IN THE COURT OF APPEAL [1996] QCA 524

SUPREME COURT OF QUEENSLAND

Appeal No. 279 of 1995.

Brisbane

[EIE Ocean BV v. Commissioner of Stamp Duties]

IN THE MATTER of:
The Stamp Act 1894-1990

- and -

An Appeal by EIE Ocean BV against an Assessment of Stamp Duty by the Commissioner of Stamp Duties on a Share Sale Agreement dated 24 September 1988 between Enallage Pty Ltd as Transferor and EIE Ocean BV as Transferee

BETWEEN:

E.I.E. OCEAN B.V.

Appellant

AND:

COMMISSIONER OF STAMP DUTIES

Respondent

CASE STATED PURSUANT TO SECTION 24
OF THE *STAMP ACT* 1894

Macrossan C.J.
Pincus J.A
Williams J.

Judgment delivered 17 December 1996

Separate Reasons for Judgment of each member of the Court, all concurring as to the Orders made.

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1. QUESTION (A)(I) IS ANSWERED: YES.

2. THE APPEAL IS OTHERWISE REMITTED TO THE TRIAL DIVISION FOR DETERMINATION BY TRIAL.
3. SUCH DIRECTIONS MAY BE GIVEN IN THE TRIAL DIVISION AS ARE NECESSARY FOR THE PROPER AND EXPEDITIOUS DETERMINATION OF THE APPEAL, INCLUDING BUT NOT LIMITED TO AN ORDER THAT AN EXPERT BE APPOINTED TO ADVISE THE COURT ON ANY ISSUE OR ISSUES ARISING, ON SUCH TERMS AS TO COSTS AND OTHERWISE AS THE COURT THINKS FIT.
4. COSTS OF THE PROCEEDINGS IN THIS COURT TO BE COSTS IN THE CAUSE AS DETERMINED IN THE FURTHER PROCEEDINGS IN THE TRIAL DIVISION.

CATCHWORDS:	Stamp Duty - Case Stated - s. 24 *Stamp Act* 1894 - default assessment - "land rich" company - whether valuation of the land exceeds 80% of total value - value of goodwill - what part of goodwill attaches to land - personal goodwill and local goodwill - facts stated for the opinion of the Court - method of valuation - correct assessment - whether value of goodwill to be included in land value. Procedure - case stated - s. 24 *Stamp Act* 1894 - power to require an opinion removed from act - what power does Commissioner have to state a case - s. 68(3) *Supreme Court of Queensland Act* 1991 - remission to Trial Division of Supreme Court.
Counsel:	Mr R W Gotterson QC, with him Mr H Alexander for the appellant. Mr K D Dorney QC, with him Mr J A Logan for the respondent.
Solicitors:	Mallesons Stephen Jaques for the appellant. Crown Solicitor for the respondent.
Hearing date:	24 July 1996.

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CASE STATED PURSUANT TO SECTION 24 OF THE *STAMP ACT* 1894

REASONS FOR JUDGMENT - THE CHIEF JUSTICE

Judgment delivered 17 December 1996.

Pincus JA has set out the background facts and referred to the issues that arise on this appeal.

If the sale in question was of shares in a "land rich" company, as that term has come to be used, then additional duty at the rate referable to a conveyance is to be paid. In a number of respects, there is no contest between the parties. The land, and with it the Sanctuary Cove Resort, in the control of the company, Riana Investments Pty Ltd, whose shares were sold by the agreement of 24 September 1988, was situated in Queensland; the consideration for the sale of the shares was $341m and there were a number of items other than land, entitlement to which passed under the sale. Items that were of the nature and value specified in paragraph 7 of the stated case had a value of $46,348,136. None of these matters mentioned so far were in dispute but an issue is raised whether there were further items, the entitlement to which passed on the share sale for which an allowance would have to be made in addition to the paragraph 7 matters, if the value of the included land is to be isolated. Within the total adjusted consideration of $341m, the value of any further items might depress the relative percentage which the value of the land passing as a result of the sale bore to the total value of the property comprehended so that the duty chargeable at conveyance rates under the prescribed provisions would be reduced below that which the Commissioner, with his view of land value, has imposed or would be eliminated altogether if the land value percentage should be less than 80 percent: see 56 FL(2).

The Commissioner's approach to valuation of the land involved a subtraction of the paragraph 7 total of $46,348,136 from the $341m total, leading him to adopt $294,651,864 for land. This sum comfortably exceeds the $272,800,000 which is 80 percent of the $341m total made relevant by the "prescribed provisions": in fact, it shows a land value percentage to the total value of relevant assets as 86.41 percent.

The appellant, in saying that an additional number of items of value passing as a result of the sale not allowed for by the Commissioner, contends that under the approach he has adopted, his land value is inflated. These additional items are claimed by the appellant to total

$79,280,000 and to be distributable under these headings: concept and design $34m, trade names and trademarks $25m and other intangibles (value of tax losses and synergistic effect) $20,280,000. An alternative description of some aspects of these components could be adopted. A principal debate on the appeal concerned "goodwill" which could reflect some part of the additional headings and amounts for which the appellant contended. The appellant pressed for and the Commissioner resisted the conclusion that goodwill independent of land value passed under the sale. If the appellant can demonstrate that the land value contended for by the Commissioner was unduly inflated by at least $46,348,136 the position is arrived at where the relative percentage for the land value component falls below the 80 percent level and none of the additional duty is payable. With a lesser degree of success attending its contentions, the appellant may still have to pay some duty but in a reduced amount.

In the circumstances of this case and on the approaches so far pursued, no obviously correct land value appears. Starting with the objectively acceptable figure of $341m derived from the consideration on the share sale, if it could be accepted that the Commissioner had deducted all non-land items and attributed proper values to them, then his approach and the result at which he has arrived would have persuasive force. Although the appellant was disposed to object to it, there is nothing inherently wrong with the Commissioner's "subtractive" approach if it is possible to be satisfied that the component values he has adopted are substantially correct. The method resembles the commonly adopted method of analysing unimproved value from the evidence provided by sale prices paid for improved land.

The approach of the appellant's valuers attempted to arrive at land values independently of the share contract price by capitalising assumed future profits from aspects of the Resort's operations and then reconciling the result with the share sale figure by attributing values to balancing items. The appellant's valuers, in their exercise, have relied on what can be described as claimed expert opinion. In certain instances they have assumed some relationship between true present value of items and actual historical expenditure paid to produce them. In these proceedings it is not necessary to say more than that the reliability of this method has no greater claim to acceptance than the Commissioner's method.

With each side rejecting relevant aspects of the components relied on by the other, I agree with the conclusion of Pincus JA that the most important of the questions transmitted to this Court for decision cannot be answered. The duty, if any, payable cannot be stated until relevant values have been determined and this cannot be done on the material contained in the case stated and transmitted with it.

The relevant statutory provisions relating to stamp duty appeals are important in this case but some preliminary observations may be made.

The classical view of appeals by case stated saw them as consisting of a statement of "ultimate" facts upon which the questions arose and to which principles of law could be applied to provide the answer: see e.g. *The Queen v. Rigby* (1956) 100 CLR 146. The appeals brought in the Supreme Court by case stated under the Stamp Act customarily conformed to this style and there are a number of statements suggesting that the Court's power to answer questions posed in this form of appeal was quite restricted and allowed no alternative mode of determining the duty payable when disputes concerning it arose. It is open to speculate whether in this strict regime a number of appellants may have been under pressure to yield ground in the interests of having the Commissioner state facts which would enable some, at least, of the area of dispute between the parties to find an answer. It was accepted that the case stated procedure provided the only avenue of appeal. It is clear that the present case has been stated as though the classical standard no longer applied. Any requirement for stating only ultimate facts has been very largely departed from. The factual matters upon which the land valuation and hence liability to duty depend have been dealt with by annexing a very large volume of documents which contain, spread throughout their bulk, reference to various aspects of the parties' competing contentions and the valuations upon which the parties rely. The immediate questions are whether in this form the appellant has a viable appeal and if so, how is it to be resolved.

Pincus JA has indicated how the form of the legislation dealing with stamp duty appeals stood at relevant times. The share sale agreement was dated 24 September 1988 and, for present purposes, it has been accepted in the argument presented that the most significant sections of the Stamp Act were s.22, s.22A and s.24, as they then stood. Read together there were, prior to 1988, some indications of an underlying assumption that appeals in cases of dispute about duty properly chargeable would occur only when there had been prior inquiry made by a party under s.22(1) seeking the Commissioner's opinion on the question. This appears principally from in s.24, the only section explicitly dealing with appeals, where there was the reference to a stated case "setting forth the question or questions upon which (the Commissioner's) opinion was required". However, in April 1988 s.22 was amended in a number of respects including by omitting subs.(1) and with it the reference to the Commissioner being required to express an opinion. Notwithstanding this, the reference in s.24(1) mentioned above was retained. It may be observed that subsequently s.24 has been substantially recast, but it still refers to the case stated setting out the questions upon which the Commissioner's opinion was required. However, at present, under new procedures, there will always have been a notice of appeal served and a prior lodgment of objection to the Commissioner's assessment. I express the view in passing that while the current form of the Act retains the use of the case stated where there is an appeal against assessment, the reference to the questions upon which the Commissioner's opinion was required may now be taken to refer to the issues raised and considered under the objection procedure. Under the current provisions there may also have occurred some transformation of the more rigid case stated procedures. In making this observation I am influenced by the approach adopted and the general statements of principle made by the High Court in _Commissioner of Stamps (S.A.) v. Telegraph Investment Co. Pty Ltd_ (1995) 184 CLR 453 dealing with South Australian legislation. Statements made in that case have been referred to by Pincus JA. For the disposal of this appeal there is no need to express any final view upon the effect of the current Queensland legislation because it is accepted that we are concerned only with its effect at an earlier time.

Nevertheless, acting upon the general indications provided by the High Court in the _Telegraph Investments_ case, the conclusion should be adopted that as at September 1988, s.24 gave a substantive right of appeal in all cases of dissatisfaction with assessment and not just in cases where the expression of the Commissioner's opinion had previously been required. It is not necessary to decide whether, under the legislation in that earlier form, the appeal necessarily involved the utilisation of the case stated procedures but historically the consistent use of that mode of appeal had prevailed for such an extended period that there is no reason to reject that view.

The case stated procedure has been used in the present instance but the form of the case is, as already remarked, very different from the old strict model. It contains no comprehensive statement of ultimate facts and seeks the view of the Court on factual matters which are sketched by reference only to the case and its annexures. Both sides continue to press for the questions to be answered. Neither side suggests that there is not an appeal validly before the Court. That being so, and the Court being confronted with the need to resolve factual questions to fulfil its duty of determining the duty payable it can and should make use of the power conferred by s.68(3) of the Supreme Court of Queensland Act 1991 which, in terms, is broad enough to cover the situation.

Pincus JA has reviewed a number of authorities dealing with the nature of goodwill and its value and the occasions when, in connection with a business being conducted on land there can be associated goodwill with a value beyond that which it gives to the land on which the business is conducted. The distinction is between local goodwill attached to a place and personal goodwill. Whether in a case like the present there was, at September 1988, goodwill accompanying the share sale, that was not reflected in the value of the land on which the resort stood, I regard as only one of the factual questions arising. It will have to be determined on evidence assisted by the contributions of expert witness. It would have been open to the parties to the sale to agree on a schedule in the nature of an apportionment to accompany the sale of shares, stating how the share price in the contract had been arrived at and specifying a separate price for goodwill, but if that had been done I would not regard it as conclusive. That is because the assignment of value to the goodwill might merely have artificially reduced the figure otherwise properly attributable to the value of the land enhanced by the goodwill attached to it. In short, I regard the question as one which cannot be decided in the abstract. It is a factual matter for determination after consideration of such analyses as may be tendered and relied on by the parties.

I agree that question (a)(i) should be answered "Yes" and that the appeal should otherwise be remitted to the Trial Division for determination by trial. I agree with the further terms of the order proposed by Pincus J.A.

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REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 17 December 1996

This is an appeal under s. 24 of the *Stamp Act* 1894 ("the Act" or "the Stamp Act") and it concerns a sale of shares in what may be described as a "land rich" company. Its most unusual feature is that the only issues are the values to be attributed to certain assets, a subject difficult to deal with by means of the procedure of a case stated; the most expensive asset is a Hyatt Hotel. On 24 September 1988 there was made an agreement to sell all the shares in Riana Investments Pty Ltd ("Riana") for a price to be calculated; that price was later fixed at $21,258,700. The consequence of the agreement was that EIE Ocean BV ("the taxpayer") acquired all the issued shares in the capital of Riana, which company was at the time of the transaction "entitled" within the meaning of the relevant provisions of the Stamp Act, to assets compendiously known as the Sanctuary Cove Resort ("the Resort"). According to the case stated (para 4(a)), the full unencumbered value of those assets, other than property of the kind described in s. 56FL(4) of the Act was $341M. The agreement was assessed to stamp duty on 18 September 1990 in the sum of $127,552.20 and that assessment was not challenged. Then, in the following year, on 30 May 1991, the Commissioner issued a notice of default assessment under s. 22A(2) of the Act in the sum of $11,046,671. It is the correctness of the latter assessment which is in issue in these proceedings.

It is necessary to explain the effect of and partially to quote the relevant provisions of the Act, but I shall first set out the central point of the dispute; it is whether the value of land to which Riana was entitled at the time its shares were sold was or was not 80% or more of the value of all its property, other than certain property which is excluded under the Act. There is no dispute that the total value of the relevant property was $341M; that was the value of all Riana's property less the excluded property. The Commissioner's assessment must be upheld if it appears that the value of Riana's land was $272,800,000 or more, that sum being 80% of the total of $341M; if the value was less than $272,800,000 then the assessment is not reduced to a lower figure, but eliminated. It is also common ground that there was at the relevant date a substantial difference between the total value of the relevant property, $341M, and the value of the land. The Commissioner says the value of the land was $294,651,864, whereas the taxpayer says it was $79,280,000 less than that figure. The Commissioner's valuation of the land exceeds 80% of the total value; the taxpayer's valuation is much less than 80% of the total. A substantial part of the difference between the two sets of figures is due to the Commissioner having allowed nothing for goodwill, in valuing items of property other than land.

I now proceed to an explanation of the effect, in the present case, of the relevant provisions of the statute.

Effect of "land-rich company" provisions

As I have mentioned, the valuation in question was what is called a default assessment, made under s. 22A of the Act on 30 May 1991; there had been an earlier such assessment issued on 18 December 1990, but neither side contends that its existence matters. Section 22A gives the Commissioner power to assess duty "[where] a person fails to deliver or lodge, as and when he is required to do so by or under this Act, a statement, return or other document on which duty is chargeable under this Act . . . ". The failure on the part of the taxpayer on which the Commissioner relied, in issuing the default assessment, related to the requirements of s. 56FH of the Act, which creates an obligation to prepare and lodge a statement in respect of a "relevant acquisition" where "a person acquires a majority interest or a further interest in a corporation to which the prescribed provisions apply". The point of that requirement is that s. 56FH deems the statement to be an instrument executed on the day on which the relevant acquisition occurs. Section 56FK imposes ad valorem duty on the statement at a rate which, as is common ground, would in the present case justify an assessment in the sum contended for by the Commissioner if the Commissioner's view of the value of the relevant assets is correct. Subject to the question whether the "prescribed provisions" applied, it is clear that there was such a failure as is asserted by the Commissioner, although the taxpayer purported to lodge a s. 56FH statement, it did not comply with that section because it did not supply the information specified in the form, use of which the section requires. The question in the case is whether the opinion as to values on which the Commissioner based the default assessment is correct; but it may be incorrect without destroying the Commissioner’s right to duty, as long as the value of the land is the figure I have mentioned, $272,800,000, or more.

The central provision, s. 56FH, uses the expressions "relevant acquisition" and "prescribed provisions". The former is defined by s. 56FM, whose terms it seems unnecessary to explain other than to say that here there was a "relevant acquisition" because all the shares in Riana were acquired, whereas s. 56M applies even where only a "majority interest", as defined, is acquired. The "prescribed provisions" are ss. 56FA to s. 56FO; see s. 56F. The question whether these provisions apply depends on the effect, in the circumstances, of s. 56L which makes the "prescribed provisions" apply to a corporation which fulfills two descriptions, set out in paras. (a) and (b) of s. 56FL(1). It is common ground that para. (a) is satisfied and the question is fulfilment of (b) which applies where the corporation is "a landholder within the meaning of subs. (2)".

Section 56FL(2) imposes two alternative tests and in the present case, it is agreed, the question is whether the test in the former is satisfied:

> "A corporation is a landholder for the purposes of the prescribed provisions if at the time of a relevant acquisition -
>
> (a) it is entitled to land in Queensland or it is entitled to land in Queensland as a co-owner, or both, and the full unencumbered value of the land or land in which it is a co-owner, or both, is not less than $1 000 000, and the full unencumbered value of all land to which the corporation is entitled, whether in Queensland or elsewhere is 80 per cent or more of the value of all property to which it is entitled, other than property directed to be excluded by subsection (4);

Here the land in question is that on which the Resort has been constructed and is land wholly in Queensland. The word "entitled" in the provision is given an extended meaning by s. 56FL(6), so as to include property of subsidiaries; it is common ground that here Riana was on 24 September 1988 entitled by reason of s. 56FL(6) to all the land I have mentioned. Further, the value of the "property directed to be excluded by subsection (4)" is not in dispute, so that the terms of s. 56FL require no discussion.

Facts in case stated

There are questions of principle involved in determining the relevant values, in particular the circumstances in which it is appropriate to treat goodwill associated with the site of a business as part of the land value; there are also factual issues. No facts have been found and the Commissioner's counsel says that under the Stamp Act the only relevant facts are those stated by the Commissioner in the case. A question arises as to whether assertions in or attached to the stated case are to be regarded as facts stated by the Commissioner. It was argued by counsel for the taxpayer that certain allegations in correspondence forming part of the case and emanating from the taxpayer's advisers should be treated as facts stated by the Commissioner, since the Commissioner had not disputed them.

I need not discuss the suitability of a case stated as a way of deciding the correct value of property; it must be evident that the procedure will not ordinarily suit such a dispute, as this case amply illustrates; see Francis v. Commissioner of Stamp Duties (N.S.W.) (1953) 91 C.L.R. 368 at 400. Under this procedure the Court has been held to be confined, at least prima facie, to the facts stated in the case: Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. Ltd (No. 1) (1913) 16 C.L.R. 572 at 622-624, Mack v. Commissioner of Stamp Duties (N.S.W.) (1920) 28 C.L.R. 373 at 381, The Queen v. Rigby

(1956) 100 C.L.R. 146 at 150, 151. But it is only facts stated which can possibly bind the Court; argument contained in the case does not do so, nor do reasons given, except insofar as they contain "some further express findings of fact in elaboration of the express statements in the case itself", Marshall v. Whittaker's Building Supply Co. (1963) 109 C.L.R. 210 at 217; see also Industrial Equity Ltd v. Commissioner for Corporate Affairs (Vic) (1989) 1 A.C.S.R. 153 at 157-159. Where there is doubt as to whether part of the content of the case is intended to be an explicit statement of fact, the tendency will be to resolve that doubt against its being intended to bind the Court, to minimise the unfairness which may ensue from the contrary approach: cf. the recommendations of the High Court as to construction of such provisions, in Commissioner of Stamps v. Telegraph Investment Co. Pty Ltd (1995) 70 A.L.J.R. 155 at 160E.

The allegations in the case stated including the voluminous documents annexed to it (which, the case says, form part of the case) are in a number of categories. First, there are arguments or contentions put forward by one side or the other. An example is annexure "J", a letter written by the Commissioner, in which he explained the calculations underlying an assessment foreshadowed by the letter. Then there are numerous assertions of fact, contained in correspondence, by the taxpayer's advisers; many are to be found in a valuation report by Jones Lang Wootton, annexure "I"; it says, to take an example, that the total nett lettable floor area of what is described as the retail village, being part of the Resort, excluding certain designated areas, is 10,118 sq. metres (p. 26). A third category consists in assertions as to the state of mind of the Commissioner; para. 7 of the case stated alleges that the Commissioner "formed the opinion that the full unencumbered value of the land as at 24 September 1988 was $294,651,864". And para. 28 says that, in determining that figure, the Commissioner was satisfied that he should not reduce it by the further amount contended for by the taxpayer, because of various matters which he set out and of which he said he was satisfied.

It is my opinion that none of these three categories of allegation binds the Court. Section 24 nowhere says that anything in the case binds the Court, nor does the section even say that it is to contain any assertions of fact. But the statute has as I have said been construed as entitling the Commissioner to state facts and, subject to some considerations discussed below, making the Commissioner's statements of facts binding on the Court. There is an important difference, for this purpose, between arguments, contentions and statements of opinion, on the one hand, and statements of objective fact on the other. In some circumstances the fact that the Commissioner holds a certain opinion or is satisfied of a particular matter may, prima facie, in itself justify an assessment; but that is not so here. As far as statements of fact in the correspondence from the taxpayer's side are concerned, it is argued that, being incorporated in the case, such statements are binding on the Court just as much as those which are set out in the main body of the case. But that is not the correct view, for the doctrine that statements of fact made by the Commissioner in the case are binding cannot apply to statements of fact made by other persons, unless the Commissioner adopts them as his own. By including the relevant correspondence in the case the Commissioner does not necessarily, and plainly does not in this case, adopt statements of fact contained in them as his own. Looked at in this way, the case stated, although 735 pages in length, contains little by way of statements of fact with respect to the matters truly in contention. I have already referred to one important statement of fact, namely the value of all the relevant property, namely $341M, but that is common ground.

But as to the matters debated before us, there are in essence only hypotheses and unresolved disputes. For example, the case sets out the way in which the sum of $46,348,136, being the difference between the $341M and the Commissioner's land value, is made up (para. 7). But all that is intended to be qualified by the opening words of the paragraph in which it appears: "In assessing conveyance duty chargeable on the Form Z the Commissioner formed the opinion that . . . " (emphasis added). Very properly, the Commissioner has refrained from "stating the taxpayer out of court" by setting out facts which would perhaps put an end to all possibility of dispute and the Commissioner does not contend that statements in the case of his opinion, on disputed matters, establish the facts about which the opinions are held.

The critical questions the Court is asked to answer are whether the Commissioner's assessment is right and if it is not, what the correct assessment is. It seems plain that the second question cannot be answered; the answer to it depends on finding facts. Neither side was able to explain by what process the Court could, using the facts in the case only, determine the correct assessment; it appeared, in the end, to be assumed that the Court would deal with the matter in a preliminary way, and then either send it back to the Commissioner or make an order having the effect that the factual issues would be tried and the assessment fixed by a judge. This procedural issue is further discussed, later in these reasons.

Approaches of parties to valuation

The competing approaches of the parties are as follows. The Commissioner has not attempted directly to value the land. He has begun with the total figure of $341M and taken from it the nett values of certain assets, not being realty, to arrive at land value. All the items in the Commissioner's list of non-realty items, totalling $46,348,136, are agreed and the largest single item is the value of management rights, $12.5M. The taxpayer argues that other sums should be deducted from the starting figure of $341M. The taxpayer does not, however, begin from the $341M and work down, as the Commissioner has; its approach has been to value the land and then to allocate the difference between the land value and the total of

$341M to various types of assets. The taxpayer contended that there were intangible assets valued at $79,280,000 which had not been taken into account in the Commissioner's approach.

In further analysing the difference between the parties, it is convenient to start with the land valuation on which the taxpayer relies, done by Jones Lang Wootton. That valuation, at the relevant date, was based on an "information memorandum prepared by Discovery Bay Developments Pty Ltd relating to proposed income cashflows and expenditure necessary to operate all components of the overall project". The valuers did not themselves purport to estimate the likely level of cashflows or expenditure, but started from the figures in the memorandum to which I have referred; it is not annexed to the valuation. They made some adjustments to those figures, the precise character of which is not stated.

It may be of some importance to understand how Jones Lang Wootton proceeded; they were said to have used a discounted cash flow method, but it is plain that no such method was consistently used. One thing which is clear, however, is that the figures arrived at depend on projections or assumptions of future returns, and that proposition will be illustrated.

The component described in the Jones Lang Wootton report (p. 69) as "Country Club, Recreation Club and Golf Courses" is, the report says, based on income and expense figures provided in the memorandum prepared by Discovery Bay Development; the figures in the memorandum have been adjusted in some way and Jones Lang Wootton say a capitalisation rate of 15% on future cash flows has been adopted. The report says: "Our valuation figures include an element of <u>goodwill</u> and also include all relevant plant, equipment, fixtures, fittings, etc" (emphasis added). Reference to the figures which support the valuation of this component, which totals $32M, shows that it assumes a stipulated income - obviously nett, not gross - in each of six years; the total is a little over $23M. To that are added membership joining fees projected for each of the six years, totalling about $9M. Capitalisation of the income flow at 15% gives a capital value of a little over $27M and, discounting the membership joining fees, the present value of those fees is a little under $6M; with an adjustment for completion costs, the total value comes as I have said to $32M. The report says that the valuation figures include an element of goodwill and also chattel values; these are taken into account in the sense that they contribute to the assumed returns on which the whole calculation is based. Whatever is of value in the assets producing these returns is included in the final figure of $32M.

Another component in the Jones Lang Wootton valuation is the Waterfront Tavern and Bar, valued at a million dollars. It is not really clear how this sum is arrived at, but the report explains (p. 75) that there have been adopted income and expense figures contained in the memorandum I have mentioned, as well as initial trading results. The report goes on to say that the tavern and bar "will also pay occupational rent to the retail village and therefore our valuation represents only the value of plant, equipment, fixtures, fittings and goodwill".

The Brewery and Beer Garden (p. 72), again, are said to be obliged to pay an occupational rent and, again, the valuation is said to represent only "plant, equipment, fixtures, fittings and goodwill". It is also stated that a capitalisation of 25% has been adopted. But this seems not to be reconcilable with the result arrived at; the valuation appears to be simply an approximation of the total expected income, over five years.

I do not propose to analyse the valuation further, other than to say that its largest element is the sum of $68M attributed to the value of the Hyatt Hotel, said to be based on discounting projected cash flows; the accompanying schedule shows clearly that the principal component of the calculation is expected nett profits.

It does not appear to me that the Jones Lang Wootton calculations necessarily adopt a consistent method, but one respect in which the various calculations which the valuation includes are consistent, is that each depends on assumptions about future returns. The operations of the resort have been divided up into component parts and attempts made, on bases which might or might not be sound, to estimate what profits will be gained from them in the future. Using the Jones Lang Wootton results, the taxpayer's approach is that the difference between the total of the Jones Lang Wootton valuation, namely $270M, which with certain adjustments gives a land value of about $244M, and the total value of $341M, is nearly $97M, a figure to which certain further adjustments of about $5M are made.

This leaves a gap of $91,780,000, which the taxpayer ascribes to intangibles. As I have already pointed out, it is common ground that $12.5M should be allowed for management rights, which is a component of this intangibles figure. The balance, $79,280,000, is split up by the taxpayer as follows -

Concept and design	$34M
Trade name and trade mark	$25M
Other	$20.28M

In defence of this approach, the taxpayer has made comments about the excellence of the concept and design of the Resort, the considerable sums expended on it and the advantages of the special State legislation applicable to the Resort. The figure for trade names and trade marks is based on assertions as to the costs of certain marketing and promotion activities. Under the heading "Other" are included accumulated tax losses and synergistic benefits.

It is, I have suggested, plain enough that the inclusion of all these assertions about the value of intangibles in documents annexed to the case does not require, or justify, their being treated as facts. Whether they are likely to ultimately be established is not a question on which extensive discussion is useful; but some comment on the issues is necessary.

It appears from what I have said above that the Commissioner has allowed nothing for goodwill and it may seem, on the face of it, that that is an extreme position. On the other hand, the taxpayer's approach counts goodwill twice. If there is valuable goodwill, its value consists in attracting business, producing profits; but the Jones Lang Wootton valuation is based on assumptions as to profits likely to be received. With respect to some components of the Jones Lang Wootton valuation, totalling $270M, the text of the valuation concedes that the goodwill is included; but the better view is that it is included in all the components. Turning, then, to the elements which are said to bridge the $79.28M gap referred to above, they plainly include goodwill items. As I have explained, the item "trade name and trade mark $25M" is essentially a summation of marketing and promotion costs.

It should further be noted that the largest of the three items listed above is $34M for concept and design. The allowance of $34M is sought to be justified on the basis of what might broadly be described as certain advantages which the businesses conducted at the Resort enjoy, of such a kind as to attract customers. Again, if these advantages, such as the excellence of the Resort design, are worth money, that should produce extra income; but the Jones Lang Wootton valuation is based on expected income and must then take the excellence of the concept and design into account.

Value of Goodwill Included in Land Value?

A question which arises is whether, if the company whose shares are sold owns land on which a business or businesses is or are conducted, goodwill should be treated as part of the land value. Suppose for example the company owns a business conducted on land and with physical assets which are worth $1M, but the business is worth $2M because of its valuable goodwill. On the Commissioner's argument, as I understand it, if the whole of the goodwill is local in the sense that it attaches to the site of the business, then for the purposes of the statute with which we are concerned the value of the land should be taken to be $2M including the $1M goodwill value. The taxpayer on the other hand would say that the Commissioner is not entitled to lump in the goodwill value with the value of the land. It should be added that one of the intangibles relied on by the taxpayer, accumulated tax losses, is plainly not goodwill and it is not suggested that it be treated as part of land value.

The question whether, when a business is conducted on a particular piece of land, the value of the goodwill of the business should be taken to be included in the value of the land on which it is conducted has arisen surprisingly often, in various contexts. It cannot be pretended that there is any simple principle to be derived from the cases, some of which are discussed below. But one point which seems clear is that what is called personal goodwill cannot possibly be included in land value. The authorities discriminate between local or site goodwill and personal goodwill, the former being that part of the goodwill of a business which is not dependent upon the characteristics of the person or persons conducting the business from time to time, and the latter is the rest of the goodwill. In <u>Federal Commissioner of Taxation v. Williamson</u> (1943) 67 C.L.R. 561 at 563, Rich J. said:

> "[Goodwill] is local to the extent to which the trade connection depends on the place in which the business is carried on, for example, where there is only one hotel in a place the connection may be for all practical purposes entirely local. It is personal to the extent to which it is the personality, ability and good reputation of the trader that attract the trade and not the place where it is carried on." (563)

There seems to be no good reason for holding in the present case that any goodwill other than local goodwill is, for the purposes of valuation, inseverable from the land; that is, if in the present case there is goodwill which can properly be characterised as personal, its value cannot be included in land value. A question may arise whether there can be any personal goodwill where, as in the present case, the land is sold at the relevant date and a new proprietor takes control. The taxpayer would say that at least where the employees and agents running the various businesses on the land in question continue to do so, it is artificial to treat the change of control as entirely destructive of personal goodwill; the Hyatt organisation, for example, presumably continued to run the hotel and any personal goodwill properly seen as related to the hotel would hardly be affected by the change of ownership of the buildings.

Commissioner contends that local goodwill is treated as attaching to the land and its value is simply part of land value. There are compulsory acquisition cases which support this approach. In Minister for Home and Territories v. Lazarus (1919) 26 C.L.R. 159, a compensation statute provided that the resumed owner was entitled to the value of land plus improvements. Lazarus had a hotel building on the acquired land and was entitled on resumption to the unimproved value of the land on a certain date and to the value of the improvements at the (later) acquisition date. The question which was asked of the High Court was at what date the value of the business and goodwill should be assessed, and that depended on the construction of the statute; but some remarks were made about the relationship between the goodwill and the land. Barton J. (at 163) said that "the loss of a goodwill must be practically identical with the loss of a business where the goodwill is the subject of compensation . . .". Counsel had argued that goodwill was included in the improved value, but Barton J. held (at 164) that it attached to the unimproved value. In the principal judgment it was said (at 166) that the value of a hotel "does not include the value of the business and goodwill", but then:

"If the goodwill of a business is personal only, it adds nothing to the value of the

> land. If it is attributable wholly or partly to the land, it *pro tanto* enhances its value, and that value is recoverable, not as goodwill *eo nomine* but as part of the value of the land".

Isaacs and Rich JJ. agreed with Barton J. that the value of local goodwill was to be added to the unimproved value of the land.

Although the views expressed in Lazarus are not said to depend upon any special rule applicable to compulsory acquisition cases, it appears that the treatment of goodwill in such cases depends on the "value to the owner" principle. In Commonwealth v. Reeve (1949) 78 C.L.R. 410, the question was the entitlement to compensation of tenants of premises who conducted a coffee lounge in them. The Commonwealth compulsorily acquired the building and the tenants were awarded a sum which took into account the profits which were being earned from the coffee lounge, the assessment including an allowance for goodwill. Latham C.J. pointed out at p. 418 that what was in issue was the value to the owner. Dixon J. remarked (at 424):

> "Early cases in the law of compensation establish that where premises were compulsorily acquired upon which the owner conducted a business, the consequent destruction or impairment of the goodwill of the business must be taken into account . . . where the goodwill was localized in the land taken the consequent destruction of the goodwill must be taken into account in assessing the value or purchase price of the interest acquired . . . "

Dixon J. followed the views expressed in Lazarus which I have just discussed. There are other authorities in this line, but it seems to me clear enough that for the purposes of assessing value on compulsory acquisition any local goodwill is included in land value.

I turn now to revenue cases. In The Rosehill Racecourse Company v. The Commissioner of Stamp Duties (N.S.W.) (1905) 3 C.L.R. 393, there was a conveyance of the freehold of a racecourse; the goodwill was dealt with by a separate agreement. The Commissioner argued that the conveyance of the land necessarily conveyed the goodwill also and that therefore its value should be included when assessing stamp duty on the conveyance of the freehold; that contention had been accepted in the Supreme Court of New South Wales.

Barton J., following English authority, held that the assessment could not stand on the ground that the goodwill being separable had been separated by the parties (402). O'Connor J. said (at 408):

> "There are cases in which it would be clear that the goodwill could not be separated from the land or premises. In a case of that sort the conveyance of the land must carry with it the goodwill. But there are other cases in which it is equally clear that the goodwill is separable from the land having an independent existence apart from the land, and is capable of being carried away from the land by the vendor."

O'Connor J. took the view that in the circumstances the goodwill was personal; the reason for this was that the critical element in the goodwill was a right described as "personal" - i.e. attaching to the owner of the racecourse and not the land. A recent income tax case, in which a similar problem was considered, is <u>Federal Commissioner of Taxation v. Krakos Investments Pty Ltd</u> (1996) 96 A.T.C. 4063; it seems enough to say that there a view resembling that of Barton J. in the <u>Rosehill</u> case was adopted.

An issue like that in the <u>Rosehill</u> case was considered in <u>Tooth and Co. Ltd v. The Commissioner of Stamp Duties</u> (1909) 9 S.R.N.S.W. 652. That concerned the sale of leasehold hotel premises and the question, as in the <u>Rosehill</u> case, was whether the transfer of the lease carried the goodwill with it. It was held by a majority that the major part of the goodwill was local and inseparable from the premises and that it passed with the transfer of the lease: see the judgments of Pring and Sly JJ.

Problems of this kind have been dealt with in some income tax cases. In Federal Commissioner of Taxation v. Williamson (above) the question was whether the purchaser of a chemist business was entitled to a deduction of a certain sum paid for goodwill. Rich J. cited the two stamp duty cases I have mentioned for these propositions:

> "To the extent to which the goodwill is local it is attached to and cannot be severed from the land on which the business is carried on . . . To the extent to which it is personal it is only accidentally associated with the land, and may be severed from it and dealt with separately . . . ".

The judge held that the payment for goodwill was a "premium in respect of land" and the judge held that this description was satisfied because there was a payment of a "special premium for goodwill which is nevertheless still regarded as attached to land". In Box v. The Commissioner of Taxation (1952) 86 C.L.R. 387, the question related to the sale of a bakery business. It was held in effect that the goodwill sold was not local goodwill but personal goodwill and therefore a conclusion opposite to that reached in Williamson's case ensued. Similar issues arising in other contexts were dealt with in Brown v. Potter [1965] Qd.R. 268 and in Duncan v. Rid (1976) 2 N.S.W.L.R. 105.

Of these cases I think that which is most directly helpful to the Commissioner's contention is Tooth & Co., which seems unequivocally (although by a majority) to be based on the view that the conveyance of a leasehold hotel necessarily carries with it that part of the goodwill which is "local and inseparable from the premises". It would seem not a far step to conclude that, for the purposes of the provisions with which we are concerned here, the value of the land must be taken to include the value of the local goodwill as opposed to personal goodwill.

The difference between the parties' contentions about this point may perhaps be illustrated by considering the hotel, part of the property in issue. If the taxpayer's contention is right then the value of the land on which the hotel stands, including the improvements, does not include that part which is attributable to goodwill, either local or personal. If the Commissioner is wholly right, then the value is simply the market value of the functioning hotel, including any amounts which might properly be attributable to either local or personal goodwill; as to personal goodwill, the Commissioner's contention must be rejected, as I have said.

The attraction of the Commissioner's contention, so far as it relates to local goodwill, is that it accords with commercial usage of language. Suppose the hotel were sold and temporarily closed down and all those persons who worked in or in relation to it dismissed. Personal goodwill would thus be destroyed, but there could still be substantial local goodwill, no doubt tending to diminish while the hotel stood closed; see on this point Lazarus (above) at p. 166, where the effect of destruction of a hotel by fire is considered. In that situation, there being no functioning business to be sold, I think the value of the hotel considered as realty would ordinarily be taken to include local goodwill.

The point may be further illustrated by assuming that a hotel is erected in some remote place, but one to which over time patrons have become increasingly inclined to resort. If local goodwill is to be excluded when valuing the hotel, as realty, that can only be done on the artificial basis that the public has not developed an inclination to visit it, that it stands alone and deserted. Then consider the sale of the freehold of a hotel which is being run by a lessee under a long lease. Its value would depend essentially upon the rentals being received and likely to be received in the future; but if local goodwill is not to be included in the value, then one would have to exclude from the rental, in making the necessary calculation, that part of it which is attributed to local goodwill.

The conclusion at which I arrive, then, is that the Commissioner's contention about local goodwill is correct and that this is to be regarded as an asset inseparably connected with the land, for present purposes.

The task of discriminating between the value of local goodwill, to be regarded as part of the value of the land, and that of personal goodwill, is not necessarily an easy one. But the principle or concept is clear enough; local goodwill can be exploited, i.e. taken advantage of, only at the site in question, whereas non-local or personal goodwill can be exploited elsewhere. As is said by Hill J. in Krakos (above) at 4071:

> "While there may be difficulties in law in dealing with a trade name independently of the business to which it is related . . . modern experience makes it clear that names may be turned into account by means other than assigning or leasing a business . . . no-one could doubt the enormous value which accrues to brand names (such as Coca Cola) or business names (such as McDonalds)."

The case discloses that the Commissioner has taken advice from the firm of Ernst & Young about some of the issues; much of that advice is based on the content of accounting standards or draft standards which reflect a, no doubt appropriately cautious approach, to including among the assets of a company estimates of the value of goodwill. Much of what is there stated cannot be of assistance in performing the task with which the Court is faced, namely dissecting out from the sum of $341M an estimate of the value of intangibles other than management rights (already conceded by the Commissioner) and local goodwill. For example, it is said at page 5 of Ernst & Young's analysis that in accordance with Exposure Draft 49, "accounting for identifiable intangible assets", " . . . it is necessary to establish that it is probable that the future benefits or service potential embodied in the identifiable intangible asset will eventuate and it possesses a cost or other value that can be measured reliably". The Court's position is that if it is satisfied that (for example) the name Sanctuary Cove had at the relevant date potential application to other projects than the Resort with which we are concerned, it must attach a value to that factor. Difficulty in assessing the proper amount there would undoubtedly be, and it could hardly be said that the value of such a factor could be "measured reliably". But the statute requires the Court to determine whether the Commissioner's assessment is correct and if it is not, what is the correct assessment; that can only be done by determining to what extent the figure of $341M properly represents value other than realty value. A dissection must be performed, whether or not it can be done strictly in accordance with accounting standards or draft standards. Further, our attention was drawn to the list of trademarks and trademark applications at pp. 678 and 679 of the record, as well as the copyright referred to at p. 679. The question whether non-realty value can be attributed to any of such items is not necessarily determined by simply asking whether there is a history of applying such intangibles to other sites than the Resort: see p. 20 of the Ernst & Young report. The question is rather whether a buyer and seller, in fixing the price, would in practice have been likely to attach value, and if so how much value, to the prospect of application of tradenames and the like off site.

The procedure which I favour, as appears below, would permit the calling of evidence before a single judge. Such evidence may merely consist of having witnesses or deponents swear to matters presently contained in the case, or could include further, different evidence. Partly for this reason, it seems to me not useful to discuss the issues further, except to make two points. One is that the letter from Price Waterhouse at p. 555 of the record assumes that tradenames and trademarks may properly be equated in value to amounts spent on promotion. The fallacy of that is obvious; apart from any other consideration, it ignores the fact that such promotional activity would in substantial part have added to local goodwill. A second point is that Ernst & Young (p. 22) thought the information available about accumulated losses and other relevant circumstances was insufficient to enable a proper value to be placed on tax losses; that is plainly correct.

It is necessary to consider further the procedural question touched on above.

Commissioner of Stamps (S.A.) v. Telegraph Investments Company Pty Limited

This case, reported in 184 C.L.R. 453, is the only High Court decision in which the problem of determining unresolved factual disputes, under stamp duty legislation similar to that in force in Queensland, has been dealt with. It is necessary to attempt to determine the effect of the case, so far as this appeal is concerned. The issue was the duty chargeable on a certain deed which had been assessed by the Commissioner, although the taxpayer had not requested any assessment. The significance of that, both sets of reasons given in the High Court agreed, was that s. 24(4) of the *South Australian Stamp Duties Act* 1923 allowed the taxpayer to require the Commissioner "to state and sign a case setting forth the question upon which his opinion was required and the assessment made by him" (emphasis added). The taxpayer's argument was that if there was no request for an opinion, there was no power to state a case. The language quoted is in substance the same as that in s. 24(1) of our Stamp Act. As here, the Commissioner had made an assessment without having been asked to do so, and the majority in the Telegraph Investment case held that the consequence was that the appeal provision of the South Australian Act had no application; so the procedure on appeal to the Supreme

Court was not prescribed by the Stamp Act and the Court was entitled to take evidence on disputed questions of fact. The minority view was somewhat similar, except that McHugh and Gummow JJ characterised the use of the stated case procedure as being, in the circumstances, an irregularity. On the face of it the High Court decision might seem to apply in the present case; in this, as in the Telegraph Investment case, the assessment was not the result of any request for the Commissioner's opinion and in this, as in the High Court case, the statute contemplated a statement of the case, setting forth the questions upon which the Commissioner's opinion was required. The Telegraph Investment case supports the view that if there is no such requirement then the procedure laid down by s. 24 does not apply.

But the Queensland Act was amended shortly prior to the date of the agreement which is in issue here, by Act No. 34 of 1988, s. 19; that deleted s. 22(1) of the Act, which provided in effect that the Commissioner might be required by any person to express his opinion with reference to any executed instrument, whether it was charged with duty, and if so, with what amount of duty. The amendment removed the only provision in the Act enabling people to require the Commissioner to express such an opinion; but no consequential amendment was made to s. 24, which continued, and still continues, to assume the existence of such a power. It was argued for the Commissioner, in the present case, in effect, that "was required" - in s. 24(1) means "was required by the Act" and reference was made to s. 22(4); but in its context "was required", having regard to the history of the legislation, must be a reference to a requirement made by the taxpayer.

In the Telegraph Investment case, the reasoning the High Court used led to the conclusion that the procedure prescribed by s. 24 of the South Australian Act did not apply, because the taxpayers had not availed themselves of the power to require the Commissioner to state his opinion. A similar line of reasoning in the present case would leave s. 24 of our Act, read quite literally, with no operation whatever; if our s. 24 is confined to instances in which the Commissioner has been required to state his opinion under the Act, it will have no possible application, for there is no power so to require him.

It appears to me to follow that, in contrast to the section under consideration in the Telegraph Investment case, here s. 24 should be held to apply to any and all of the Commissioner's assessments and the reference in the section to the case "setting forth the question or questions upon which [the Commissioner's] opinion was required" must be treated as surplusage. This approach has its difficulties, one of which is that, so truncated, all that s. 24(1) obliges the Commissioner to do is to state and sign a case setting forth his assessment; but it appears to me that the construction adopted in the Telegraph Investment case should not be applied to our Act.

This is not to say that the High Court decision is irrelevant to the present case. The majority judgment is authority for the view that one should attempt to avoid a construction of s. 24 which would "preclude the taxpayer from placing disputed matters before the court" or "deny taxpayers access to the court for the proper determination of their rights". In the judgment of McHugh and Gummow JJ, doubt is cast upon the correctness of the view stated, in particular, in Mack v. Commissioner of Stamp Duties (N.S.W) (above), that the facts stated in the case are to be taken as the ultimate facts and the Court cannot draw inferences (482, 484). Further, McHugh and Gummow JJ emphasise that "unmistakable and unambiguous language" is necessary to establish an incontestable tax, being one under which the taxpayer "is denied the right to resist an assessment by proving in the courts that the criteria of liability have not been satisfied" (466, 484). Having regard to these expressions of view, it is not easy to see how the doctrine, nowhere to be found expressed in s. 24, that the taxpayer may neither contest nor seek to supplement what the Commissioner states as facts, can survive; so far from there being in the section an employment of "unmistakable and unambiguous language" to achieve that result, the section says nothing whatever on the subject of setting out facts, let alone the possibility of contesting what is set out. Further, the majority judgment, insofar as it requires the adoption of a construction which would not "preclude the taxpayer from placing disputed matters before the Court," points in the same direction.

The view that one should read into s. 24, as necessarily implicit, that any facts the Commissioner decides to state are, whether in fact correct or not, made incontestable by that section, cannot be reconciled with the principles of construction adopted in the Telegraph Investment case. Were it necessary to decide the point, there would be much to be said for the conclusion that Queensland decisions on s. 24 inconsistent with the approach taken in the Telegraph Investment case should be treated as wrong.

I have noted that a majority of the Full Court in O'Sullivan v. Commissioner of Stamp Duties [1984] 1 Qd.R. 212, even before the Telegraph Investment case, took a view which would allow this Court to determine facts in a s. 24 appeal:

> "The argument is that the form of appeal allowed . . . does not admit of determination of disputed facts or values. It seems to me that the answer to the latter problem is that the procedure should not be allowed to govern the substantive right of appeal and a stated case may be used for determination of facts which may be necessary for the Full Court to enable it to decide the relevant issues." per Matthews J. at 215, and see per Kelly J. at 218.

Although this expression of view was obiter, the Telegraph Investment case supports its correctness. But Mr Gotterson Q.C., who led for the taxpayer, argued that a provision of the Supreme Court of Queensland Act 1991 expressly permits the remission of this case to the Trial Division for the determination of facts. Section 68(3) of that Act provides:

> "If a proceeding is pending before the Court of Appeal, the Court of Appeal may, on application by a party or of its own motion, order that the whole or a part of the proceedings be remitted to the Trial Division for determination (by trial or otherwise) of the proceeding or of any question of fact or law arising in the proceeding".

The submission was not accepted by Mr Dorney Q.C., who led for the Commissioner; he contended that on its proper construction the section does not apply to appeals of the present kind. The reason for this implicit limitation did not, with respect, clearly emerge; on its face the section is perfectly general and applies to any proceeding of whatever kind pending before the Court of Appeal. If s. 68(3) is to be held not to permit the whole or part of this proceeding to be remitted to the Trial Division for the determination of questions arising in the proceeding, that can only be because insofar as the questions are factual, they are not ones "arising in the proceeding". That is, the contention might be advanced that s. 68(3) does not apply because the Court is implicitly prohibited by s. 24 from determining any factual question - so no such questions arise. The argument faces a number of difficulties. The first is that just alluded to, that there is Supreme Court authority in favour of the view that in matters of this kind the Court can determine facts. A second is that s. 24 expressly requires this Court to determine what is the correct assessment, if of opinion that the Commissioner is wrong, and it can only carry out that duty, in the present case, by determining factual questions. The third and most potent is that so narrow a view would be inconsistent with the approach required by the Telegraph Investment case, namely to adopt a construction of the relevant provisions which would not prevent a taxpayer from obtaining a proper determination of its rights.

An alternative argument put forward by Mr Dorney was that the discretion given by s. 68(3) of the *Supreme Court of Queensland Act* 1991 should not be exercised so as to remit the whole or any part of a matter to the Trial Division because the preferable course, he said, is to remit the case to the Commissioner. I put aside as not requiring decision the question whether there is any power to do so; s. 24 does not expressly permit that course, nor did Mr Dorney refer us to any other statutory provision conferring the requisite power. Assuming that the matter may, under s. 24, be sent back to the Commissioner for reconsideration of his assessment, one must consider the position which is likely to arise if the Commissioner adheres to his assessment. It is likely that resolution of the dispute between the parties will then be beset by the very same difficulties referred to above: unless the Commissioner purports to state facts which lead inexorably to a view that his assessment is correct, there will remain factual disputes, unresolved. Another possibility is that if the matter is remitted to the Commissioner he will waive the assessment or amend it; but if the Commissioner has power to take these courses, he may take them whether or not the matter is remitted to him.

Conclusions

It appears improbable that the Commissioner has reached a right conclusion as to the value of the land, for he has treated all goodwill as attached to the land; further, it perhaps seems unlikely that it will turn out that the accumulated tax losses are worth nothing. However, accurate conclusions cannot be reached on these issues for the reasons that the case stated includes no facts, with respect to the contested questions, but merely assertions and arguments. As I have explained, I reject the submission on behalf of the taxpayer that one should take all assertions of fact in the documents in the case, made on its behalf and not specifically rebutted by the Commissioner, as having been stated by the Commissioner.

One of the questions asked, (a)(i), raises no contentious issue; I would answer that question but otherwise remit the matter to the Trial Division for determination by trial; as the case is one in which the Court may reasonably require independent advice, I would make a special order to facilitate that.

The orders I propose are:

1. Question (a)(i) is answered: Yes.
2. The appeal is otherwise remitted to the Trial Division for determination by trial.
3. Such directions may be given in the Trial Division as are necessary for the proper and expeditious determination of the appeal, including but not limited to an order that an expert be appointed to advise the Court on any issue or issues arising, on such terms as to costs and otherwise as the Court thinks fit.
4. Costs of the proceedings in this Court to be costs in the cause as determined in the further proceedings in the Trial Division.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 279 of 1995

Brisbane

Before Macrossan CJ
Pincus JA
Williams J

[EIE Ocean BV v. Commissioner of Stamp Duties]

IN THE MATTER of:
The Stamp Act 1894-1990

- and -

An appeal by EIE Ocean BV against an Assessment of Stamp Duty by the Commissioner of Stamp Duties on a Share Sale Agreement dated 24 September 1988 between Enallage Pty Ltd as Transferor and EIE Ocean BV as Transferee

BETWEEN:

E.I.E. OCEAN B.V.

Appellant

AND:

COMMISSIONER OF STAMP DUTIES

Respondent

CASE STATED PURSUANT TO SECTION 24
OF THE *STAMP ACT* 1894

REASONS FOR JUDGMENT - WILLIAMS J

Judgment delivered 17 December 1996

In his reasons for judgment Pincus JA has set out the circumstances in which this Case Stated pursuant to s.24 of the Stamp Act 1894-1990 has come before the court. Except where it is necessary in order to make my reasoning clear I will not refer to those matters.

Pincus JA has commented on the unsuitability of the Case Stated procedure to resolve disputes of the kind raised here. What he has said merely adds to the weight of judicial criticism of that procedure in recent years. In days when the only question was as to the duty payable on the face of a particular document there was probably no inadequacy with the Case Stated procedure; the document itself was before the court and generally no other information was required. But given the complexity of modern stamp duty legislation, particularly when transactions rather than documents are being assessed to duty, it is no longer appropriate to ask the court to determine an appeal against an assessment of duty in this way.

It has now been recognised that findings of fact made by the Commissioner preliminary to the making of an assessment may be reviewed pursuant to the provisions of the Judicial Review Act 1991, but that does not produce a satisfactory result in all instances (<u>Westpac Banking Corporation v. Commissioner of Stamp Duties</u> (1994) 1 Qd. R. 99).

The fact that the legislature has not responded to judicial criticisms of the procedure is not without significance. Clearly the legislation provides for an appeal against an assessment; the Act does not provide that the assessment of the Commissioner is conclusive so that it cannot be challenged in the court. The taxpayer is given a right of appeal by s.24, and that section expressly requires the court to assess the duty with which the document or transaction is chargeable. Particularly where the court concludes that there is some error in the assessment made by the Commissioner, the court must, albeit impliedly, have the power to do all that is necessary in order for it to assess the duty chargeable. This is a matter to which I will return later.

The relevant Share Sale Agreement dated 24 September 1988 was lodged for assessment of duty, and the assessment of the Commissioner on 18 December 1990 in the sum of $127,552.20 was paid by EIE Ocean BV ("EIEO") and that assessment is not contested in these proceedings. When that Agreement was lodged the solicitors acting for the taxpayer delivered to the Commissioner a letter dated 24 October 1988 in which the view was expressed that once relevant land valuations were finalised Riana Investments Pty Limited ("Riana") would not be a landholder for purposes of s.56FL(2) of the Stamp Act; but to protect the taxpayer's position, if the valuations should establish the contrary, a Form Z under the Stamp Act was lodged noting that the land component was "subject to valuation".

So far as the Case Stated contains matters of fact it can be said that subsequently the Commissioner pursuant to s.22A(2) of the Stamp Act altered that Form Z by inserting $294,651,864 as the value of land to which Riana was entitled. Thereafter the Commissioner issued a Default Assessment dated 30 May 1991 under s.22A(2) of the Stamp Act showing $11,046,671 as the duty payable. It is that default assessment which is challenged on this appeal.

Before discussing the merits of the appeal it is desirable to refer in some little detail to certain provisions of the Stamp Act as at the material time. Section 22 is the basic provision providing for assessment of duty by the Commissioner. Where an instrument comes into his possession he may require such evidence as he considers necessary to show to his satisfaction whether all facts and circumstances affecting the liability of the instrument to duty are fully and truly set out therein. Subsection (2) is then in these terms:

> "Where the Commissioner is of the opinion that an instrument -
>
> (a) is not chargeable with any duty - it is to be stamped with a particular stamp denoting that it is not chargeable with duty;
>
> (b) is chargeable with duty - the Commissioner is to assess the duty with which, in the Commissioner's opinion, it is chargeable."

Then the Commissioner is empowered by s.22A to make default assessments of duty; for present purposes subsections 1 and 2 are relevant and provide as follows:

> "(1) Where a person fails to deliver or lodge, as and when the person is required to do so by or under this Act, the statement, return or other document on which duty is chargeable under this Act the Commissioner may assess the duty which in the Commissioner's opinion ought to be charged on the statement, return or other document that has not been delivered to or lodged with the Commissioner, as if it had been delivered to or lodged with the Commissioner.
>
> (2) Where the Commissioner is not satisfied with a statement, return or other document delivered to or lodge with the Commissioner and on which duty is chargeable under this Act, the Commissioner may -
>
> (a) alter the statement, return or other document so that, in the Commissioner's opinion, it satisfies the requirement of this Act; and
>
> (b) assess the duty which in the Commissioner's opinion is chargeable under this Act on the statement, return or other document (altered by the Commissioner pursuant to paragraph (a)) with which the Commissioner was not satisfied."

I also refer to, without quoting, s.23 which empowers the Commissioner to require information necessary for the purpose of determining the amount of stamp duty payable pursuant to the Act. Finally reference need be made to s.56FC which, so far as is relevant, provides:

> "(1) The Commissioner may -
>
> (a) require a person who is required to lodge a statement under s.56FH, 56FI or 56FJ to furnish the Commissioner with a further statement in a form approved by the Commissioner concerning the full unencumbered value of any land, or such evidence of that value as the Commissioner considers appropriate; and
>
> (b) assess duty having regard to the evidence of value referred to in paragraph (a).
>
> ...
>
> (3) Where the Commissioner is not satisfied with evidence of value furnished under subsection (1) ... the Commissioner may -
>
> (a) cause a valuation of the property to be made by some person appointed by the Commissioner; or
>
> (b) accept a valuation of the property tendered by or on behalf of any party;
>
> and for the purpose of assessing duty payable or determining any liability to prepare a statement under this part, the Commissioner may have regard to that valuation."

What the Case Stated asserts is that the Commissioner acted under s.22A. On 30 May 1991 he had "formed the opinion that the full unencumbered value of the land as at 24 September 1988 was $294,651,864" (paragraph 7 of the Case) and altered the schedule to Form Z by inserting that figure in the relevant schedule. On that basis the default assessment was issued. It is now necessary to look at the Case Stated in order to see what were the facts on which the Commissioner acted in arriving at that opinion. The Case Stated does not make it clear that the Commissioner required the taxpayer to furnish a valuation pursuant to s.56FC(1), but in fact in November 1988 the taxpayer furnished a valuation report by Jones Lang Wootton. It is clear that between then and May 1991 the taxpayer furnished the Commissioner with other information relevant to the assessment of duty. During that period the Commissioner in March 1990 advised the taxpayer "of his view that goodwill generated from the development, promotion and marketing of the Sanctuary Cove Resort attached to the Resort could not be separated from the land upon which the business of the Resort had been carried on." (Case para 17) That contention was the subject of further material lodged on the taxpayer's behalf with the Commissioner.

That brings one to paragraphs 26, 27 and 28 of the Case which are of critical importance:-

> "26. The Commissioner did not accept the contentions made in those submissions of EIEO, its solicitors and agents, in respect of the sum of $79,280,000 and concerning the asset matters, and instructed Messrs Ernst and Young, by letter dated 20 May 1991, to undertake an expert review of the issues which the submissions raised.
>
> 27. After further consideration of the issues and after discussions with Ernst and Young of the conclusions which were later contained in their written report of 5 July 1991 ... the Commissioner issued to EIEO the Notice of Default Assessment dated 30 May 1991 ... on or about 27 June 1991 under s.22A of the Stamp Act.
>
> 28. In determining that the full unencumbered value of the land was $294,651,864 and in determining the assessment of duty chargeable on the Form Z, the Commissioner was satisfied that he should not reduce the full unencumbered value of the land for assessment purposes by a further amount of $79,280,000 as contended for by EIEO because ..."

The Case Stated does not say so, but it would appear that the Commissioner purported to act under s.56FC (3) in seeking advice from Ernst and Young. The instructions contained in the letter of 20 May 1991 are not included in the annexures to the Case Stated, but the report of Ernst and Young of 5 July 1991 commences by saying: "We refer to your letter of 20 May 1991 and our subsequent discussions with Mr Graham Tregenza. You have requested Ernst and Young undertake a review of the issues associated with the value attributed to the management rights, intellectual property and goodwill of the Sanctuary Cove Resort in a report by Price Waterhouse dated 7 January 1991."

Neither the court nor the taxpayer are aware of the substance of discussions between the Commissioner and Ernst and Young referred to in paragraph 27 of the Case Stated; it was after those discussions that the default assessment was issued. What is known, because it is annexed to the Case Stated, is that when Ernst and Young provided their report of 5 July 1991 the following critical conclusions were expressed:

> "... we are unable to state that $79.28 million is properly attributable to intangible assets due to the existence of two different real estate valuations for Sanctuary Cove at acquisition date. However, we consider that any amount paid in excess of the fair value of net assets acquired (including identifiable intangible assets) is attributable to unidentifiable intangible assets) or residual goodwill). We consider that the value of intangible assets such as the CDTT is already included in the real estate valuations of Sanctuary Cove.
>
> There may be a value attributable to the CDTT in relation to future economic benefits from licensing arrangements but there is no financial information available in this regard nor any indication that such additional revenue sources are not already included in JLW's valuation. We note that there may be a value of between $Nil and $13.944 million included in the above amount attributable to accumulated tax losses but there is insufficient information available to form a precise view as to value." (CDTT is a reference to Concept, Design, Tradename and Trademark)

A major concern is whether or not the Commissioner has complied with s.56FC(3)(a) of the Act. It seems tolerably clear that Ernst and Young did not make a valuation of the property in question; it cannot be said that the Commissioner caused or required them to make such a valuation. Rather they have given their views on certain issues raised in the material furnished on behalf of the taxpayer. They concluded that certain deductions were not justified and apparently the Commissioner accepted their reasoning. But finding that certain deductions should not be made does not support a valuation of $294,651,864 for the land in question. Ernst and Young do not in the report find the land to be so valued.

It cannot be said in my view that in forming the opinion that the full unencumbered value of the relevant land as at 24 September 1988 was $294,651,864 the Commissioner acted under s.56FC(3). Whilst that provision says that he "may have regard to that valuation" it would appear that Ernst and Young did not provide a "valuation". Whilst it is easy to say that a valuation in circumstances such as this can be broken up into compartments and a valuation could be limited to a specific component thereof, it is nevertheless of critical importance that the taxpayer knows the precise basis on which the Commissioner is acting so that steps can be taken to challenge findings made or opinions expressed by him if necessary.

One agreed fact is that the total consideration for the Share Sale Agreement was $341 million. The Commissioner has worked back from that in the sense that he has asked himself the question what amounts can be deducted as being the values of other property the subject of the transaction. He has not directly addressed the question what is the value of the relevant land component. Clearly, at least in theory, the

Commissioner's approach could result in a value being attributed to the land which was totally insupportable if the value thereof was assessed according to one of the more traditional methods. More importantly he has not, as noted, complied with s.56FC(3) of the Act.

That would be a sufficient basis, in my view, for this court concluding that the Commissioner's opinion and assessment based thereon cannot be accepted. That conclusion can clearly be reached if one excludes from the 700 odd pages of what is said to constitute the Case Stated the evidentiary and argumentative material and limits consideration to "ultimate fact": Westpac Banking Corporation v. The Commissioner of Stamp Duties (1994) 1 Qd. R. 99 at 103.

If one adopts a strict approach to what constitutes the Case Stated and decides the matter thereon, it may not in my respectful view be possible to analyse some of the factual matters in depth as Pincus JA has done. Certainly I agree with his Honour's reasoning that the Commissioner has demonstrably, if one has regard to all the material annexed to the Case Stated, erred in concluding that all goodwill must attach to the land. Given the fact that the Commissioner has included all of that material in the Case Stated it is certainly not unfair to have recourse to it in order to confirm the conclusion that his assessment cannot be upheld. In the circumstances it is not necessary to say more on that.

Having found that the assessment of the Commissioner cannot stand this court must determine the duty with which the transaction is chargeable. It is necessary now to return to the court's powers when dealing with a Case Stated pursuant to s.24 of the Act. When a matter comes before the court strictly on a Case Stated procedure the court is limited to the facts as stated therein. It may well be (see, for example, the discussion of the issue in O'Sullivan v. Commissioner of Stamp Duties (1984) 1 Qd. R. 212 and Westpac Banking Corporation v. The Commissioner of Stamp Duties (1994) 1 Qd. R. 99) that in determining whether the assessment of the Commissioner is correct the court should only have regard to ultimate facts as in the Case Stated. But once the position is reached where the court says that the Commissioner's assessment cannot stand, different considerations must apply. The court is obliged by the statute to assess the correct amount of duty. Once that stage is reached the statute obliges the court to determine what is the correct amount of duty, and that must, at least impliedly, mean that the court must investigate the transaction, make findings of fact, and assess duty.

The legislation gives a right of appeal to the taxpayer and entitles the taxpayer to have the court assess the duty if the Commissioner's assessment is found to be wrong in law. As the legislature has not seen fit to respond to the court's criticisms of the suitability of doing that given the procedure provided for by s.24, the court must of itself determine what is the most appropriate procedure to adopt in order to give effect to the taxpayer's rights. If the court was merely to hold that it did not have the necessary machinery to make such an assessment that would be depriving the taxpayer of the statutory right to have the court determine the proper amount of duty payable where the Commissioner's assessment was shown to be erroneous.

The legislation under consideration by the High Court in Commissioner of Stamps v. Telegraph Investment Co Pty Ltd (1995) 184 CLR 453 was materially different from the Queensland legislation, but the philosophy underlying the reasoning is relevant for present purposes. The position in that case was different because the legislation gave a right of appeal which was instituted by filing a notice of appeal with the court. Thereafter the Commissioner was required to state and sign a case for the purpose of the appeal (at 458-9). The ratio of the case was clearly that the provisions relating to the Case Stated could not detract from the basic right of appeal to the court. Here there is no separate right of appeal as such, there is only an appeal by way of Case Stated; the proceedings in this court are initiated by the Case Stated.

But, adapting the reasoning of the High Court, clear and unambiguous words would be required if the taxpayer was to be denied the right, conferred by s.24, to have the court determine the proper amount of duty payable. In my view there is nothing in the statute which clearly prevents the court from doing all that is necessary to arrive at the proper assessment of duty. This court can therefore have recourse to its general and inherent powers in determining how disputed issues relevant to the proper assessment of duty should be resolved.

Clearly it is entirely inappropriate to have three judges sit on a hearing to determine facts, some of which would clearly be disputed, necessary to be made in order to determine the value of the subject land for purposes of assessing duty. In those circumstances s.68(3) of the Supreme Court of Queensland Act 1991 affords a reasonable solution. This court may of its own motion order that the relevant questions be remitted to the Trial Division for determination.

Before concluding I should refer to one minor matter on which, with respect, I have come to a conclusion contrary to that reached by Pincus JA. The 1988 amendment to the Stamp Act deleted s.22(1) as it stood prior to that time. It had provided that the Commissioner might be required by any person to express his opinion with reference to any executed instrument, whether it was charged with duty, and if so, with what amount of duty. On the deletion of that provision there was no longer any such requirement on the Commissioner. But s.24 was not relevantly amended when that provision was deleted. Subsection (1B) requires the "Commissioner to state and sign a case setting out the questions upon which the Commissioner's opinion was required". It was argued for the Commissioner that since 1988 that must mean "was required by the Act". I agree with that interpretation. Whenever the Commissioner makes an assessment it must be said he was "required" to do so for purposes of s.24(1B). A somewhat similar situation was considered by the High Court in the Telegraph Investment case. The court there recognised that "the effect of the amending Act may be to alter the meaning which remaining provisions of the amended Act bore before the amendment" (184 CLR at 463). In other words the previous construction of a section does not survive an amendment if, reading the amended statute as a whole, the provision should be given another construction. That is the position here in my view.

I agree with the orders proposed by Pincus JA.