HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND KIEFEL JJ

TEC DESERT PTY LTD & ANOR APPELLANTS

AND

COMMISSIONER OF STATE REVENUE RESPONDENT

TEC Desert Pty Ltd v Commissioner of State Revenue [2010] HCA 49
15 December 2010
P26/2010

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 15 January 2010 and, in place thereof, order that the appeal to that Court be dismissed with costs.*

3. *Within 28 days of the date of this order, or such further period as this Court may allow by order made within that 28-day period, the parties may file agreed short minutes of appropriate further orders as indicated in the reasons of this Court; and, in default of such agreement, the matter be remitted to the Court of Appeal.*

On appeal from the Supreme Court of Western Australia

Representation

J W De Wijn QC with B Dharmananda for the appellants (instructed by Mallesons Stephen Jaques)

G T W Tannin SC with B P King for the respondent (instructed by State Solicitor for Western Australia)

CATCHWORDS

TEC Desert Pty Ltd v Commissioner of State Revenue

Stamp duties – Conveyance on sale – Interest in land – Sale Agreement provided for sale to appellants of chattels of WMC Resources Ltd ("WMC") – Sale Agreement required WMC to grant appellants, for a fee, licences to use "Fixtures" – "Fixtures" defined in Sale Agreement as items "affixed to land, and an estate or interest in which is therefore an estate or interest in land" – Most WMC assets on land subject of WMC mining tenements – Whether Sale Agreement transferred interest in land – Whether interest in items affixed to land subject of mining tenements interest in land – Whether such items "Fixtures".

Real property – Mining tenements – Mining plant – Whether interest of holder of mining tenement interest in land – Whether interest in mining plant, affixed to land, interest in land – Relevance of general law concerning fixtures.

Stamp duties – Conveyance on sale – Interest in land – Some WMC assets on WMC freehold land – On termination of licences, appellants required to acquire WMC's right, title and interest in "Fixtures" – WMC warranted it had title to "Fixtures" notwithstanding their affixation to freehold – Whether obligation to acquire "Fixtures" on WMC freehold effected transfer of interest in land – Nature of title to "Fixtures" dealt with under licences – Whether appellants' obligation to rehabilitate land, or negative covenant preventing WMC assigning freehold without assignee being bound by licences, created interests in land.

Words and phrases – "fixture", "mining lease", "mining plant".

Mining Act 1904 (WA), ss 108(3), 273.
Mining Act 1978 (WA), s 114.
Stamp Act 1921 (WA), ss 19(a), 63(1), 70(2).

1 FRENCH CJ, GUMMOW, HEYDON, CRENNAN AND KIEFEL JJ. On 24 July 2000 the respondent ("the Commissioner"), pursuant to the *Stamp Act* 1921 (WA) ("the Stamp Act"), assessed to duty of $9,140,280.25 a written agreement ("the Sale Agreement") dated 27 November 1998. The date for the application of the Stamp Act is 24 July 2000. The parties to the Sale Agreement included the vendor, WMC Resources Ltd ("WMC"), and the purchasers, the first appellant ("TEC") and the second appellant ("AGL") as partners carrying on business under the name "Southern Cross Energy".

The Sale Agreement

2 The Sale Agreement was styled "WMC Power Assets Sale Agreement". In broad terms the Sale Agreement provided for the divestment by WMC, in favour of TEC and AGL, of its responsibility for the generation of power for the running of its mining operations in Western Australia. The expansion of the Australian mining industry in recent decades has been marked by significant expenditure on infrastructure required for the exploitation of mineral resources[1].

3 Assets of WMC which were chattels or other personal property (defined as "Sale Assets") were to be sold for a purchase price of $190,363,990. Assets classified as "Fixtures" (a defined term) were to be the subject of licence agreements with aggregate fees of $39,836,010 for the 15-year licence term should WMC require prepayment on completion of the sale. This sum of $39,836,010 corresponded with the total value given to the Fixtures in the "Asset Register" identified in the Sale Agreement.

4 The primary judge (Simmonds J) outlined as follows the subject matter of the Sale Agreement[2]:

> "WMC had two power generation systems [the Northern System and the Southern System] for the purposes of the Sale Agreement, each comprising power generation stations and, depending on the system, generators. In addition, for both systems, there were electrical wires and

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1 See *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145; [2008] HCA 45; Menghetti, "Mining", in Davison, Hirst and Macintyre (eds), *The Oxford Companion to Australian History*, rev ed (2001) 434 at 435.

2 *TEC Desert Pty Ltd v Commissioner of State Revenue* (2006) 65 ATR 499 at 503 [3]-[5].

> associated transmission and distribution plant and equipment connecting the power stations and generators to certain named operations, and, depending on the system, to a smelter, a village or a township or townships. There was also further personal property associated with these systems forming part of them for the purposes of the Sale Agreement.
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> For the most part the assets comprising the two systems were on lands the subject of various mining tenements, although one power generation station and certain items of the transmission and distribution ... sort were on lands held in freehold by WMC, and there were some assets on land in respect of which it was not clear that WMC had any tenure.
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> Under the Sale Agreement, [TEC and AGL] acquired certain assets among those comprising the system, and provision was made for [them] to acquire the right to use the remaining assets *in situ*. For the latter purpose a series of nine licences, each under a Licence Agreement ..., patterned on a form provided for in [Sched 8 to] the Sale Agreement, were granted by WMC in January 1999. These were assessed to stamp duty. No appeal was taken before me against those assessments."

Clause 2.1 of the Sale Agreement stated:

> "Subject to the terms and conditions of this Agreement, [WMC] will sell and [TEC and AGL] will buy, on the Completion Date, all of [WMC's] respective right, title and interest in and to the Sale Assets as at the Completion Date, free from any Encumbrance, for the Purchase Price."

Clause 5.2 required the execution of licences in the form of the draft specified in Sched 8 to the Sale Agreement. Completion took place on 29 January 1999 and by that date WMC had granted TEC and AGL nine separate licences generally in the form of Sched 8 ("the Licence Agreements").

The Supreme Court and the Court of Appeal

5 Section 33 of the Stamp Act provided for an appeal to the Supreme Court of Western Australia against the decision of the Commissioner on an objection to an assessment. If the Supreme Court determined that the assessment was in error it was required by s 33(4) to assess the duty chargeable and order the Commissioner either to refund any excess of duty which had been paid or to reassess the instrument if it had been charged with insufficient duty. Access to the Supreme Court has since been replaced by the right to apply for review by the

State Administrative Tribunal[3], but the previous system continues to apply to the present litigation.

6 In the Supreme Court, the primary judge rejected the basis of assessment by the Commissioner and decided that the assets sold under the Sale Agreement were restricted to personal property and did not include an estate or interest in land[4]. Accordingly, his Honour determined that the duty chargeable upon the Sale Agreement was nil and so allowed the appeal by TEC and AGL against the assessment. An appeal from the decision of Simmonds J by the Commissioner to the Court of Appeal (Wheeler, McLure and Newnes JJA)[5] was successful. Indeed, the Court of Appeal held that insufficient duty had been assessed and under s 33(4)(b) directed reassessment by the Commissioner. It did so on the footing that duty should be assessed not only on the total value of the Sale Assets but also on the $39,836,010 attributable to the Fixtures the subject of the Licence Agreements, giving a total dutiable value of $229,492,659.

7 By special leave, TEC and AGL appeal to this Court. For the reasons which follow, the appeal should be allowed.

The relevant charging provisions

8 The expression "conveyance on sale" in Pt IIIB of the Stamp Act includes every instrument whereby any estate or interest in any property on the sale thereof "is transferred to or vested in the purchaser" (s 63(1)). Section 74(1) charges with the same *ad valorem* duty as is imposed upon a conveyance on sale every contract for the sale of any estate or interest in any property. Section 16(1) imposes the duties specified in the Second Schedule to the Stamp Act. Item 4 thereof deals with conveyances or transfers on sale of property and identifies the purchaser as the person liable to pay the *ad valorem* duty. However, s 16(2) provides for the exemptions from duty which are specified in the Third Schedule.

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3 *Taxation Administration Act* 2003 (WA), s 40(1) as amended by *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act* 2004 (WA), s 1174.

4 (2006) 65 ATR 499 at 544 [300].

5 *Commissioner of State Revenue v TEC Desert Pty Ltd* [2009] WASCA 128. Supplementary reasons were given for the orders made by the Court of Appeal: [2009] WASCA 128 (S).

The relevant effect of Item 2(7c) in the Third Schedule is to exempt the conveyance or transfer of any estate or interest in "goods, wares or merchandise". This phrase includes all tangible movables[6]. However, where s 70(2) applies, the exemption is denied.

9 Section 70(2) states:

"If an instrument –

(a) transfers, or is or includes an agreement to transfer, or evidences the transfer of, a chattel and land; and

(b) is chargeable with duty in respect of the land,

the instrument is chargeable with duty in respect of the unencumbered value of the land plus the unencumbered value of the chattel."

The term "chattel" in s 70(2) includes an estate or interest therein and the term "transfer" includes convey and vest (s 70(1)). The term "land" in s 70(2) includes "an estate or interest in land". As will appear, and as the Commissioner accepts, the Sale Assets the subject of the Sale Agreement did not include any freehold land or any mining tenements held by WMC. These it retained.

10 The relevant facts are not in dispute. The controversy concerns the construction of the Sale Agreement and the operation of the relevant legislation. The assessment was made by the Commissioner on the footing that items of plant and equipment which were dealt with by the Sale Agreement were, with some exceptions, fixtures in the technical sense of that term, with the result that the Sale Agreement was an agreement for the sale of an interest in realty, rather than in personalty, and so was not exempted by Item 2(7c) of the Third Schedule. Accordingly, the Commissioner treated the Sale Agreement as an agreement for the sale of property which consisted in whole or in part of land or an interest in land.

11 In *Commissioner of Stamp Duties (NSW) v Pendal Nominees Pty Ltd*[7], Mason CJ referred to "the common law rule" that an instrument should be

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6 *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* (1940) 63 CLR 52 at 67 per Dixon J; [1940] HCA 7.

7 (1989) 167 CLR 1 at 10-11; [1989] HCA 19.

stamped for its leading and principal object; that stamp covered everything accessory to that object so that merely accessory or ancillary provisions to the principal transaction did not attract additional duty. Section 19(a) of the Stamp Act supplements the common law rule by dealing with the case of an instrument which has more than one principal object[8]. The statute does so by providing for an instrument containing or relating to "several distinct matters" to be "separately and distinctly charged" with duty in respect of each matter as if it were in a separate instrument. Questions of impression and degree are necessarily involved, but the Sale Agreement is not an instance of the type of "composite instrument"[9] to which s 19(a) is addressed. The Commissioner correctly submits that the leading and principal object of the Sale Agreement was the disposition by WMC of its power and transmission assets to TEC and AGL.

12 The power and transmission assets were disposed of as to the Sale Assets on the completion date, and as to the Fixtures by the mechanism in the Licence Agreements.

Terminology

13 In *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation*[10], Dixon CJ, Williams and Taylor JJ observed that the meaning of the words "mine", "mining" and "minerals" is "by no means fixed and is readily controlled by context and subject matter".

14 Further, of terms such as "real property", "lease" and "fixture" it should be emphasised that, not only does each bear a technical meaning in the general law, but also when they appear in statutory regimes creating rights and imposing obligations it is not to be assumed that they are used simply and exclusively in the sense understood by the general law. Thus in *Western Australia v Ward*[11] Gleeson CJ, Gaudron, Gummow and Hayne JJ, with reference to an earlier statement by Toohey J[12], treated the term "mining lease" as an example of

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8 *Commissioner of State Taxation v Balcatta Nominees Pty Ltd* [1981] WAR 7 at 12.

9 *Commissioner of Stamp Duties (NSW) v Pendal Nominees Pty Ltd* (1989) 167 CLR 1 at 12.

10 (1956) 94 CLR 509 at 522; [1956] HCA 80.

11 (2002) 213 CLR 1 at 158 [287]; [2002] HCA 28.

12 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 117; [1996] HCA 40.

looseness of terminology and said that the rights and obligations of the holder of an interest so described in particular legislation would not necessarily be determined simply by application of the nomenclature "lease". Earlier, in *Commissioner of Main Roads v North Shore Gas Co Ltd*[13], Barwick CJ, McTiernan, Kitto and Taylor JJ, when considering the particular statutory right of the respondent to lay and maintain gas pipes, remarked:

> "[W]hy should it be assumed that the exercise of a specific statutory right to lay and maintain pipes, as in the present case, operates to vest in the donee of the power an interest in the land in which the pipes have been laid? The conclusion that it does seems to us to result from a lawyer's inherent tendency to assimilate such a right to some category known to the common law."

The WMC mining tenements

15 The Northern System supplied power for the conduct by WMC of its operations at Leinster, Mount Keith and Agnew, and the Southern System for its operations at Kambalda and Kalgoorlie. There were power stations at four of those locations, Agnew being the exception.

16 The Kalgoorlie power station was situated on freehold land of which WMC was the registered proprietor under the provisions of the *Transfer of Land Act* 1893 (WA) ("the Transfer of Land Act"). In respect of an emergency supply line to the Kambalda nickel smelter, WMC had statutory rights under the *Energy Corporations (Powers) Act* 1979 (WA)[14] over land part of which was held under freehold title. It will be sufficient hereafter to deal specifically with the position of the Kalgoorlie power station.

17 The Leinster and Kambalda power stations were situated on land the subject of mineral leases held by WMC under the *Mining Act* 1904 (WA) ("the 1904 Act"). The Mt Keith power station was on land the subject of a mining lease held by WMC under the *Mining Act* 1978 (WA) ("the 1978 Act")[15].

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13 (1967) 120 CLR 118 at 127; [1967] HCA 41.

14 Renamed the *Energy Operators (Powers) Act* 1979 (WA) by *Gas Corporation (Business Disposal) Act* 1999 (WA), s 78.

15 The 1904 Act was repealed by s 3(1) of the 1978 Act.

Mineral leases granted under the 1904 Act are deemed by the 1978 Act[16] to be mining leases granted under the 1978 Act but subject generally to the terms and conditions of the grant under the 1904 Act that are not inconsistent with the 1978 Act. These WMC mining tenements were in respect of land otherwise largely the subject of pastoral leases. Pastoral leases are a creature of statute or regulation and confer a limited entitlement to use Crown land; the relevant legislation in Western Australia received detailed consideration in *Ward*[17].

18 The case before the primary judge and the Court of Appeal had been run on the footing that if the Commissioner could not succeed in respect of the power generation facilities, the Commissioner could not succeed in respect of the transmission facilities. Accordingly, in this Court, the primary focus of argument was upon the stamp duty assessment with respect to the power stations, and, in particular, to those items attached to the land the subject of the WMC mining tenements.

19 In the Court of Appeal, McLure JA recorded that the case had been conducted "on the basis that a mining tenement gives rise to an interest in the land the subject of the tenement"; a corollary appears to have been that WMC was in a position analogous to a tenant of freehold land, so that the items classed in the Sale Agreement as "Fixtures" were to be treated as if they were a tenant's fixtures at common law. These were assumptions or concessions of law, not fact, upon matters of legal principle which are of general public importance. In their written submissions in this Court, TEC and AGL appeared to depart from these assumptions or concessions and to focus upon the provisions of the 1978 Act rather than the general law. That became further apparent as oral argument proceeded.

20 The general proposition respecting the conduct of appeals is that the substantial issues between the parties are to be settled at trial[18]. Nevertheless, save for any special provision for costs of the litigation, TEC and AGL should not be held to concessions or assumptions upon legal issues of general public importance concerning the operation of the Stamp Act and the mining legislation

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16 Section 4; Second Sched, cl 2(1).

17 (2002) 213 CLR 1 at 117-131 [157]-[196].

18 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17-18 [35]; [2005] HCA 12.

of Western Australia[19]. The position taken by the Commissioner in oral argument was to seek to uphold the decision of the Court of Appeal by all legitimate means. No special costs order protective of the Commissioner should be made.

21 It is appropriate to turn immediately to consideration of the false basis on which the case has been conducted in the courts below, beginning with the law respecting fixtures.

Fixtures

22 Much of the reasoning of the Court of Appeal turned upon the application of fundamental principles respecting the character of realty attributed to chattels affixed to land, particularly by tenants. The written submissions on the appeal to this Court responded to that reasoning.

23 Accordingly, some statement of basic principle is appropriate. In the seventh edition of Megarry and Wade's *The Law of Real Property*, the following appears[20]:

> "The meaning of 'real property' in law extends to a great deal more than 'land' in everyday speech. It comprises, for instance, incorporeal hereditaments; and it includes certain physical objects which are treated as part of the land itself. The general rule is '*quicquid plantatur solo, solo cedit*' ('whatever is attached to the soil becomes part of it'). Thus if a building is erected on land and objects are permanently attached to the building, then the soil, the building and the objects affixed to it are all in law 'land,' i.e. they are real property, not chattels. They will become the property of the owner of the land, unless otherwise granted or conveyed."

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19 cf *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 113-114 [60]-[61]; [2004] HCA 48; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 634 [108]; [2009] HCA 12.

20 (2008) at 1066 [23-001] (footnotes omitted).

24 To this may be added the statements by Conti J in *National Australia Bank Ltd v Blacker*[21]. There, with reference to a number of decisions, including that of Walsh J in *Anthony v The Commonwealth*[22], he said[23]:

> "There is a variety of general principles which should be considered in assessing whether an item of personal property has become attached to land in a manner designed to achieve a specific objective or a variety of objectives, such as to become a part of the realty and therefore, a fixture. Whether an item has become a fixture depends essentially upon the objective intention with which the item was put in place. The two considerations which are commonly regarded as relevant to determining the intention with which an item has been fixed to the land are first, the degree of annexation, and secondly, the object of annexation."

25 As noted above, in the Court of Appeal, reliance by analogy was placed upon the law respecting "tenant's fixtures". That law concerns the rights of persons who have limited interests, such as life interests and leases for a term, or their personal representatives, to sever and remove from the land what admittedly are fixtures in the sense of the term as just discussed. Unless and until that right of severance and removal is exercised, the fixtures form part of the realty[24].

26 Upon this aspect of the subject, it is said in Megarry and Wade[25]:

> "Prima facie, all fixtures attached by the tenant are 'landlord's fixtures', i.e. must be left for the landlord at the end of the lease. But important exceptions to this rule have arisen, and fixtures which can be removed under these exceptions are known as 'tenant's fixtures'. This expression must not be allowed to obscure the fact that the legal title to the fixture is in the landlord until the tenant chooses to exercise his power and sever it.

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21 (2000) 104 FCR 288 at 293-294 [10]-[12].

22 (1973) 47 ALJR 83 at 89.

23 (2000) 104 FCR 288 at 293 [10].

24 *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* (1940) 63 CLR 52 at 68-69 per Dixon J.

25 *The Law of Real Property*, 7th ed (2008) at 1072 [23-010] (footnotes omitted); cf *D'Arcy v Burelli Investments Pty Ltd* (1987) 8 NSWLR 317.

The tenant may do so only during the tenancy or (except in cases of forfeiture or surrender) within such reasonable time thereafter as may properly be attributed to his lawful possession *qua* tenant."

27 The case for the Commissioner depends in large measure upon the proposition that items affixed to land the subject of mining tenements held by WMC under the 1904 Act and the 1978 Act took the character of realty owned by WMC because that was the character of the mining tenements. But, as explained below, that was not the character of the mining tenements nor, accordingly, was it the character of those affixed items. Further, the 1904 Act and the 1978 Act provided their own regime for the removal of items of mining plant upon expiry of mining tenements; this renders inapt any analogy with the general law principles respecting tenant's fixtures.

The treatment of mining plant and mining tenements by the common law and statute

28 Speaking of the 1904 Act, and more generally of the scheme of mining legislation in Australia, in *Adamson v Hayes*[26] Barwick CJ explained that it was by the mechanism provided by the statute "rather than by the creation of any actual estate or interest in the land"[27] that the holder of a mining tenement was provided with the security adequate for the furtherance of the mining activity. Stephen J added that "no interest in land is involved in any ordinary sense of that term"[28].

29 This treatment of mining tenements in the Australian statutory system had been foreshadowed by the law in England. The general position under the common law in England with respect to the grant by a freeholder of a licence to work a mine was described by Page Wood V-C in *London and North-Western Railway Co v Ackroyd*[29] as follows:

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26 (1973) 130 CLR 276 at 288-289; [1973] HCA 6.

27 (1973) 130 CLR 276 at 289.

28 (1973) 130 CLR 276 at 312.

29 (1862) 31 LJ (NS) Eq 588 at 591. See also *Norway v Rowe* (1812) 19 Ves 144 at 158 per Lord Eldon LC [34 ER 472 at 477]; *Roberts v Davey* (1833) 4 B & Ad 664 at 672 per Littledale J [110 ER 606 at 609]; Bainbridge and Brown, *The Law of Mines and Minerals*, 5th ed (1900) at 280.

> "[A] licence to work a mine is only a licence to get the minerals, and when you have got them, you have done all you have a right to do, and you have no interest in the land."

30 There also had been some anticipation of the Australian legislation in the treatment of mining tenements by the customary law in parts of England. In *Wake v Hall*[30], which concerned the special statutory recognition by the *High Peak Mining Customs and Mineral Courts Act* 1851 (UK)[31] of the ancient customs for the working of a lead mine in the King's Field in the Duchy of Lancaster, Lord FitzGerald concluded[32]:

> "In my humble opinion, the machinery and buildings never ceased to be the property of the miners and removable by them, both are treated together as forming mineral property – property of the miners in the nature of personalty, and there seems no pretence for the contention that the right to remove them had been abandoned."

The result in *Wake v Hall* was that the miners were entitled to pull down and remove machinery and buildings they had placed upon the land for mining purposes without trespassing upon the appellants' land.

31 The customary law with respect to tin mining in Cornwall was considered in *Ivimey v Stocker*[33], where Lord Cranworth LC said:

> "The estate or interest of tinbounders is of an anomalous character. They have a mere chattel, passing to executors, not to heirs, and they lose all their interest if they cease to work the mine. Their title is not derived from the owner of the land, though they are bound to make him a *render* dependent on the quantity of ore raised."

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30 (1883) 8 App Cas 195.

31 14 & 15 Vict c 94.

32 (1883) 8 App Cas 195 at 216. See also *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* (1940) 63 CLR 52 at 68-69 per Dixon J.

33 (1866) LR 1 Ch App 396 at 404.

The distinction between the position of executors and heirs was significant because under the law at that time in England, personal property vested in the executor from the moment of death of the testator, while real property passed, in the case of intestacy, directly to the heir at law[34].

32 Section 273 of the 1904 Act fortified the conclusion reached in *Adamson* by requiring all mining tenements and shares and interests therein to be taken in law to be "chattel interests". In *Adamson* this Court held[35] that this expression identified the mining tenements as personal property and not as chattels real. Section 273 had a forerunner in s 18 of the *Mining Act* 1874 (NSW), which had stated that any right, title or interest acquired or created under that statute was to be deemed and taken in law to be "a chattel interest"; that term was held to render the mining tenements personalty[36]. These provisions reflected the treatment at general law, as noted above, of a mining lease as a sale of the minerals extracted rather than as a demise of the land from which they were taken[37].

33 Section 108(3) of the 1904 Act empowered the Minister to direct the removal and sale of plant, machinery, engines and tools found on or within the land the subject of a forfeited or void lease; in respect of leases surrendered or abandoned, or leases expiring by effluxion of time, provision for removal appears to have been left to the requirements of regulations made under s 306.

34 The provisions of the 1978 Act with respect to mining leases received detailed consideration in the joint reasons in *Ward*[38]. The grant thereunder of

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34 Helmore, *The Law of Real Property in New South Wales*, 2nd ed (1966) at 462-463.

35 (1973) 130 CLR 276 at 289, 294-295, 296, 300-302.

36 *Williams v Robinson* (1891) 12 NSWR (Eq) 34 at 39-40, 40-41. With respect to miners' rights, s 5 of the *Mining Statute* 1865 (Vic) and s 5 of the *Mines Act* 1890 (Vic) had classified them as chattel interests. Section 41 of the *Mining Act* 1893 (SA) provided that "[e]very claim shall be personal property", "claim" being defined in s 4 as any area held under a miner's right or business licence.

37 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 192-193; [1969] HCA 28.

38 (2002) 213 CLR 1 at 157-162 [282]-[296].

exclusive possession for mining purposes is directed at preventing others from carrying out mining and related activities on the relevant land[39].

35 Section 85 of the 1978 Act describes the authorities conferred by a mining lease as exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted, and confers ownership of all minerals lawfully mined from that land, subject to the Act and any conditions to which the mining lease is subject. Mining leases under the 1978 Act commonly contain conditions requiring removal of all buildings and structures from the site at the completion of operations under the mining lease[40]. Further, s 114 makes detailed provision where a mining tenement expires or is surrendered or forfeited for the removal by the holder of the mining tenement, or in default thereof at the direction of the Minister, of "mining plant". This term is defined as "any building, plant, machinery, equipment, tools or any other property of any kind *whether affixed to land or not so affixed*" (s 114(1)) (emphasis added). Section 114 thus operates upon the statutory assumption that what is "mining plant" is not determined by the general law respecting the affixture of chattels to the freehold, of which they then became part and to which the general law respecting removal of tenant's fixtures applies.

36 Section 119 of the 1978 Act provides that mining tenements may be sold or disposed of and be the subject of legal and equitable interests, but requires that dispositions thereof be effected by a signed written instrument. The 1904 Act (s 306(14)) authorised the making of regulations providing for the transfer, assignment and sub-leasing of mining tenements under that statute. In *Ward*[41] reference was made to the many examples of the exercise by courts of equity of their jurisdiction to protect the enjoyment by the plaintiff of rights which were conferred by or under statute, but were not necessarily proprietary in character, whether as personalty or realty. Thus, the exercise of equitable jurisdiction with respect to mining tenements is not necessarily indicative of the character of those tenements as interests in realty rather than as personalty.

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39 *Western Australia v Ward* (2002) 213 CLR 1 at 165 [308].

40 *Western Australia v Ward* (2002) 213 CLR 1 at 161-162 [295].

41 (2002) 213 CLR 1 at 160 [291].

Conclusions respecting items attached to land the subject of WMC mining tenements

37 The Sale Agreement identified (cl 2.1) the subject matter of the sale as "all of [WMC's] respective right, title and interest in and to the Sale Assets". It defined (cl 1.1) the Sale Assets to mean so much of a list of assets (including specified power stations, generators and transmission systems) as were not "Fixtures". The term "Power System Assets" was defined (cl 1.1) as the Sale Assets and all Fixtures and improvements to the land the subject of the Licence Agreements. The parties proceeded on the basis (cl 3.2(a)) that:

> "(i) all of the Power System Assets which are a chattel, chose in action or other personal property are to be sold outright to [TEC and AGL] under this Agreement; and
>
> (ii) all of the Power System Assets which comprise Fixtures are not to be sold to [TEC and AGL] under this Agreement, but are to be treated as Licensor's Improvements under the Licence Agreements."

Upon completion, the *ownership* of the Sale Assets passed to TEC and AGL, but it was only the *risk* of all Fixtures which passed to TEC and AGL (cl 5.3).

38 It follows from the statements of principle set out earlier in these reasons that items affixed to land do not become, merely because of their affixation, "fixtures" in the technical sense[42].

39 WMC warranted (sub-par (ii) of cl 8.1(c)) that, with respect to Fixtures on land not being freehold land owned by WMC but land the subject of mining tenements, WMC had such rights as were conferred by the 1904 Act and the 1978 Act. Further, in cl 1.1 of the Sale Agreement the term "Fixture" was carefully defined[43]. This was as "an item of property affixed to land, *and* an estate or interest in which is *therefore* an estate or interest in land" (emphasis added). The presence of the conjunction "and" is important. The definition was not apt to catch items which were "mining plant" within the meaning of s 114 of

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42 See also *Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700 at 712-713; *Lees & Leech Pty Ltd v Commissioner of Taxation* (1997) 73 FCR 136 at 148.

43 cf *Akiba v Queensland (No 2)* (2010) 270 ALR 564 at 768-769 [876]-[877].

the 1978 Act and which, given the nature of a mining lease as personal property, were not fixtures which thereby would have assumed the character for the purposes of the Stamp Act of an estate or interest in land.

40 The result was that these items were not Fixtures and were not excluded from the Sale Assets. As chattels, for the purposes of the Stamp Act, they attracted the exemption provided by Item 2(7c) of the Third Schedule, unless s 70(2) applied because the Sale Agreement also included an agreement to convey or vest an estate or interest in land. If s 70(2) applied, the exemption in favour of chattels would be lost.

41 Accordingly, unless s 70(2) applies, the appeal must succeed with respect to the items affixed to land the subject of the WMC mining tenements.

The Fixtures on WMC freehold land – the Kalgoorlie power station

42 In *Commissioner of State Revenue (Vict) v Pioneer Concrete (Vic) Pty Ltd*[44] it was said in the joint reasons:

> "By an exception, a transferor excludes some part of that which is transferred, so that it remains with the transferor. It does not pass to the transferee. A reservation is of something newly created and involves a re-grant of something that did not previously exist."

In the present case, the Sale Agreement was so drafted as to except from the Sale Assets any interest of WMC in the Fixtures; these were to be made the subject of licences by WMC to TEC and AGL. WMC, on or before completion, was required to execute the Licence Agreements (cl 5.2(b)(i)) in the form set out in Sched 8.

43 To that end, in sub-par (i) of cl 8.1(c), WMC warranted to TEC and AGL that it had "title as the owner" of those Fixtures on freehold land owned by WMC, "notwithstanding the affixation".

44 With respect to the Kalgoorlie power station, the licence provided (cl 3.1) for the grant by WMC to TEC and AGL of a licence of the area the subject of the power station site and of the Power System Assets which were Fixtures, for 15 years from the date of completion of the Sale Agreement. The position of

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44 (2002) 209 CLR 651 at 665 [40]; [2002] HCA 43.

TEC and AGL during the term of the licence was protected by a negative covenant given by WMC in cl 8.2. This obliged WMC not to assign its interest in any of the licence area until such time as the assignee covenanted with TEC and AGL to be bound from the date of the assignment by all the terms and conditions of the licence.

45 Upon expiration of the term of the licence or earlier termination of the licence, TEC and AGL were obliged by cl 10 to cease using the licensed area and to rehabilitate it.

46 The effect of cl 16.4 of the licence agreement for the Kalgoorlie power station (numbered cl 17.5 in Sched 8), when read with the definitions in cl 1.1, was that, with some exceptions, on termination of the licence for any reason, TEC and AGL were obliged to acquire the right, title and interest of WMC in (i) the Fixtures on freehold land owned by WMC and (ii) such rights as were conferred by the 1904 Act and the 1978 Act in the case of Fixtures on land not owned by WMC.

47 With respect to (ii), the rights, titles and interests of WMC, as explained above, were dependent upon and derivative of the mining tenements held by WMC, which were of the nature of personalty, not realty. An agreement to acquire them could not attract stamp duty as an agreement for the sale of an estate or interest in land. What of (i)?

48 If there had been prepayment of the licence fees, WMC was obliged by cl 16.4(a)(i) to repay that portion attributable to the post-termination period, and TEC and AGL were obliged to pay, as consideration for the acquisition from WMC, the amount otherwise repayable by WMC. Where no prepayment had been made, TEC and AGL were obliged to pay the then present value of the licence fees for the balance of the term (cl 16.4(a)(ii)).

49 The title which TEC and AGL were obliged by cl 16.4 to acquire on termination of the Kalgoorlie power station licence was that identified in the warranty by WMC in sub-par (i) of cl 8.1(c) of the Sale Agreement. The warranty was that WMC had title to the Fixtures "as the owner thereof notwithstanding the affixation" to the freehold. The warranty provided an agreed hypothesis or convention upon which WMC and TEC and AGL conducted their reciprocal affairs, in particular, for the operation of the pro forma licence in

Sched 8[45]. The agreed assumption that WMC had a distinct title to the relevant Fixtures as chattels, notwithstanding their affixation to the WMC freehold, provided consideration for the payments by TEC and AGL which were identified in cl 16.4 (cl 17.5 in the form of licence in Sched 8). This in turn was reflected in the structure of the purchase price in cl 3.2 of the Sale Agreement.

50 The Commissioner submitted that the Kalgoorlie licence obligations flowing from the Sale Agreement with respect to WMC freehold Fixtures rendered the Sale Agreement an agreement for sale of an estate or interest in land. Reference has been made above to the negative covenant given by WMC in cl 8.2 with respect to covenants by any assignee and to the obligation to rehabilitate the site imposed upon TEC and AGL by cl 10. The obligation of rehabilitation imposed upon TEC and AGL might attract a mandatory injunction at the suit of WMC. The negative covenant by WMC in cl 8.2 might in an appropriate case be enforced by injunction at the suit of TEC and AGL. But these remedies would be in aid of contractual stipulations, not any estate or interest in land. Those stipulations did not qualify the registered title of WMC under the Transfer of Land Act, being, at best, nothing more than personal equities of the kind recognised in the authorities upon the operation of the Torrens System[46].

51 Accordingly, the Sale Agreement did not include an agreement by WMC to vest in TEC and AGL an estate or interest in the freehold land the site of the Kalgoorlie power station, within the meaning of s 70(2) of the Stamp Act. There is thus no footing for the application of s 70(2) to any estates or interests in chattels so as to deny the exemption otherwise attracted by Item 2(7c) of the Third Schedule to the Stamp Act.

52 These conclusions make it unnecessary to consider the efficacy at law and in equity of a sale by the owner of the freehold of land, but with retention of title to unsevered fixtures, or a sale of the unsevered fixtures with retention of the rest of the land[47].

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45 See *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244-245; [1986] HCA 14.

46 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 613, 637-638, 653-654; [1988] HCA 16.

47 The unsettled state of authority is considered in Butt, *Land Law*, 6th ed (2010) at 51-53 [3 19]-[3 22].

Order

53 The appeal should be allowed with costs.

54 The order of the Court of Appeal of the Supreme Court of Western Australia dated 15 January 2010 should be set aside and in place thereof the appeal to that Court should be dismissed with costs.

55 In their written submissions TEC and AGL in this Court also seek orders for the refund of moneys paid by them to the Commissioner and for the payment of interest. Within 28 days of the date of this Court's order, or such longer period as the Court may provide by order made within that period, the parties should bring in agreed short minutes of appropriate further orders; in the absence of that agreement, the matter should be remitted to the Court of Appeal for disposition consistently with these reasons.