SUPREME COURT OF QUEENSLAND

CITATION:	*Wyuna Court Pty Ltd v Vikpro Pty Ltd* [2015] QSC 216
PARTIES:	**WYUNA COURT PTY LTD (ACN 602 269 250) ATF WYUNA COURT UNIT TRUST** (applicant) **v** **VIKPRO PTY LTD (ACN 154 015 237)** (respondent)
FILE NO/S:	No 3672 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2015
JUDGE:	Dalton J
ORDER:	**Declare that from 1 July 2012 the respondent is liable to pay land tax levied on the applicant in respect of the land the subject of registered sub-lease No 710320129**
CATCHWORDS:	TAX AND DUTIES – LAND TAX – LIABILITY FOR LAND TAX – LESSEES – VALIDITY AND CONSTRUCTION OF AGREEMENTS AS TO PAYMENT OF TAX – where the respondent leases land from the applicant – where the applicant sought to enforce a clause of the lease providing that the respondent-lessee was liable to pay or recompense the applicant for the land tax incurred – where s 44A of the repealed *Land Tax Act* 1915 provided that a provision requiring a lessee to pay land tax was unenforceable – where s 44A was repealed in 2009 and a specific provision allowing for its continued operation was enacted in the *Land Tax Act* 1915 – where the *Land Tax Act* 1915 was repealed and the *Land Tax Act* 2010 does not make specific provision for the continued operation of s 44A – whether the respondent is liable to recompense the applicant for land tax incurred STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – OTHER MATTERS – where the respondent submitted that s 89(b) of the *Land Tax Act* 2010 continued the application of s 44A of the repealed *Land Tax*

Act 1915 – whether s 89(b) allows the continued operation of s 44A

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – OTHER MATTERS – where the respondent submitted that s 20(2)(b) and (c) of the *Acts Interpretation Act* 1954 continued the application of s 44A of the repealed *Land Tax Act* 1915 – whether s 20(2)(b) and (c) allows the continued operation of s 44A

ESTOPPEL – ESTOPPEL BY CONDUCT – PROMISSORY ESTOPPEL – PARTICULAR CASES – where the respondent submitted that the applicant was estopped from requiring the respondent to pay land tax – where a director of the respondent swore that in October 2011 a statement was made by the administrator of the landlord at the time to the effect that "land tax was not payable" – whether such a statement was made

Acts Interpretation Act 1954 (Qld) s 4, s 20(2)
Land Tax Act 1915 (Qld) (reprint 6C) s 44A
Land Tax Act 1915 (Qld) (reprint 7G) s 76
Land Tax Act 2010 (Qld) s 89(b)
Revenue and Other Legislation Amendment Bill 2009 (Qld)

COUNSEL:	G Beacham for the applicant P Dunning QC with S Richardson for the respondent
SOLICITORS:	Holding Redlich for the applicant GM Lawyers for the respondent

[1] The respondent tenant leases land from the applicant. The lease contains the following clause:

> "**11.2 Rates, Taxes**
>
> The Lessee shall duly and punctually pay all rates, taxes, assessments, duties, levies, impositions and other outgoings (**'*Outgoings*'**) whatsoever in respect of the Demised Land and the improvements thereon which may be imposed, assessed, levied or charged by, or payable to, any duly constituted authority in that behalf and *whether payable by the owner or occupier or partly by each* …" (emphasis in the original).

[2] The tenant contends it is not liable to pay land tax levied in relation to the demised land because of the provisions of the *Land Tax Act* 1915 (Qld), now repealed, and the *Land Tax Act* 2010 (Qld). Section 44A(1) of the *Land Tax Act* 1915 provided:

> "**44A Provision to pay land tax etc. unenforceable**
>
> (1) A provision in a lease entered into after 1 January 1992 requiring a lessee to –
>
> (a) pay land tax; or

(b) reimburse the lessor for land tax;

is unenforceable.

…"

[3] It was uncontroversial between the parties that the subject lease fell within the ambit of that section, and that the section had the effect that the applicant could not enforce the provisions of cl 11.2 against the respondent so as to recover land tax it paid in respect of the demised land.

[4] Amendments to the *Land Tax Act* 1915, in 2009, repealed s 44A. At Part 9, division 5 of the amended *Land Tax Act* 1915-2009 there were transitional provisions. One of those transitional provisions related specifically to the previous s 44A:

"**76 Application of previous s 44A**

(1) This section applies to –

(a) a lease (the *pre-existing lease*) to which previous section 44A applied immediately before the commencement; and

(b) a lease that arises from –

(i) a renewal under an option to renew contained in the pre-existing lease; or

(ii) an assignment or transfer of the pre-existing lease.

(2) Previous section 44A applies to the pre-existing lease and a lease mentioned in subsection (1)(b) despite its repeal by the amending Act, section 19."

[5] As well there was a more general transitional provision in the *Land Tax Act* 1915-2009:

"**69 Application of previous provisions to particular liabilities etc.**

Subject to section 72, despite their amendment or repeal by the amending Act, the previous provisions of this Act continue to apply in relation to –

(a) a pre-commencement liability; and

(b) a pre-commencement act or omission."

[6] A pre-commencement liability was defined at s 67 of the *Land Tax Act* 1915-2009 as:

"*pre-commencement liability* means a liability for land tax arising before the commencement."

A pre-commencement act or omission was defined as meaning:

"*pre-commencement act or omission* means an act or omission done or omitted to be done for this Act before the commencement." (sic).

[7] The explanatory notes to the *Revenue and Other Legislation Amendment Bill* 2009 (by the passage of which the 2009 amendments to the *Land Tax Act* 1915 were effected) provides:

> "*Clause 52* inserts a new Part 9 division 5 – *Transitional Provisions* – into the *Land Tax Act* 1915. A new section 67 defines significant terms used in Part 9 division 5. A new section 68 provides for the application of the *Land Tax Act* 1915 as amended by the Bill. The amended Act applies to liabilities arising, or acts or omissions done or omitted to be done, on or after commencement of the Bill.
>
> …
>
> A new section 76 confirms that the prohibition on landlords passing land tax onto tenants continues to apply to leases in existence immediately before commencement, and to renewals and assignments and transfers of these leases.
>
> …"

[8] It was common ground between the parties that, notwithstanding the 2009 amendments, the landlord remained unable to enforce the liability to recompense land tax created by cl 11.2 of the lease. In my view that was because of the operation of s 76, extracted above. That section continued the operation of s 44A in respect of the lease between the applicant and the respondent.

[9] There was a new *Land Tax Act* passed by parliament in 2010. It was apparently thought desirable to rewrite the 1915 Act so that it accorded with what the explanatory notes call "contemporary drafting practices".[1]

[10] At Part 10 of the *Land Tax Act* 2010 are transitional provisions. There is no equivalent to s 76 of the *Land Tax Act* 1915-2009 expressly preserving the operation of the previous s 44A. There is a provision, s 89, which is very much like s 69 of the 1915-2009 Act.

> "**88 Application of this Act**
>
> (1) This Act applies to –
>
> (a) a post-commencement liability; and
>
> (b) an act or omission done or omitted to be done for this Act on or after 30 June 2010. [sic].
>
> …
>
> **89 Continued application of repealed Act**
>
> Despite its repeal, the repealed Act continues to apply to –
>
> (a) a pre-commencement liability; and

[1] The explanatory notes apparently see contemporary drafting practices as involving the use of plain English and promoting clarity. The part of the explanatory notes which explains this is written in very poor English, including using the verb "rewrite" as a noun – see page 3 under the heading, "Rewrite of the *Land Tax Act* 1915".

(b) an act or omission done or omitted to be done for the repealed Act before 30 June 2010. [sic].

…"

[11] This Part of the 2010 Act contains the following definitions:

> "*post-commencement liability* means a liability for land tax arising on or after 30 June 2010.
>
> *pre-commencement liability* means a liability for land tax, within the meaning of the repealed Act, arising before 30 June 2010.
>
> *repealed Act* means the repealed *Land Tax Act* 1915."

[12] The tenant did not argue that s 89(a) of the 2010 Act was applicable to the current situation. I think that is plainly right, for a pre-commencement liability for land tax, as defined, must mean a liability to the revenue, not a contractual liability to recompense an amount which a landlord has paid to the revenue.

[13] Thus the tenant was driven to reliance on s 89(b). The first difficulty in its way was that the subsection is so poorly drafted as to be almost meaningless. The most charitable interpretation of that provision[2] is that words have been accidentally omitted, and that the provision should read something along the lines of, "an act done for the purposes of the repealed Act …". Even that expression is less precise than, say, "an act done pursuant to the repealed Act …".

[14] The explanatory notes to the 2010 Act say:

> "*Clause 89* provides for the continued application of the repealed Act to pre-commencement liabilities ,ie, for financial years up to and including 2009-10". (commas, spacing and lack of a full stop as per the original).

That is, the explanatory notes do not attempt to provide an explanation of what became s 89(b).

[15] Assuming that s 89(b) should have read, relevantly, "an act done for the purposes of the repealed Act …", I reject the argument advanced by the tenant that its entry into the lease was an act done for the purposes of the *Land Tax Act* 1915. The statutory words are simply not capable of bearing that meaning.

[16] Secondly, the fact that s 89(b) is so similar to s 69 of the 2009 transitional provisions is an indication that it does not continue the operation of previous s 44A. Section 69 of the 2009 transitional provisions did not continue the operation of previous s 44A, for that was specifically dealt with by s 76 of the 2009 transitional provisions.

[17] Further, the circumstance that the legislature in 2010 omitted a specific provision preserving some operation of previous s 44A, when only the year before it had included

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[2] And the definition of "pre-commencement act or omission" in the 2009 transitional provisions.

such a provision, is a strong indication that the legislature determined that s 44A was no longer to apply. That is particularly so in circumstances where sections 90-96 of the 2010 Act provide for specific situations where the effect of the previous law is continued. As noted, there is nothing in those sections about s 44A.

[18] The tenant alternatively relied upon s 20(2)(b) and (c) of the *Acts Interpretation Act* 1954 (Qld) which provide:

> "(2) The repeal or amendment of an Act does not –
>
> …
>
> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or
>
> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or
>
> …"

[19] By s 4, the application of the *Acts Interpretation Act* may be "displaced, wholly or partly, by a contrary intention appearing in any Act". In my view, the repeal of the 1915 Act, together with what must be regarded as the deliberate failure to re-enact an equivalent transitional provision to s 76 of the 2009 amending Act, show a clear parliamentary intention that the effect of s 44A was not to continue, displacing any operation which s 20(2) could otherwise have had.

[20] The effect of the *Land Tax Act* 2010 was to remove the bar on enforceability of cl 11.2 of the lease.

Estoppel

[21] Alternatively, the tenant argued that the landlord was estopped from enforcing its right to collect the amount of land tax it paid pursuant to cl 11.2 of the lease.

[22] Mr Paul Anthony McAvoy was a director of the tenant at all material times. He swore that sometime between 10 October 2011 and 11 October 2011 he had a discussion with the administrator of the landlord as part of an ongoing resolution of disputes between the landlord and tenant. He swore that, at the time, there was a renegotiation of the rental rate per square metre to be paid under the lease. I accept that. It appears borne out by the amendments made to the sub-lease, which is JH-4 to the affidavit of William James Harris filed 3 July 2015. Mr McAvoy swears that in that context he said to Mr Harris, the administrator, words to the effect that "land tax should not be charged in relation to [the demised premises]", and that Mr Harris replied to the effect, "that is right, land tax was not payable".

[23] Mr Harris said, and I can readily accept, that he had no specific memory of the conversation alleged by Mr McAvoy. He admitted that he was broadly aware of an immunity in tenants against landlords recovering land tax as an outgoing – t 1-27 – but disclaimed any detailed knowledge of that – t 1-27 – and in particular could not recall

what his state of knowledge was at the time of the alleged conversation – t 1-28. As administrator of the landlord he had, in May 2011, given his solicitors instructions to issue a notice to remedy breach of covenant to the tenant. That notice, which is JH-3 to his July affidavit, included a summary of monies owing as follows:

> "…
>
> | | | |
> |---|---|---|
> | Rent for the period 1 July 2006 to 31 May 2011 (including overdue interest as at 19 May 2011) | $ 415,299.65 | Refer Annexure A |
> | Land Tax for the period 1 July 2010 to 30 June 2011 | $ 18,310.93 | Refer Annexure B |
>
> …"

It will be seen that land tax is claimed over a different period from rent. The reason for that was, Mr Harris swore, that his legal advice at about the time the letter was written was that land tax was recoverable for the period claimed because of the change brought about by the 2010 Act. It seems unlikely to me that:

(a) having been aware generally of the prohibition on landlords recovering land tax;

(b) having received advice in May 2011 that under the 2010 Act landlords could recover land tax, and

(c) having made demand for land tax from this tenant, in accordance with that advice,

Mr Harris would represent in October or November 2011 that, in terms of the lease going forward, land tax was not recoverable.

[24] On 9 November 2011 the tenant's solicitors wrote to the landlord's solicitors. The letter refers to the "revised" lease, which had been registered some eight days previously. It continues, "We note your client's view that land's [sic] tax is payable under the terms of the lease. As you know, our client's view differs." It then offers three reasons for the tenant's view. The first, based on a construction of the lease, is clearly wrong. The second is based on the effect of the 2010 legislation and is, in my view, wrong. The third reason is an argument as to calculation of land tax recoupment as an outgoing, which was not advanced before me. Then the letter goes on to say that, "in any event", those solicitors were instructed that, as part of the renegotiation of the lease, Mr McAvoy and Mr Harris had agreed that land tax was not payable. This is not quite what Mr McAvoy now asserts. It is surprising that, had an agreement as to the matter been reached as part of the renegotiation, it was not documented in the amendments to the lease, particularly where both the landlord and tenant were represented by good commercial solicitors.

[25] On the other hand, there is an invoice dated 19 December 2011 which shows a credit of land tax by the landlord on or about 19 December 2011. The invoice is from the landlord's agent and there was no evidence from that agent as to why the credit was made. The solicitor's letter of 9 November 2011 does not expressly refer to any preceding invoice charging land tax. Mr Harris' recollection was that the credit of land tax occurred in a wider commercial context. He recalled that Mr McAvoy provided a fund to pay the tenant's creditors and that allowed a Deed of Company Arrangement to be agreed. Mr Harris' recollection was that land tax was forgiven by the landlord because, had the

landlord insisted upon it, the fund provided by Mr McAvoy would have been insufficient to pay all creditors and the operation of the Deed of Company Arrangement would have been jeopardised. There was no documentation as to this. Nonetheless I accept Mr Harris' recollections, albeit they are general in their nature. My impression of him was that he was a competent professional, giving his best recollections sincerely.

[26] Having considered all the material, I am not persuaded that the conversation between Mr McAvoy and Mr Harris occurred, as Mr McAvoy swore that it did. There is no clear documentary evidence which supports the tenant's position and I am not prepared to accept Mr McAvoy's evidence without that. Mr McAvoy was described by his own counsel in submissions as an undisciplined witness. In my opinion, his evidence was given in a belligerent and querulous manner, disrespectful both to cross-examining counsel and the Court.

[27] He was very reluctant to co-operate with the process of answering questions. He is a real estate agent who develops property and is commercially sophisticated. Nonetheless he obdurately refused to locate numbered pages of exhibit bundles, even when the process was very patiently explained to him by cross-examining counsel. He even evinced (falsely in my view) trouble finding the letter which was exhibited to his own affidavit, notwithstanding that affidavit contained only three exhibits over 14 pages, only one of which was a letter (from his own solicitors). When asked to check that a document to which he was directed was the Amended Deed of Company Arrangement, he retorted, "How do I do that?", without making any attempt to turn either to the front of the document or the signature pages.

[28] Throughout his evidence Mr McAvoy was combative, responding, for example, "for the 15th time", "were you there?" and "what the receiver was trying to do was steal the land", rather than answer the questions posed. When he did make answers, they were frequently calculated to include material which he perceived advantaged his case, rather than simply to respond to the questions asked.

[29] In these circumstances I am not actually persuaded that Mr McAvoy had the conversation the tenant relies upon. I feel no confidence in the honesty of his evidence. As well, considering his combative style in giving evidence, I doubt that in his commercial dealings with Mr Harris he had simple, direct and straightforward communications, such as that he swears to in his affidavit. I think it much more likely that the conversation would have been characterised by his self-serving ambiguous style. The result is that the estoppel claim must fail.

Disposition

[30] The applicant asked for a declaration that the respondent was liable in terms of cl 11.2 from the date of the operation of the 2010 Act. When I raised the question of the apparent forgiveness of liability for the financial years ended 2011 and 2012, counsel conceded that the declaration was not sought in relation to those years. The declaration I make therefore deals only with the position from 1 July 2012.

[31] I declare that from 1 July 2012 the respondent is liable to pay land tax levied on the applicant in respect of the land the subject of registered sub-lease No 710320129.

[32] I will hear the parties as to costs.