SUPREME COURT OF QUEENSLAND

CITATION:	*Harvey v Commissioner of State Revenue* [2015] QCA 258
PARTIES:	**JANE HARVEY** (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	Appeal No 8354 of 2014 SC No 4480 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 183
DELIVERED ON:	4 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2015
JUDGES:	Margaret McMurdo P and Philippides JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce fresh evidence is refused.** **2. The appeal is dismissed with costs.**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – ARRANGEMENTS AFFECTING LIABILITY TO DUTY – where the appellant began residing at a property owned by Laworld Brisbane Pty Ltd whose sole director was Mr Harvey, the appellant's husband – where the appellant and Mr Harvey agreed that Laworld would sell the appellant the property for $1.5 million with completion on 15 June 2009 or 14 days from written confirmation by Laworld that the bank had agreed to release its security over the property – where on 16 May 2009 the appellant signed Laworld's minute of the resolution already signed by Mr Harvey recording the terms and conditions of the agreement including a $100 deposit; and that the property would be sold free of encumbrances with vacant possession but if settlement was not completed the appellant would vacate the property – where on 15 June 2009 Laworld as transferor, through Mr Harvey, and the appellant as transferee signed an instrument of transfer, Form 1, under the *Land Title Act* with consideration of $1.5 million – where Laworld executed the Form 24 – where the Commissioner issued a notice of assessment of land tax to Laworld – where Laworld sought to reduce its liability because of the transfer to the appellant –

where the appellant sought an exemption for the property under s 11(6A) *Land Tax Act* for principal place of residence – where in support of her claim for exemption, the appellant later provided the Office of State Revenue a copy of the Form 23 settlement notice relating to the transfer of the property – where the appellant also provided a letter from Laworld to the Office of State Revenue confirming that settlement took place on 15 June 2009, together with copies of the transfer and the Form 24 – where the Form 24 recorded both the date of possession and date of settlement as 15 June 2009 – where the bank did not agree to release its security over the property by 15 June 2009 or at any later time – where on 4 November 2009 the appellant lodged the Form 23 settlement notice at the Office of the Registrar of Titles – where on 18 November 2009 Laworld was issued with an amended notice of assessment of land tax, deleting the property from Laworld's land tax assessment and assessing the land tax as nil – where the appellant was then issued an amended notice of assessment of land tax, allowing her a principal place of residence deduction for the property – where the Commissioner obtained a restricted valuation report stating that the indicative value range for the property as at 15 June 2009 was between $5 million to $5.5 million – where the Commissioner issued a default assessment to the appellant based on the consideration of the property being $5.5 million – where the appellant objected to the assessment on the basis that her agreement with Laworld had been cancelled – where the Commissioner disallowed her objection – where the appellant later cancelled the 15 June 2009 transfer and applied for a reassessment on the grounds of that cancellation – where the appellant sought a mandatory injunction requiring the Commissioner to reassess the transfer to nil duty under s 156A(6) *Duties Act* or, in the alternative, a mandatory injunction requiring the Commissioner to reassess the agreement or agreements to nil duty under s 115(1) *Duties Act*, together with a declaration that she is not indebted for the amounts in the assessment and an injunction restraining the Commission from entering judgment or otherwise enforcing the assessment – where the primary judge dismissed her proceeding – where the appellant contends that the primary judge erred in finding that she relied on the transfer form in her application for exemption from land tax – where the appellant contends that the primary judge erred in holding the transfer as liable to duty as it was executed in escrow and the condition of the escrow was never fulfilled so it was not "signed" within the meaning of the *Duties Act* – where the appellant contends that the primary judge wrongly held that the Commissioner could determine the value of land in a valuation obtained otherwise than under s 505(2)(a) *Duties Act* and s 13(2) *Taxation Administration Act* – where the appellant contends that the primary judge erred in construing the justiciability of the validity and correctness of the Commissioner's assessment – whether the appeal should be allowed

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the Commissioner failed to decide under s 132(2) *Taxation Administration Act* whether the agreement to transfer or the transfer form itself was the most applicable dutiable transaction within s 21(2) *Duties Act* – where the appellant contends that the primary judge should have found that this resulted in an assessment on both the agreement to transfer and the actual transfer and constituted jurisdictional error, thereby invalidating the assessment – where the appellant contends that s 69(1)(b) *Taxation Administration Act* is invalid as contrary to Chapter III of the *Commonwealth Constitution* – where the appellant seeks leave to adduce evidence in support of her contentions – whether the application to adduce evidence should be granted

Commonwealth Constitution, Ch III
Duties Act 2001 (Qld), s 5, s 8, s 9, s 10, s 11, s 13, s 14, s 16, s 17, s 19, s 21, s 22, s 115, s 156, s 156A, s 505, Sch 2
Income Tax Assessment Act 1936 (Cth), s 175
Land Tax Act 1915 (Qld), s 11
Land Title Act 1994 (Qld), s 176
Taxation Administration Act 2001 (Qld), s 3, s 6, s 11, s 13, s 25, s 26, s 27, s 55, s 58, s 69, s 87, s 132

Airservices Australia v Canadian Airlines International Limited (2000) 202 CLR 133; [1999] HCA 62, cited
American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd (1981) 147 CLR 677; [1981] HCA 65, cited
Baring v Commissioners of Inland Revenue [1898] 1 QB 78, cited
Bowker v Burdekin (1843) 11 M&W 128; (1843) 152 ER 744; [1843] EngR 277, cited
Byrne v Revenue Commissioners [1935] IR 664, cited
Darling Casino Ltd v New South Wales Casino Control Authority (1997) 191 CLR 602; [1997] HCA 11, cited
Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473; [2008] HCA 41, cited
Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1995) 183 CLR 168; [1995] HCA 23, cited
Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146; [2008] HCA 32, considered
Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336; [1981] HCA 4, cited
Glennan v Commissioner of Taxation (2003) 77 ALJR 1195; [2003] HCA 31, cited
Harvey v Commissioner of State Revenue [2014] QSC 183, related
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, considered
Keswick Developments Pty Ltd v Keswick Island Pty Ltd [2011] QCA 379; [2011] QCA 379, cited

Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, cited
Maritime Services Board of New South Wales v Australian Shipping Commission (1991) 27 NSWLR 258, cited
McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2015] 1 Qd R 350; [2014] QCA 232, considered
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Scook v Premier Building Solutions Pty Ltd (2003) 28 WAR 124; [2003] WASCA 263, cited
Spencer v The Commonwealth (1907) 5 CLR 418; [1907] HCA 82, cited
Vale v Sutherland (2009) 237 CLR 638; [2009] HCA 26, cited

COUNSEL: F L Harrison QC, with T C Somers, for the appellant
M D Hinson QC for the respondent

SOLICITORS: Elliott & Harvey for the appellant
Crown Law for the respondent

[1] **MARGARET McMURDO P:** On 13 December 2010, the respondent, the Commissioner of State Revenue, assessed the appellant, Ms Jane Harvey, under s 16 *Duties Act* 2001 (Qld),[1] as liable on a dutiable transaction relating to a beachfront home at Mermaid Beach for $274,425 transfer duty; $205,818.75 penalty tax; and $22,874.97 unpaid tax interest. This was a default assessment made under s 13(2) *Taxation Administration Act* 2001 (Qld). Ms Harvey unsuccessfully objected to but did not appeal from that decision.[2] Instead, she sought a mandatory injunction requiring the Commissioner to reassess the transfer document to nil duty under s 156A(6) *Duties Act*.[3] Alternatively, she sought a mandatory injunction requiring the Commissioner to reassess the agreement or agreements to nil duty under s 115(1) *Duties Act*,[4] together with a declaration that she is not indebted for the amounts in the December 2010 assessment and an injunction restraining the Commissioner from entering judgment or otherwise enforcing the December 2010 assessment, together with a costs order in her favour. The primary judge dismissed her proceeding.[5] She has appealed to this Court on numerous grounds contained in a seven page notice of appeal but in her written and oral submissions she refined these to three issues.

[2] The first issue is whether, because of post-assessment events which I shall shortly describe, the judge wrongly held that, under s 156A(2)(c) *Duties Act*,[6] she relied on the transfer form in her application for exemption from land tax.

[3] The second issue is whether the judge erred in holding the transfer as liable to duty. She contends that it was executed in escrow and the condition of the escrow was never

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1 Relevantly set out in these reasons at [22].
2 See s 69 *Taxation Administration Act*, set out in these reasons at [34].
3 Set out in these reasons at [27].
4 Set out in these reasons at [26].
5 *Harvey v Commissioner of State Revenue* [2014] QSC 183.
6 Set out in these reasons at [27].

fulfilled so that it was not "signed" within the meaning of *Duties Act*, Schedule 2, Column 2, When liability for transfer duty arises, (b).[7] The judge also wrongly held that the Commissioner could determine the value of land in a valuation obtained otherwise than under s 505(2)(a) *Duties Act*[8] and s 13(2) *Taxation Administration Act*[9] and failed to distinguish between facts which the Commissioner can determine and opinions as to value, which require a valuation under those provisions. She contends the judge erred in considering the Commissioner was entitled to rely on that valuation in determining the December 2010 assessment.

[4] The third issue is whether the judge wrongly construed the justiciability of the validity and correctness of the December 2010 assessment. Ms Harvey contends his Honour erred in construing s 132(2) *Taxation Administration Act*[10] and its relationship with s 21(2) *Duties Act*.[11] The Commissioner failed to decide under s 132(2), before issuing the December 2010 assessment, whether the agreement to transfer or the transfer form itself was the most applicable dutiable transaction within s 21(2). She contends that the judge should have found that this resulted in an assessment on both the agreement to transfer and the actual transfer and constituted jurisdictional error or absence of jurisdictional facts, thereby invalidating the December 2010 assessment. Further, she contends the judge should have held that s 69(1)(b) *Taxation Administration Act*[12] is invalid as it is contrary to Chapter III of the *Commonwealth Constitution*.[13] That provision infringes the principle identified in *Kable v Director of Public Prosecutions (NSW)*[14] in that it requires Ms Harvey to pay the Commissioner's assessment before appealing against it.

[5] In support of the third issue, Ms Harvey applies for leave to adduce evidence from her lawyers as to events which have occurred since the primary hearing.

[6] Ms Harvey contends that the judge should have held either that the assessment was invalid or, if valid, unenforceable, so that she was entitled to the declaratory relief she sought. She asks that the appeal be allowed, the judgment below set aside and instead that this Court issue a mandatory injunction requiring the Commissioner to re-assess the transfer document to nil duty under s 156A(6) *Duties Act*. Alternatively, if there is a valid assessment, she asks this Court for a mandatory injunction requiring the Commissioner to re-assess the document or documents to nil duty under s 115(1) *Duties Act*; a declaration that she is not indebted to the Commissioner as assessed; an injunction restraining the Commissioner from entering judgment or otherwise enforcing the December 2010 assessment against her; and an order that he pay her costs of and incidental to the action and the proceedings and of this appeal.

[7] Before discussing the competing contentions and my conclusions for rejecting Ms Harvey's contentions on each of these three issues, I will set out the relevant facts and statutory provisions.

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7 Set out in these reasons at [23].

8 Set out in these reasons at [28].

9 Set out in these reasons at [29].

10 Set out in these reasons at [36].

11 Set out in these reasons at [25].

12 Set out in these reasons at [34].

13 Notices under s 78B *Judiciary Act* 1903 (Cth) were served on all State and Commonwealth Attorneys-General at the original hearing but none wished to intervene unless the matter came before the High Court of Australia (AB 616 – 618; Appeal hearing transcript T1-2).

14 (1996) 189 CLR 51; [1996] HCA 24.

The facts relating to the assessment of transfer duty

[8] Ms Harvey began residing at 1 Heron Avenue, Mermaid Beach, the property at the centre of this appeal, in December 2008. Laworld Brisbane Pty Ltd was the registered proprietor under the *Land Title Act* 1994 (Qld). Its sole director was Michael Harvey, Ms Harvey's husband. On 15 May 2009 he and Ms Harvey agreed that Laworld would sell her the property for $1.5 million, with completion on 15 June 2009 or 14 days from written confirmation by Laworld that the National Australia Bank had agreed to release its security over the property in order to provide clear title. On 16 May 2009 she signed Laworld's minute of the resolution already signed by Mr Harvey, recording the terms and conditions of the agreement to sell noted above and including a $100 deposit; and that the property would be sold free of encumbrances with vacant possession but if settlement was not completed she would vacate the property. The minute also noted a resolution to instruct a local real estate agent to provide a letter regarding market value once confirmation was received from the bank.[15] On 15 June 2009 Laworld as transferor, through Mr Harvey, and Ms Harvey as transferee signed an instrument of transfer, Form 1 under the *Land Title Act* with consideration of $1.5 million. Laworld acknowledged receipt of that sum; confirmed the accuracy of the Form 24 containing property information relating to the circumstances of the transaction for the purposes of the *Duties Act*; and executed the Form 24. The bank did not agree to release its security over the property by 15 June 2009 or at any later time.

[9] Under s 11(1) *Land Tax Act* 1915 (Qld), land tax is payable by every owner of land not exempt from taxation but s 11(6A) exempts land owned by an individual, other than as trustee, used as the individual's principal place of residence. On 17 August 2009 a notice of assessment of land tax was issued to Laworld for $92,333.32. Laworld sought to reduce its liability under the August 2009 assessment for land tax because of the transfer to Ms Harvey. She sought an exemption under s 11(6A) on 2 November 2009, and lodged a signed Form LT12, Exemption or deduction claim for principal place of residence.[16] Later in November 2009 in support of her claim and at the request of the Office of State Revenue, she provided a copy of a Form 23 settlement notice[17] relating to the transfer of the property. It recorded the property as her address for service and under the heading, Other Instruments directly related to the transaction, it recorded "NIL." She also provided a letter from Laworld to the Office of State Revenue dated 17 November 2009[18] in which she confirmed that settlement took place on 15 June 2009, together with copies of the 15 June 2009 transfer[19] and the Form 24.[20] The Form 24 recorded both the date of possession and the date of settlement as 15 June 2009. Meanwhile, on 4 November 2009 she lodged the Form 23 settlement notice at the Office of the Registrar of Titles.

[10] On 18 November 2009 Laworld was issued with an amended notice of assessment of land tax, deleting the property from Laworld's land tax assessment and assessing the land tax payable by Laworld on it as nil. The same day Ms Harvey received an amended notice of assessment of land tax, allowing her a principal place of residence deduction for the full unimproved value of the property.

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15 AB 94 – 95.
16 AB 440.
17 AB 444.
18 AB 445.
19 AB 446.
20 AB 447 – 448.

[11] On 25 November 2009 the Commissioner sought information from Laworld under s 87 *Taxation Administration Act*[21] as to a number of matters including the value of the property at the date of the transfer. On 23 December 2009 Laworld responded, stating there was no contract or agreement in writing between it and Ms Harvey and enclosing a letter from Burleigh Miami Realty stating that a "reasonable asking price" for the property as at 15 June 2009 was between $1,480,000 and $1,520,000 taking the economic climate into consideration but cautioning that this was not a valuation.[22] On 8 January 2010[23] an investigator from the Office of State Revenue wrote to Ms Harvey requesting further information and stating that their records showed the unimproved value of the property was $6,200,000.[24]

[12] On 8 December 2010 Ms Harvey's solicitors informed the Commissioner that notice had been given to Laworld terminating the agreement to purchase the property; that Laworld had accepted the termination; and for the first time informed the Commissioner that there was an oral agreement with a term that the property be transferred free of encumbrances and that Laworld was unable to give effect to that agreement.[25]

[13] On 1 June 2011 the bank informed the Commissioner that Laworld had not submitted any application to release the bank's security over the property.[26]

[14] On or about 15 September 2011, the bank exercising its mortgagee's power of sale, transferred the property to a third party for consideration of $3,200,000.

[15] Sometime between March and November 2010, the Commissioner obtained a restricted valuation report from a registered valuer stating that the indicative value range for the property as at 15 June 2009 was $5,000,000 to $5,500,000.[27]

[16] On 13 December 2010 the Commissioner issued the December 2010 assessment notice with which this appeal is concerned for $274,425 transfer duty; $205,818.75 penalty tax; and $22,874.97 unpaid tax interest. The notice included under the heading Consideration, "$5,500,000" and under the heading Transaction Type, both "Transfer of Residential Land" and "Agreement to transfer dutiable property, Land in Queensland."[28] In the accompanying letter, the Commissioner noted that an invoice for the recovery of valuation costs of $660 was enclosed.[29]

[17] Ms Harvey objected to the December 2010 assessment on grounds including that her agreement with Laworld had been cancelled. The Commissioner disallowed her objection on 29 March 2011 but stated that he would consider her application based on s 115 *Duties Act*. On 18 April 2011 he notified her that s 115(1) *Duties Act* did not apply and confirmed the December 2010 assessment. On 20 April 2011 she objected to that decision. On 26 May 2011 she commenced the proceeding the subject of this appeal. On 19 March 2013 the Commissioner disallowed her objection.

[18] On 11 February 2014 Ms Harvey cancelled the 15 June 2009 transfer[30] and two days later applied to the Commissioner for a reassessment on the grounds of that cancellation.

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21 Set out in these reasons at [35].
22 AB 459 – 461.
23 It is common ground that the letter was incorrectly dated 8 January 2009.
24 AB 462 – 463.
25 AB 99.
26 AB 543 – 546.
27 AB 514 – 520.
28 AB 540.
29 AB 321.
30 AB 613.

Relevant provisions in the *Duties Act*[31]

[19] The *Duties Act* does not contain all the provisions about duties in Queensland;[32] the *Taxation Administration Act* also contains provisions dealing with, among other things, assessments,[33] collections and refunds of duty;[34] the imposition of interest and penalty tax;[35] and investigative powers and evidentiary matters.[36]

[20] Under *Duties Act* Chapter 2, Transfer duty, transfer duty is imposed on dutiable transactions.[37] Chapter 2, Part 2, Some basic concepts for transfer duty, s 9(1) states that a dutiable transaction includes:

> "(a) a transfer of dutiable property;
> (b) an agreement for the transfer of dutiable property, whether conditional or not."

[21] Dutiable property includes land in Queensland.[38] The dutiable value of a statutory dutiable transaction is the amount payable for the transaction.[39] Under s 11(7), this is relevantly:

> "(a) the consideration for the dutiable transaction; or
> (b) the unencumbered value of the dutiable property or new right the subject of the transaction if –
>
> …
>
> (iii) the unencumbered value is greater than the consideration for the transaction."
>
> …

[22] Chapter 2, Part 3, Liability for transfer duty, s 16 *Duties Act*, provides that:

> "A liability for transfer duty imposed on a dutiable transaction in schedule 2, column 1, arises at the time stated opposite the transaction in schedule 2, column 2."

[23] Schedule 2, When liability for transfer duty on dutiable transaction arises, relevantly includes:

"**Column 1** – **Dutiable transaction**	**Column 2** **When liability for transfer duty arises**
Transfer of dutiable property	The earlier of the following — (a) when the property is transferred; (b) …if an instrument effects, or when recorded in a register will effect, the transfer — when the instrument is signed by the parties to the transaction
Agreement for transfer of dutiable property	When the agreement is made"

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31 As the assessment was made on 13 December 2010, the relevant reprint is Reprint No 7.
32 *Duties Act* s 5(1).
33 *Duties Act* s 5(2)(a).
34 *Duties Act* s 5(2)(b).
35 *Duties Act* s 5(2)(c).
36 *Duties Act* s 5(2)(f).
37 *Duties Act* s 8(1).
38 *Duties Act* s 10(1).
39 *Duties Act* s 11(1).

[24] Under s 17(2), transfer duty imposed on a dutiable transaction must be paid by the parties to the transaction. Under s 19(3):

> "The parties liable to pay transfer duty relating to another dutiable transaction must, within 30 days after the liability arises, lodge —
> (a) the instrument … that effects or evidences the transaction … ; and
> (b) an approved form for the transaction."

[25] Sections 21 and 22 relevantly provide:

> "**21 No double duty—general**
> (1) If a transaction for property constitutes more than 1 dutiable transaction for the property and imposition of transfer duty on all of the dutiable transactions for the property would result in transfer duty being imposed more than once on the transaction, the commissioner must decide the dutiable transaction on which transfer duty is imposed.
> *Note–*
> For objections and appeals against assessments of duty, see the [Taxation] Administration Act, part 6.
> (2) For subsection (1), the commissioner must decide the dutiable transaction that is the most applicable dutiable transaction having regard to the provisions of this chapter and the primary purpose of the transaction.
>
> **22 No double duty—particular dutiable transactions**
> ...
> (2) If transfer duty imposed on a dutiable transaction that is an agreement for the transfer of dutiable property is paid, no transfer duty is imposed on the transfer of the property to the transferee under the agreement."

[26] Chapter 2, Part 13, Exemptions for transfer duty, Division 1, Exemptions for cancelled agreements and particular agreements entered into before registration of companies, relevantly provides:

> "**115 Exemption — Cancelled Agreements**
> (1) Transfer duty is not imposed on a dutiable transaction that is an agreement for the transfer of dutiable property (the ***cancelled agreement***) if —
> (a) the agreement is ended because of a breach of it by a party to it; or
> (b) the agreement is ended because of non-fulfilment of a condition of it; …"

[27] Chapter 2, Part 14, Division 3, Reassessments for transfer duty, Division 3, Reassessments for cancelled transfers of dutiable property, relevantly provides:

> "**156A Reassessment of duty for cancelled transfer of dutiable property**
> (1) This section applies if —
> (a) a person, directly or by the person's agent, pays transfer duty on a transfer of dutiable property effected or evidenced by an instrument; and

(b) the instrument is cancelled by the parties before it has legal effect; and

(c) the dutiable property has not been transferred to the transferee or a related person of the transferee; and

(d) the instrument was not cancelled—

(i) to give effect to a resale agreement; or

(ii) as part of an arrangement under which any of the dutiable property is or will be transferred, or is agreed to be transferred, to the transferee or a related person of the transferee.

(2) For this section, an instrument has legal effect if—

(a) for an instrument that, when recorded in a register, will effect the transfer of dutiable property—the instrument is lodged for recording in the register; or

(b) a right has been exercised, or an obligation fulfilled, under the instrument; or

(c) the instrument has been relied on in any other way.

…

(6) The commissioner must make a reassessment of transfer duty for the transaction on the basis that transfer duty is not imposed on the transaction."

[28] Chapter 16, Miscellaneous provisions, includes:

"**505 Valuation or evidence of value of property**

(1) For determining whether a person is liable for duty or a person's liability for duty, the commissioner may —

(a) by notice given to the person, require the person to lodge a valuation of property prepared by a registered valuer or to provide the other evidence of value the commissioner considers appropriate; or

(b) have property valued; or

(c) rely on a valuation of property prepared by a registered valuer, or other person the commissioner is satisfied is properly qualified to provide evidence of value of property, for any purpose, whether or not for determining liability for duty.

(2) If the commissioner is not satisfied with the valuation or evidence lodged or provided under subsection (1)(a), the commissioner may —

(a) have the property valued; or

(b) rely on a valuation of the property prepared by a registered valuer, or another person the commissioner

is satisfied is properly qualified to provide evidence of the value of the property, for any purpose, whether or not for determining liability for duty under this Act.

(3) The commissioner may recover the cost of obtaining a valuation under this section from the person or persons liable for the duty.

(4) The commissioner may assess duty on the basis of a valuation or evidence obtained under this section."

Relevant provisions in the Taxation Administration Act[40]

[29] The main purpose of the *Taxation Administration Act* is to make general provision about the administration and enforcement of revenue laws.[41] Nothing in the Act prevents a revenue law making specific provision about the administration and enforcement of that law.[42] Each revenue law must be read together with this Act as if they together formed a single Act.[43] The *Duties Act*[44] together with the *Land Tax Act*[45] are revenue laws. The Commissioner is empowered to make assessments of liability for tax.[46] Part 3, Assessments of tax, Division 1, Assessments made by the commissioner, relevantly provides:

"**13 Default assessments**

(1) This section applies in each of the following circumstances—

(a) for —

…

(ii) another assessment —the taxpayer does not give information required to be given under an information requirement or lodge a document required to be lodged under a lodgement requirement;

(b) the commissioner is not satisfied about the accuracy or completeness of a document lodged, or information given, for the assessment of a taxpayer's liability for tax under a tax law;

…

(2) The commissioner may make an assessment under this section (a ***default assessment***) for the amount the commissioner reasonably believes to be the taxpayer's liability.

…"

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40 As the assessment was made on 13 December 2010, the relevant reprint is Reprint No 5.
41 *Taxation Administration Act* s 3(1).
42 *Taxation Administration Act* s 3(2).
43 *Taxation Administration Act* s 3(3).
44 *Taxation Administration Act* s 6(1).
45 *Taxation Administration Act* s 6(4).
46 *Taxation Administration Act* s 11.

[30] Part 3, Division 3, Reassessments, relevantly provides:

> "**25 Reassessment does not replace previous assessment**
>
> A reassessment does not replace the previous assessment but merely varies it by—
>
> (a) decreasing or increasing the taxpayer's liability for tax; or
>
> (b) changing the basis on which the taxpayer's liability for tax is assessed."

[31] Part 3, Division 4, Assessment notices, relevantly provides:

> "**26 Assessment notice to be given to taxpayer**
>
> (1) The commissioner must give notice of the making of an assessment (an ***assessment notice***) to the taxpayer.
>
> (2) The assessment notice must state—
>
> (a) the amount of the tax assessed; and
>
> (b) the date by which the tax must be paid; and
>
> (c) the taxpayer's right to object to the assessment; and
>
> (d) the basis on which unpaid tax interest may accrue; and
>
> (e) if assessed interest or penalty tax is payable under the notice—enough information to enable the taxpayer to ascertain the basis for the assessment of the interest or penalty tax; and
>
> (f) for a compromise or default assessment—it is a compromise or default assessment; and
>
> (g) for a reassessment—the amount of the liability for tax under the previous assessment."

[32] Part 3, Division 5, Other provisions, s 27 provides:

> "**27 Assessments made on available relevant information**
>
> The commissioner may make an assessment on the available information the commissioner considers relevant."

[33] Part 5, Interest and penalty tax, Subdivision 1, s 54 – s 57, deals with unpaid tax interest. Subdivision 2, s 58 – s 59, deals with penalty tax.

[34] Part 6, Objections, reviews and appeals against assessments, Division 2, Appeals and reviews, Subdivision 1, Right of appeal or review, relevantly provides:

> "**69 Right of appeal or review**
>
> (1) This section applies to a taxpayer if —
>
> (a) the taxpayer is dissatisfied with the commissioner's decisions on the taxpayer's objection; and

(b) the taxpayer has paid the whole of the amount of the tax and late payment interest payable under the assessment to which the decision relates.

(2) The taxpayer may, within 60 days after notice is given to the taxpayer of the commissioner's decision on the objection—

(a) appeal to the Supreme Court; …".

[35] Part 7, Investigations, Division 2, Investigations under tax laws, Subdivision 2, Provisions about requiring information, documents and attendance, s 87 provides:

"**87 Power to require information or documents**

The commissioner or an investigator may, by written notice given to a person, require the person to —

(a) give to the commissioner or an investigator, either orally or in writing, information in the person's knowledge about a stated matter within a stated reasonable time and in a stated reasonable way; or

(b) give to the commissioner or an investigator a document about a stated matter in the person's possession or control within a stated reasonable time and in a stated reasonable way."

[36] Part 10, Enforcement and legal proceedings, Division 2, Evidence, includes:

"**132 Evidentiary provisions for assessments**

(1) Production of a document signed by the commissioner purporting to be a copy of an assessment notice—

(a) is conclusive evidence of the proper making of the assessment; and

(b) for—

(i) a proceeding on an appeal against, or review of, a decision on an objection—is evidence that the amount and all particulars of the assessment are correct; or

(ii) another proceeding—is conclusive evidence that the amount and all particulars of the assessment are correct.

(2) The validity of an assessment is not affected merely because a provision of a tax law has not been complied with."

[37] The Schedule 2 Dictionary relevantly provides:

"***assessment*** means a determination under part 3, of a taxpayer's liability for tax for which an assessment notice is given, and includes a reassessment.

…

information requirement means a requirement under a tax law to give information to the commissioner or an investigator.

...

lodge means lodge with the commissioner.

lodgement requirement means a requirement under a tax law to—
(a) lodge a document; or
(b) give a document to the commissioner or an investigator.
…"

The effect of post-assessment events on the enforceability of the assessment

[38] The first issue identified by Ms Harvey concerns the effect of the post-assessment events in this case (namely the failure of the bank to release its security, the bank's sale of the property to a third party and Ms Harvey's termination of the agreement and cancellation of the transfer) on the enforceability of the assessment. I will set out the competing contentions on this issue before stating my reasons for rejecting Ms Harvey's contentions.

Ms Harvey's contentions

[39] Ms Harvey contends that the *Duties Act* and the *Taxation Administration Act* work harmoniously, with the former governing which documents are liable to transfer duty and the latter governing assessment and recovery of duty. Both the agreement to transfer and the transfer form itself were liable to transfer duty under the *Duties Act* but under s 21 and s 22 once the duty was imposed on one document, the other was not dutiable. *Duties Act* s 115[47] and s 156A[48] were complementary and recognised that assessments would be made and then reassessed when circumstances changed so that duty was not paid on failed transactions. As the bank sold the property to someone else and she subsequently terminated the agreement and cancelled the transfer, the Commissioner was bound to reassess the duty payable by her as nil under s 156A. The judge erred in finding to the contrary on the basis that she had "deployed" the transfer in her application for exemption from land tax.[49]

[40] She rightly identifies that s 156A(2)(a) does not apply to the transfer and that s 156A(2)(b) has no application. The question is whether the transfer is within s 156A(2)(c) in that it "has been relied on in any other way." She contends that s 156A(2)(b) and s 156A(2)(c) should be construed as applying only to cases which fall outside s 156A(2)(a), that is, to instruments which effect a transfer without registration. She argues that otherwise s 156A could have no application if, say, a transferor lodged a caveat pending settlement, even if the caveat was removed by the court; such an unattractive consequence cannot have been intended by the legislature. She contends that the construction of s 156A(2) taken by the primary judge and the Commissioner is too broad. She gave the example of vendors and purchasers entering into a contract for the sale of land, with the property at the purchasers' risk so that the purchasers obtained insurance and the vendors cancelled their insurance. If the contract was not

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47 Set out in these reasons at [26].
48 Set out in these reasons at [27].
49 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [65].

completed, on the judge's construction of s 156A(2) the vendor would not be entitled to a favourable reassessment. Such a construction is inconsistent with the clear purpose of s 156A evidenced by its heading. She submits that s 156A(2)(b) and s 156A(2)(c) follow the distinction in Schedule 2, Column 2,[50] When liability for transfer duty arises, between (a) when the property is transferred, and (b)(ii) where an instrument effects or when recorded in a register will effect the transfer, when the instrument is signed by the parties. Section 156A(2)(b) and s 156A(2)(c) should be construed as not applying to a transfer like the present which if registered would effect the transfer. If the construction advanced by the Commissioner and adopted by the judge[51] were correct, she argues, s 156A(2)(c) would be surplusage; such a construction should be avoided.[52]

[41] Her land tax concessions, she further contends, depended on her agreement with Laworld and her possession of the property, not on the signing of any transfer or on the actual transfer of the land. The signed Form LT12, Exemption or deduction claim form for principal place of residence, did not refer to the transfer form and therefore did not rely on it. Nor was the primary judge's conclusion as to reliance supported by the copy of the transfer form provided to the Commissioner. The transfer form, Ms Harvey contends, was irrelevant to whether Laworld ceased to be liable for land tax or whether she was entitled to the land tax exemption because she became the owner of the property for the purposes of the *Land Tax Act*. As a result, Laworld ceased to be liable for land tax and she was entitled to the exemption whether or not the transfer form had been signed. Under s 16 and Schedule 2, Column 2(b)(ii) *Duties Act*, liability for transfer duty did not arise. For these reasons, too, the judge was wrong to hold the transfer had been relied on within the meaning of s 156A(2)(c).

[42] She emphasises that although an assessment determines liability for duty at the date of the assessment, it is open under the legislative scheme established by the *Duties Act* and the *Taxation Administration Act* for the taxpayer to show that the instrument assessed has ceased to be dutiable. The evidentiary effect of s 132(1)(b)(ii) *Taxation Administration Act*[53] is not to make the notice of assessment conclusive evidence for all time and in all circumstances until amended. The post-assessment events in this case rendered the transfer form incapable of being registered or of effecting a transfer. It ceased to be under Schedule 2, Column 2(b)(ii) an instrument which "when recorded in a register will effect, the transfer"[54] of the land said to be dutiable. As a result the transfer ceased to be liable to duty and the judge should have found that the December 2010 assessment ceased to have effect.

[43] The judge's conclusion as to reliance, she contends, was not supported by the copy of the transfer form provided to the Commissioner. The introductory words to s 156A(2) refer to an instrument having "legal effect" so that "relied on" in s 156A(2)(c) means "relied on for the legal effect that it has" that is, as an instrument which if registered would effect a transfer. If an instrument is relied on in some other way, such as to minimise land tax or to evidence the mere existence of the agreement to transfer, it does not fall within s 156A(2)(c). It is irrelevant that the Commissioner was unaware of the agreement to transfer the property in considering whether she had relevantly deployed the transfer. The transfer ceased to be dutiable once it became

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50 Set out in these reasons at [23].

51 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [45] – [60].

52 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71]; Pearce, DC., Geddes, RS., *Statutory Interpretation in Australia*, (2014) 8th Ed., [2.26], 62 – 64.

53 Set out in these reasons at [36].

54 *Duties Act* Schedule 2, Column 2 (b), When liability for transfer duty arises.

impossible for it to be registered, that is, at least by the time of the bank's sale to the third party. The transfer could not be relied on once it had no legal effect. At that point the assessment became unenforceable. For all these reasons, she contends the judge was wrong to hold that, in obtaining the land tax concessions and exemption, she had relied on the transfer form within the meaning of s 156A(2)(c). The transfer was cancelled before it had legal effect so that the requirements of s 156A(1) were met and the Commissioner was required to reassess her transfer duty as nil.

The Commissioner's contentions

[44] The Commissioner contends that the judge rightly concluded that s 156A has no application as the transfer was not cancelled before it had legal effect under s 156A(2). It was not cancelled until February 2014, long after the Commissioner relied on it to reduce the land tax liability of both Laworld and Ms Harvey. The judge rightly rejected Ms Harvey's contention that s 156A(2)(b) and s 156A(2)(c) applied only to instruments that effect a transfer without registration.[55] The introductory words of s 156A(2) make clear that it applies to instruments described in s 156A(1). While s 156A(2)(a) is limited to a particular type of instrument, s 156A(2)(b) and s 156A(2)(c) apply to all instruments described in s 156A(1), including instruments of the kind described in s 156A(2)(a). The use of "or" between the paragraphs in s 156A(2) gives each paragraph a separate field of operation. Section 156A(2)(a) is confined to instruments requiring registration to effect the transfer of dutiable property. Both s 156A(2)(b) and s 156A(2)(c) are broader and more inclusive. Section 156A(2)(b) encompasses events such as a transferee taking possession before the transfer is effected or acting on an obligation to insure the property before the transfer is effected. Section 156A(2)(c) is wider still, encompassing situations not clearly covered by s 156A(2)(a) and s 156A(2)(b) where the instrument has been relied on in any other way.

[45] The judge, the Commissioner contends, rightly rejected Ms Harvey's argument as to the absence of reliance.[56] Her contentions that, for s 156A(2)(c) to apply it is necessary for the transfer to be relied on to effect a transfer, is not the ordinary meaning of its terms. They ignore the fact that she provided a copy of the transfer to the Commissioner in support of her claim for exemption from land tax. She relied on the transfer to avoid an existing liability for land tax. She also relied on the transfer in completing the Form 23 Settlement Notice which she provided to the Commissioner. The Commissioner was unaware of the minute of 16 May 2009, signed by Laworld and Ms Harvey, agreeing to the terms and conditions of the transfer until 8 December 2010.

[46] The judge also rightly rejected Ms Harvey's contention, the Commissioner submits, that once the transfer could not be registered or given effect, it ceased to be an instrument of the kind described in Schedule 2, Column 2(b)(ii).[57] The transfer was dutiable under s 16 and Schedule 2, Column 2(b)(ii), when it was signed by the parties. The Commissioner contends that Ms Harvey's argument is contrary to the clear meaning and operation of the relevant legislative provisions. The liability for transfer duty arose when the transfer form was signed and continued unless and until s 156A(1) had application. Section 156A(1) does not apply as the transfer was not cancelled before it had legal effect (s 156A(1)(b)). She was not entitled to a reassessment of duty under s 156A and remains liable for the duty as assessed.

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55 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [49] – [53] and [57] – [60].

56 Above, [61] – [68].

57 Above, [69] – [72].

Conclusion on this issue

[47] The *Duties Act*, self-evidently, is concerned with assessments of duty.[58] Its Chapter 2 in which s 156A is found deals with transfer duty. Under s 156A an assessment of duty may be reassessed in the circumstances there specified. It is common ground, in light of the post-assessment events including the bank's sale of the property to a third party and Ms Harvey's subsequent cancellation of the transfer, that s 156A(1)(a), (c) and (d) apply. The question is whether under s 156A(1)(b) the transfer was cancelled before it had legal effect. If so, Ms Harvey is, as she contends, entitled to a reassessment of transfer duty. Under s 156A(2) the transfer will have legal effect if it comes within either s 156A(2)(a) or (b) or (c). The Commissioner relies solely on s 156A(2)(c).

[48] Ms Harvey's contention, that s 156A(2)(b) and s 156A(2)(c) should be construed as not referring to instruments of the kind referred to in s 156A(2)(a) (that is, those which when recorded in a register, would effect the transfer of dutiable property) should be rejected. There is no sound reason to construe s 156A in this artificial and convoluted way when its text and its context in the legislative scheme are considered. Ms Harvey's proposed construction is inconsistent with the clear terms of s 156A, particularly those of s 156A(2)(c), "has been relied on in any other way." Those words are broad and all-encompassing and do not suggest a legislative purpose to exclude instruments capable of effecting the transfer of dutiable property when registered. Ms Harvey's examples of caveats or pre-settlement insurance considerations do not persuade me that the construction adopted by the primary judge was so absurd that the legislature cannot have intended it. The distinction in Schedule 2, Column 2 between (a) and (b)(ii) does not assist Ms Harvey's argument. Those provisions merely state that liability for transfer duty arises at the earlier of the two dates provided for in (a) and (b)(ii), namely when the property is transferred or, for certain registrable instruments, when they are signed. They are equally consistent with the construction of s 156A proposed by the Commissioner. The construction adopted by the primary judge,[59] which I would also adopt, works harmoniously with the scheme relating to transfer duty provided for in the *Duties Act* and the *Taxation Administration Act*. His Honour did not err in rejecting this contention of Ms Harvey.

[49] Her next contention raises whether the primary judge erred in concluding that the transfer had been "relied on in any other way" under s 156A(2)(c) so that it had legal effect and was subject to transfer duty. It is true that the 2 November 2009 Form LT12 requesting the land tax exemption, did not in terms refer to the transfer. The Form LT12, however, stated that it related to the property which was, of course, the subject of the transfer. She stated in it that she used the property for "residential purposes continuously." She provided the Commissioner with the Form 23 Settlement Notice dated 4 November 2009 relating to Laworld's transfer of the property to her.[60] On 17 November 2009 she provided the Commissioner with a copy of the transfer and the Form 24 which referred to her as transferee and Laworld as transferor and recorded the dates of both possession and settlement as 15 June 2009, inferentially relying on the transfer for that information. The following day the Commissioner reduced her and Laworld's liability for land tax on the basis that Laworld transferred the property to her on 15 June 2009 (so that it was no longer liable for land tax on the property) and after which she used it as her principal place of residence (so that it was exempt from land tax). Far from being irrelevant to the revised assessment of land tax, the transfer was critical to it.

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58 *Duties Act* s 5(2)(a).

59 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [45] – [60].

60 AB 444.

[50] The only rational inference from these dealings with the Commissioner is that Laworld and Ms Harvey relied on the transfer in applying to reduce their land tax liability. The terms of s 156A(2)(c) do not support Ms Harvey's contention that it requires that the instrument be relied on to effect the transfer. It can also be relied on as evidence of the transfer.[61] For the reasons identified by the primary judge,[62] his Honour rightly concluded that under s 156A(2)(c) the transfer had been relied on and therefore had legal effect under s 156A(2) and s 156A(1)(b). She is not entitled to a reassessment under s 156A and remains liable under the December 2010 assessment.

[51] Ms Harvey has not demonstrated the post-assessment events made the December 2010 assessment unenforceable.

Was the transfer form liable to duty?

[52] The second issue identified by Ms Harvey concerns whether the judge erred in holding the transfer was liable to duty. As for the first issue, I will set out the competing contentions on this issue before stating my reasons for rejecting Ms Harvey's contentions.

Ms Harvey's contentions

[53] Ms Harvey contends that the transfer was not liable to transfer duty for three reasons. The first is that it was executed in escrow and the condition of the escrow was never fulfilled. The second is that the valuation relied on by the Commissioner was not valid and could not support the Commissioner's assessment based on that valuation rather than the consideration of $1,500,000 recorded in the transfer. The third is that the Commissioner was not entitled under the *Duties Act* and the *Tax Administration Act* to rely on the valuation obtained by the Commissioner under s 505 *Duties Act*.

[54] As to the first contention, Ms Harvey emphasises that the transfer was executed with only the deposit paid when conditions in the agreement between the parties, (that the bank agree to release its security over the property) had not been fulfilled. It followed, she contends, that the transfer was not liable to duty until fulfilment of that condition.[63] It can be inferred, she submits, from the agreement and the transfer that the transfer was executed in escrow.[64] Under s 176 *Land Title Act*, she submits, the transfer once registered was effective as a deed. The parties clearly intended the transfer to become a deed upon registration. The common law continues to apply: *American Dairy Queen* (*Qld) Pty Ltd v Blue Rio Pty Ltd*,[65] *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*[66] and *Keswick Developments Pty Ltd & Anor v Keswick Island Pty Ltd & Ors*.[67] Although the transfer was signed by the parties, it was delivered in escrow and its unfulfilled condition meant that it was never liable to transfer duty.[68] Ms Harvey contends that the Commissioner's reliance on principles relating to conditional contracts in stamp duty cases has no application to the present case where the transfer was signed in escrow.

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61 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [65].

62 Above, [62] – [66].

63 *Bowker v Burdekin* (1843) 11 M&W 128, 147; 152 ER 744, 751; *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, 133, [26] – [28].

64 *Halsbury's Laws of England*, 5th Edition, 2012, Volume 32, 151, [237].

65 (1981) 147 CLR 677, Brennan J, 686.

66 (2008) 237 CLR 473, Gummow A-CJ, Heydon, Crennan and Kiefel JJ, 494, [51].

67 [2011] QCA 379, [85].

68 *Baring v Commissioners of Inland Revenue* [1898] 1 QB 78, 87; *Byrne v Revenue Commissioners* [1935] IR 664, 670 – 671.

[55] Her second contention on this issue is that, as the valuation relied on expressed a range of prices and not a firm valuation figure, the Commissioner did not obtain a valid valuation under s 505 *Duties Act*.[69] The Commissioner, she argues, was not entitled to substitute, as the value of the property for the assessment of transfer duty, an invalid valuation for the consideration of $1,500,000 recorded in the transfer. She emphasises that under s 11(1) *Taxation Administration Act*, the Commissioner must make an assessment of transfer duty. Under s 11(7) *Duties Act*, this is assessed on either the consideration for the dutiable transaction or the unencumbered value of the dutiable property, whichever is greater. Under s 13 *Taxation Administration Act*, if the Commissioner is not satisfied with the accuracy or completeness of a document lodged or information given, the Commissioner may make a default assessment for the amount the Commissioner reasonably believes to be the taxpayer's liability. Under s 27 *Taxation Administration Act*, the Commissioner makes the assessment on the available information the Commissioner considers relevant.

[56] Applying s 87 *Taxation Administration Act* to this case, she contends the Commissioner is empowered to require Laworld to provide "information in [Laworld's] knowledge about a stated matter[70] … or … a document about a stated matter in [Laworld's] possession or control."[71] She submits that the Commissioner purported to act under s 87 in writing to Laworld on 25 November 2009, seeking information as to the value of the property at the date of the transfer. Laworld responded on 23 December 2009, enclosing a letter from a real estate agent, dated 21 December 2009, stating that a reasonable asking price for the property as at the date of transfer was between $1,480,000 and $1,520,000. There was no evidence that on 25 November 2009 Laworld was in possession of information as to the value of the property at the date of transfer or that the real estate agent's letter was then in Laworld's possession or control. The fact that the real estate agent's letter was dated 21 December 2009 strongly suggests this information only came to Laworld on that date. The Commissioner's view of the value of the property differed from the consideration provided for it under the transfer but that did not authorise the Commissioner, either under the *Duties Act* or the *Taxation Administration Act*, to assess duty based on the Commissioner's valuation rather than on the consideration. As a result, the December 2010 assessment was not an assessment under the *Duties Act* or the *Taxation Administration Act*.

[57] Ms Harvey further contends that providing evidence of value which the Commissioner does not accept is not a failure to "give information required to be given under an information requirement" within s 13(1)(a)(ii) *Taxation Administration Act*. Nor can it be dissatisfaction "about the accuracy or completeness of a document lodged, or information given" under s 13(1)(b) *Taxation Administration Act*. The Commissioner has power under s 87 to require information or documents and where information or documents are not supplied can issue a default assessment. The Commissioner's failure to accept the accuracy of Laworld's letter from the real estate agent did not mean that Laworld had breached s 87. The primary judge erred in finding the condition precedent to making a default assessment under s 13 was met as Laworld had not failed to "give information required to be given under an information requirement" within the terms of s 13(1)(a).

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69 *Spencer v The Commonwealth* (1907) 5 CLR 418, 432; *Airservices Australia v Canadian Airlines International Limited* (2000) 202 CLR 133, 282, [444]; *Vale v Sutherland* (2009) 237 CLR 638, 646, [21], 647, [27], 651, [42] – [43].

70 *Taxation Administration Act* s 87(a).

71 *Taxation Administration Act* s 87(b).

The Commissioner's contentions

[58] As to Ms Harvey's first contention, the Commissioner submits that, whilst disputing the transfer was executed in escrow, the judge was right to conclude that there was no warrant for reading into Schedule 2, Column 2(b)(ii) *Duties Act* a qualification or limitation on the clear words used there so as to exclude an instrument delivered or held in escrow. To construe the *Duties Act* in this way would be to insert a new time as to when liability for transfer duty arose and would amount to a re-writing of the Act where there was no warrant to fill a gap in the legislation or to avoid an absurd result. Under s 9(1)(b)[72] and Schedule 2 *Duties Act*, in the case of a conditional agreement for the transfer of dutiable property liability for transfer duty arises when the agreement is made, not when the conditions are satisfied. Schedule 2 is concerned with fixing a time for liability for duty by reference to a physical act, here, under Column 2(b)(ii), when the parties sign the transfer. Ms Harvey's contention is also inconsistent with s 115 *Duties Act*[73] which provides for a reassessment where, after execution, an agreement for the transfer of dutiable property ceases to be binding because of non-fulfilment of a condition. While s 176 *Land Title Act* provides that a transfer once registered becomes effective as a deed, until it is registered it has the character it ordinarily bears. Ms Harvey's contention concerning s 176 does not assist her.

[59] As to Ms Harvey's contention as to the valuation, the Commissioner contends that, in making a default assessment under s 13(2) *Taxation Administration Act*, the Commissioner may determine the value of the property otherwise than by adopting a value in a valuation obtained under s 505(2)(a) *Duties Act*. The Commissioner adopts the reasons of the primary judge on this question.[74] The Commissioner had to determine the unencumbered value of the property in determining the liability for transfer duty and in making the December 2010 assessment. He was required under s 13(2) to assess the amount he reasonably believed to be the taxpayer's liability on the available information he considered relevant: s 27 *Taxation Administration Act*.[75] The available information he considered relevant included a valuation opinion which valued the property at between $5,000,000 and $5,500,000. The Commissioner contended that, in any case, the Commissioner was not required to value the property by adopting the valuation obtained under s 505(2)(a). In terms of valuation evidence, the Commissioner was not confined by s 505 which confers power on the Commissioner to obtain information for the purpose of making an assessment. Section 505 is not an exhaustive statement of the Commissioner's powers in respect of valuation evidence. To construe s 505 in that way would be inconsistent with s 27. The Commissioner has the ultimate responsibility for making the decision as to the value. The sources of information which the Commissioner could use in making a default assessment and in valuing the property were not restricted under the legislative scheme to a valuation under s 505. The Commissioner emphasises that a valuation is a notoriously inexact science[76] and does not always allow for precise mathematical calculation but rather is a matter of estimation[77] so that an assessment based on a value which lies within a range of figures is in any case capable of being a valuation, either under s 505 or as more

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72 Set out in these reasons at [20].
73 Set out in these reasons at [26].
74 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [74] – [76] and [88] – [89].
75 Set out in these reasons at [32].
76 *Vale v Sutherland* (2009) 237 CLR 638, 646, [21].
77 *Commissioner of Taxation (Cth) v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336, 381.

general evidence of valuation.[78] Ms Harvey could have exercised her right of appeal in respect of the Commissioner's assessment of value but did not.

Conclusion on this issue

[60] As to Ms Harvey's first contention, it is true both that Laworld's transfer of the property to her was, according to the minuted agreement of 16 May 2009, conditional upon the bank agreeing to release its security, and also that this condition was not subsequently met. It is also true that in some jurisdictions conditional transactions may not be subject to assessment of duty: see, for example, *Baring v Commissioners of Inland Revenue*[79] and *Byrne v The Revenue Commissioners*.[80] But as the primary judge identified, the legislative purpose of the *Duties Act* and the *Taxation Administration Act* is that conditional agreements should be subject to transfer duty. So much is clear from s 9(1)(b) which expressly provides that a dutiable transaction includes an agreement for the transfer of dutiable property whether conditional or not. This construction is also supported by s 115 which provides that transfer duty is not to be imposed on an agreement for the transfer of dutiable property which has ended because of non-fulfilment of a condition. As I have explained earlier, s 115 was of no assistance to Ms Harvey as she relied on the transfer under s 156A(2)(c) before the agreement was terminated and the transfer cancelled so that the agreement and the transfer had legal effect. The effect of s 9(1)(b) and Schedule 2 *Duties Act* is that agreements for transfer of dutiable property include conditional agreements, so that the liability for transfer duty on a conditional agreement arises when the agreement is made. There is no reason why the legislative purpose of the *Duties Act* and the *Taxation Administration Act* is not to extend this liability for transfer duty to instruments of transfer based on a conditional agreement to transfer, at least where the transfer has been relied on under s 156A(2)(c) so that it has legal effect. For such instruments, liability for transfer duty arises in accordance with Schedule 2, Column 2, (a) and (b). His Honour rightly concluded that there is no warrant in the text or context of the *Duties Act* for importing an exception to the duty imposed on a transfer of dutiable property if the instrument or transfer is signed or held in escrow. This contention is not made out.[81]

[61] Nor can I accept Ms Harvey's next contention that the Commissioner was bound to determine the value of the property only by adopting a valuation under s 505(2)(a). It is true, as Ms Harvey contends, that there is a persuasive body of jurisprudence supporting the proposition that a valuation of property, although an inexact science[82] and notoriously imprecise,[83] should be expressed as a definite figure rather than as a range. See, for example, *Spencer v The Commonwealth*[84] and *Vale v Sutherland*.[85] The figure determined as the valuation should be the price that a willing purchaser, at the relevant date, here the date of transfer, would have paid a vendor not unwilling but not anxious to sell.[86] The term "valuation" is not defined in the *Duties Act* or, for

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78 *Maritime Services Board of New South Wales v Australian Shipping Commission* (1991) 27 NSWLR 258, 280.
79 [1898] 1 QB 78, 89.
80 [1935] IR 664, 670 – 671.
81 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [94].
82 *Vale v Sutherland* (2009) 237 CLR 638, [21].
83 Above, [43].
84 (1907) 5 CLR 418, Griffith CJ, 432.
85 (2009) 237 CLR 638, [21], [27] and [42] – [43].
86 *Spencer v The Commonwealth* (1907) 5 CLR 418, 432.

that matter, in the *Taxation Administration Act*.[87] It should have its meaning at common law. It follows that a valuation report giving only an indicative value range, here of "$5,000,000 to $5,500,000", was not a valuation for the purposes of s 505.

[62] The Commissioner was empowered under s 13(2) and s 27 to determine the amount which he reasonably believed was the value of the property so as to determine the transfer duty payable under the December 2010 assessment. Under s 11(7) *Duties Act*, if the unencumbered value is greater than the consideration for the transfer, the unencumbered value is the dutiable value of the transaction. In exercising these powers under s 13(2) and s 27, he was entitled to consider the valuer's opinion which valued the property at "$5,000,000 to $5,500,000." Whilst s 505 empowered him to do things in relation to valuation evidence, nothing in s 505 or elsewhere in the *Duties Act* or the *Taxation Administration Act* limited his power under s 27 to considering relevant information as to valuation to that obtained under s 505. This conclusion is consistent with the use of the discretionary "may" in the opening words of s 505(1) and its placement in *Duties Act* Chapter 16, Miscellaneous provisions. Ms Harvey could have challenged the Commissioner's finding as to valuation through an appeal process but she did not. The December 2010 assessment is conclusive evidence of the proper making of the assessment under s 132 unless Ms Harvey's contentions as to the third issue are upheld.

[63] I turn now to Ms Harvey's contentions concerning s 13 and s 87 *Taxation Administration Act*. As she points out, on 25 November 2009 the Commissioner wrote to Laworld requiring it under s 87 to provide "independent evidence of value of the property." There was no evidence that Laworld had such valuation evidence in its possession or control. The letter as to value which Laworld provided to the Commissioner from the real estate agent post-dated the Commissioner's letter to Laworld. There was no evidence that Laworld had failed to give information required to be given under an information requirement or lodge a document required to be lodged under a lodgement requirement in terms of s 13(1)(a)(ii). But as the primary judge identified,[88] there was no reason to conclude that the December 2010 assessment was made under s 13(1)(a)(ii). Under s 13(1)(b), the Commissioner was empowered to make the December 2010 assessment on the basis that the Commissioner was not satisfied about the accuracy of the information given for the assessment of Ms Harvey's liability for transfer duty under Chapter 2, Part 3 *Duties Act*. The Commissioner's dissatisfaction with the consideration for the property in the transfer documents of $1,500,000 representing its value, (see s 11(3) *Duties Act*) triggered s 13(1)(b), irrespective of whether s 13(1)(a)(ii) applied. Ms Harvey's concerns about whether there had been an information requirement under s 13(1)(a)(ii) and the impact of that on s 87 were irrelevant. This contention is not made out.

[64] None of Ms Harvey's contentions that the judge erred in holding the transfer was liable to duty is made out.

The justiciability of the validity and correctness of the assessment

[65] The third issue identified by Ms Harvey concerns whether the judge wrongly construed the justiciability of the validity and correctness of the assessment. As for the first two issues, I will set out the competing contentions on this issue before stating my reasons for rejecting Ms Harvey's contentions.

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87 The meaning of "unencumbered value" of property is set out in s 14 *Duties Act* but is of no assistance in determining this question.

88 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [90].

Ms Harvey's contentions

[66] Ms Harvey contends that s 132(2) *Taxation Administration Act* does not apply where the Commissioner has failed to follow the mandatory steps in s 21 *Duties Act*. The Commissioner failed to identify, as required under s 21, whether it was the minuted agreement or the transfer form that was subject to transfer duty. This non-compliance with a statutorily prescribed procedure for making an assessment means that the Commissioner cannot rely on s 132 as conclusive evidence of the proper making of the December 2010 assessment. Only where there has been compliance with mandatory provisions but non-compliance with less significant provisions could it be said under s 132(2) that the validity of an assessment was not affected "merely because a provision of a tax law has not been complied with." The word "merely" in s 132(2) makes clear that a serious non-compliance will not be protected. For those reasons, she contends that the judge erred in not distinguishing s 132(2) from s 175 *Income Tax Assessment Act* 1936 (Cth) and in not distinguishing this case from *Federal Commissioner of Taxation v Futuris Corporation Limited*.[89] The judge should have construed s 132(2) in the context of the whole legislative scheme, applying the principles of statutory construction he identified[90] and in the manner identified in Pearce and Geddes' *Statutory Interpretation in Australia*.[91] Privative clauses like s 132(2) must be construed as not intending to deprive citizens of access to the courts without express provision: *Darling Casino Ltd v New South Wales Casino Control Authority*.[92]

[67] Ms Harvey also contends that privative clauses like s 132 are subject to the principles identified in *Kirk v Industrial Court of New South Wales*[93] as discussed in *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd*.[94] She contends that s 132(2) cannot apply in the circumstances of this case because it purports to deprive the Supreme Court of the authority to confine the Commissioner to the limits of the Commissioner's jurisdiction. It was beyond the power of the Queensland legislature to enact s 132(2).

[68] Ms Harvey emphasises that s 69(1)(b) *Taxation Administration Act* required that she pay the whole of the amount of the December 2010 assessment as a precondition to exercising a right of appeal or review. She contends that the combined operation of s 69 and s 132 relied on by the Commissioner is to prevent her from challenging her liability for duty, the extent of that liability, and the figure chosen by the Commissioner as the dutiable value of the transactions. This, she contends, infringes the principle identified in *Kable v Director of Public Prosecutions (NSW)*.[95] The combined operation of s 69 and s 132 substantially impairs this Court's institutional integrity. The provisions are incompatible with the Court's role as a repository of federal jurisdiction as they require the Court to give judgment for a debt merely on the Commissioner's determination. They compel the Court in an action for debt to enforce without question a determination made by the executive. The judge should have held that s 69(1)(b) was invalid on the ground that it is contrary to Chapter III *Commonwealth Constitution*. The provisions contravene the basic principle of jurisprudence that as far as possible all matters in controversy between parties should be completely and

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89 (2008) 237 CLR 146, 166.
90 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [54] – [56].
91 Pearce, DC., Geddes, RS., *Statutory Interpretation in Australia*, (2014) 8th Ed., [1.7], 9.
92 (1997) 191 CLR 602, 630 – 635.
93 (2010) 239 CLR 531, 579, [94].
94 [2014] QCA 232, [98] – [99] and [103].
95 (1996) 189 CLR 51; [1996] HCA 24.

finally determined in one proceeding. Their combined effect is to "require the court to dance to the executive's tune." She contends the primary judge erred in not dealing with this issue[96] and, in light of the *Kable* principle, should have found s 69(1)(b) invalid.

[69] In support of this contention, she has applied for leave to adduce evidence in the appeal through her solicitor, Ms Kerry Therese Doyle, to the following effect. On 18 August 2014 after the primary judge delivered his reasons and pronounced his orders, Ms Harvey's solicitors received a letter of demand from the Commissioner's lawyers arising from the December 2010 assessment for $623,255.07. She emphasises that, despite this appeal, the Commissioner has refused to delay these recovery proceedings.

[70] She contends that, for all these reasons, the December 2010 assessment of transfer duty was invalid. She also submits that the Commissioner was not entitled to penalty tax and unpaid tax interest under s 55 and s 58 *Taxation Administration Act*. She further submits that the Commissioner was not empowered under s 505(3) to recover the cost of valuation under s 505 because the valuation was not a valuation according to law.

The Commissioner's contentions

[71] The Commissioner relies on the primary judge's reasons for rejecting Ms Harvey's contention that s 132(2) only applies to non-compliance with provisions of the *Duties Act* or the *Taxation Administration Act* which are ancillary to the process of assessment and not where there is a failure to follow a statutorily required step leading to or a procedure prescribed for making an assessment.[97] Her construction of the legislation finds no support in the text or context of s 132(2) or in accepted principles of statutory construction. It is contrary to the approach taken in *Futuris* to s 175 which is analogous to s 132(2). When its text is construed in its legislative context, s 132(2) evinces the legislative intent that failure to comply with a provision does not result in invalidity.[98] Section 132(2) is a legitimate means for the legislature to provide that errors which do not go to jurisdiction do not effect the validity of an assessment.[99] The notion that any failure to observe requirements of a Federal law necessarily results in invalidity was rejected in *Glennan v Commissioner of Taxation*[100] and should be rejected in the analogous case of a failure to observe requirements of a State law.

[72] The Commissioner submits that Ms Harvey's contentions, that errors in the assessment process result in the December 2010 assessment not being an "assessment" in s 132 and that, if s 132(2) provided otherwise, it was beyond the legislative power of the Queensland Parliament to enact, should be rejected. Section 132(2) does not preclude review for jurisdictional error; it cannot in light of *Kirk*. Subject to the s 21 point, the judge correctly found that the alleged Commissioner's errors relied on by Ms Harvey were not errors. For the reasons given by his Honour,[101] the Commissioner contends that the Commissioner's non-compliance with s 21 in this case does not result in the December 2010 assessment becoming something which is not an "assessment" within s 132(2). Ms Harvey remains liable under the December 2010 assessment.

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96 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [127].
97 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [112] – [120].
98 *Futuris*, [23].
99 *Futuris*, [24]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 – 614; and *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 241 – 242.
100 (2003) 77 ALJR 1195, 1199 [26].
101 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [123] – [124].

[73] As to the *Kable* argument, the Commissioner contends that his Honour correctly concluded that this case did not raise any *Kable* issue. The Commissioner emphasises that Ms Harvey did not seek to exercise her appeal rights under s 69. As a result, he contends s 69 has nothing to do with either the proceeding at first instance or this appeal. As to her *Kable* argument concerning the Commissioner's recovery proceedings for her unpaid tax as a debt, the proceeding below and this appeal are not recovery proceedings. The Commissioner contends the application to adduce fresh evidence should be refused.

[74] In any case, the Commissioner contends that s 69 and s 132(2) do not substantially impair this Court's institutional integrity. In creating a duty or obligation to pay money, the legislature may attach special incidents or characteristics which do not pertain to debts owed by one citizen to another within the sense of the general law: *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*.[102] Where a statute creates a debt, special statutory provisions, as for example in tax legislation, may make inapplicable pleas which might otherwise raise a triable issue in an action to recover the debt.[103] The Commissioner contends that s 132(1) makes inapplicable any plea about the correctness of the amount and particulars of the assessment in any proceeding other than an appeal against or review of a decision on an objection under s 69. But s 132(2) does not put beyond review something which does not satisfy the statutory description of an assessment. Ms Harvey's December 2010 assessment was not of that character.

[75] The Commissioner further submits that Ms Harvey's contentions, that the Commissioner is not entitled to recover valuation costs under s 505 or penalty tax and unpaid tax interest, are unfounded. She is liable under a valid and existing default assessment so that penalty tax and unpaid tax interest may be imposed. The valuation report of 13 December 2010, the Commissioner contends, was a valuation under s 505(3) and the Commissioner is entitled to recover the costs of obtaining it.

Conclusion on this issue

[76] The primary judge rightly identified that the Commissioner did not comply with s 21 *Duties Act* in that the December 2010 assessment identified both the transfer and the agreement to transfer without clarifying which of those two dutiable transactions was subject to transfer duty.[104] Critically, however, only one lot of duty was assessed. Section 21 is a pivotal provision in this legislative scheme in that, together with s 22, it prevents double duty from being imposed on dutiable transactions which effectively form a single continuous transaction for property. The evil of double duty is more likely to be avoided if the Commissioner makes clear, as s 21 requires, which particular transaction of two or more potentially dutiable transactions forming part of one single continuous transaction for property is dutiable. But as the Commissioner's breach of s 21 was of a technical kind only and there was no imposition of double duty, the judge was clearly correct in concluding that, in the circumstances of this case, the error was not a jurisdictional error.

[77] I turn now to Ms Harvey's contentions as to s 132. The terms of s 132 must be construed together with s 69 in the context of the legislative scheme established by the *Duties Act* and the *Taxation Administration Act*. The primary judge correctly

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102 (2008) 237 CLR 473, Gummow A-CJ, Heydon, Crennan and Kiefel JJ, 493 – 494 [51].

103 Above, 495 [52].

104 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [96] – [103].

recognised that *Futuris*[105] is persuasive authority for construing s 132(1)(b)(i) as having the effect that, in an appeal or review under s 69, an assessment notice is evidence, but not conclusive evidence, of the amount and all the particulars of the assessment. But for other proceedings, such as those before the primary judge and this appeal, s 132(1)(b)(ii) makes the assessment notice conclusive evidence of those matters. The terms of s 132(2) envisage that the validity of an assessment may be able to be questioned judicially, but not "merely because a provision of a tax law has not been complied with." As the primary judge identified by analogy with the High Court's reasoning in *Futuris*[106] in construing s 175, the Commissioner's failure to comply with s 21 does not mean there has not been an assessment; it does not amount to jurisdictional error unless the failure lies outside the reach of s 132(2).[107] This is not a case within the category of cases identified in *Futuris*[108] where the assessment was tentative or provisional or where the Commissioner acted in deliberate bad faith so that there was no legitimate assessment.

[78] It is true, as Ms Harvey contends, that there are differences between s 175 and s 132(2). Section 175 unlike s 132(2) does not contain the word "merely" but it does state that "the validity of any assessment shall not be affected by reason that any of the provisions of [the] Act have not been complied with." The primary judge rightly concluded that s 175 and s 132(2) are analogous and that the reasoning in *Futuris* applied equally to the present case. Subject to the principles discussed by the High Court in *Kirk*, *Futuris* is authority for the proposition that it is legitimate for the federal parliament to narrow the scope of what constitutes jurisdictional error. The reasoning in *Futuris*[109] applies equally to State legislation like the *Duties Act* and the *Taxation Administration Act* and in construing s 132(2). Ms Harvey's contrary contention must be rejected.

[79] As the primary judge identified, the legislative purpose in s 132(2) is that only those assessments, where there has been non-compliance with a provision of the legislative scheme which might wholly invalidate the assessment as an exercise of statutory power, can be challenged. There is a right of appeal or review under s 69. The terms of s 132 do not suggest that all errors made in applying steps provided in the legislative scheme for the process of making the assessment such as s 21(2), will prevent an assessment notice being conclusive evidence of the proper making of the assessment and that the amount in and all particulars of it are correct.[110] The Commissioner's breach of s 21 was of a technical nature in that the evil that s 21 was clearly intended to avoid was never perpetrated: there was only one assessment of transfer duty although it was recorded on the December 2010 assessment as applying to two transactions. The Commissioner did not assess Ms Harvey as liable for double duty. Had the Commissioner done so, Ms Harvey's argument would be persuasive. As there has been no jurisdictional error, *Kirk* has no application.

[80] As to Ms Harvey's *Kable* argument, it is true that s 69(1)(b) limits a taxpayer's right of appeal and review to circumstances where the taxpayer has paid the whole of the amount payable under the assessment including late payment interest. Many taxpayers may be unable to access large sums like those with which this appeal is concerned within the relatively short time frame provided. Although courts have long recognised the

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105 *Futuris*, at [23] – [25].
106 Above.
107 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [116].
108 *Futuris*, at [25].
109 *Futuris*, at [64] – [67].
110 *Harvey v Commissioner of State Revenue* [2014] QSC 183, [123].

harshness of provisions such as s 69(1)(b), they are standard in taxation statutes and consistent with long standing legislative policy to protect the revenue both at a State and Federal level.[111] The primary judge rightly identified that there was no merit in dealing with the *Kable* point because Ms Harvey had not appealed under s 69. That provision had no application to the proceeding below and nor does it have application to this appeal. During the hearing of this appeal, counsel for the Commissioner stated without objection that the Commissioner had not commenced proceedings against Ms Harvey to recover the assessed transfer duty as a debt. But in any case, the fact that she commenced this appeal did not stop the Commissioner from pursuing his rights under the December 2010 assessment. Nor is there is anything in the requirement in s 69(1)(b) that the taxpayer pay the assessment before a merits appeal or review can be entertained which offends the *Kable* principle. Section 69(1)(b) was not repugnant to or incompatible with the institutional integrity of Queensland courts resulting from their constitutional position in the Australian legal system which flows from Chapter III *Commonwealth Constitution*. This contention is baseless.

[81] The Commissioner was entitled to have the property valued under s 505 *Duties* Act but, for the reasons I have explained, the valuation obtained was not a lawful valuation as it did not specify a particular figure, but rather a range. It was not a valuation of the kind envisaged in s 505. For that reason Ms Harvey is right to say she is not obliged under s 505(3) to pay for the costs of obtaining that valuation. But those costs do not form part of the December 2010 assessment; they were invoiced separately. She is liable, however, to pay the penalty tax and unpaid tax interest which are part of the assessment: see s 55, s 58 and s 132.

[82] Ms Harvey's contentions that the judge wrongly construed the justiciability of the validity and correctness of the assessment are not made out.

Summary and Orders

[83] Ms Harvey has been unsuccessful on all the issues she has raised in this appeal, save that she is not liable to pay the Commissioner's costs of $660 for the valuation under s 505(3). That amount, however, was not part of the December 2010 assessment and is irrelevant to the orders she sought both at first instance and in this appeal. It is true that Laworld's transfer of the property to Ms Harvey on which transfer duty was assessed was not ultimately successful in that the bank never released its security and later exercised its powers as mortgagee to sell the property to a third party, and Ms Harvey terminated the agreement to transfer and much later cancelled the transfer. But Laworld and Ms Harvey relied on the transfer to reduce their liability for land tax. This meant that she was liable for transfer duty and the resulting penalty tax and unpaid tax interest. If she wished to challenge the Commissioner's determination as to the value of the property on the date of the transfer, she should have exercised her appeal rights under s 69. The requirements of s 69(2) may well have made this difficult and the result may seem harsh but that is consistent with long-standing legislative policy adopted at both State and Federal level to protect the revenue. She has not demonstrated that the fresh evidence she seeks to adduce would assist her in her appeal.

[84] The application to adduce fresh evidence should be refused. Her appeal should be dismissed with costs.

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111 *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473, Gummow A-CJ, Heydon, Crennan and Kiefel JJ, [44].

[85] I would make the following orders:

1. The application to adduce fresh evidence is refused.

2. The appeal is dismissed with costs.

[86] **PHILIPPIDES JA:** I agree that the application to adduce new evidence should be refused and that the appeal should be dismissed with costs for the reasons set out in McMurdo P's judgment.

[87] **BURNS J:** I agree with the reasons of, and the orders proposed by, the President.