legislation in its unamended form. That a legislature has subsequently made particular provision to cover relevant events or circumstances may provide an indication that the legislation as earlier enacted was not intended to cover those events or circumstances at an earlier time<sup>20</sup>.

---

20 *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 86 per Dixon J. See in particular *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255 per Dawson J.