HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CHIEF COMMISSIONER OF STATE REVENUE	APPELLANT
AND	
DICK SMITH ELECTRONICS HOLDINGS PTY LTD	RESPONDENT

Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd
[2005] HCA 3
8 February 2005
S299/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales entered on 7 November 2003, and in its place order that:*

   (a) *Appeal allowed with costs;*

   (b) *Set aside the orders of Gzell J entered 8 January 2003, and in their place order that:*

      (i) *The assessment made by the defendant on or about 13 July 2001 is confirmed;*

      (ii) *The plaintiff pay the defendant's costs.*

On appeal from the Supreme Court of New South Wales

Representation:

B A J Coles QC with H R Sorensen for the appellant (instructed by Crown Solicitor for the State of New South Wales)

J W Durack SC with D G Charles for the respondent (instructed by Gilbert & Tobin)

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

CATCHWORDS

Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd

Stamp duty – Dutiable transactions – Sale of shares – Share acquisition agreement stipulated that a dividend would be declared on shares prior to transfer – Agreement stipulated that Purchaser was to fund dividend – Purchase price was calculated by deducting dividend amount from specified sum – Whether value of the dividend formed part of the consideration for the dutiable transaction.

Words and phrases – "consideration".

Duties Act 1997 (NSW), ss 8, 9, 11, 19, 21(1).

1 GLEESON CJ AND CALLINAN J. This appeal arises out of a disputed assessment of stamp duty, on a Share Acquisition Agreement, made under the *Duties Act* 1997 (NSW) ("the Act"). The dispute concerns the dutiable value of the relevant dutiable property and, in particular, the consideration for the dutiable transaction for the purposes of s 21(1)(a) of the Act. Duty was assessed on the basis that the consideration was $114,139,649. The respondent contended that it was $88,555,552. The respondent's contention was upheld by Gzell J in the Supreme Court of New South Wales[1], and by the Court of Appeal of the Supreme Court of New South Wales (Meagher JA and Sheller JA; Davies AJA dissenting)[2]. In this Court, the respondent supported the reasoning in the Supreme Court, but also advanced an alternative argument that could lead to a conclusion that both figures were wrong.

The agreement

2 The parties to the agreement were InterTAN, Inc, a company incorporated in Delaware, USA (called "the First Vendor"), InterTAN Canada Ltd, a company incorporated in Alberta and continued into British Columbia, Canada (called "the Second Vendor"), and the respondent, a company incorporated in New South Wales (called "the Purchaser"). The subject matter of the agreement was shares in the capital of InterTAN Australia Ltd, a company incorporated in New South Wales (called "the Company"). The Company carried on, in Australia and New Zealand, the business of a radio, television, and consumer electronics retailer. The First Vendor owned 12,200,000 ordinary shares in the Company and the Second Vendor owned 10,735,562 redeemable preference shares. Between them, those shares comprised the whole of the Company's issued capital.

3 The agreement was dated 10 April 2001. It recited that the Vendors wished to sell and the Purchaser wished to purchase the shares in the Company on the terms of the agreement.

4 Neither the Articles of Association, nor any financial accounts, of the Company were in evidence. Completion was to take place at a future date. Clause 2 contained a number of conditions precedent to completion, including receipt of certain consents and approvals from third parties, and the discharge, on terms acceptable to the Purchaser, of a charge granted by the Company in favour of a bank. Clause 3 provided for what is sometimes called "due diligence", that

[1] *Dick Smith Electronics Holdings Pty Ltd v Chief Commissioner of State Revenue* (2002) 51 ATR 490.

[2] *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* (2003) 58 NSWLR 567.

is to say, further investigation by the Purchaser of the Company's affairs. Completion Date was defined to mean the first business day two days after satisfaction or waiver of the conditions precedent. The Vendors and the Purchaser respectively were given the right to terminate the agreement if certain conditions precedent were not satisfied or waived on or before 30 June 2001.

5 Clause 5 of the agreement provided that, on completion, the Vendors would sell, and the Purchaser would purchase, the shares for the Purchase Price, which was a defined term. The clause also provided that, on completion, title to the shares would pass to the Purchaser.

6 Clause 4 dealt with a number of matters relating to what was described as Conduct before Completion. It included the following:

> "4.1 Conduct of business
>
> The Vendors shall ensure that the Company does not do the following things during the period from the date of this agreement to the Completion Date (inclusive), without the prior consent of the Purchaser.
>
> ...
>
> (d) (No distributions) Declare or pay or agree to declare or pay any dividend, make any other distribution of its profits, reduce its capital, repay any shareholder's loan or advance or buy back any of its shares, other than a dividend declared in accordance with clause 4.4 such dividend being payable immediately prior to Completion (provided that the Company shall not pay such dividend until Completion).
>
> ...
>
> 4.4 Dividend
>
> (a) The parties agree that prior to Completion, the Vendors shall ensure that the Company shall declare a dividend on its ordinary shares equal, in total, to the Dividend Amount. The record date for the dividend shall be one day prior to the Completion Date and the dividend shall be payable on Completion.
>
> (b) The First Vendor shall notify the Purchaser of:
>
> (i) the amount of the Dividend Amount; and

(ii) the amount, if any, by which the Dividend Amount will exceed the balance of the Company's franking account on Completion,

not less than 2 Business Days prior to Completion.

(c) The First Vendor indemnifies the Purchaser against any claim, loss, liability, cost or expense, direct or indirect, which the Purchaser or the Company pays or is liable for arising from the payment of an unfranked dividend pursuant to clause 7.7 to the extent that that claim, loss, liability, cost or expense exceeds the amount withheld by the Company pursuant to clause 7.7."

7 The term Dividend Amount was defined to mean "all retained earnings (up to a maximum of $27,000,000) which the Company is able to pay on the Shares at Completion, or such other amount as the parties agree."

8 Clause 7 contained the following provisions:

"7.6 Payment of Purchase Price

On Completion, after satisfaction of the Vendors' obligations under this clause, the Purchaser shall pay the Purchase Price to, or at the direction of, the First Vendor by telegraphic transfer in immediately available funds to an account nominated by the First Vendor before Completion. The parties agree that the Purchaser may pay the portion of the Purchase Price to which the Second Vendor is entitled to the First Vendor, who shall hold such amount on behalf of the Second Vendor.

7.7 Discharge of Intra-Group Liabilities

On Completion, immediately after payment of the Purchase Price, the Purchaser shall fund the Company so that the Company is able to discharge the debts created by the declaration of the dividend referred to in clause 4.4. Immediately following such funding, the parties shall procure that the Company pay that dividend, less any amount which the Company is required to withhold on account of the dividend not being fully franked.

7.8 Simultaneous completion

Neither the Vendors nor the Purchaser need complete the sale of any Shares unless the sale of all the Shares is completed simultaneously. Neither Vendor is obliged to complete the sale of

> the Shares unless the Purchaser has performed, or is ready, willing and able to perform, its obligations under clause 7.7."

9 The term Purchase Price was defined to mean "$114,139,649.00 minus the Dividend Amount." It was apportioned as to $10,735,562 to the Second Vendor and as to the balance to the First Vendor.

10 In brief, it was agreed on 10 April 2001 that, on the Completion Date, the Vendors would sell and the Purchaser would purchase the shares in the Company; that in the meantime the Vendors would procure that the Company declare a dividend on the ordinary shares equal to all the Company's retained earnings up to completion; that the Purchaser would "fund the Company" to enable it to discharge the debts created by the declaration of the dividend; and that the purchase price for the shares would be $114,139,649 minus the amount of the dividend, apportioned between the Vendors as mentioned above.

11 Curiously, there appears to have been no evidence of the date of actual completion. Gzell J recorded the following facts:

> "The dividend declared was for $25,584,097. The [respondent] claimed that the Purchase Price, therefore, became $88,555,552. Immediately after the payment of this amount, the [respondent] 'funded' [the Company] by way of a loan of $25,584,097 and it was from those funds that the liabilities created by the declaration of the dividend were discharged. In effect, the vendors sold their shares *ex dividend*."

12 The concluding sentence of that paragraph was adopted in the Court of Appeal by Meagher JA and Sheller JA. It accords with both the form and the substance of the agreement and the transaction. Because of the obligation assumed by the respondent in cl 7.7, it is not a complete description of the effect of the agreement. The significance of that matter for the purposes of the Act will need to be examined. Even so, and subject to that qualification, the agreement was that title to the shares was to pass after all retained earnings had been made the subject of a declaration of dividend, and the purchase price of the shares was, in the events that occurred, $114,139,649 minus the amount of the dividend ($25,584,097), that is to say, $88,555,552.

13 Although, as the transaction was put into effect, the application of cl 7.7 was simple enough, its meaning is not entirely plain. The requirement to "fund the Company" to enable it to discharge the debts created by the declaration of the dividend appears to assume that the Company would need such funding, because it would not have the necessary cash readily available. It is possible to infer from other provisions in the agreement that the business of the company was extensive, and its affairs complex. It was probably unlikely to have an amount equal to the whole of its retained earnings sitting in a bank account available for

distribution. It probably had better ways of using its money. On the other hand, it was not inevitable that there would be a need to "fund" the whole, or even part, of the dividend. Furthermore, such funding as was required did not have to take the form of a loan from the respondent. It could, for example, have taken the form of a subscription for equity capital. Presumably, it could have taken the form of providing support, by way of security, for a loan to the Company by a third party, such as a bank. One thing is clear. If, as ultimately occurred, the respondent were to make a loan to the Company in order to satisfy the requirements of cl 7.7, then the respondent would obtain a corresponding asset in the form of the debt due from the Company. That the Company was solvent is not in question. The price that was paid for the shares in the Company reflects its ability to repay a loan. We do not know the terms and conditions of the loan that was in fact made but there is no reason to doubt that the respondent obtained full value for the loan. Similarly if the respondent were to subscribe for equity capital in order to satisfy cl 7.7, it would obtain a corresponding asset in the form of further shares in the Company. Clause 7.7 did not require, or even contemplate, that the purchaser should make a gift to the Company.

14 The Vendors caused the Company to declare a dividend, prior to completion, of $25,584,097. The declaration of dividend created a debt in that amount owed by the Company to the holders of the ordinary shares[3]. That liability existed at completion, and the value of the net assets of the Company, and therefore the value of its shares, on completion was diminished by that amount, as the agreement envisaged. The respondent paid to the Vendors, by way of purchase price, the agreed price of the shares at completion, which was $114,139,649 minus the dividend, that is $88,555,552. There is no reason to doubt that this reflected the value of the shares at completion. The Company paid to the First Vendor the debt it owed it as a result of the prior declaration of the dividend: $25,584,097. The respondent lent that amount to the Company. The Company incurred a liability to the respondent of $25,584,097, and the respondent obtained an asset in the form of a debt owing by the Company to the respondent of $25,584,097. There is no justification for ignoring any of these facts, which were all provided for, or the natural consequence of what was provided for, in the agreement.

The Act

15 Chapter 2 of the Act deals with "Transactions concerning dutiable property". The imposition of duty on transactions, as well as on instruments,

[3] Corporations Law, s 254V.

represents a shift in emphasis as compared with earlier stamp duty legislation[4]. Nevertheless, many of the provisions of the Act are modelled on the previous statute.

16 Section 8(1) provides that Ch 2 charges duty on dutiable transactions identified as including:

> "(a) a transfer of dutiable property, and
>
> (b) the following transactions:
>
> (i) an agreement for the sale or transfer of dutiable property".

17 Section 11 defines dutiable property as including "shares ... in a NSW company". The dictionary at the end of the Act defines "NSW company" in a manner that includes the Company.

18 Section 9(1) provides that the duty charged on a dutiable transaction referred to in s 8(1)(b) is to be charged as if each such dutiable transaction were a transfer of dutiable property. By virtue of s 9(2)(c) the transfer is taken to have occurred at the time when the agreement was entered into, that is, 10 April 2001. Duty is charged on the dutiable value of the shares at the rate set out in Pt 3 of the Act (s 19).

19 Section 21 of the Act, so far as presently relevant, provides:

> "(1) The ***dutiable value*** of dutiable property that is subject to a dutiable transaction is the greater of:
>
> (a) the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration), and
>
> (b) the unencumbered value of the dutiable property."

20 In the ordinary case of an arm's-length agreement for the sale of property, there is likely to be no difference between (a) and (b). Indeed, the consideration for the sale agreement would, in many cases, be the best evidence of the property's value. The section does not assume that there will be a difference between (a) and (b). It accepts that there may be a difference, and makes

[4] cf *Commissioner of State Revenue (Vict) v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651.

provision for that. It was common ground in argument that, in par (a), "or" means "and".

21 In the present case, duty was assessed, and the appellant sought to uphold the assessment, on the basis, and only on the basis, that the relevant provision was s 21(1)(a) and that the amount of monetary consideration for the dutiable transaction was $114,139,649. The appellant's written submissions state: "Para 21(1)(b) of the Act is not relevant to this case." It was acknowledged in oral argument that the appellant's assessment was made without any attempt to apply the portion of s 21(1)(a) that refers to "the value of a non-monetary consideration". Senior counsel for the appellant said that, on his case, there was no question of valuing anything. Certainly, there was never any attempt by the appellant, in making the assessment, to value either the shares for the purpose of s 21(1)(b), or any non-monetary consideration for the purpose of s 21(1)(a).

"Consideration"

22 In *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)*[5], Dixon J said, in relation to provisions of the *Stamp Duties Act* 1920 (NSW) which in the relevant respect were comparable to those of the Act:

> "In the context I think that the word 'consideration' should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts. The difference is perhaps not very material because the consideration must be in money or money's worth. But in the law of simple contracts it is involved with offer and acceptance: indeed properly understood it is perhaps merely a consequence or aspect of offer and acceptance. Under s 66 the consideration is rather the money or value passing which moves the conveyance or transfer."

23 The question that arose in that case concerned a reduction of capital by a company, which distributed to its shareholders, *in specie*, shares it held in other companies. The shares were distributed at the value at which they stood in the company's books, which was less than their actual value. The Commissioner argued that duty was payable either at the rate applicable to a conveyance without consideration in money or money's worth, or at the rate applicable to a conveyance made upon a consideration in money or money's worth of less than the unencumbered value of the property conveyed. The taxpayer argued, and the Court accepted, that duty was payable at the rate applicable to a conveyance

[5] (1948) 77 CLR 143 at 152.

made upon a consideration in money or money's worth of not less than the unencumbered value of the property conveyed.

24 In order to understand the distinction drawn by Dixon J, and its relevance to that case, it is necessary to recall the meaning and significance of consideration in conveyancing. An explanation may be found in *Elphinstone's Introduction to Conveyancing*[6]. In conveyancing, marriage, for example, was treated as valuable consideration[7]. "Money, marriage, doing something which is troublesome to oneself, or of use to the other party ... are all valuable considerations."[8] One significance of the presence or absence of either valuable or good consideration was concerned with equity's doctrine of uses. "If, before the Statute of Uses, one man enfeoffed another, the Court of Chancery held that unless the motive was one which was adequate, the feoffor remained entitled to the use; in other words, that the use 'resulted' to the feoffor ... On the other hand, if the motive was adequate, if the feoffment was made for consideration, whether valuable or good, the use enured to the feoffee."[9] What Elphinstone referred to as motive is what Dixon J described as that which moves the conveyance. Marriage was valuable consideration. A motive of natural love and affection was good consideration[10]. But, of course, in the case of a conveyance on sale, the usual form of consideration was money or money's worth; ordinarily, the purchase price.

25 In *Archibald Howie*[11], Dixon J explained the decision as follows:

> "The reduction involving the payment off of part of the paid up share capital must therefore be considered an effectuation of a provision of the contract of membership. The allotment of the share and the payment up of the liability thereon conferred upon the holder for the time being of the share a right to have the assets of the company used and applied in the various ways in which the articles expressly or impliedly require or authorize and this is one of them. *It is an effectuation or realization of the rights obtained by the acquisition of the share in the same way as is the*

[6] 7th ed (1918) at 80-82.

[7] See Stuckey and Needham, *The Conveyancing Acts and Regulations*, (1953) at 18.

[8] Maw, *Elphinstone's Introduction to Conveyancing*, 7th ed (1918) at 80.

[9] Maw, *Elphinstone's Introduction to Conveyancing*, 7th ed (1918) at 82.

[10] Stuckey and Needham, *The Conveyancing Acts and Regulations*, (1953) at 18.

[11] (1948) 77 CLR 143 at 152-153.

> *distribution of a dividend*. The consideration given is the payment up of the share capital in satisfaction of the liability for the amount of the share incurred on allotment." (emphasis added)

26 Those observations apply to one aspect of the present case. The consideration for the dividend distributed by the Company to the First Vendor (the owner of the ordinary shares) was the amount subscribed for the share capital. The First Vendor provided full consideration for that dividend in exactly the same way as the shareholders in *Archibald Howie* provided full consideration for the distribution *in specie*. It was the original subscription for capital, and the rights thereby acquired, that "moved" the payment of the dividend. This cannot be overlooked in an analysis of the whole transaction.

27 In *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*[12], Mason J[13] and Aickin J[14] referred to *Archibald Howie* and to the distinction between the adequacy of consideration for the purpose of contract law and the adequacy of consideration for the purpose of revenue law. Again, however, in the ordinary case of a conveyance on sale following an arm's-length transaction, that distinction is unlikely to be material. In the same case, at first instance, Sheppard J said[15]:

> "It is no doubt right to say that 'consideration' is used in the legislation in the conveyancing sense and not the sense in which it is used in simple contract ... But in my opinion that means no more, when one is speaking of a conveyance, than that the consideration which moves the conveyance is the money which the conveyee has agreed to pay under the pre-existing contract."

28 In *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)*[16], Dixon CJ dealt with the question of the consideration moving a conveyance or transfer on sale. It was, he held, the agreed purchase price. He said:

[12] (1981) 146 CLR 336.

[13] (1981) 146 CLR 336 at 375-376.

[14] (1981) 146 CLR 336 at 435-436.

[15] *St Helens Farm (ACT) Pty Ltd v Federal Commissioner of Taxation* (1979) 46 FLR 217 at 237.

[16] (1958) 100 CLR 392 at 408.

> "But here, for their own purposes the parties have given the transaction the form of a sale at a price. Had it not been for the situation occupied by the two companies one to another it might not have been possible, or at all events lawful, to transfer at such prices. In a practical sense doubtless the transaction was 'moved' by that circumstance. But within the meaning of the words in s 66(3A) would the consideration moving the transfers – the consideration 'upon' which the transfers are made – be anything but the price the parties chose to adopt? After all we are dealing with a transfer on sale."

29 In that case, the dealings were not at arm's length, but the Court held that the agreed price was the consideration upon which the transfers would be made. In the present case, also, we are dealing with a transfer on sale. That is the nature of the dutiable transaction.

The consideration for the dutiable transaction

30 The declaration and payment of the dividend by the Company to the Vendors was not the dutiable transaction. It was a transaction that was envisaged, and permitted, by the agreement between the Vendors and the respondent, but it was a transaction between the Vendors and the Company. The declaration of dividend, prior to completion, involved an exercise by the Vendors of their rights as shareholders of the Company. It created a liability in the Company which was discharged by the payment of the dividend at completion. As Dixon J pointed out in *Archibald Howie*, the consideration for the payment of the dividend was the original subscription for capital in the Company by the shareholders, considered in the light of the rights under the Company's Articles of Association which they thereby acquired.

31 The loan by the respondent to the Company, to provide it with the ready money to pay the debt to the Vendors incurred by the declaration of dividend, was not the dutiable transaction. The consideration for the loan was the Company's promise to repay the loan together with any interest that was payable.

32 The purchase price of the shares in the Company clearly was not $114,139,649. Both in form and in substance, the purchase price of the shares was $114,139,649 minus the amount of the dividend. How could it have been otherwise? The agreement contemplated that, prior to completion, the Vendors would use their rights as shareholders to cause the Company to declare a dividend out of all the retained profits of the Company up to a maximum of $27 million. Inevitably, the net assets of the Company would be reduced by the amount of the dividend, because the declaration of the dividend created a liability in that amount in the form of a debt owing by the Company to the Vendors. Hence, the purchase price was agreed to be $114,139,649 minus the amount of

the dividend. It was the First Vendor, the owner of the ordinary shares, whose share of the purchase price was reduced by the amount of the dividend.

33 The consideration for which the Vendors agreed to transfer, and transferred, their shares was not $114,139,649. They received two amounts of money. They received $88,555,552 from the respondent, which was the purchase price payable under the agreement. The First Vendor received $25,584,097 from the Company, which was the dividend to which it was entitled on its ordinary shares. The Vendors received the first amount in their capacity as Vendors. The First Vendor received the second amount in its capacity as creditor of the Company; a capacity created by exercise by the Vendors of their power as shareholders to cause the Company to declare a dividend. It is wrong to treat the dividend as part of the consideration for the share transfers.

34 It might be noted in passing that a different view would produce some surprising consequences, in relation both to revenue law and financial accounting. As has been noted, the respondent acquired, in addition to the shares, an asset in the form of a debt of $25,584,097 owing to it by the Company. To treat the capital gains tax cost base of the shares as $114,139,649 would appear anomalous. No doubt it would suit the First Vendor in some respects, as the income tax involved in a sale of the shares would be likely to be considerably more than the amount of stamp duty involved in this case. However, the Federal Commissioner of Taxation would probably have different ideas. The First Vendor received, on income account, a dividend of $25,584,097. The Vendors received, on capital account, a total amount of $88,555,552. The appellant's argument appears to imply that the Vendors received $114,139,649 in total on capital account. These curiosities result from the fact that the argument for the appellant does not reflect either the legal form or the commercial substance of the dutiable transaction.

35 It is true that it was part of the agreement between the Vendors and the respondent that, before transferring the shares in the Company to the respondent, a dividend would be declared. That does not make the declaration and payment of the dividend part of the dutiable transaction. The right of the Vendors to declare the dividend was not conferred on them by the agreement. It was conferred on them by the Articles of Association of the Company. The agreement provided that, as between the Vendors and the Purchaser, the exercise of that right would not constitute an impermissible depletion of the Company's assets during the period between contract and completion, but it was not the source of their right to declare, or the First Vendor's right to receive, the dividend.

36 The fallacy in the argument for the appellant is the assumption that, because the Vendors were to receive the purchase price, and one of them was to receive the dividend, the whole amount of $114,139,649 is to be regarded as the

consideration for the transfer of the shares. The Vendors between them received only two monetary payments: the purchase price of the shares ($88,555,552); and the dividend ($25,584,097). The consideration for the dividend has already been identified. The First Vendor was not paid $25,584,097 by the respondent, and it did not receive it as part of the consideration for the shares. It was paid that amount by the Company, in discharge of the debt resulting from the declaration of the dividend. Counsel for the appellant disclaimed any suggestion that this transaction involved an attempt to evade or avoid duty. There is nothing particularly complicated about the arrangement. Both legally and commercially its elements are quite straightforward. It was an arm's-length transaction intended to have legal effect according to its form. There is no reason to disregard that form[17].

37 The appellant argued that it would be wrong to overlook the funding obligations undertaken by the respondent in cl 7.7 of the agreement, and given effect by the loan from the respondent to the Company of $25,584,097. So much may be accepted. What follows from that? It does not make the loan part of the dutiable transaction. Nor does it make the payment of $25,584,097 by the respondent to the Company part of the consideration for the transfer of the shares. It was a payment by way of loan, in consideration for the borrower's promise to repay. It is correct that the obligation in cl 7.7 was part of what the Purchaser was required to undertake, and was willing to undertake, in return for the promise to transfer the shares. In the course of argument in this Court, counsel for the respondent, apparently for the first time, raised the possibility that the obligation to fund was non-monetary consideration for the dutiable transaction, and therefore arose for examination, if at all, under what might be described as the second limb of the words in parenthesis in s 21(1)(a).

38 The distinction between monetary consideration and non-monetary consideration, it was accepted on both sides, corresponds with the distinction, in earlier legislation, between money and money's worth. Clause 7.7 did not oblige the respondent to pay, and the respondent did not pay pursuant to cl 7.7, any money to the Vendors. It did not necessarily oblige the respondent to pay any amount, or at least any particular amount, to the Company. The nature and extent of any required funding was left to be decided between the respondent and the Company.

39 Whatever else cl 7.7 required, it did not oblige the respondent to make a gift to the Company. If the respondent had been willing and able to arrange for a third party to make a loan to the Company, perhaps supported by security from the respondent, the clause would not have obliged the respondent to make any

[17] *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 211 ALR 101.

payment to the Company. What cl 7.7 gave the Vendors was not a right to receive any money from the respondent, or even a right to have the respondent pay money to the Company, but an assurance that the Company would have available to it, on completion, liquid funds sufficient to discharge the debt created by the declaration of the dividend and that, if and to the extent necessary, those funds would be made available to the Company, whether by the provision of loan or equity capital or otherwise, by the respondent. That was what was agreed on 10 April 2001.

40 There has never been any attempt to assess the value to the Vendors of the obligation undertaken by the respondent in cl 7.7. The respondent accepts that consideration for a transfer on sale can include the conferring by a purchaser of a benefit on a third party at the vendor's request. Even so, the respondent submits, if the conferring of a benefit takes the form of a payment of an amount of money, that amount itself will only satisfy the description of part of the consideration for the transfer if the amount is paid as the price, or part of the price, "of the subject conveyed"[18]. Let it be supposed, to simplify the problem, that cl 7.7 had in terms obliged the Purchaser to lend the Company an amount sufficient to put it in funds to pay the dividend. The amount of the loan would not bear the character of part of the price of the shares. The loan has its own consideration, namely the agreement to repay (with or without interest). In the present case that agreement was equal in value to the amount of the loan. The undertaking by the Purchaser of an obligation to make the loan may be regarded as part of the price of the shares, but the value to the Vendors, or the cost to the Purchaser, of that obligation, at least in the circumstances of the present case, could not be regarded as equivalent to the amount of the loan. As has already been noted, the position is more complicated, because cl 7.7 did not impose a simple obligation to make a loan, and it is the value to the Vendors of the obligation in cl 7.7 that is relevant.

41 We are prepared to accept that the obligation accepted by the respondent under cl 7.7 is part of the consideration for the dutiable transaction. We cannot accept that it is monetary consideration for the transfer on sale. It is non-monetary consideration for the transfer on sale, and its value to the Vendors would depend upon the complex of commercial factors bearing upon the worth of the benefit of the assurance they sought and obtained in the sale agreement. Having regard to the evident financial strength of the Company, and to the variety of possible ways in which the assurance might have been provided, the value might not be substantial. That may explain why the appellant has not attempted to put a case on this basis.

[18] cf *Marquis of Chandos v Commissioners of Inland Revenue* (1851) 6 Ex 464 at 479-480 [155 ER 624 at 632] per Pollock CB.

42 Under the *Taxation Administration Act* 1996 (NSW), pursuant to which the present proceedings were considered, the parties were not limited to the grounds of objection to the assessment (s 100(2)). The respondent bore the onus, and it has established that the assessment was excessive. The Supreme Court had wide powers to dispose of the appeal (s 101). Gzell J allowed the respondent's objection to the assessment, set aside the appellant's decision disallowing the objection, remitted the matter to the appellant to be determined in accordance with his reasons for judgment, and ordered the appellant to pay the costs. The Court of Appeal dismissed the appeal with costs.

Conclusion

43 Gzell J and the majority in the Court of Appeal were correct to conclude that the appellant was wrong in assessing duty on the basis that the consideration for the dutiable transaction was $114,139,649. However, in concluding that the consideration was $88,555,552 they appear to have overlooked (because it was not argued) the value of the non-monetary consideration in the form of the value of the obligation undertaken by the respondent in cl 7.7 of the agreement.

44 The parties to the present appeal should have the opportunity of putting before the Court in writing, within 21 days, their respective submissions as to the orders, including orders as to costs, that should now be made.

45 GUMMOW, KIRBY AND HAYNE JJ. InterTAN Australia Ltd ("the Company") was incorporated in the State of New South Wales. At premises there and elsewhere in Australia, the Company carried on business as a radio, television and electronics retailer using the names "Tandy Electronics" and "RadioShack".

46 Of the issued share capital of the Company, a Delaware corporation, InterTAN Inc, was the beneficial owner of 12.2 million fully paid ordinary shares[19] and a British Columbia corporation, InterTAN Canada Ltd, was the beneficial owner and registered holder of 10,735,562 fully paid A class redeemable preference shares (together, "the Shares"). These two corporations are referred to respectively as "the First Vendor" and "the Second Vendor", and collectively as "the Vendors". The Shares comprised all the issued shares in the capital of the Company.

47 Dick Smith Electronics Holdings Pty Ltd ("the Purchaser") entered into a written agreement with the Vendors dated 10 April 2001 ("the Agreement") for the purchase by it of the Shares. The Agreement was titled "Share Acquisition Agreement" and also described on the title page as "Sale of InterTAN Australia". The date on which the Agreement was completed does not appear but cl 2.3 was directed to the satisfaction of certain conditions precedent on or before 30 June 2001, and in cl 1.1 "Completion Date" was defined as the first business day two days after the satisfaction or waiver of the conditions precedent, or any other agreed date.

48 Under cover of a letter from its solicitors dated 10 July 2001, which, from the terms of that letter, was after completion, the Purchaser lodged with the appellant ("the Commissioner") the Agreement and six share transfer forms. Thereafter, the Commissioner assessed duty under the *Duties Act* 1997 (NSW) ("the Act") in the sum of $684,838.20. This exceeded the $531,330.60 which had been proffered by the Purchaser, and the difference was accounted for by the Commissioner's conclusion that the consideration which had moved the transaction was $114,139,649, rather than the $88,555,552 for which the Purchaser contended.

49 The dispute came before the Supreme Court of New South Wales (Gzell J) as an appeal by the Purchaser under Pt 10 Div 2 (ss 96-103A) of the *Taxation*

[19] InterTAN Inc was the registered holder of 12,199,996 ordinary shares; each of four individuals was the registered holder of one ordinary share.

Administration Act 1996 (NSW) ("the Administration Act"). Gzell J revoked the assessment and remitted the matter to the Commissioner for redetermination[20].

50 The appeal to this Court is brought by the Commissioner against the rejection by the Court of Appeal (Meagher and Sheller JJA; Davies AJA dissenting) of the Commissioner's appeal to that Court[21].

51 For the reasons that follow, the appeal should be allowed and an order made confirming the assessment by the Commissioner. That is the appropriate order which the Supreme Court should have made under s 101 of the Administration Act.

Provisions of the parties' agreement

52 It is convenient to refer further to provisions of the Agreement, beginning with two of the central definitions in cl 1.1:

> "***Purchase Price*** means $114,139,649.00 minus the Dividend Amount."
>
> "***Dividend Amount*** means all retained earnings (up to a maximum of $27,000,000) which the Company is able to pay on the Shares at Completion, or such other amount as the parties agree."

53 Clause 5, headed "Sale and Purchase", provided:

> "5.1 Sale of Shares
>
> On Completion, the Vendors, as beneficial owners, will sell and the Purchaser will purchase, free and clear of all Encumbrances, the Shares for the Purchase Price.
>
> 5.2 Title and Risk
>
> On Completion, title to the Shares and risk in the Shares shall pass to the Purchaser."

[20] *Dick Smith Electronics Holdings Pty Ltd v Chief Commissioner of State Revenue* (2002) 51 ATR 490; 2003 ATC 4001.

[21] *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* (2003) 58 NSWLR 567.

On or before completion, the Vendors were to ensure, among other things, that there were delivered to the Purchaser, "Transfers in registrable form in favour of the Purchaser, or such other transferees as the Purchaser may direct, duly executed by each registered holder as transferor of the Shares" (cl 7.2(b)).

54 It would be a misstatement of the operation of the Agreement, and of the transaction for which it provided, to refer simply to cl 5 and the statement therein that the Purchaser will purchase the Shares for the Purchase Price, for the conclusion that it was the receipt by the Vendors of that payment alone which supplied the monetary consideration actuating or moving the transfer of the Shares by the Vendors to the Purchaser. It is necessary to look further into the provisions of the Agreement.

55 Clause 4 was headed "Conduct before Completion". Paragraph (d) of cl 4.1 obliged the Vendors to ensure that the Company did not, during the period from the date of the Agreement to the completion date, without the consent of the Purchaser:

> "Declare or pay or agree to declare or pay any dividend, make any other distribution of its profits, reduce its capital, repay any shareholder's loan or advance or buy back any of its shares, *other than a dividend declared in accordance with clause 4.4* such dividend being payable immediately prior to Completion (provided that the Company shall not pay such dividend until Completion)." (emphasis added)

Clause 4.4, headed "Dividend", provided:

> "(a) The parties agree that prior to Completion, the Vendors shall ensure that the Company shall declare a dividend on its ordinary shares equal, in total, to the Dividend Amount. The record date for the dividend shall be one day prior to the Completion Date and the dividend shall be payable on Completion.
>
> (b) The First Vendor shall notify the Purchaser of:
>
> (i) the amount of the Dividend Amount; and
>
> (ii) the amount, if any, by which the Dividend Amount will exceed the balance of the Company's franking account on Completion,
>
> not less than 2 Business Days prior to Completion.
>
> (c) The First Vendor indemnifies the Purchaser against any claim, loss, liability, cost or expense, direct or indirect, which the Purchaser or

> the Company pays or is liable for arising from the payment of an unfranked dividend pursuant to clause 7.7 to the extent that that claim, loss, liability, cost or expense exceeds the amount withheld by the Company pursuant to clause 7.7."

56 Clause 7.6 obliged the Purchaser to pay the Purchase Price to or at the direction of the First Vendor; that portion of the Purchase Price to which the Second Vendor was entitled was to be held on its behalf by the First Vendor. Clauses 7.7 and 7.8 deal with what were identified as "Discharge of Intra-Group Liabilities" and "Simultaneous completion" respectively. Their texts were as follows:

> "7.7 On Completion, immediately after payment of the Purchase Price, *the Purchaser shall fund the Company* so that the Company is able to discharge the debts created by the declaration of the dividend referred to in clause 4.4. Immediately following such funding, the parties shall procure that the Company pay that dividend, less any amount which the Company is required to withhold on account of the dividend not being fully franked."

> "7.8 Neither the Vendors nor the Purchaser need complete the sale of any Shares unless the sale of all the Shares is completed simultaneously. *Neither Vendor is obliged to complete the sale of the Shares unless the Purchaser has performed, or is ready, willing and able to perform, its obligations under clause 7.7.*" (emphasis added)

57 Clause 7.7 placed upon the Purchaser an obligation on completion and immediately after payment of the Purchase Price to "fund" the Company to enable it to discharge the duties created by the declaration of the dividend referred to in cl 4.4. One effect of cl 7.8 was that the Vendors were obliged to complete the sale of the Shares only if the Purchaser had performed or was ready, willing and able to perform the funding obligation imposed by cl 7.7.

58 The dividend declared by the Company pursuant to cl 4.4 on its ordinary shares (beneficially held by the First Vendor) was $25,584,097. This was less than the $27 million maximum for the Dividend Amount to be subtracted from the $114,139,649 stated in the definition of the Purchase Price.

59 On completion, the Purchaser paid out a total of $114,139,649 comprising payments of $88,555,552 to the Vendors and $25,584,097 to the Company in performance of its funding obligation under cl 7.7. The latter sum funded the Company for payment to the First Vendor of the dividend on the ordinary shares,

being the Dividend Amount stipulated in cl 4.4. The funding was by way of loan by the Purchaser to the Company.

The issue and disposition in the Supreme Court

60 The litigation has turned upon the significance of the difference between these two sums of $88,555,552 and $114,139,649 for the determination of what moved the transfers by the Vendors for the purposes of the Act.

61 The primary judge and the majority in the Court of Appeal accepted the Purchaser's submission that the relevant consideration was the smaller rather than the greater sum. In particular, Sheller JA, one of the majority in the Court of Appeal, expressed his reasoning in terms which the Purchaser strongly supported in argument in this Court. After noting the argument by the Commissioner that the consideration was the greater amount, Sheller JA continued[22]:

> "The reasoning for this conclusion depends entirely upon the [P]urchaser's agreement in cl 7.7 on completion and after payment of the [P]urchase [P]rice to 'fund the [C]ompany so that the [C]ompany is able to discharge the debts created by the declaration of the dividend'. The method of funding was not specified. Nor was the amount of necessary funding specified. The thinking was quite simply that because the [P]urchaser provided funding, in this case by making a loan, to the [C]ompany of $25,584,097, in some way this amount became part of the consideration for the transaction."

However, attention is directed by this passage to with what the Purchaser (as transferee) parted, and to whom it was transferred, rather than to what the Vendors (as transferors) received.

A duty on transactions

62 Before turning to further consideration of the submissions, reference should be made to the central provisions of the Act. In *DKLR Holding Co (No 2)*

[22] (2003) 58 NSWLR 567 at 571.

Pty Ltd v Commissioner of Stamp Duties (NSW)[23], Mason J, with reference to the judgment of Latham CJ in *Commissioner of Stamp Duties (Q) v Hopkins*[24], said[25]:

> "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".

In contrast, the Act imposes duty on certain "transactions" which concern "dutiable property". The argument on the present appeal did not seek to explore what expansion (if any) may be found as a result to the propositions that "liability of an instrument to duty is not necessarily determined by its apparent tenor and that extrinsic evidence may properly bear upon the question of the real nature of the instrument"[26].

63 Chapter 2 of the Act (ss 8-104) is headed "Transactions concerning dutiable property". Sub-paragraph (i) of s 8(1)(b) states that one of the transactions on which Ch 2 charges duty is "an agreement for the sale or transfer of dutiable property". The term "dutiable property" is defined in s 11 so as to include shares in a New South Wales company such as the Company.

64 The duty charged upon a dutiable transaction being an agreement for the sale or transfer of shares was duty charged "as if each such dutiable transaction were a transfer of dutiable property" (s 9(1)). The consequence was that the relevant dutiable transaction in this case was the Agreement; the Purchaser was to be taken as the transferee of the Shares by a transfer occurring on 10 April 2001, the date of entry into the Agreement (s 9(2))[27]. The duty charged by Ch 2 was payable by the Purchaser as the transferee (s 13).

65 The liability for duty arose by the first execution of the Agreement (s 12(2)). This, it appears to be accepted, is the date of execution the instrument

[23] (1982) 149 CLR 431. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 266-267, 275.

[24] (1945) 71 CLR 351 at 360.

[25] (1982) 149 CLR 431 at 449.

[26] *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 484.

[27] cf *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)* (1958) 100 CLR 392 at 406.

bears, 10 April 2001. However, the transaction was to be assessed on the footing that the Agreement was performed according to its terms[28]. Those terms included cl 4 and cl 7, a matter to which further reference will be made.

66 Payment of double duty was avoided by the operation of s 18(2); the duty chargeable in respect of the transfers of the Shares, made in conformity with the Agreement, was $2 provided the duty chargeable in respect of the Agreement had been paid. It was for this reason that, with the letter to the Commissioner of 10 July 2001, the share transfers were lodged with the Agreement and on the footing that the transfers would attract only nominal duty.

67 Section 19 stated:

> "Duty is charged on the *dutiable value* of the dutiable property subject to the dutiable transaction at the relevant rate set out in [Ch 2 Pt 3]." (emphasis added)

The term "dutiable value" was relevantly defined in s 21(1):

> "The ***dutiable value*** of dutiable property that is subject to a dutiable transaction is the greater of:
>
> (a) the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration), and
>
> (b) the unencumbered value of the dutiable property."

The term "unencumbered value" was stated by s 23(1) as the value of the property "determined without regard to any encumbrance to which the property [was] subject". No reliance was placed by the Commissioner upon s 24, directed against arrangements reducing dutiable value. Nor was any reliance placed upon s 294[29].

[28] *The Crown v Bullfinch Proprietary (WA) Ltd* (1912) 15 CLR 443.

[29] This states:

> "An instrument that contains or relates to several distinct matters for which different duties are chargeable under this Act is to be separately and distinctly charged with duty in respect of each such matter, as if each matter were expressed in a separate instrument."

Arguments of the parties

68 The Commissioner had been empowered by s 49 to make an assessment by way of estimate where in the Commissioner's opinion the full dutiable value of the dutiable property subject to an agreement for transfer or sale could not be immediately ascertained. In the letter of 10 July 2001, the solicitors for the Purchaser wrote to the Commissioner:

> "Under clause 9.1 of the [Agreement] the purchase price in respect of [the Shares] is subject to adjustment dependent on the net assets of [the Company] as at 30 April 2001. The accounts which will form the basis of this adjustment have not yet been finalised and therefore, in order to avoid late stamping penalties, we would be grateful if you could interim stamp the [Agreement] ad valorem for $531,330.60 and also stamp each of the share transfer forms as having been produced.
>
> When the completion accounts for this transaction have been finalised we will produce evidence of the final consideration in order to finalise the stamping of this documentation."

69 However, in response, the Commissioner took the position that "the intended result of the whole transaction is of the Vendors receiving $114,139,649" and duty was assessed accordingly. No question of interim stamping was pursued. Rather, the Purchaser contended that the monetary consideration for the transaction was reduced, for assessment purposes, by the actual sum of the Dividend Amount, while the Commissioner insisted that the requirement in cl 7.7 that the Purchaser fund the Company to discharge the debt created by the declaration of the dividend formed part of the monetary consideration for the transfer of the Shares.

70 The effect of s 21(1) was that the dutiable value of the Shares was 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 that property. In this Court, neither side contended that the latter alternative of the definition of dutiable value was engaged. What was the monetary consideration "for" the transfer of the Shares? That is the question upon which the answer to the appeal turns.

The consideration for duty purposes

71 It was accepted by both parties that, consistent with this Court's decisions in *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)*[30] and *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)*[31] on earlier stamp duty legislation of New South Wales, "consideration" in s 21 of the Act is not to be read as requiring identification of the consideration sufficient to support a contract. So much follows inevitably from the recognition of the fact that s 21(1)(a) (and the expression "the consideration ... for the dutiable transaction") will find application in cases in which a transfer of dutiable property is not made pursuant to contract. So, as Dixon J pointed out in *Archibald Howie*[32]:

> "the word 'consideration' should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts".

That is, as his Honour went on to say[33], "the consideration is rather the money or value passing which moves the conveyance or transfer".

72 To adapt what was said by Lord Wilberforce of other stamp duty legislation[34]:

> "In the first place, the phrase 'consideration for the transfer or conveyance' seems to me to refer clearly and naturally to that which passed to the transferor company 'for' the transferred properties."

The criterion in the Act of consideration "for" the transaction, being the Agreement for the sale and transfer of the Shares to the Purchaser, upon whom s 13 imposes the liability to pay the duty, looks to what was received by the

[30] (1948) 77 CLR 143.

[31] (1958) 100 CLR 392.

[32] (1948) 77 CLR 143 at 152.

[33] (1948) 77 CLR 143 at 152.

[34] *Shop and Store Developments Ltd v Commissioners of Inland Revenue* [1967] 1 AC 472 at 503. See also at 495 per Lord Morris of Borth-y-Gest ("that which is received") and at 498 per Lord Hodson ("a quid pro quo for that which passed by the transfer or conveyance").

Vendors so as to move the transfers to the Purchaser as stipulated in the Agreement.

Consideration "for" the transfer in this case

73 It may be accurate for general purposes to say, as the primary judge emphasised, that "[i]n effect, the [V]endors sold their shares *ex dividend*"[35]. But to say that is to invite speculation as to the commercial and other revenue considerations which may have influenced the form in which the transaction was cast. This is not to answer the question posed by s 21(1) of the Act. What was to be received by the Vendors, and was received by them, was $114,139,649. The Vendors had bargained for an obligation on the part of the Purchaser to bring about that result.

74 The Purchaser discharged an obligation it owed the Vendors under the Agreement to "fund" the Company and so to provide for the payment by the Company of the dividend declared on the ordinary shares. The tripartite element in the transaction does not by itself provide an answer to what otherwise is the operation of the Act[36]. The contrary was not seriously urged in the oral submissions for the Purchaser.

75 The consideration which moved the transfer by the Vendors to the Purchaser of the Shares which they owned in the Company was the performance by the Purchaser of the several promises recorded in the Agreement in consequence of which the Vendors received the sum of $114,139,649. It was only in return for that total sum (paid by the various steps and in the various forms required by the Agreement) that the Vendors were willing to transfer to the Purchaser the bundle of rights which their shareholding in the Company represented.

76 Noticing the several steps which the Agreement required to be undertaken in order to achieve that result must not be permitted to obscure that the amount of monetary consideration for the transaction of the sale and transfer of the Shares was the sum identified. That part of the amount was to come as a dividend from the Company, the Vendors' shares in which were being sold, rather than immediately from the Purchaser, does not deny that proposition.

[35] (2002) 51 ATR 490 at 491; 2003 ATC 4001 at 4002.

[36] cf *Shop and Store Developments Ltd v Commissioners of Inland Revenue* [1967] 1 AC 472 at 503; *Commissioner of Inland Revenue v New Zealand Forest Research Institute* [2000] 1 WLR 1755 at 1758 (PC).

77 That which passed to the Vendors "for" the transfers of the Shares was "consideration" which was "monetary" rather than "non-monetary" within the meaning of s 21(1) of the Act. The transaction was to be assessed to duty on the footing that it was performed on its terms and, completion having taken place before the Agreement was furnished by the Purchaser to the Commissioner, both sides addressed their arguments by reference to the implementation of the transaction. The Commissioner correctly took the stance that the intended result of the transaction, seen as a whole, was the receipt by the Vendors of $114,139,649.

The error of the Supreme Court

78 The result of this analysis is that the primary judge and the majority of the Court of Appeal erred in the approach that they respectively took to the application of the Act to the uncontested facts. Approached correctly, the case may be summed up as follows. The promises which the parties made and recorded in the Agreement can be sufficiently described as being:

1. the Vendors' promise to transfer the Shares to the Purchaser;
2. the Vendors' promise to procure the Company to declare as large a dividend as it could (up to a maximum of $27 million);
3. the Purchaser's promise to pay the Vendors $114,139,649 minus the Dividend Amount; and
4. the Purchaser's promise to "fund" the Company's payment of the dividend.

79 The consideration for each of those promises is to be found in the promises made by the opposite party[37]. However, what for the purposes of s 21(1) of the Act moved the transfers by the Vendors was performance of *all* of the various stipulations in the Agreement, not merely the promises which the Purchaser made. To put the same point in other words: why identify the consideration "for" the transfers as only what the Purchaser gives up? The Vendors transferred the Shares in return for receiving some $114 million, of which part was received from the Company because the parties had agreed that this should be so.

80 To identify, as the submissions for the Purchaser would have it, promise 4 as one which leads to the creation of an asset which the Purchaser will hold (the

[37] *Chitty on Contracts*, 29th ed (2004) at 217 [3-004] concerning the need to distinguish between (and the law's concern for) the consideration for a *promise* as distinct from consideration for a *contract*.

debt owed by the Company to the Purchaser) is apt to mislead. Promise 2, although made by the *Vendors*, is a promise whose performance works to the advantage of both sides. The Vendors receive money. The Purchaser, because of promises 2 and 4, satisfies the Vendors' desire for money by a means which gives the Purchaser the asset of a debt as distinct from the indirect interest it would have obtained as shareholder in what but for the dividend would have been larger and more valuable assets of the Company.

Orders

81 The appeal should be allowed with costs. The order of the Court of Appeal should be set aside. In place thereof, it should be ordered that the appeal to that Court be allowed with costs, the orders of the primary judge set aside and in place thereof the assessment made by the Commissioner on or about 13 July 2001 be confirmed. The Purchaser should pay the costs of the Commissioner of the proceedings at first instance.