HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL AND KEANE JJ

Matter No M74/2014 to M79/2014

COMMISSIONER OF STATE REVENUE — APPELLANT

AND

LEND LEASE DEVELOPMENT PTY LTD — RESPONDENT

Matter No M80/2014

COMMISSIONER OF STATE REVENUE — APPELLANT

AND

LEND LEASE IMT 2 (HP) PTY LTD — RESPONDENT

Matter No M81/2014

COMMISSIONER OF STATE REVENUE — APPELLANT

AND

LEND LEASE REAL ESTATE INVESTMENTS LIMITED — RESPONDENT

Commissioner of State Revenue v Lend Lease Development Pty Ltd
Commissioner of State Revenue v Lend Lease IMT 2 (HP) Pty Ltd
Commissioner of State Revenue v Lend Lease Real Estate Investments Limited
[2014] HCA 51
10 December 2014
M74/2014 to M79/2014, M80/2014 & M81/2014

ORDER

In Matter Nos M74-M77/2014, M79/2014 and M80/2014

1. Appeal allowed with costs.

2. Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 15 August 2013 and, in its place, order that the appeal be dismissed with costs.

In Matter Nos M78/2014 and M81/2014

1. Appeal allowed with costs.

2. Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 15 August 2013 and, in its place, order that:

(a) the appeal be allowed in part;

(b) the assessment be remitted to the Commissioner of State Revenue to reassess the duty by excluding the amount described as referable to "Grand Plaza Retention Amount", and otherwise in accordance with the reasons of this Court; and

(c) the appeal be otherwise dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

P H Solomon QC with C G Button and D C Morgan for the appellant in all matters (instructed by Solicitor for the Commissioner of State Revenue)

N J Young QC with C J Horan for the respondents (instructed by Herbert Smith Freehills)

CATCHWORDS

Commissioner of State Revenue v Lend Lease Development Pty Ltd
Commissioner of State Revenue v Lend Lease IMT 2 (HP) Pty Ltd
Commissioner of State Revenue v Lend Lease Real Estate Investments Limited

Stamp duty – *Duties Act* 2000 (Vic) charged duty on dutiable value of dutiable property that is subject of dutiable transaction – Section 20 provided that dutiable value was greater of "consideration ... for the dutiable transaction" and unencumbered value of dutiable property – Land transfers part of larger, single, integrated and indivisible transaction – Whether "consideration ... for the dutiable transaction" included amounts payable under larger transaction.

Words and phrases – "consideration for", "dutiable transaction", "single, integrated and indivisible transaction".

Duties Act 2000 (Vic), ss 20, 261.

1 FRENCH CJ, HAYNE, KIEFEL, BELL AND KEANE JJ. Chapter 2 of the *Duties Act* 2000 (Vic) ("the Duties Act") charges[1] duty on certain transactions. One form of dutiable transaction[2] is a transfer of dutiable property[3]. Dutiable property includes[4] an estate in fee simple in land in Victoria. Liability for duty arises[5] when a dutiable transaction occurs. Duty is charged[6] on the dutiable value of the dutiable property. Section 20(1) of the Duties Act provides that the dutiable value of dutiable property that is the subject of a dutiable transaction is the greater of:

> "(a) the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration); and
>
> (b) the unencumbered value of the dutiable property".

2 Between October 2006 and June 2010, the Victorian Urban Development Authority ("VicUrban") transferred to one or other of the respondents (together "Lend Lease") an estate in fee simple in seven parcels of land in the Docklands area of Melbourne. It is sufficient to refer in these reasons to "Lend Lease" without distinguishing between the several respondents. Doing that will simplify the description of transactions and events.

3 The Commissioner of State Revenue ("the Commissioner") assessed duty to be charged on each transfer by reference to the amount the Commissioner determined to be the consideration for the dutiable transaction. Lend Lease objected to the assessments. The Commissioner disallowed the objections. Lend

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1 s 7(1).

2 s 7(2).

3 s 7(1)(a).

4 s 10(1)(a)(i).

5 s 11(1).

6 s 18.

Lease requested[7] the Commissioner to treat the objections as appeals to the Supreme Court of Victoria.

4 At first instance, the primary judge (Pagone J) dismissed[8] the appeals. Lend Lease appealed to the Court of Appeal of the Supreme Court of Victoria. That Court (Warren CJ, Tate JA and Kyrou AJA) allowed[9] each appeal. By special leave, the Commissioner appeals to this Court. The appeals to this Court should be allowed.

5 The central issue in this Court, as it was before the primary judge and in the Court of Appeal, is what is the consideration (being the amount of a monetary consideration or the value of a non-monetary consideration) for each of the dutiable transactions. To explain that issue further it is necessary to begin in the agreements between Lend Lease and VicUrban which lie behind the relevant dutiable transactions.

Development agreements

6 VicUrban is successor[10] to the Docklands Authority, an authority established by the *Docklands Authority Act* 1991 (Vic) to promote, encourage and facilitate development of the Docklands area of Melbourne[11].

7 In 2001, VicUrban (then called the Docklands Authority) and Lend Lease made a development agreement ("the 2001 DA"). The 2001 DA was varied and

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7 *Taxation Administration Act* 1997 (Vic), s 106.

8 *Lend Lease Development Pty Ltd v Commissioner of State Revenue (Vic)* 2012 ATC ¶20-311; (2012) 87 ATR 504.

9 *Lend Lease Development Pty Ltd v Commissioner of State Revenue (Vic)* 2013 ATC ¶20-410.

10 *Victorian Urban Development Authority Act* 2003 (Vic), s 81. This Act was later amended by the *Victorian Urban Development Authority Amendment (Urban Renewal Authority Victoria) Act* 2011 (Vic), changing its title to *Urban Renewal Authority Victoria Act* 2003 and establishing Urban Renewal Authority Victoria as successor to VicUrban. Nothing turns on these amendments. It is convenient to refer to the relevant authority as "VicUrban".

11 *Docklands Authority Act* 1991 (Vic), s 9(1).

restated in 2006 and 2008 and, in some respects, supplemented by further agreements. It will be necessary to refer to some aspects of the 2001 DA as later varied and supplemented but the issues which arise in the appeals, and their resolution, can be sufficiently explained by reference to the 2001 DA.

8 A recital to the 2001 DA recorded that Lend Lease had submitted a bid proposal to VicUrban for the development of what the agreement referred to as the "Land". The Land was defined as the whole or any part of the land contained in a specified certificate of title and known as Victoria Harbour Precinct, Docklands Area. It included part of an area on which there had been a gasworks.

9 The development to be undertaken was large and complicated. In the Commissioner's written submissions in this Court, the 2001 DA was described as providing "for an interlocking set of rights and obligations by which the Victoria Harbour Precinct of the Docklands was to be transformed from a polluted, disused industrial area, cut off from the Melbourne CBD to an area in which people would live, find recreation and work" (footnote omitted). Lend Lease agreed to buy the Land from VicUrban and design, construct and sell large residential and commercial buildings. VicUrban was to share in the gross revenue Lend Lease would receive from sale of the residences, offices and other parts of the buildings which Lend Lease was to design and construct.

10 The 2001 DA required VicUrban to bring the whole of the land on which the gasworks had operated to a state in which it could be used for parkland and open space as well as for high density residential and commercial use. (It will be recalled that the Land the subject of the 2001 DA included only part of the gasworks site.) The 2001 DA obliged Lend Lease to spend set amounts of money on works of art which were to be installed in public spaces. The agreement further obliged each of VicUrban and Lend Lease to build various forms of infrastructure for the development, including a major road extension, a bridge, a park and other public areas. Some of the infrastructure was to be on the Land (as defined); some was not.

11 Given the size and complexity of the proposed development, it is unsurprising that the 2001 DA provided for the development to proceed by stages. The 2001 DA identified 35 "Stages". The number and names of those Stages were later varied but those details do not presently matter. The 2001 DA set out a table of the "Base Amounts" for each Stage on "Stage Release", the time when Lend Lease took title to the Stage. Those amounts were subject to escalation and adjustment but for present purposes it is enough to record that the total of the Base Amounts to be paid by Lend Lease to VicUrban in respect of the (then) 35 Stages was $100.3 million. The total was made up of three separate

elements: "Stage Land Payment", "Minimum External Infrastructure Contribution" and "Minimum Gasworks Site Remediation Contribution". The table in the 2001 DA which set out the Base Amounts that Lend Lease was to pay VicUrban also set out the "Projected Gross Revenue on Sale" by Lend Lease of the developed Stages. The Projected Gross Revenue on Sale was more than $1,811.7 million.

12 A recital to the 2001 DA recorded that VicUrban had agreed to sell to Lend Lease "the Land on the terms and conditions contained in the Land Sale Contract and this Agreement". (It will be recalled that the "Land" was defined, in effect, as the whole of the land known as the Victoria Harbour Precinct or any part of it.) "Land Sale Contract" was defined as "any contract of sale between [VicUrban] and [Lend Lease] for a Stage, or the Land, substantially in the form" of a contract set out in a schedule to the 2001 DA.

13 Subject to a qualification that is not relevant, cl 4.1 of the 2001 DA obliged VicUrban and Lend Lease to "enter into and settle a Land Sale Contract for the purchase by [Lend Lease] of each Stage for the Stage Land Payment on or before the Stage Release Date for that Stage". The "Stage Release Date" for a Stage was defined as the date specified in a "Staging Plan" as the date for release of a Stage. A Staging Plan was a plan, acceptable to VicUrban, "detailing the physical and geographical evolution" of the project from its commencement to its practical completion. The "Stage Land Payment" was defined as Lend Lease's "contribution for each Stage" as specified in the table of payments already mentioned.

14 Clause 4.7 of the 2001 DA obliged Lend Lease to make certain payments to VicUrban. Payments were to be made by reference to four different times. The first payments were due on or before what the agreement called the "Actual Stage Release Date": the date Lend Lease took title to a Stage. The second payments were due on or before the "Initial Reconciliation Date": the date 28 days after first receipt of the total of all money and the market value of all non-monetary consideration received in respect of the sale or other dealing with a Stage. The third payments were due after the Initial Reconciliation Date and were to be made on or about 30 June and 31 December for two years after "Stage Practical Completion". The final payments were due two years after Stage Practical Completion.

15 The first payments to be made by Lend Lease (on or before it took title to a Stage) had five components: the Stage Land Payment, the Minimum External Infrastructure Contribution, the Minimum Gasworks Site Remediation Contribution, the "Stage Integrated Public Art Contribution" and any other

amounts due and payable by Lend Lease to VicUrban under the agreement. Leaving aside the last of these components, each of the other amounts was fixed by the agreement.

16 The two "Minimum" payments were described as being "on account" of "project contributions": in the one case the "Project External Infrastructure Contribution" and in the other, the "Project Gasworks Site Remediation Contribution". Each of those items was defined as Lend Lease's "contribution" to the cost, in the first case, of "External Infrastructure" (being infrastructure that would deliver specified services, transport connections and utilities) and in the other, of remediation of the gasworks site. The 2001 DA fixed the maximum amount of Lend Lease's contributions (subject to variation and escalation) as $23.6 million and $27 million respectively. The Stage Integrated Public Art Contribution was fixed as a percentage of the "Stage Development Cost", which, in effect, was the estimated total cost of design and construction of the work necessary to bring the Stage to practical completion.

17 The several payments that were to be made after Lend Lease took title to the Stage (that is, after the Actual Stage Release Date) were payments which, together with the payments already made by Lend Lease to VicUrban, took the Stage Land Payment to an amount equal to 2.74 per cent of the "Actual Gross Proceeds of Sale" of the Stage, took the Minimum External Infrastructure Contribution to an amount equal to 1.35 per cent of the Actual Gross Proceeds of Sale, and took the Minimum Gasworks Site Remediation Contribution to an amount equal to 1.55 per cent of the Actual Gross Proceeds of Sale. As already noted, the contribution amounts for External Infrastructure and Gasworks Site Remediation were capped.

The statutory question

18 The appeals to this Court turn on one statutory question posed by s 20(1)(a) of the Duties Act: what was "the consideration ... for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration)"? Although some reference was made in argument to the second limb of the definition of "dutiable value" ("the unencumbered value of the dutiable property"), it was not disputed that the relevant statutory question is the question that has been identified. Nor was it disputed that "the

consideration ... for the dutiable transaction" is "the money or value passing which moves the conveyance or transfer"[12].

The central difference

19 It is useful to attempt to identify the central point of difference between the parties. Although the 2001 DA was later varied and supplemented in ways which bear upon the particular assessments which are in issue, what has been said about the 2001 DA is sufficient to identify that point.

20 Lend Lease submitted that the only amount properly brought to duty as consideration for transfer of the Land was in each case the amount of the Stage Land Payment. (It will be recalled that cl 4.1 of the 2001 DA required the parties to enter into and settle a Land Sale Contract "for the purchase ... of each Stage *for the Stage Land Payment*" (emphasis added). The amended agreements of 2006 and 2008 did not alter this provision.)

21 The Commissioner submitted that the consideration for the transfer of the Land was in each case more than the Stage Land Payment stated in the relevant Land Sale Contract. The Commissioner submitted that the consideration for the transfer was the total of the several sums which cl 4.7 of the 2001 DA obliged Lend Lease to pay to VicUrban or, in cases governed by that agreement as varied or supplemented, the equivalent amounts. The payments required by cl 4.7 of the 2001 DA have been described earlier in these reasons.

The Court of Appeal

22 The reasons of the Court of Appeal were given by Tate JA. Her Honour made extensive reference to a number of decisions of this Court and other courts about the application of instruments based stamp duty legislation. Particular emphasis was given to the decision of the Full Court of the Supreme Court of New South Wales in *Bambro (No 2) Pty Ltd v Commissioner of Stamp Duties*[13].

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12 *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 152 per Dixon J; [1948] HCA 28; *Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496 at 518 [71] per Gummow, Kirby and Hayne JJ; [2005] HCA 3.

13 (1963) 63 SR (NSW) 522.

23 It is desirable to approach the reasoning adopted by the Court of Appeal in the present cases by first examining what was decided in *Bambro*. The decision turned upon the proper construction and application of legislation imposing duties on instruments. Hence, whether the instrument contained or related to several distinct "matters"[14] was at the forefront of consideration. The instrument in issue in *Bambro* provided for the vendor of land to transfer the land to the purchaser and for the vendor then to build a shopping centre on the land. Separate prices were agreed for the transfer and for the building works. The Full Court held[15] that the agreement to transfer and the agreement to build were separate "matters" and that ad valorem duty (chargeable on the amount or value of the consideration for the sale of property) was to be charged by reference only to the price for the land, not the total of the price for the land and the price for the building works. The obligation to build the shopping centre was held to be a separate matter bearing duty, but only at the fixed amount due on "an agreement ... not otherwise specifically charged with any duty".

24 It will be observed that, in the present cases, the parties stood in a relationship different from that considered in *Bambro*. Here, it was the *purchaser* of the land (Lend Lease), not the vendor (VicUrban), which was to undertake the bulk of the development work to be carried out on the land being transferred. And, after that work was finished, and the resulting premises were sold, Lend Lease was bound to pay VicUrban amounts calculated by reference to the gross revenue received on its sale of what was built. Further, the particular transfers in issue took their place in a larger series of transactions regulated by the 2001 DA (or that agreement as later varied and supplemented). The rights and obligations of both Lend Lease and VicUrban under the 2001 DA (and the subsequent agreements) were interconnected in many more ways than their having been negotiated at the one time and recorded in the one document.

25 The Court of Appeal's reasoning proceeded in the following steps.

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14 *Stamp Duties Act* 1920 (NSW), s 17(1).

15 (1963) 63 SR (NSW) 522 at 529.

26 First, Tate JA said that it is important to keep in mind the nature of the interest[16] in land which is transferred and the condition[17] of the dutiable property at the time of transfer.

27 Second, her Honour described[18] what Lend Lease had submitted were ten errors made by the primary judge. These errors were said[19] to stem from a "failure to adopt the correct conception of the complex arrangement between the parties and its *distinct* parts" (emphasis added).

28 Having recorded[20] the Commissioner's arguments, Tate JA returned to the nature and condition of the dutiable property and emphasised[21] that the Land which was transferred was undeveloped land. The primary judge's conclusion was said[22] to have treated the Land, at the time of its transfer, as having been developed. Or, as Tate JA said[23] of all of the payments other than the Stage Land Payment:

> "By taking into account the totality of [those other] payments, regardless of when the works were performed and regardless of any connection between the works and the land other than general 'enhancement' of the Precinct, the [primary] judge looked to the enhanced value the land was to achieve by reason of the development as though the development was complete and the enhanced value had been realised." (footnote omitted)

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16 *Lend Lease Development Pty Ltd v Commissioner of State Revenue (Vic)* 2013 ATC ¶20-410 at 15,351 [135], referring to *Commissioner of State Revenue (Vict) v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at 664 [38]; [2002] HCA 43.

17 2013 ATC ¶20-410 at 15,354 [148], referring to *Bambro* (1963) 63 SR (NSW) 522.

18 2013 ATC ¶20-410 at 15,363-15,366 [174]-[189].

19 2013 ATC ¶20-410 at 15,363 [174].

20 2013 ATC ¶20-410 at 15,366-15,371 [190]-[201].

21 2013 ATC ¶20-410 at 15,372 [208], 15,372-15,373 [211], 15,373-15,374 [216]-[217], again referring to *Bambro* (1963) 63 SR (NSW) 522.

22 2013 ATC ¶20-410 at 15,372 [208].

23 2013 ATC ¶20-410 at 15,373 [211].

29 These first two steps in reasoning were said to follow from principles derived from *Bambro*. In particular, Tate JA said[24] that:

> "An agreement to purchase land and to engage in construction on that land does not entail that duty ought [to] be assessed on the land as improved, even where there is but one transaction and one bargain, the whole object of which is for the purchaser to acquire the development on the site".

Rather, her Honour continued[25], "[t]he *single, integrated and indivisible character* of a transaction does not preclude the transaction from containing or relating to several distinct 'matters' only one of which may attract duty" (emphasis added). "[T]he focus must be on that which is to be transferred or vested or accrued by force of the conveyance – what is the value of the consideration for *its* sale"[26].

30 The steps which have been described lay at the heart of the reasoning of the Court of Appeal. That is, it was said to be necessary to recognise that the land being transferred was undeveloped. And it was said to be both possible and necessary in these cases to divide a "single, integrated and indivisible" transaction into separate matters.

31 The balance of the reasons of the Court of Appeal was largely directed to demonstrating that matters said to have been taken into account by the primary judge did not support the conclusion that the consideration for the transfers of Land included any sum other than the Stage Land Payment stated in the relevant contract of sale.

32 Tate JA rejected[27] what she held to be undue weight given by the primary judge to the interdependence of the obligations assumed by the parties under the 2001 DA and the Land Sale Contracts. There was said[28] to be:

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24 2013 ATC ¶20-410 at 15,354 [145(1)].

25 2013 ATC ¶20-410 at 15,354 [145(2)].

26 2013 ATC ¶20-410 at 15,354 [145(7)].

27 2013 ATC ¶20-410 at 15,375-15,377 [222]-[231].

28 2013 ATC ¶20-410 at 15,376 [226].

> "a failure [by the primary judge] to appreciate that an interdependence of mutual promises is not sufficient to determine whether a payment was made 'for' a dutiable transaction; that the single, integrated and indivisible character of a transaction is not decisive and does not preclude the transaction from containing or relating to several distinct matters only one of which may attract duty; and that an agreement to purchase land to engage in construction does not entail that the duty ought to be assessed on the land as part of the development even where there is but one transaction and but one bargain, the whole object of which is for the purchaser to acquire the development".

33 But neither in this passage, nor elsewhere in the reasons, was any criterion stated by which the obligations undertaken in a "single, integrated and indivisible" transaction were to be divided or by which it might be determined which promises were properly to be treated as consideration moving the transfer by VicUrban to Lend Lease. Nor was it explained what was meant by saying that the primary judge gave *undue* weight to the interdependence of the relevant obligations.

34 Next, Tate JA held[29] that consideration "for" the transfers cannot be identified by applying a "but for" test of causation and that whether payments were made, or were to be made, before or after transfer was[30] not decisive of whether the payment was a part of the consideration for the transfer.

35 Lastly, the executory promises (for Lend Lease to pay VicUrban, after transfer, amounts calculated by reference to gross revenue received) were said[31] to be not consideration for the transfer but rather payments made "as part of the interchange of rights and obligations that constituted the development [to] enhance the realisable profit on the sale of the development".

36 On these bases, Tate JA concluded[32] that the consideration for each transfer of Land was the Stage Land Payment specified in the relevant Land Sale

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29 2013 ATC ¶20-410 at 15,377-15,378 [232]-[235].

30 2013 ATC ¶20-410 at 15,378 [238].

31 2013 ATC ¶20-410 at 15,380 [248].

32 2013 ATC ¶20-410 at 15,382 [258].

Contract. Her Honour found[33] that the primary judge "was wrong in failing to recognise that the contribution payments were for matters that were separate and distinct from the transfer of the land" and that each of the payments other than the Stage Land Payment "was 'for' something other than the transfer of the land".

Lend Lease's argument

37 Lend Lease's argument in this Court followed a substantially similar path to the reasoning of the Court of Appeal and began by emphasising that the Land which was transferred was undeveloped land when it was transferred.

38 Lend Lease accepted that the statutory question could not be answered by looking only at the Land Sale Contracts and that regard must also be had to the overarching agreement pursuant to which each Land Sale Contract was made: the 2001 DA or that agreement as varied and restated in 2006 or 2008.

39 Lend Lease submitted that the 2001 DA (and that agreement as varied and supplemented) contained "multiple interrelated obligations dealing not only with the sale and transfer of the Land to the Developer, but also with the ongoing development and ultimate realisation of the Land as part of the wider Docklands area". Because the agreement thus provided for "multiple exchanges of value", it was necessary, so the argument continued, to identify the "nature and purpose" of the several payments for which the agreement provided. And, so the argument concluded, only the Stage Land Payment was consideration moving the transfer of the relevant Land, which, at the time of imposition of the duty, was undeveloped land. All other payments were in the nature of, and had as their purpose, payment for development work (much of which was to be done on land other than the transferred Land) or payment of a share of revenue from the sale of the developed Land resulting from the execution of what was a joint development project between Lend Lease and VicUrban.

40 Lend Lease's argument about dividing its payments proceeded from two premises. One was particular to the circumstances of these cases; the other was a general legal proposition. The particular premise was that the rights and obligations created by the 2001 DA (and the later agreements) can, and should, be divided between those relating to the transfers of Land and those relating to other subjects variously described as (among other things) "other investments made by [VicUrban]", "profit sharing between joint developers", "authority to

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33 2013 ATC ¶20-410 at 15,382 [258].

engage in developmental works" and "development works". The general legal premise on which the particular premise depended was that in identifying the consideration for the transfers in these cases it is necessary (or at least relevant) to ask whether the relevant agreements contained or related to several distinct matters or transactions.

The general premise

41 Acts providing for stamp duties on instruments have long made provision[34] that an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters. For the most part, the Duties Act imposes duty on transactions rather than instruments, but it does contain some residual provisions which are instruments based. That being so, it is unsurprising that s 261 of the Duties Act provides that:

> "An instrument that contains, gives effect to, or relates to, two or more distinct matters or transactions is to be separately and distinctly charged with duty in respect of each such matter or transaction, as if each matter was expressed in a separate instrument."

42 The Court of Appeal assumed that principles which it derived from *Bambro* were to be applied in the present cases. As already explained, one of those principles was that it was necessary to determine whether the 2001 DA (and that agreement as later varied and supplemented) contained or gave effect to two or more distinct matters[35]. But *Bambro* turned on the application of the relevant provisions of the *Stamp Duties Act* 1920 (NSW), an Act which provided for the charging of duty on instruments, not transactions. And the Court of Appeal did not examine whether, or how, s 261 of the Duties Act would apply when the Commissioner was required (as in these cases) to assess the duty to be charged in respect of a dutiable transaction, as distinct from a dutiable instrument.

43 In these cases, however, there is little, if anything, to be gained by deciding whether there was more than one "matter" or "transaction". A conclusion that there was more than one "matter" or "transaction" is no more than

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34 See, for example, *Stamp Act* 1891 (UK), s 4; *Stamp Duties Act* 1920 (NSW), s 17(1); *Stamps Act* 1958 (Vic), s 22(a).

35 2013 ATC ¶20-410 at 15,354 [145(2)].

a statement, in other words, of the answer that is to be given to the statutory question identified earlier: what was the consideration "for" the transfers, in the sense of what was "the money or value passing which move[d] the conveyance or transfer"[36]. It is not necessary to decide, therefore, whether the Court of Appeal was right to conclude, as it must be taken to have concluded, that s 261 can apply when duty is to be assessed on a dutiable transaction. Rather, chief attention must be given to Lend Lease's submission, and the Court of Appeal's conclusion, that the consideration for the transfers was only the Stage Land Payment.

The state of the Land

44 Contrary to the holding of the Court of Appeal, and to Lend Lease's argument in this Court, it is not relevant to observe that the Land was undeveloped when it was transferred to Lend Lease. Identifying what was the consideration "for" the transfer does not depend upon the state or condition of the Land at that time. The premise for Lend Lease's argument, and the Court of Appeal's holding, was that the condition of the Land, and thus its "value" (presumably market value[37]), could assist in deciding what was the consideration for its transfer. But whether the Land was developed or undeveloped when it was transferred neither helps identify nor establishes what was the consideration for its transfer. Its state or condition when transferred would, of course, be directly relevant to its market value under s 20(1)(b) of the Duties Act. That was not the basis of the assessments in issue in these cases. The Commissioner relied on s 20(1)(a) on the basis that, in these cases, the consideration "for" the transfer was greater than the market value of the Land in its then condition. Because that is so, the condition of the Land when it was transferred is not to the point.

45 Once it is decided that nothing turns on whether the Land was developed or undeveloped when it was transferred, the reasoning followed in the Court of Appeal, and adopted by Lend Lease in its argument in this Court, can be seen to depend upon the premise that the "single, integrated and indivisible" transaction between VicUrban and Lend Lease could be and should be divided between transfers of land and other matters or transactions. The Court of Appeal did not expressly identify what criterion it used to make the division it did. No clearer definition of a criterion was proffered by Lend Lease in argument in this Court.

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36 *Archibald Howie* (1948) 77 CLR 143 at 152 per Dixon J; *Dick Smith Electronics* (2005) 221 CLR 496 at 518 [71] per Gummow, Kirby and Hayne JJ.

37 *Spencer v The Commonwealth* (1907) 5 CLR 418; [1907] HCA 82.

Dividing the payments

46 Determining whether the consideration for the transfers was only so much of the payments made by Lend Lease as constituted the Stage Land Payment is not assisted by presupposing, as much of Lend Lease's argument in this Court did, that the "multiple interrelated obligations" in the 2001 DA not only can, but must, be divided between "sale and transfer of the Land", on the one hand, and other obligations described as "the ongoing development" of the Land and its "ultimate realisation" on the other. First, any presupposition of this kind denies that all of the obligations which the parties to the 2001 DA undertook were "interrelated". That would be reason enough to hesitate before making any presupposition that those obligations can or should be divided. But second, and more fundamentally, any presupposition of the kind described assumes the answer to the ultimate statutory question. It assumes that the obligations relating to payments for "the ongoing development" of the Land and payments calculated by reference to its "ultimate realisation" formed no part of the consideration moving the transfers. But what was the consideration moving the transfers is the very question for decision.

47 In this Court, Lend Lease submitted only that there are several matters relevant to whether one or more payments, or one or more parts of a total payment, was or were "for" the transfers of the Land. Those matters included (but appeared not to be limited to) the state of the Land at the time of transfer, how the amount of the payment was calculated, whether the contract was subject to any conditions precedent, whether and how the failure to perform obligations following transfer engaged default provisions, whether there was an agreement about how VicUrban would apply the sum paid, whether the payment was to recover an outlay already made, or later to be made, by VicUrban, whether the payment related to work done on land that was or would be the subject of transfer to Lend Lease and whether the payment was a share of amounts to be received on realisation of the developed Land.

48 At the risk of undue abbreviation, Lend Lease's submission was that sums that could be said to be paid as Lend Lease's contribution to the cost of development work which VicUrban had done or would do, and sums that were to be paid as a share of amounts Lend Lease would realise on its sale of the Land, did not form a part of the consideration for the transfer. And once those payments were identified as relating only to development obligations or "revenue" or "profit" sharing, all that remained as consideration for the transfer of the Land was the Stage Land Payment.

Consideration "for" the transfers

49 As the majority in this Court's decision in *Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* pointed out[38], the statutory criterion of consideration "for" the transaction "looks to what was received by the Vendors so as to move the transfers to the Purchaser *as stipulated in the Agreement*" (emphasis added). In *Dick Smith Electronics*, the majority held[39] that:

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

50 In these cases, the consideration which moved the transfer by VicUrban to Lend Lease of each Stage was the performance, by Lend Lease, of the several promises recorded in the 2001 DA (or that agreement as later varied and supplemented), in consequence of which VicUrban would receive the total of the several amounts set out in the applicable agreement. It was only in return for the promised payment of that total sum, by the various steps recorded in the applicable agreement, that VicUrban was willing to transfer to Lend Lease the Land comprising the relevant Stage.

Identifying the consideration

51 The conclusion just described is reached after an inquiry that begins in the agreements the parties made. The search is for "what was received by the [vendor] so as to move the transfers to the [purchaser] *as stipulated in the Agreement*"[40] (emphasis added).

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38 (2005) 221 CLR 496 at 518 [72] per Gummow, Kirby and Hayne JJ.

39 (2005) 221 CLR 496 at 519 [75] per Gummow, Kirby and Hayne JJ.

40 *Dick Smith Electronics* (2005) 221 CLR 496 at 518 [72].

52 Lend Lease accepted that attention cannot be confined to the Land Sale Contracts. It accepted that it is necessary to consider the agreement pursuant to which the relevant Land Sale Contracts were made (the 2001 DA or that agreement as later varied and supplemented). It is then to be observed that cl 4 of that agreement provided not only for the making of a contract for the sale of a Stage *for the Stage Land Payment* but also for Lend Lease to pay VicUrban the several sums described in cl 4.7. The Stage Land Payment was only one of the sums which cl 4.7(a)(i) obliged Lend Lease to pay VicUrban on or before Lend Lease took title to a Stage. And as has been explained, the amounts under cl 4.7(a)(ii), (b) and (c) which Lend Lease was bound to pay (*after* it took title to a Stage) adjusted the payments made before Lend Lease took title so as to provide VicUrban with amounts equal to specified percentages of the Actual Gross Proceeds of Sale of the developed Land, including amounts (up to identified caps) as contributions towards the cost VicUrban incurred for External Infrastructure and Gasworks Site Remediation.

53 The Court of Appeal was right to describe[41] the transaction that VicUrban and Lend Lease made as "single, integrated and indivisible". The transaction recorded in the 2001 DA had that character not just because it was recorded in a single set of transaction documents but because the rights and obligations provided for in those documents were interlocked. The interlocking nature of the obligations is demonstrated by reference to the provisions made by the 2001 DA in respect of default. And those provisions show that performance of all of the stipulations about payments connected with a Stage moved the transfer of the relevant Land to Lend Lease.

54 First, each Land Sale Contract provided (in effect) that a "Material Default"[42] by the purchaser of the Land under the 2001 DA would entitle VicUrban to terminate the contract for the sale of the Land.

55 Second, under the 2001 DA, any failure to comply with a provision of the development agreement, a Land Sale Contract or any other "Project Document"[43] was a "Default Event". The 2001 DA did not differentiate between the

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41 2013 ATC ¶20-410 at 15,376 [226].

42 As defined in the 2001 DA.

43 Defined in a way that included not only the 2001 DA and Land Sale Contract, but also a number of other documents recording or relating to aspects of the overall project of developing the Victoria Harbour Precinct, Docklands Area.

consequences which were to follow from the occurrence of a Default Event constituted by a breach of a Land Sale Contract and the occurrence of a Default Event constituted by any other breach. Rather, a distinction was drawn between a Material Default and other forms of default. And any failure by Lend Lease to pay money to VicUrban, whether under the 2001 DA or under a Land Sale Contract, was a "Financial Default" and, by definition, a Material Default.

56 If, on account of Lend Lease's breach, VicUrban became entitled to terminate the development agreement, VicUrban was entitled to terminate the agreement in relation to all future Stages and any Stage which had been transferred to Lend Lease but on which "Commencement of Development"[44] had not occurred. A Stage of the latter kind had to be retransferred to VicUrban. VicUrban was then bound to resell the forfeited Stages. The amounts VicUrban received on resale were to be applied first in meeting VicUrban's "[l]oss, cost or damage" suffered directly or indirectly in respect of the termination of the agreement, and second in reimbursing Lend Lease "the aggregate of *all sums actually* [*outlaid*] by [Lend Lease] on purchasing the Forfeited Stages ... including any amounts paid on account of the Project External Infrastructure Contribution and the Project Gasworks Site Remediation Contribution in respect to the Forfeited Stages" (emphasis added) together with the assessed increase in market value of the forfeited Land resulting from the works which Lend Lease had done under the agreement (whether on the forfeited Land or elsewhere).

57 The default provisions of the 2001 DA as varied and restated in 2006 and 2008 were not materially different.

58 These provisions about default demonstrate that there was only one bargain between the parties, not two or more bargains[45]. More than that, the provisions made for the consequences of default show that the promised performance of all of the stipulations for payment occasioned by the transfer of a Stage was what moved that transfer.

59 Noticing that some of the amounts which Lend Lease was to pay were described as its "contribution" to Integrated Public Art or the cost of External Infrastructure or the cost of the Gasworks Site Remediation may invite attention

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44 Defined as completion of remediation of the Land, foundations and footings.

45 cf *Prudential Assurance Co Ltd v Inland Revenue Commissioners* [1993] 1 WLR 211 at 219-220 per Sir Donald Nicholls VC; *Paul v Inland Revenue* [1936] SC 443.

to whether those sums were consideration moving the transfer of the Stage. But a number of points may be made about the use of the word "contribution".

60 First, the 2001 DA defined "Stage Land Payment" as Lend Lease's "contribution" for each Stage and the total of the Stage Land Payments (the "Total Land Price") as Lend Lease's "contribution for the cost of the Land". Second, recognising that, as Lend Lease emphasised, VicUrban and Lend Lease were each obliged to do work that was necessary to the overall success of the venture points firmly towards the conclusion that all of the various "contribution" payments which Lend Lease was obliged to make in connection with each Stage (some before transfer and some after transfer) formed a part of the consideration moving the transfer of the Stage. It was only in return for the performance of not only the obligation to make the "contribution" fixed as the Stage Land Payment but also the obligations to make all the other forms of "contribution" that VicUrban was willing to transfer the Land to Lend Lease.

61 Two other points should be made about the payments which Lend Lease was obliged to make. Neither the manner of calculation of the amounts that were to be paid as contributions, nor the connection which the 2001 DA expressly drew between some of those payments and work undertaken by VicUrban (on External Infrastructure or Gasworks Site Remediation), denies the conclusion that VicUrban was willing to transfer the Land only in consideration of Lend Lease making all of the payments for which the 2001 DA (and that agreement as later varied and supplemented) provided. Observing that much of the work identified as the reason or occasion for a payment (provision of Integrated Public Art, External Infrastructure and Gasworks Site Remediation) would be undertaken on or in respect of land which was not the subject of the transfer in issue does not point against the conclusion that payment of all of the relevant sums was a part of the consideration for the transfer. Providing for an allowance to be made to Lend Lease, out of the proceeds of resale after default, in respect of the increase in the market value of forfeited Land brought about by the works which Lend Lease did outside that land reinforces the conclusion that the obligations which Lend Lease assumed under the 2001 DA (and that agreement as later varied and supplemented), and, in particular, its payment obligations, cannot be divided in the manner asserted by Lend Lease.

62 The performance of the several promises of payment for which the 2001 DA stipulated was the consideration which moved each transfer of Land. Each transaction of transfer was a "single, integrated and indivisible" transaction. It was not to be divided as it was by the Court of Appeal.

63 It remains to deal with the particular assessments.

The particular assessments

64 These appeals relate to the transfer of the Land in seven Stages: Dock 5, Mosaic, C3/C4 (63-93 Merchant Street), C9 (Myer), C10 (Montage), V4 (MKWH) and V5 (Convesso).

65 Lend Lease objected to the Commissioner's inclusion in the consideration for the transfer of each of these Stages of the amounts paid for Integrated Public Art Contribution, and for each Stage except C3/C4 the amounts paid for External Infrastructure Contribution (or Base External Infrastructure Contribution) and Gasworks Site Remediation Contribution (or Base Gasworks Site Remediation Contribution)[46]. The amounts of some of those payments in respect of some of the seven Stages in issue were fixed by variations made to the 2001 DA or supplementary agreements (described as "Stage Deeds"). The Commissioner rightly submitted that those subsequent agreements did not alter the character of the payments in any relevant respect. Lend Lease did not contend to the contrary. Enough has been said earlier in these reasons to explain why Lend Lease's objection to the inclusion of these amounts in the consideration for each transfer fails.

66 In respect of the C9 and C10 Stages the Commissioner did not seek to support, in this Court, so much of the assessments as related to an item called "Grand Plaza Retention Amount". The assessments issued in respect of these Stages will accordingly require adjustment to reflect this concession. Otherwise, however, nothing more need be said about this item in the two assessments (which are the assessments in issue in matter numbers M81 of 2014 and M78 of 2014 respectively).

67 But particular reference must be made to some other kinds of payment.

Grand Plaza payments

68 Under the 2001 DA, Lend Lease was bound to construct the "Grand Plaza Works". As the name suggests, the works would provide a large space for public recreation. By the variation agreement made in 2008, the obligation to procure construction of the Grand Plaza was shifted to VicUrban. Under the agreement as so varied, Lend Lease was bound, with effect from 10 May 2007, on or before it took title to a Stage (the Actual Stage Release Date) and until a set amount was paid, to pay VicUrban a "Grand Plaza Contribution". The amount of the

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46 The change in terminology was not said to be significant.

contribution was fixed as 1.3 per cent of the Projected Gross Revenue on Sale of the Stage. The Grand Plaza Contribution is relevant to the assessments made in respect of the V4 and V5 Stages.

69 The 2008 variation and restatement of the 2001 DA also provided for payment of a "Grand Plaza Additional Payment", on or before the Actual Stage Release Date, in respect of the C9 Stage. The amount to be paid was calculated as half of the difference between an agreed percentage of Projected Gross Revenue on Sale and the "Projected Stage Infrastructure Cost". When actual revenue and cost were known, an adjustment payment was to be made to bring the amount paid to half of the difference between the agreed percentage of Actual Gross Proceeds of Sale and the "Actual Stage Infrastructure Cost".

70 No relevant distinction can be drawn between these payments or between either of them and the payments relating to Integrated Public Art, External Infrastructure and Gasworks Site Remediation. The payments were stated to be "in addition to any other amounts payable by [Lend Lease]" under the 2008 variation and restatement and the 2008 variation and restatement made no distinction between the Grand Plaza payments and any other payments for the purposes of determining what was a Financial Default (and thus a Material Default) under the agreement. The Commissioner was right to include them in determining the amount of consideration for the transfer of the relevant Stages.

Additional Authority Payments

71 The 2006 variations to the 2001 DA added a new element to the payments that were to be made under cl 4.7. In addition to the Stage Land Payment and contributions to Integrated Public Art, External Infrastructure and Gasworks Site Remediation, an amount was to be paid as an "Additional Authority Payment". On or before taking title to a Stage, Lend Lease was obliged to pay an Additional Authority Payment calculated by reference to the extent to which the projected gross revenue on sale would be larger because the development would be larger than anticipated. The amount paid on this account on or before transfer was subject to later adjustment by reference to actual gross proceeds of sale received. The 2008 variations did not affect these aspects of the agreement. The payments are relevant to the assessments made in respect of the C3/C4 and C9 Stages.

72 Although cl 11.13 of the 2006 variation and restatement of the 2001 DA provided that VicUrban may elect to allocate all or part of the sums paid as an Additional Authority Payment to public infrastructure, neither this provision, nor any other aspect of the provisions made for the Additional Authority Payments, permits any relevant distinction between those payments and the payments

relating to Integrated Public Art, External Infrastructure and Gasworks Site Remediation. The Commissioner was right to include the amounts paid as Additional Authority Payments in determining the amount of consideration for the transfer of the relevant Stages.

Final and Additional Land Payments

73 It will be recalled that cl 4.7 of the 2001 DA provided, among other things, for certain adjusting payments to be made on or before the Initial Reconciliation Date and then after Stage Practical Completion. One class of adjusting payments was calculated to bring one element of the amounts paid to 2.74 per cent of the Actual Gross Proceeds of Sale. This adjustment became known as the "Final Land Payment" in respect of the Dock 5 Stage and the "Additional Land Payment" in respect of the C3/C4 Stage.

74 The Commissioner's assessments of the consideration for the transfer of the Dock 5 Stage and the C3/C4 Stage included the Final Land Payment and Additional Land Payment respectively. For the reasons that have been given the Commissioner was right to do so.

Estimate of future contributions

75 In respect of both the C3/C4 Stage and the C10 Stage, the Commissioner also included in the amount assessed to be the consideration for the transfer his estimate of the amount of the various contributions which would fall due for payment under the adjusting provisions which have been described (the "Estimate of Outstanding Amounts"). In respect of the C9 Stage, the Commissioner included in the amount assessed to be consideration for the transfer his estimate of future contributions that he called the "Estimated Land Payment", the "Estimated External Infrastructure Contribution" and the "Estimated Gas Site Remediation". Again, for the reasons which have been given, the Commissioner was right to conclude that the promise to pay those further amounts was a part of the consideration for the transfer of the relevant Land.

Non-monetary consideration

76 For the C9 and C10 Stages the Commissioner included amounts for non-monetary consideration. The Land Sale Contract for the C10 Stage expressly provided that "for GST purposes" the consideration which Lend Lease would provide to VicUrban for the Land included, but was not limited to, "the Price" stated in the contract (the Stage Land Payment) and certain identified

works for providing roads and infrastructure "with a GST exclusive market value" of a specified sum. The C9 Stage Deed similarly provided that certain works would be provided as consideration for the Land. Although both were stipulations said to be "for GST purposes", and the identification of what is a consideration for a supply under the relevant GST legislation differs from the inquiry demanded by s 20(1)(a) of the Duties Act, the parties' agreements recorded, accurately, what Lend Lease was providing in return for the transfers. Lend Lease was providing the performance of other promises it had made under the applicable development agreements.

77 The Commissioner was right to include the non-monetary consideration in the assessments made in respect of both Stages C9 and C10.

Conclusion and orders

78 For these reasons, each appeal to this Court should be allowed with costs and the orders of the Court of Appeal set aside. In each matter, other than matters M78 of 2014 and M81 of 2014, there should be consequential orders that the appeal to the Court of Appeal is dismissed with costs.

79 In matters M78 of 2014 and M81 of 2014 there should be consequential orders that the appeal to the Court of Appeal is allowed in part and the assessment remitted to the Commissioner to reassess the duty by excluding the amount described as referable to "Grand Plaza Retention Amount", and otherwise in accordance with the reasons of this Court. The appeal to the Court of Appeal should otherwise be dismissed with costs.