HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

PORT OF PORTLAND PTY LTD APPELLANT

AND

STATE OF VICTORIA RESPONDENT

Port of Portland Pty Ltd v Victoria [2010] HCA 44
8 December 2010
M62/2010

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraphs 1 and 3 of the order of the Court of Appeal of the Supreme Court of Victoria made on 10 December 2009 and, in lieu thereof, order that:*

   (a) the appeal to that Court be allowed with costs;

   (b) the judgment of Mandie J made on 6 December 2007 be set aside; and

   (c) the proceeding be remitted to the Trial Division of the Supreme Court of Victoria for an assessment of damages and consequential orders, including as to costs of the whole of the proceedings in the Trial Division.

On appeal from the Supreme Court of Victoria

Representation

J D Merralls QC with S T Pitt for the appellant (instructed by Mills Oakley Lawyers)

P J Hanks QC with C M Kenny SC and C O H Parkinson for the respondent (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with A J Sefton intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

CATCHWORDS

Port of Portland Pty Ltd v Victoria

Constitutional law – States – Reception of English law – Status in Victoria of constitutional principle recognised in s 12 of *Bill of Rights* 1688.

Contract – Construction – Enforceability of contractual obligation – Treasurer of State of Victoria directed Port of Portland Authority to sell its assets and business to appellant under contract ("Contract") – Section 4A(1) of *Port of Portland Authority Act* 1958 (Vic) gave Treasurer power to make direction – Treasurer party to Contract on behalf of State – State agreed, in cl 11.4(a) of Contract, to amend statutes to ensure port improvements excluded from land value used to calculate appellant's land tax – State agreed, in cl 11.4(b), to refund or allow to appellant excess tax if amendments did not become law – Whether cl 11.4(b) void as dispensation by executive from land tax legislation contrary to s 12 of *Bill of Rights* – Whether cl 11.4(b) effected dispensation – Whether cl 11.4(b) authorised by legislature enacting s 4A(1).

Land tax – Valuation of land – Whether State's obligation in cl 11.4(b) arose – Legislative amendments made in purported conformity with cl 11.4(a) – Whether amendments ensured port improvements excluded from land value – Statutory scheme provided for "general valuation" of all rateable land in municipal district every six years – At time of Contract, no valuation for part of appellant's land by reason of former municipal rates exemption – Whether valuer had power to make supplementary valuation – Whether supplementary valuation could take into account amendments not in force at time of last general valuation – Whether court or tribunal could take into account amendments on objection against general valuation of balance of land.

Words and phrases – "dispensation", "dispensing power", "general valuation", "supplementary valuation".

Bill of Rights 1688 (1 Will & Mar Sess 2 c 2), s 12.
Imperial Acts Application Act 1980 (Vic), ss 3, 8.
Land Tax Act 1958 (Vic), ss 3(2), 3(2A).
Valuation of Land Act 1960 (Vic), ss 2(1), 2(2AA), 5A(1), 13DF, 42(1).

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The Port of Portland Authority ("the Authority") was designated as such by s 3A of the *Port of Portland Authority Act* 1958 (Vic) ("the Authority Act")[1]. This effected a change of name to the body corporate first constituted as the "Portland Harbor Trust Commissioners" by s 4 of the *Portland Harbor Trust Act* 1949 (Vic). The Authority applied its real property, plant and equipment and other assets in the operation of the deep water commercial port known as the Port of Portland in the Western District of Victoria ("the Port").

The Contract

2 The appellant was nominated as the purchaser under, and since has completed, an agreement dated 15 February 1996 ("the Contract"). The subject matter was the sale by the Authority (defined as "the Vendor") to the appellant (defined as "the Purchaser") of its assets and business for a purchase price of $30 million. The governing law was that applicable in Victoria (cl 22.8). The effect of the Contract was, through a process of "privatisation", to pass the Port from public to private ownership.

3 The Contract stipulated (cl 6.1) that, subject to satisfaction of the conditions precedent in cl 4, completion was to take place on 1 March 1996. Clause 11 was headed "ADJUSTMENTS" and provided for the allowance on completion of various adjustments to outgoings, expenses, rents and profits. The dispute which has come to this Court on appeal from the Court of Appeal of the Supreme Court of Victoria (Maxwell P and Buchanan JA; Nettle JA dissenting)[2] concerns the provision made in cl 11.4 respecting land tax.

4 One of the conditions precedent to completion which was stipulated in cl 4.1 was that there still be in force the direction of the Treasurer of Victoria dated 14 February 1996 ("the Direction"). This was in the following terms:

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1 The Authority Act was repealed, and the Authority abolished, by the *Port Services (Amendment) Act* 1997 (Vic). All remaining property, rights and liabilities of the Authority were transferred to the State Electricity Commission of Victoria: *Port Management Act* 1995 (Vic), s 154.

2 *Port of Portland Pty Ltd v State of Victoria* [2009] VSCA 282.

> "I, Alan Robert Stockdale, MP, Treasurer, pursuant to section 4A(1) of the [Authority Act] having consulted with the Minister for Roads and Ports direct the [Authority] to sell, assign, transfer and otherwise dispose of, to Infratil Australia Limited (ACN 071 909 816) and Ascot Investments Pty Ltd (ACN 007 664 360) (or to a company nominated by them as provided for in the Asset Sale Agreement) for the amount of AUD30,000,000 those of its assets, liabilities, undertaking and business as specified in the Asset Sale Agreement executed by Infratil Australia Limited, Ascot Investments and the State of Victoria on 13 February 1996 (the "Asset Sale Agreement") and further direct that such sale, assignment, transfer or disposition is subject to and in accordance with the terms and conditions in the Asset Sale Agreement."

The appellant was a company in which each of Infratil Australia Ltd and Ascot Investments Pty Ltd held 50 per cent of the issued shares, and which was nominated by them as the Purchaser. Section 4A(1) of the Authority Act stated:

> "In addition to its other powers under this Act, the Authority must (if directed in writing to do so by the Treasurer after consultation with the Minister) sell, assign, transfer or otherwise dispose of any part of its assets, liabilities, undertaking or business to any person or body specified in the written direction, at the price specified in the written direction and subject to and in accordance with the other conditions (if any) specified in the written direction."

5 In addition to imposing an obligation upon the Authority, s 4A(1) impliedly conferred upon the Treasurer the power of determining whether to give a direction and the conditions to be specified in the direction[3]. That power was exercisable "from time to time as occasion require[d]"[4]. The Contract, the subject of the Direction, was one to which the parties were not only the Vendor and the Purchaser, but also the Treasurer "for and on behalf of the Crown in right of the State of Victoria ('State')". Part II (ss 20-27) of the *Crown Proceedings*

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3 See *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 303; [1985] HCA 70; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 169 [52]; [2004] HCA 31; *Griffith University v Tang* (2005) 221 CLR 99 at 126-127 [74]-[75]; [2005] HCA 7.

4 *Interpretation of Legislation Act* 1984 (Vic), s 40.

Act 1958 (Vic) ("the Crown Proceedings Act") renders the Crown liable in respect of any contract made on its behalf in the same manner as a subject (s 23) and provides that proceedings against it shall be instituted under the title of the "State of Victoria" (s 22).

6 However, it should be emphasised that the State, the respondent to the present appeal, became a party to the Contract not by reason of the exercise purely of executive authority, but rather from the exercise by the Treasurer of authority conferred by statute, namely s 4A(1) of the Authority Act. Section 4A(1) authorised the Treasurer to direct the Authority to sell its assets on terms and conditions which included the making of adjustments as spelled out in cl 11 and the assumption by the State of the obligation in cl 11.4(b).

7 Clause 11.4 was headed "Land Tax" and stated:

> "(a) The State has agreed with the Purchaser that it will effect an amendment to statutes governing the assessment and imposition of land tax to ensure that the unimproved site value used as the basis for assessment of land tax liability for the Real Property excludes the value of buildings, breakwaters, berths, wharfs, aprons, canals or associated works relating to a port.
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> (b) In the event that, before or after Completion the relevant statutory amendments do not become law and, as a result of that the Purchaser is assessed to land tax on the Real Property at a rate higher than would have been the case if the relevant statutory amendments were law, the State will refund or allow to the Purchaser the difference between the two amounts."

8 This presents various difficulties in construction. To the action brought against it by the appellant in the Supreme Court, the State pleaded that cl 11.4 was void or beyond the power of the State by reason of being a ministerial or executive act that purported to bind the Parliament, with the result that the State could not be sued for any failure of the Parliament to give effect to cl 11.4. In substance that plea was upheld at first instance by Mandie J[5], and by the majority in the Court of Appeal.

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5 *Port of Portland Pty Ltd v State of Victoria* [2007] VSC 488.

The *Bill of Rights*

9 In this Court, the appellant (like the intervener, the Attorney-General of Western Australia) accepts that: (a) there applies in Victoria the constitutional principles associated with the treatment in England by the Convention Parliament in the *Bill of Rights*[6] of the endeavours of King James II (in Scotland styled King James VII) to subvert the laws and liberties of the Kingdom by assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without the consent of the Parliament at Westminster; and (b) in particular, there applies in Victoria the prohibition expressed in s 12 of the *Bill of Rights* that no executive "dispensation by *non obstante* of or to any statute or any part thereof shall be allowed but that the same shall be held void and of no effect except a dispensation be allowed" of by statute.

10 The terms in which the *Bill of Rights* was expressed ("as it [the dispensing power] hath been assumed and exercised of late") may have been adopted to preserve the prerogative to pardon offences after they were committed[7]. They may also have been directed to the misuse by King James II of what previously had been the convenient means provided by the dispensing power of relieving against the operation of outdated, ill-drawn and ill-advised statutes. A consequence of the *Bill of Rights* was that thereafter full responsibility for the drafting of statutes fell to the Parliament[8].

11 The Convention of Estates of the Kingdom of Scotland had enacted its own *Claim of Right Act* 1689, c 28[9]. This, whilst declaring that King James VII

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6 1688 (1 Will & Mar Sess 2 c 2). The question of dates between 1688 and 1689 is considered in *Cadia Holdings Pty Ltd v New South Wales* (2010) 84 ALJR 588 at 610 [98]; 269 ALR 204 at 230; [2010] HCA 27.

7 *R v Stead* [1994] 1 Qd R 665 at 668. The prerogative of mercy is preserved in Victoria by s 327 of the *Criminal Procedure Act* 2009 (Vic), previously s 584 of the *Crimes Act* 1958 (Vic).

8 Edie, "Revolution and the Rule of Law: The End of the Dispensing Power, 1689", (1977) 10 *Eighteenth Century Studies* 434 at 450.

9 APS IX 38.

had forfeited the Crown, in presently relevant respects followed the *Bill of Rights*[10]. No legislation was passed by the Irish Parliament[11] and the extent to which the constraints imposed by the *Bill of Rights* (particularly respecting the dispensing power) operated upon the exercise of executive power in Ireland remained unclear[12].

12 The constitutional rearrangements made by the Convention Parliament had the effect in England, and thereafter in the United Kingdom, of settling the scope of the executive power in various respects. In Australia it was with these limitations upon the executive that the constitutions of the States took their shape[13]. The position in the colonies is considered as follows by Justice McPherson in his work *The Reception of English Law Abroad*[14]:

> "Whether Parliamentary enactments like the Habeas Corpus Act 1679 or the Bill of Rights 1689 limited royal prerogatives in the overseas possessions as they did in England was for some time a matter of contention between the crown and colonists. Probably the correct view is that, although at first not all of the rights guaranteed by Acts like those were immediately in force at the settlement of a colony, they or some of their provisions were attracted to and received as and when a colony attained the stage of constitutional development at which those Acts became reasonably capable of being applied as a part of the locally adopted English statute law[15]."

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10 Walker, *A Legal History of Scotland*, (1996), vol 4 at 88-89.

11 See *The People (Attorney-General) v O'Callaghan* [1966] IR 501 at 518.

12 Osborough, "The Failure to Enact an Irish Bill of Rights: A Gap in Irish Constitutional History", (1998) 33 *Irish Jurist* 392 at 412-413.

13 *Cadia Holdings Pty Ltd v New South Wales* (2010) 84 ALJR 588 at 603 [54]-[56], 611 [106]; 269 ALR 204 at 220-221, 232.

14 (2007) at 98-99.

15 For example, s 9 of the *Bill of Rights* guaranteeing freedom of speech in Parliament would not have been capable of application until a colony had a representative legislature; but other parts of the *Bill of Rights* could be and have been applied:

(Footnote continues on next page)

13 The *Bill of Rights* is one of the "transcribed enactments" set out in s 8 of the *Imperial Acts Application Act* 1980 (Vic) and by force of s 3 thereof continues "to have in Victoria ... such force and effect, if any, as [it] had at the commencement of this Act". The preferable view is that these provisions in the Victorian statute at best serve only to reinforce what are settled constitutional principles. From the *grundnorm* represented by the constitutional settlement by the Convention Parliament there was to be no turning back in England, or thereafter in the United Kingdom. In Australia the absence of a power of executive dispensation of statute law, what Dixon CJ called a "general constitutional principle"[16], became an aspect of the rule of law and, as Wild CJ put it with respect to New Zealand, is "a graphic illustration of the depth of our legal heritage"[17]. Such a power is absent from the Constitutions of the States which are identified in s 106 of the Constitution.

Paragraph (b) of cl 11.4 is effective

14 The appellant does not place at the foundation of its case against the State par (a) of cl 11.4, with its reference to the effecting by the legislature of an amendment to the land tax laws. This makes it unnecessary to determine whether Nettle JA was correct in the view that par (a) should be construed as imposing an obligation upon the executive limited to what it could lawfully and effectively do to procure the passage of the legislation to which par (a) refers. The appellant places its case upon par (b) of cl 11.4, and submits that it is sufficient for its case to characterise the failure to legislate as specified in par (a) as no more than the factum for the operation of par (b). This submission should be accepted. It enables the appellant to skirt any issue that par (a) is void as an attempt to fetter by contract the exercise as the State legislature sees fit of the power provided by ss 15 and 16 of the *Constitution Act* 1975 (Vic). Section 15

Fitzgerald v Muldoon [1976] 2 NZLR 615 (no power to dispense with Act of Parliament); *R v Stead* [1994] 1 Qd R 665 at 668-669 (no power to pardon before offence committed: *Bill of Rights*, ss 1 and 2).

16 *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258, see also at 272-273 per Windeyer J; [1960] HCA 82.

17 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622.

vests the legislative power of the State in the Parliament and s 16 identifies that power as one to make laws in and for Victoria in all cases whatsoever.

15 Upon the factum supplied by failure to legislate as described in par (a), par (b) operates if the appellant is assessed to land tax at the higher rate referred to in par (b), whether this is in respect of an assessment before or after completion. In those circumstances, the difference is to be borne by the State, whether by refunding money paid or by allowance in computation of what is payable but unpaid. The payments are made by way of adjustment in the price for sale of public assets and do not have the character of a dispensation from the operation of the land tax legislation. Further, and in any event, the Authority Act supplied legislative support for the entry by the State into and performance of the obligation in par (b) of cl 11.4.

16 The Authority was obliged by s 42(2A) of the Authority Act to pay the proceeds of sale received on completion of the Contract to a fund established by that section, but subject to directions given by the Treasurer under sub-ss (2B) and (2C). Under those provisions the Treasurer was empowered to direct payment of any specified part of the proceeds into the Consolidated Fund established and kept under s 9 of the *Financial Management Act* 1994 (Vic).

17 The adjustments for which cl 11.4(b) provided qualified what otherwise would be the operation of the financial arrangements under the Authority Act for the sale of the assets of the Authority at the direction of the Treasurer under s 4A(1) of that statute. The Direction was supported by s 4A(1) and drew the terms of the Contract, including cl 11.4(b), into the operation of the legislative scheme for "privatisation".

18 The upshot is that the plea by the State based upon constitutional principles emphasising the control by the legislature of the executive, particularly in revenue matters, was effectively confessed and avoided by the appellant. The "statutory backing" to the Contract, to use Windeyer J's words in *Placer Development Ltd v The Commonwealth*[18], sufficiently supported the obligation of the State under cl 11.4(b). Judgment against the State would be satisfied by the appropriation provided for under s 26 of the Crown Proceedings Act.

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18 (1969) 121 CLR 353 at 366; [1969] HCA 29.

The appeal on the merits

19 The appeal thus falls for determination on the merits, namely whether in the events that happened and upon the proper construction of cl 11.4(b) and the relevant revenue and land valuation legislation, there is a differential which the appellant may recover and, if so, how it is to be assessed.

20 Section 9 of the *Land Tax Act* 1958 (Vic) ("the Land Tax Act")[19] exempted from land tax land vested in a public statutory authority constituted under a statute such as the Authority Act. The appellant, as the Purchaser, would not be in that position, and par (a) of cl 11.4 was designed to ensure that in assessment of the ongoing land tax liability of the appellant there would be excluded from the unimproved site value the works relating to the Port. If par (a) was satisfied, then the condition for the operation of par (b) would not be met and the State would have no obligations thereunder to the appellant.

The obligation in cl 11.4(b) of the Contract

21 In this Court, by way of notice of contention, the State submits that no obligation arose on the part of the State to refund to the appellant, after completion, any differential in the purchase price. By the terms of cl 11.4(b), that obligation would arise only if "the relevant statutory amendments [did] not become law" and as a result the appellant was assessed to land tax at a higher rate. The reference to the relevant statutory amendments is a reference to what was described in cl 11.4(a) as

> "an amendment to statutes governing the assessment and imposition of land tax to ensure that the unimproved site value used as the basis for assessment of land tax liability for the Real Property excludes the value of buildings, breakwaters, berths, wharfs, aprons, canals or associated works relating to a port".

22 The State contends that the condition for the operation against it of cl 11.4(b) was not satisfied because an amendment meeting the description in par (a) became law upon the commencement of the *State Taxation (Omnibus*

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19 The Land Tax Act was repealed on 1 January 2006 by s 116 of the *Land Tax Act* 2005 (Vic).

Amendment) Act 1996 (Vic) ("the Omnibus Amendment Act"). Section 27 of the Omnibus Amendment Act amended the definition of "improvements" in s 2(1) of the *Valuation of Land Act* 1960 (Vic) ("the Valuation Act") and inserted s 2(2AA). The effect of the amendment was that "[w]orks relating to a port, being buildings, breakwaters, berths, wharfs, aprons, canals or associated works" were improvements within the meaning of the Valuation Act.

23 The "site value" of land, as defined in s 2(1) of the Valuation Act, was calculated upon the fictitious assumption that any improvements to land had not been made. However, "improvements" was defined so as not to include "work done or material used for the benefit of the land by the Crown or by any statutory public body". By reason of provisions[20] in the Land Tax Act, "the site value", adjusted in accordance with s 3(4) of that Act, was the value of land upon which land tax was assessed. As the law stood at the time of the Contract, the land tax payable was to be calculated by reference to "the site value" which would have included numerous improvements at the Port.

24 The amendment to the Valuation Act came into force on 25 June 1996[21], being the day on which the Omnibus Amendment Act received Royal Assent[22]. However, by reason of the time scale for the making of periodic valuations of land, the appellant contends that the amendment did not *ensure* that the value of the works described in cl 11.4(a) were excluded from the value of the land upon which land tax was calculated for the 1997-2001 calendar years.

25 The submissions of the State in response are that: (a) once the amendments were enacted the contractual obligation was discharged; and (b) if, as the appellant contends, the obligation of the State went further and was to ensure that the amendments had an immediate effect upon land tax liability of the appellant, then they had, or at least were capable of having, that effect. The State seeks to make good that second submission by way of two propositions: the first is that a supplementary valuation for the main port area for the 1997-2001 tax period was made which excluded the works declared to be improvements in

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20 Sections 3(2), 6 and 8.

21 *Victoria Government Gazette*, G25, 27 June 1996 at 1593.

22 Omnibus Amendment Act, s 2(1).

s 2(2AA); and the second is that the appellant was entitled to object, pursuant to the Valuation Act, to the valuation of the land it had acquired, and on review the operation of s 2(2AA) would have been a mandatory consideration.

26 Before further consideration of the competing submissions of the parties, it is convenient to say more regarding the land acquired by the appellant and the structure of the statutory scheme for the imposition of land tax in Victoria.

The land acquired by the appellant

27 Under the Contract, the appellant acquired approximately 115 hectares of unalienated Crown land. The main port area, known as Barton Place and comprising approximately 68 hectares, was largely occupied by the Authority and subsequently the appellant. The balance of the main port area, and the remaining land acquired, was subject to leasehold interests. For ease of reference, all of Barton Place will be referred to in these reasons as "the main port area", that part of the land in the main port area occupied by the Authority and then the appellant shall be referred to as "Barton Place", and that part of the main port area subject to leases, as well as the rest of the acquired land, as "the leased land".

28 The leased land and approximately 37 hectares of Barton Place were situated in the municipal district of the Shire of Glenelg ("the Shire"). By an Order in Council dated 21 January 1997[23], the municipal district of the Shire was extended to include land from the high water mark to 200 metres seaward, with the effect that, from 24 January 1997, the size of Barton Place within the Shire increased to approximately 49 hectares.

29 Before acquisition by the appellant, Barton Place, as land vested in a public statutory body and used for public purposes, was land exempt from municipal rates by reason of s 154(2) of the *Local Government Act* 1989 (Vic) ("the Local Government Act"). Accordingly, Barton Place had never been valued for municipal rating purposes. The significance of this lies in the reliance upon valuations made for municipal rating purposes in the assessment of land tax under the Land Tax Act. Upon the appellant acquiring Barton Place in 1996 the exemption from municipal rates no longer applied. From 24 January 1997 a

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23 *Victoria Government Gazette*, G3, 23 January 1997 at 194-196.

further 12 hectares, approximately, of Barton Place then also fell within the boundaries of the Shire. It appears that those 12 hectares, being land below the high water mark, were not formerly within any other municipal district and so had not been rateable.

The land tax scheme

30 Land tax was assessed by reference to the "site value" of land as at the "relevant date"[24]. For the purposes of assessing and levying land tax, the Commissioner of State Revenue[25] was permitted to use valuations made by a rating authority within the meaning of the Valuation Act[26]. Section 2(1) of the Valuation Act provided that a "council" within the meaning of the Local Government Act was a rating authority, the relevant rating authority here being the Shire. Section 157(1) of the Local Government Act permitted a council, such as the Shire, to use the site value system of valuation. That is one of the valuation systems used by the Shire and was relevant to the assessment of land tax.

31 Section 3(2A) of the Land Tax Act provided that, for land within the municipal district of a municipal council, the "relevant date" for valuation was generally the date as at which the land was valued for the purposes of the last "general valuation" returned to the municipal council before 1 January in the year immediately preceding the year for or in which land tax was being assessed. The term "general valuation" was not defined in the Land Tax Act but, given the definition of "supplementary valuation" in s 3(6) and the interrelation between the two Acts, it clearly referred to a "general valuation" as defined in s 2(1) of the Valuation Act; namely, "a valuation of all the rateable land in the area of a rating authority or in any one or more subdivisions of such an area".

32 Prior to amendments made in 1998[27], s 13DC(5)(b) of the Valuation Act required a valuation of rateable land within a council's municipal district to be

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24 Land Tax Act, s 3(2).

25 Defined as such in s 3(1) of the Land Tax Act.

26 Land Tax Act, s 16.

27 See *Valuation of Land (Amendment) Act* 1998 (Vic), s 3(2).

made and returned every six years. Despite the absence of the term "general valuation" in s 13DC(5)(b), it was clearly contemplated under the statutory regime that councils such as the Shire would conduct a general valuation every six years, and that in the intervening periods supplementary valuations could be carried out under s 13DF of the Valuation Act in certain circumstances[28]. Both s 13DC and s 13DF appeared in Pt 2, Div 3A of the Valuation Act, which was headed "Valuations for Local Government Act 1989". Division 3A was inserted in 1989[29], the year the Local Government Act was enacted.

33 The date of the last general valuation for land within the Shire before the making of the Contract was 30 June 1993. Most of the leased land had been valued as at, or near to, that date. Barton Place was valued, for the first time, by Mr McDonald, the valuer for the Shire, in his supplementary valuation of 7 March 1997. He valued the site value of Barton Place as at 30 June 1993 as $2,050,500. By reason of a change in the size of Barton Place, a further supplementary valuation was returned on 28 June 2000 assigning a site value of $2,044,800. These two figures for site value were used as the basis for calculating the land tax payable by the appellant on Barton Place for the years 1997-2001. The State contended, and the appellant accepted, that no supplementary valuation was carried out for the leased land, but it appears that some of the leased land had supplementary valuations. If that is so, the reasons below concerning the effect of any supplementary valuations of Barton Place on cl 11.4 are equally applicable to any supplementary valuations of parts of the leased land.

34 The amendments to the Valuation Act in 1998 meant that the next general valuation did not take place until a valuation was made as at 1 January 2000, and would thereafter be made at two-year intervals. Mr McDonald returned a site value for Barton Place of $2,044,800 as at 1 January 2000. After an objection was lodged by the appellant, that figure was significantly reduced by

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28 See also s 256 of the *Local Government Act* 1928 (Vic), s 256 of the *Local Government Act* 1946 (Vic) and s 258 of the *Local Government Act* 1958 (Vic) which had enabled a council to cause a supplementary valuation "without causing a valuation to be made of all rateable property within the municipal district or any one or more of the subdivisions thereof".

29 *Valuation of Land (Amendment) Act* 1989 (Vic), s 8.

Mr McDonald to $221,000 and subsequently confirmed by the Valuer-General. The appellant's contention, disputed by the State, is that the reduction in value was due to the proper exclusion of the s 2(2AA) improvements to arrive at the latter figure.

35 But in this Court the question to be resolved is whether Mr McDonald's supplementary valuation in March 1997, or indeed any other supplementary valuations, *could* have excluded from the site value of Barton Place, or parts of the leased land, the improvements referred to in s 2(2AA) of the Valuation Act as amended from 25 June 1996. If it could not have done so, then no change to the law was made which *ensured* that those improvements, on the assumption they correlated with what was required by cl 11.4(a), were excluded from the site value. It would then follow that the State was in breach of its obligation under cl 11.4(b) of the Contract.

Supplementary valuations

36 The State contends that Mr McDonald's valuation in March 1997 was a supplementary valuation supported by s 13DF of the Valuation Act and capable of taking into account the insertion of s 2(2AA) in that Act. Subsections (1) and (2) of s 13DF relevantly provided:

> "(1) Despite anything in this or any other Act, a person referred to in section 13DA may carry out a supplementary valuation for the purposes of the [Local Government Act].
>
> (2) A supplementary valuation may be made in any of the following circumstances–
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> …"

37 The State submits that sub-s (1) provided a general power for a supplementary valuation to be made and that pars (a) to (o) of sub-s (2) did not limit the exercise of that power to the circumstances there listed. The State contends that if sub-s (2) was an exhaustive list of circumstances in which a supplementary valuation could be made, then sub-s (1) would have no work to do.

38 Section 13DA(1) provided that a council "may appoint" persons to make "valuations *under this Act* for the purposes of the [Local Government Act]"

(emphasis added). That provision meant that, at least as the Valuation Act then stood, a supplementary valuation was to be carried out by the same class of valuers entitled to carry out a general valuation in accordance with s 13DC. However, the work performed by s 13DF(1) was to stipulate that a supplementary valuation could be made without the need to undertake a general valuation of all rateable land within the area of a rating authority. It could be made despite any prohibition or restriction on the making of supplementary valuations that might have existed (but does not then appear to have existed) in the Local Government Act or any other Act, but only in the circumstances found in sub-s (2).

39 The interpretation of sub-s (2) as providing an exhaustive set of circumstances should be accepted. It is supported by the terms of sub-ss (4) and (5) of s 13DF. These subsections dealt with the adjustment of any rate payable in relation to the land consequent on the making of a supplementary valuation. Sub-section (4) provided that where a supplementary valuation was made in any of the circumstances in sub-s (2), other than par (o), the rate was to be adjusted from the day after the supplementary valuation had been returned. Where par (o) applied, sub-s (5) provided the different result that the rate may be adjusted by the council retrospectively for any period it considered just. If a general power could also be exercised under sub-s (1), how then, temporally, would the rate of land tax be adjusted in consequence?

40 An alternative argument by the State was that, in the circumstances, either par (e) or par (n) of s 13DF(2) was engaged. Paragraph (e) allowed the making of a supplementary valuation "if any land has become rateable since the return of the existing valuation". That certainly enabled a supplementary valuation to be made in the present case as 37 hectares of Barton Place only became rateable upon the appellant's acquisition of the land under the Contract and the loss of the exemption enjoyed by the Authority. A further 12 hectares became rateable only upon the Order in Council extending the Shire boundary. Thus, in two separate stages, the approximately 49 hectares of Barton Place within the Shire had become rateable since the return of the "existing valuation", being the last general valuation for the Shire. Whether par (n) was engaged is a matter of dispute to which it will be necessary to return below.

How any supplementary valuation was to be made

41 If par (e) of s 13DF(2) were engaged, the appellant submits that, by reason of sub-s (6) of s 13DF, the amendments made by the Omnibus Amendment Act,

with effect from 25 June 1996, could not be taken into account in any supplementary valuation, which had to value Barton Place as at 30 June 1993. Sub-section (6) directed the valuer as follows:

> "The valuer in making a supplementary valuation must–
>
> (a) have regard to the general levels of value upon which the valuation in force within the municipal district or ward was based; and
>
> (b) assess the *value* that the land to which the supplementary valuation applies would have had *if* at the time at which the last valuation of the municipal district or ward was made *it had been in the condition in which it is* at the time of the making of the supplementary valuation, *having regard to every circumstance* which affects the value of the land at the time of the making of the supplementary valuation, *if it is a circumstance requiring the making of a supplementary valuation of the land under sub-section (2)*." (emphasis added)

The enactment of the Omnibus Amendment Act did not mean that Barton Place was, in 1997, in a different "condition" to which it had been as at 30 June 1993.

42 However, the State submits that those statutory amendments were required to be taken into account in assessing the "value" of Barton Place. It further submits that the amendments were required to be taken into account by reason of s 5A(1) of the Valuation Act, which provided as follows:

> "Unless otherwise expressly provided where pursuant to the provisions of any Act a court board tribunal valuer or other person is required to determine the value of any land, every matter or thing which such court board tribunal valuer or person considers relevant to such determination shall be taken into account."

43 In the present case, however, the land being in no different condition, the value in a supplementary valuation was to be that which Barton Place would have had at the time of the last general valuation, being 30 June 1993. At that time the amendment to the Valuation Act later made by the Omnibus Amendment Act was not in force. The next step required for a supplementary valuation by par (b) of s 13DF(6) would be to have regard to "every

circumstance" affecting the value of Barton Place, as at the supplementary valuation date of 7 March 1997, but only if it was a circumstance "requiring"[30] the making of a supplementary valuation under sub-s (2). If par (e) was engaged in the present case, the change made by the Omnibus Amendment Act was irrelevant, it not being the circumstance attracting the operation of par (e) of s 13DF(2).

44 Thus, the next question is whether par (n) of s 13DF(2) was engaged and, if so, whether the result was that the valuer might have regard to the change made by the Omnibus Amendment Act.

Whether par (n) was engaged

45 Paragraph (n) of s 13DF(2) of the Valuation Act provided that a supplementary valuation may be made:

> "if for any reason other than a reason referred to in any of paragraphs (a) to (m), the capital improved value, net annual value or site value–
>
> (i) of any land specified by Order of the Governor in Council published in the Government Gazette; or
>
> (ii) of the land in any area specified by Order of the Governor in Council published in the Government Gazette–
>
> is or is likely to have been materially altered as a consequence of any Act, proclamation, Order in Council, regulation, by-law or local law".

46 Section 220Q of the Local Government Act empowered the making of the Order in Council, published in the Government Gazette on 23 January 1997, that extended the boundaries of the Shire so as to include a larger portion of Barton Place. The point made by the State is that the source of power to make the Order in Council was located in the Local Government Act and that it was unnecessary to rely upon a power to do so implied by the terms of par (n) of s 13DF(2) of the

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30 No circumstance in s 13DF(2) was capable of "requiring" the making of a supplementary valuation, each being a circumstance where a supplementary valuation "may" be made. This would best be read as a circumstance "enlivening the power for" the making of a supplementary valuation under sub-s (2).

Valuation Act. The State notes that the Order in Council specified the area which now fell within the Shire boundary; approximately 49 hectares of Barton Place was land in that area, and its site value was or was likely to have been materially altered as a consequence of an Act, namely, the Omnibus Amendment Act. If par (n) was engaged then the valuer was required under s 13DF(6)(b) to have regard to the amendment made by the Omnibus Amendment Act, this being the circumstance enlivening the power to make the supplementary valuation.

47 As stated above[31], par (e) contained the "reason" why the power to make a supplementary valuation in relation to Barton Place became exercisable, but that was not a reason why the site value was or was likely to have been materially altered. The introductory words of par (n) appear to be directed at excluding from its scope matters to which one of pars (b), (g), (i) or (l) would already apply. Those paragraphs applied to alterations to value linked to the operation of particular Victorian statutes[32].

48 The Victorian Parliament might have chosen in s 13DF(2) to provide that any amendment to the law with a consequential effect on land value was a circumstance engaging the power to make a supplementary valuation. However, the evident legislative purpose in sub-s (2) is that not all changes in land value consequent on a change in, or the operation of, the law will enable a valuation outside of the periodic cycle of general valuations. Changes in value as a consequence of the operation of the particular statutes identified in pars (b), (g), (i) or (l) will enliven the power to make a supplementary valuation. Changes in value as a consequence of the operation of any other statute, proclamation or subordinate instrument are then dealt with in the residual category in par (n). But the requirement for an Order in Council performs a limiting function. Paragraph (n) does not provide that changes in consequence of any statute, proclamation or subordinate instrument will suffice. The land must be specified in an Order in Council, or must be in an area specified in an Order in Council. The power to make such Orders in Council for the purposes of par (n) is

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31 At [40].

32 Respectively, the *Planning and Environment Act* 1987 (Vic), the *Heritage Act* 1995 (Vic), the *Victorian Conservation Trust Act* 1972 (Vic) and the *Local Government Act* 1972 (Vic).

impliedly conferred by that paragraph itself[33]. If an Order in Council is made pursuant to par (n) of s 13DF(2) of the Valuation Act there can be no dispute that par (n) applies, but a bare reference in any Order in Council to an area of land, or a specification of an area of land for some purpose unconnected with par (n), will not suffice.

49 There are good reasons why this is so. The inclusion in par (n) of sub-pars (i) and (ii) clearly contemplates that the executive retains a discretion to decide which changes in the statute law and delegated legislation will engage the power to make a supplementary valuation. It would be an odd and somewhat arbitrary criterion which provided that whenever there was, by coincidence or otherwise, a reference to an area in an Order in Council published in the Gazette the power in par (n) would be engaged with respect to land within that area, but that, absent such an adventitious reference, the power would not be engaged. The introductory words of par (n) are of importance; they confirm that changes in value consequent on the operation of laws specified by the legislature in other paragraphs of s 13DF(2) need not satisfy the additional Order in Council requirement in par (n).

50 Moreover, there are many and varied ways in which land or an area of land may come to be "specified" in an Order in Council published in the Gazette. The description of municipal boundaries is but one example and demonstrates the ease with which a vast amount of "land in any area" might come to be specified in an Order in Council. If no element of purpose were required, and given that no temporal limit is imposed, many Orders in Council made without s 13DF(2)(n) being in view nonetheless would have an impact upon the operation of the paragraph.

51 It follows that upon its proper construction par (n) only applies where: (i) the capital improved value, net annual value or site value is or is likely to have been materially altered; (ii) the reason for that alteration is not found in pars (a) to (m); (iii) the alteration is as a consequence of any Act, proclamation, Order in Council, regulation, by-law or local law; (iv) an Order in Council has been made specifying the relevant land or specifying an area in which the relevant land is located; and (v) that Order in Council was made pursuant to, or for the purposes of, par (n).

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33 See the authorities collected above, footnote 3.

52 Thus the State's argument that par (n) was engaged fails at point (v). The Order in Council extending the boundaries of the Shire was made pursuant to powers conferred by s 220Q of the Local Government Act and not pursuant to par (n) as a requisite to enliven the power to make a supplementary valuation. There was no sufficient statutory nexus or connection between the extension of the Shire boundary (to include a further 12 hectares of Barton Place) from 24 January 1997 and the coming into force of the Omnibus Amendment Act on 25 June 1996.

53 Given that no supplementary valuation of Barton Place could have taken the Omnibus Amendment Act into account, it is unnecessary to consider the appellant's further submission that Mr McDonald's valuation was invalid for want of compliance with the prescription of the powers and duties of valuers which is made by s 13DH of the Valuation Act.

54 It follows that, in relation to Barton Place (or, applying the same reasoning, in relation to any part of the leased land the subject of a supplementary valuation), the State did not ensure that the legislative amendments excluded the improvements described in cl 11.4(a). The amendments could not be taken into account in any supplementary valuation. No different result would obtain on an objection or review of the supplementary valuation for the reasons outlined below. The position with respect to the balance of the land acquired by the appellant is the next issue for determination.

The leased land

55 There is no evidence as to payment by the appellant of land tax in respect of the leased land, or whether the leased land had improvements of the kind described in the Omnibus Amendment Act. Assuming that the appellant did pay tax on the leased land, based upon a site value which included improvements to which the Omnibus Amendment Act applied, the issue again is whether the State ensured that the amendments made could have immediate consequences for the appellant's land tax liability.

56 The State points to the existence of an objection procedure under Pt 3 of the Valuation Act. The appellant did not take advantage of that procedure in respect of the site value of Barton Place or the leased land. The State submits that the appellant could have objected to the valuation of the leased land, after acquiring it, and in that objection process the improvements to which the

Omnibus Amendment Act applied could be excluded from the site value arrived at for the leased land.

Procedure for objections to valuations of land

57 Section 24A of the Land Tax Act provided the taxpayer with a right to lodge with the Commissioner of State Revenue an objection to an assessment of land tax, but no objection lay under that section relating to the site value of land where the assessment was based on a valuation made under the Valuation Act. Part 3, Div 4 of the Valuation Act provided for a separate regime whereby a written objection could be lodged with the rating authority, here the Shire. The objection regime was replaced in 1998[34], but for present purposes both regimes were, at a general level, to the same effect. References here are to the provisions as they stood prior to the 1998 amendments.

58 Section 36 provided that one of the grounds on which a valuation could be challenged was that the value assigned was too high. Section 37(3)(b) provided for the time within which an objection could be lodged, depending on whether the valuation appeared for the first time, or had appeared in a notice previously given by the Shire. Section 48 applied if for any reason a notice of valuation of land had not been given to the appellant under s 37. In such a case, the appellant would have had an opportunity within two months of receipt of its first notice of assessment to land tax for the leased land to object to the valuation of the land on any of the grounds in s 36 (s 48(1)). The provisions in Pt 3, Div 4 would then have applied as if an objection had been made under that Division (s 48(3)).

59 The appellant referred to what was said by Nettle JA in *Melbourne City Council v Port of Melbourne Corporation*[35]. This was a case concerning the equivalent provision to s 48 after the 1998 amendments. But what his Honour said there is entirely consistent with the proposition that if the appellant had not been given a notice of valuation of the leased land, then upon it receiving a notice of assessment to land tax, including land tax payable on the leased land, the

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34 See s 309 of the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act* 1998 (Vic), passed in consequence of the establishment of the Victorian Civil and Administrative Tribunal.

35 (2005) 139 LGERA 318.

appellant had a fresh time period in which to challenge the valuation of the leased land[36]. Nettle JA held that such a challenge would be limited to only those valuations of land of which the taxpayer had no notice and could not extend to other valuations of land the subject of the same notice of assessment, for which the taxpayer had already been given notice[37].

60 Accordingly the appellant enjoyed a right of objection against the valuation of the leased land that would have been governed by Pt 3, Div 4 of the Valuation Act. In the event, however, the appellant did not so object, and the time limit for doing so has long expired.

The scope for review on objection or appeal

61 The valuer for the Shire was to determine the objection in the first instance, the criterion for decision being whether "an adjustment in the valuation is justified" (Valuation Act, s 39(2)). The Valuer-General had power to disallow a recommendation of adjustment made by the valuer (s 39(4)). If the appellant was dissatisfied by the decision of the valuer or the Valuer-General, it could lodge written notice with the Shire requiring it to treat its objection as an appeal and to refer the matter to the Supreme Court or the then Victorian Administrative Appeals Tribunal (s 40). Section 42(1) relevantly provided that

> "the Court or Tribunal on an appeal shall review the assessment of valuation of the lands made by or for the rating authority (as the case may be) and may either confirm the valuation or increase or reduce the value assigned to the land or make such other amendment as it thinks fit".

62 The State submits that each of the valuer, in determining whether an adjustment was "justified", and the Court or Tribunal, in determining whether to reduce the value as it thought fit, was given a wide discretion on review of a valuation. It submits that on review, the change in the law made by the Omnibus Amendment Act could be taken into account and the site value adjusted to exclude s 2(2AA) improvements. The State points again to s 5A(1) of the

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36 (2005) 139 LGERA 318 at 332-333 [23]-[25].

37 (2005) 139 LGERA 318 at 333-334 [26]-[27].

Valuation Act, which required the valuer, Court and Tribunal to take into account every matter or thing considered relevant to a valuation.

63 Certain fundamental elements of the land tax scheme preclude the success of that line of argument. On objection or appeal, the answer to any submission by the appellant that the inclusion of s 2(2AA) in the Valuation Act required an adjustment would involve the proposition that s 3(2) of the Land Tax Act required the leased land to be valued as at a particular past date. By operation of s 3(2A) of the Land Tax Act, that date in the present case was 30 June 1993. At that time the Omnibus Amendment Act had not come into force. Its enactment lay three years ahead. The circumstance that the amendments had come into force after the last general valuation, but prior to the next general valuation, could not affect the value of the land as at 30 June 1993 if that value was determined according to law. The Land Tax Act required that the unimproved value of the land be determined by reference to the site value as at a date prior to the amendments having legal effect. Accordingly, in the present appeal to this Court the existence of a right of objection in the appellant is of no avail to the State in answering the submissions made by the appellant respecting cl 11.4 of the Contract.

Conclusions

64 The factum specified in par (a) of cl 11.4 was not satisfied, par (b) of cl 11.4 is not void or ineffective for conflict with any constitutional principle, par (b) was engaged and the appeal should be allowed. The measure of recovery by the appellant under par (b) remains for determination.

65 The matter must therefore be remitted to the Trial Division of the Supreme Court for this determination. The parties agreed that such a remitter would be appropriate were this Court to allow the appeal.

Order

66 The appeal should be allowed with costs. Paragraphs 1 and 3 of the order of the Court of Appeal made on 10 December 2009 should be set aside. In lieu thereof the appeal to that Court should be allowed with costs, the judgment of Mandie J made on 6 December 2007 set aside, and the proceeding remitted to the Trial Division of the Supreme Court of Victoria for an assessment of damages and consequential orders. The consequential orders should deal with the question of costs of the whole of the proceedings in the Trial Division.