

IN THE COURT OF APPEAL

99.328

SUPREME COURT OF QUEENSLAND

Appeal No. 9387 of 1998

Brisbane

[Road Aust P/L v CSD]

BETWEEN:

ROAD AUSTRALIA PTY LTD
ACN 075 273 004

Appellant

AND:

COMMISSIONER OF STAMP DUTIES

Respondent

CASE STATED BY THE COMMISSIONER OF STAMP DUTIES
PURSUANT TO S 24 OF THE *STAMP ACT* 1894

McMurdo P
Pincus JA
Chesterman J

Judgment delivered 20 August 1999

Judgment of the Court

(1) APPEAL ALLOWED

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(2) QUESTION (A) IS ANSWERED "NO" AND QUESTION (F) IS ANSWERED "BY THE COMMISSIONER".

(3) THE DUTY PAID IN CONFORMITY WITH THE COMMISSIONER'S ASSESSMENT IS ORDERED TO BE REPAID TO THE APPELLANT.

CATCHWORDS: EQUITY - GENERAL PRINCIPLES - EQUITABLE ESTATES AND INTERESTS - GENERALLY - NATURE OF EQUITABLE ESTATES AND INTERESTS - whether full beneficial ownership is vested in a purchaser under an executory contract for the sale of land

EQUITY - TRUSTS AND TRUSTEES - CLASSIFICATION OF TRUSTS IN GENERAL - IMPLIED TRUSTS - CONSTRUCTIVE TRUSTS-INDEPENDENT OF INTENTION - GENERAL PRINCIPLES - nature of equitable relationship which arises between vendor and purchaser under an executory contract for the sale of land - whether vendor of land is between contract and conveyance a constructive trustee of the land for the purchaser

REAL PROPERTY - GENERAL PRINCIPLES - INCIDENTS OF ESTATES AND INTERESTS IN LAND - OWNERSHIP - meaning of "estate" - whether full beneficial ownership is vested in a purchaser under an executory contract for the sale of land

TAXES AND DUTIES - STAMP DUTIES - WHAT TRANSACTIONS OR INSTRUMENTS ARE LIABLE - CONVEYANCE OR TRANSFER ON SALE - QUEENSLAND - application of "land rich" company provisions in *Stamp Act* 1894 - whether company in which shares transferred to appellant a "land-holder" for purposes of s 56FL - whether company "entitled to land" -whether "entitled to land" includes an interest in land less than full ownership - meaning of "land" - meaning of "estate"

TAXES AND DUTIES - STAMP DUTIES - APPEAL, CASE STATED, ETC - appellant purchased all the share capital in a company holding an incomplete contract for the sale of land - validity of assessment for stamp duty under prescribed provisions of *Stamp Act* 1894

Bahr v Nicolay [No 2] (1988) 164 CLR 604

Chang v The Registrar of Titles (1976) 137 CLR 177

Hewett v Court (1982) 149 CLR 639

Kern Corporation Ltd v Walter Reid Trading Pty Ltd (1987) 163 CLR 164

KLDE Pty Ltd v Commissioner of Stamp Duties (Q) (1984) 155 CLR 288

Mertune Pty Ltd v Chief Commissioner of Stamp Duties (1994) 35 NSWLR 636

Saunders v Vautier [1841] Cr & Ph; 49 ER 282

Soneco (No 77) Pty Ltd v Silvia (1989) 24 FCR 105

Stern v McArthur (1988) 165 CLR 489
The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13
Tokyo City Pty Ltd v Commissioner of State Taxation (WA)
(1997) 98 ATC 4036

Stamp Act 1894, ss 56FA(1), 56FL

Counsel: Mr F L Harrison QC for the appellant
Mr K D Dorney QC for the respondent

Solicitors: Hopgood & Ganim for the appellant
Crown Solicitor for the respondent

Hearing Date: 21 May 1999

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 9387 of 1998

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Before McMurdo P
Pincus JA
Chesterman J

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BETWEEN:

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REASONS FOR JUDGMENT - THE COURT

Judgment delivered 20 August 1999

1 This is an appeal against an assessment of stamp duty. The assessment was made on a document called a Form Z, lodged on 18 December 1997, and was in the sum of \$62,850. On 17 February 1997, Caulfield Pastoral Pty Ltd (Caulfield) executed a

contract for the purchase of land and paid a deposit of \$50,000. The price was \$1.75M. The appellant, 10 days later, the contract for sale of land being incomplete, bought all the share capital of Caulfield. The assessment was made on the basis that when the appellant bought the shares in Caulfield, Caulfield was within the meaning of certain provisions of the *Stamp Act* 1894 to which we shall refer "entitled to land which it had agreed to buy" and further that the "full unencumbered value" of the land in question was \$1.75M. This it was argued by the Commissioner, flowed from the language of the relevant part of the Act. But if it is correct, then full duty would be charged twice in relation to one sale of land - once at the stage which the Court is presently considering and again when the land was actually conveyed. This seems an unlikely outcome if the legislation which is in question was intended, as it seems to have been, merely to prevent evasion of duty.

- 2 The provisions in question are called in s 56F the "prescribed provisions" and they are ss 56FA - 56FO. Their effect is, in brief, to make stamp duty payable on a transfer of shares as if it were a transfer of land. The purpose of doing so is to prevent people avoiding conveyance duty by adopting the device of transferring the shares in the company which owns a piece of land, rather than transferring the land itself; there is a substantial difference between the rates of duty applicable. Of course, a transfer of shares in a company which owns land may come about in the ordinary course of commerce, not by way of a duty evasion device. The assumption which underlies the drafting of the prescribed provisions is that a transfer of shares in a company all or nearly all of whose assets consist of land is likely to be one done for the purposes of evading conveyance duty.

- 3 The scheme of the prescribed provisions is, broadly, as follows; the sketch of the

operation of the Act to be given leaves out much by way of detail and refinement. Under s 56FL a company is a landholder if it is not listed on the stock exchange and it is "entitled to land" in Queensland, valued at \$1M or more and if the value of all the land to which it is entitled is at least 80 per cent of the value of all its property. Under s 56FM a "relevant acquisition" is one by which a majority interest in a company is acquired. A person who makes a "relevant acquisition" of a "landholder" as defined in s 56FL has to lodge a statement in Form Z and that is charged with duty under s 56FK as if it were a conveyance of the company's land. The basic question will often be, as it is in the present case, whether the company whose shares are transferred is a "landholder" as defined in s 56FL.

4 In the present case the question whether Caulfield, the company whose shares were transferred, was then a "landholder" depends on whether the value of its interest in the land it had agreed to buy is taken to be \$1.75M, the whole value of the land, or merely the value of the deposit which Caulfield had paid. But the appellant, if it loses on that point, asks that the appeal be determined in its favour on the basis that a proper reading of the charging provisions in s 56FK shows that duty is chargeable only on the value of the deposit paid, \$50,000; we have found it unnecessary to discuss the latter argument.

5 We have been referred to authorities in the High Court and elsewhere as being relevant to the construction of the prescribed provisions. Application of these authorities is difficult, for none of them deals with a statute in identical terms and a question arises whether the differences in the language used are significant. We have also been referred to amendments to the prescribed provisions which have been made since the events in question occurred; it is said that these throw light upon the intention the legislature had when it enacted the prescribed provisions in 1988.

6 It appears to us right, in view of the obscurity of meaning of the prescribed provisions, to attempt to ascertain that meaning, in the first place, without the benefit of such assistance as may be provided by the materials just referred to. An exception to that approach, however, is that analysis of the High Court decision relied on, *K.L.D.E. Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288, and related authorities, is necessary.

7 The basic question is how the prescribed provisions apply where the company whose shares are being transferred, which we shall call "the company sold", has less than full ownership of the relevant land - for example as a co-owner, owner of a leasehold interest or of a security interest. We shall call such interests "partial interests" and ownership in the ordinary sense "full ownership". To explain the Commissioner's position in those terms, it is that although the interest in the land the company sold might have been a partial interest for some purposes, it must be treated as full ownership for the purposes of these prescribed provisions.

8 Indications can be found in the prescribed provisions throwing light on the question whether the intention was to catch sales of companies having only partial interests in land. The definition of "land" in s 56FA(1) makes land include "any estate in land"; it does not include "the interest of a mortgagee in land". When, for example, s 56FL speaks of entitlement to land the full unencumbered value of which is not less than \$1M, it is to be taken, prima facie, as referring to entitlement to an estate in land. The word "estate" has two meanings in law, one narrow and the other broad. The narrow meaning is -

"[T]he fee simple of land and any of the various interests into which it could formerly be divided at law, whether for life, or for a term of years or otherwise";

and the broad meaning is -

"[A]ny property whatever": see "Halsbury's Laws of England", 4th ed, vol 39(2), para 2.

Under the narrow meaning, the only interests caught are the fee simple - ie full ownership - and divisions, by reference to time, of that concept. For example, under the narrow meaning a leasehold interest would be an estate but a charge on land would not be. Under the broad meaning, any proprietary interest in land would be treated as an estate. It will be noted that the exclusion of a mortgagee's interest from the statutory definition of "land" suggests that the reference to "estate" in the definition was intended to convey the broader meaning.

9 One thing which is clear is that entitlement to land for the purposes of the definition of "landholder" in s 56FL includes equitable interests; the word "entitled" is defined in s 56FA(1) to mean "beneficially entitled". In the present case, the appellant and the Commissioner agree that Caulfield, the company sold, had a beneficial entitlement by virtue of its having entered into a contract to buy land and paid a deposit; the difference between the two views of the matter is that the Commissioner says the beneficial entitlement is or is deemed by the law to be full ownership, whereas on the appellant's argument Caulfield's beneficial entitlement is a lesser interest.

10 A provision which could throw light upon the intended meaning of the definition of "land" is s 56FL(2) which reads in part:

"A corporation is a land-holder 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".

This makes it plain that at least one interest less than full ownership is intended to be caught. It is rather a puzzling provision because, read literally, it seems to impute to a corporation which has, say, a one-quarter interest as co-owner of land full ownership of that land for the purposes of the definition of the word "landholder". But it does not, in our view, give rise to any inference that, insofar as the prescribed provisions deal with partial interests, they require all such interests to be treated as full ownership.

11 The question being discussed is touched on in Zipfinger, Brody & D'Angelo, "Australian Stamp Duties Law", Vol 1A at 1496 and 1497. The authors, dealing with the position in New South Wales prior to 1989, argue against the application to the New South Wales provisions of the general definition of "land" in the *Interpretation Act* 1987 (NSW). Here, the definition of "land" to which we have referred is one specifically devised for the purposes of the prescribed provisions and therefore has more weight than a definition in a general interpretation statute. Our inclination is to think that the intention of the legislation was to catch, by the definition of "land", any proprietary interest in land whether or not constituting an estate in the narrower sense discussed above. Our reasons for this view are first that it seems unlikely, as a matter of commonsense, that the narrower and technical word "estate" was deliberately chosen rather than the more familiar expression "estate or interest" with the idea of excluding any interest in land not constituting an estate in the narrower sense; the second reason is that, as we have mentioned, the definition specifically excludes the interests of mortgagees and that exclusion would not be necessary if "estate" did not *prima facie* include the interests of a mortgagee.

12 With respect to a leasehold interest, the prescribed provisions are we think fully applicable; but there is nothing in them, so far as we can see, to achieve the result that

the holder of a mere leasehold interest - a tenant - is to be treated as owning the land. The "value of the land" to which s 56FL(2) refers must be taken to be a reference to a value of the relevant estate in land - ie a value of the leasehold.

13 We now proceed to consider the consequences of our conclusion about the meaning of "estate" and also those which would follow if we are wrong about the true meaning of the word. The Commissioner's argument is that the general law requires one to treat Caulfield as having, by virtue of its contract to purchase the land, full ownership of it. Consideration of that contention must focus on the leading case, *K.L.D.E.*, where a result supporting the Commissioner's view was argued to have been reached by the High Court.

14 The issue in *K.L.D.E.* related to the exigibility to duty of a certain memorandum of transfer of land executed by a liquidator of a company. Prima facie the conveyance was dutiable. The court had to consider, however, an exemption under s 49C of the *Stamp Act*, the availability of which depended on the conclusion that the appellant and the transferor had been "associated companies" for the whole of the time during which the property had been owned by the transferor. The first question the High Court considered was the meaning of the word "owned" in the relevant provision; for reasons none of which has any relation to the current problem the judges reached the conclusion that the word "owned" should be widely construed (295). After considering authorities on the nature of the interest of the purchaser under a contract of sale, the court indicated acceptance of the view that:

" . . . a purchaser under a contract for the sale of land which is specifically enforceable has a beneficial interest in the land, albeit one conditional on . . . payment of the price" (297).

From that conclusion the court arrived immediately at the view that on execution of the

relevant contract "**the** beneficial ownership of the land passed to K.L.D.E."

15 On the face of it there is a gap in the reasoning; in a passage their Honours approved, it had been held that the relevant doctrine was that "the making of the contract . . . **to an extent** transferred the beneficial ownership to the purchaser" (296) and consistently with that the court concluded that **a** beneficial interest went to the purchaser. The conclusion that it was **the** beneficial interest which was vested in the purchaser by the making of a contract can only be explained on the basis that the court was of the view that, the notion of ownership in the statute being a wide one, it was sufficient if a sort of beneficial interest was acquired other than what would ordinarily be called ownership.

16 The High Court did not in *K.L.D.E.* unequivocally accept the proposition that the making of a contract of sale entirely divests the beneficial interest from the vendor to the purchaser. The dogma we are invited to apply in order to reach an apparently unjust result is that merely agreeing to buy a piece of land makes the person who has so agreed the beneficial owner. That statement has much to commend it: simplicity, the support of authority old and new, and a comforting ring of familiarity. Its only demerit is that it is not true.

17 The Commissioner's contention, that Caulfield was beneficially entitled to the land it had agreed to buy once the agreement was made, rests on an ancient doctrine. The discussion of this in the current (sixth) edition of "Jacobs' Law of Trusts in Australia", 1997, includes the following (para 1306):

"The **fifth** borderline category [of constructive trusts] contains the trust said variously to arise between vendor and purchaser on or after exchange and on or before completion . . . There has been much debate as to the stage at which the beneficial interest arises . . .".

The learned authors then refer with apparent approval to the following passage from

Chang v The Registrar of Titles (1976) 137 CLR 177 at 184, which we quote, omitting the case citations:

"Lord Eldon considered that a trust arose on execution of the contract . . . Plumer MR thought that until it is known whether the agreement will be performed the vendor 'is not even in the situation of a constructive trustee; he is only a trustee sub modo, and providing nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay' . . . Lord Hatherley said that the vendor becomes a trustee for the purchaser when the contract is completed, as by payment of the purchase money . . . Jessel MR held that a trust sub modo arises on execution of the contract but that the constructive trust comes into existence when title is made out by the vendor or is accepted by the purchaser . . . Sir George Jessel's view was accepted by the Court of Appeal in *Rayner v Preston* . . .".

There follows this passage:

"In the same case Jacobs J warned against the transposition into the law of vendor and purchaser of the law governing the rights and duties of trustees; where there were rights outstanding on both sides the description of the vendor as trustee tended to conceal the essentially contractual relationship which governed the rights and duties of the parties. Jacobs J doubted whether a vendor could be described as a trustee 'within the meaning of the Trustee Act' unless settlement had taken place and all that remained to be done was to transfer the outstanding legal estate. The force of his Honour's remarks may readily be conceded".

Views briefly expressed in Meagher, Gummow and Lehane, "Equity: Doctrines and Remedies", 3rd ed, 1992, para 339 are consistent with the foregoing; we note the use of the expression "disarming inaccuracy" as characterising the rule that the vendor of land is between contract and conveyance a trustee of the land for the purchaser, who becomes trustee of the purchase money for the vendor.

18 The nature of the relevant trust has been discussed on a number of occasions in the High Court. We have already quoted from *Chang*. In *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, in which the nature of the purchaser's interest appears not to have been debated the High Court said, speaking of

a share transfer:

"In those cases in which the vendor has been paid the purchase price and has delivered executed and registrable transfers of the shares to the purchaser, clearly the purchaser is the beneficial owner of the shares. Moreover, a purchaser who can by way of specific performance compel a transfer of shares under a contract is a beneficial owner of the shares". (31)

In *Hewett v Court* (1982) 149 CLR 639 at 666, there was reference to the -

". . . rational basis for the passing of the equitable estate or interest in property in anticipation of the performance of a promise to assign it . . .".

19 In *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, the point was discussed by Deane J in terms including the following:

"For limited purposes, the distinction between legal title and beneficial ownership may provide a useful reference point in describing the position of the ordinary unpaid vendor of land under an uncompleted contract of sale. However, and with due respect to some past statements of high authority to the contrary, it is wrong to characterize the position of such a vendor as that of a trustee. True it is that, pending payment of the purchase price, the purchaser has an equitable interest in the land . . . None the less, the vendor himself retains a continuing beneficial estate in the land which transcends any 'lien' for unpaid purchase money to which he may be entitled in equity after completion. **Pending completion, he is beneficially entitled to possession and use. Pending completion, he is beneficially entitled to the rents and profits. If the purchaser enters upon the land without the vendors permission and without authority under the contract, the vendor can maintain, for his own benefit, an action for trespass against the purchaser . . .** it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser . . .". (191-192) (emphasis added)

With respect, the considerations to which Deane J makes reference demonstrate that while it may be true to say that the purchaser who has not paid the price has a beneficial interest in the land, it borders on absurdity to ascribe to the purchaser the position of having the whole beneficial interest, i.e. having full beneficial ownership. If the latter situation obtained, the purchaser could, treating the vendor as a bare trustee, demand an immediate conveyance of the legal estate: *Saunders v Vautier* (1841) Cr & Ph 240; 49 ER 282.

20 Deane and Dawson JJ expressed rather similar views in *Stern v McArthur* (1988) 165 CLR 489 at 521, 522:

"It has been said in a variety of ways that a vendor under a valid contract for the sale of land holds the land as trustee for the purchaser. He is, however, a trustee only in a qualified sense and the qualifications are such as to rob the proposition of much of its significance or, for some purposes, its validity . . . the vendor retains a substantial interest in the property until the whole of the purchase money is paid. He is entitled, subject to the contract, to possession and to the rents and profits in addition to a lien on the land as security for any amount outstanding. Any right to equitable ownership on the part of the purchaser is contingent only . . . it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished".

21 Further support for the view that the interest of the purchaser under a contract of sale of land is not the same as or equivalent to full equitable ownership is to be found in *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 612, and in *Corin v Patton* (1990) 169 CLR 540 at 563. The former passage stresses that the purchaser's equitable estate or interest in the land is merely contingent and the latter that such estate or interest corresponds "with the protection which equity gives to rights acquired under the contract . . .". We refer also to a discussion in the Full Court of the Federal Court by Ryan and Gummow JJ in *Sonenco (No 77) Pty Ltd v Silvia* (1989) 24 FCR 105 at 124, 125.

22 All the monograph writers whom we have consulted emphasise the limited character of the trusteeship of the vendor under a contract of sale. The most blunt is the great American work, "Scott on Trusts", Fourth Edition, Vol 1, para 13:

"But of course it is clear enough that the vendor of land is in no real sense a trustee for the purchaser".

We refer also to Ford and Lee, "Principles of the Law of Trusts", 3rd ed, 1996 at para 22160:

"Although it is said that even while the contract is executory on both sides the purchaser is equitable owner, it is more accurate to say that from the

time the contract is made the purchaser acquires an equitable interest in the property sold and, to that extent, the beneficial interest of the vendor is diminished".

See also "Underhill and Hayton: Law Relating to Trusts and Trustees", 15th ed, 1995 at 402, Parker and Mellows, "The Modern Law of Trusts" 6th ed, 1994 at 292, and Mowbray, "Lewin on Trusts" 16th ed, 1964 at 154. Keeton and Sheridan in their work on "The Law of Trusts" 10th ed, 1974 at 194 urge caution in the use of the notion that the vendor is trustee; that warning is not always heeded.

23 There being no decisions requiring us to hold that the beneficial interest in land sold passes in its entirety, on the making of the contract, to the purchaser, we would not accept that proposition. It can only be true if it is correct that there can be a holder of the entire beneficial interest in a piece of land who has no right to enter upon it, to take possession of it, to use it or to receive rents from it.

24 To revert to the outcome of our discussion of the meaning of the word "estate" in the definition of "land" for the purposes of the prescribed provisions, if the view we favour is correct - i.e. that the interest of the company sold, Caulfield, as purchaser of the land was only a partial interest, not full ownership - it has to be taken into account when determining whether that company is a landholder. But its value is only equal to the deposit paid, not to the value of full beneficial ownership. If our view of "estate" is not correct, then the interest of the company sold is not "land" for the purpose of the prescribed provisions and may be ignored when determining whether the company sold is a landholder; that is so because the interest in question is not an estate in the narrower meaning of that word, not being an interest constituting or equivalent to a division in time of the fee simple, but merely a contingent proprietary right in the land.

25 It follows, that whether or not our interpretation of "estate" is correct, this line of

reasoning leads to the conclusion that the company sold was not at the relevant time a landholder and consequently the appeal must be allowed.

26 It remains, as foreshadowed, to mention some matters relied on by the Commissioner. We were referred to *Mertune Pty Ltd v Chief Commissioner of Stamp Duties* (1994) 35 NSWLR 636, in which the Supreme Court of New South Wales dealt with a similar problem arising under the stamp duty legislation of that State. The legislation there in question appears to differ in significant ways from that with which we are concerned. There the Commissioner advanced (644G) an argument about the nature of the purchaser's interest, akin to that used in the present case. But the judge rejected that approach (645C) holding that "[t]he stage of the conveyancing transaction is not of importance in the assessment of duty". As we understand his Honour's view, it was that because the New South Wales statute then under consideration charged duty on agreements as if they were conveyances, the same must apply under the "land rich" company provisions. At least if applied to the Queensland statute, that mode of construction of the relevant provisions would be incorrect; the prescribed provisions which have to be construed are self-sufficient except insofar as they expressly pick up other parts of the statute. Their operation is not dependent upon the parts of the Act which deal with conveyance duty generally and in particular not dependent upon s 54, which makes contracts for the sale of property subject to conveyance duty as if they were conveyances. As we have explained, the question whether conveyance duty is chargeable in the present case depends on there being an acquisition of shares in a company which is a landholder as defined in s 56FL. The conditions of liability to duty are that there must be (a) an acquisition of shares (b) from a company having the appropriate land holdings; provisions such as s 54 of the Act have nothing to do with

either point.

27 We were also referred to a Western Australian decision, *Tokyo City Pty Ltd v Commissioner of State Taxation (WA)* (1997) 98 ATC 4036. For reasons which are not evident from the report, in a similar situation there was no discussion of the question whether the interest of a purchaser under a contract of sale is for the purpose of provisions of this sort to be equated to full ownership; the case was dealt with on the basis that the Commissioner's only problem was that the contract was conditional upon town planning approval, a question not in issue here.

28 The Commissioner further relied upon the provisions of s 56FK(11), which assume that land being purchased under an agreement for sale is relevant in determining whether a corporation is a "landholder". But that is consistent with the opinion about the relevant provisions which we have expressed above; our disagreement with the Commissioner's view of the matter relates to the character of the interest of a purchaser under a contract of sale, not whether that interest is to be taken into account for the purposes of applying the definition of "landholder". It should be added that Mr Harrison QC advanced an argument for the appellant to the effect that the Commissioner's contention cannot be reconciled in any rational way with the system for determining dutiable value under s 56FK(2). While we think the argument has substance, we do not find it necessary to discuss it.

29 The orders are as follows -

- (1) Appeal allowed with costs.
- (2) Question (a) is answered "No" and question (f) is answered "By the Commissioner".
- (3) The duty paid in conformity with the Commissioner's assessment is

ordered to be repaid to the appellant.