SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Stamp Duties v Agenti Architects P/L & Ors; Commissioner of Stamp Duties v Brisbane Cruise Port P/L & Ors* [2003] QCA 265
PARTIES:	**COMMISSIONER OF STAMP DUTIES** (plaintiff/respondent) **v** **AGENTI ARCHITECTS PTY LTD** ACN 010 828 850 (first defendant/first appellant) **TRANSWORLD COMMODITIES PTY LTD** ACN 057 957 481 (second defendant/second appellant) **ROXANNE INVESTMENTS PTY LTD** ACN 069 358 747 (third defendant/third appellant) **BRAKATHOS PLUS PTY LTD** ACN 072 700 406 (fourth defendant/fourth appellant) **PEARLREACH PTY LTD** ACN 075 533 612 (fifth defendant/fifth appellant) **BRISBANE CRUISE PORT PTY LTD** ACN 084 860 800 (sixth defendant/sixth appellant) **COMMISSIONER OF STAMP DUTIES** (plaintiff/respondent) **v** **BRISBANE CRUISE PORT PTY LTD** ACN 084 860 800 (first defendant/first appellant) **BRISPORT PTY LTD** ACN 084 860 855 (fourth defendant/second appellant) **PEARLREACH PTY LTD** ACN 075 533 612 (fifth defendant/third appellant) **BRISBANE CRUISE PORT PTY LTD** ACN 084 860 800 (sixth defendant/fourth appellant)
FILE NO/S:	Appeal No 4079 of 2002 Appeal No 4080 of 2002 SC No 7812 of 2001 SC No 7813 of 2001
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 24 March 2003

JUDGES: de Jersey CJ, Jerrard JA and White J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Give leave to the respondent to amend the respondent's name to the "Commissioner of State Revenue"**
2. **Dismiss the appeals**
3. **The appellants to pay the respondent's costs of and incidental to the appeals to be assessed**

CATCHWORDS: TAXES AND DUTIES – STAMP DUTIES – APPEAL, CASE STATED, ETC – QUEENSLAND – where Commissioner of Stamp Duties sought to recover stamp duty assessed in respect of agreements for share sales – where appellants claimed oral agreement that stamp duty not payable until facilities had been constructed – whether statutory duty to charge stamp duty capable of waiver

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – where trial judge struck out appellants' defences as disclosing no reasonable cause of action – whether appellants had no real prospects of successfully defending all or part of the respondent's claim

Stamp Act 1894 (Qld), s 4, s 4B, s 22, s 23D(7)
Uniform Civil Procedure Rules 1999 (Qld), r 292

Chamberlain v Deputy Commissioner of Taxation (1988) 164 CLR 502, followed
Commissioner of Stamp Duties (Qld) v Edmunds [1989] 1 Qd R 271, followed
Commissioner of Stamp Duties v Westleigh Management Services P/L [2001] QSC 176; SC No 9593 of 2000, 8 June 2001, followed
CSR Ltd v Casaron P/L [2002] QSC 021; SC No 9987 of 2000, 15 February 2002, referred to
Commissioner of Taxation (Cth) v Ryan (2000) 201 CLR 109, followed
Cuming Campbell Investments P/L v Collector of Imposts (Vic) (1938) 60 CLR 741, followed
Federal Commissioner of Taxation v Wade (1951) 84 CLR 105, followed
Foodco Management P/L v Go My Travel P/L [2001] QSC 291; SC No 3549 of 2001, 10 August 2001, referred to
McPhee v Zarb & Ors [2002] QSC 004; SC No 6277 of 2001, 8 January 2002, referred to
O'Sullivan v Commissioner of Stamp Duties (Qld) [1984] 1

Qd R 212, followed

COUNSEL: The appellants appeared on their own behalf
K Dorney QC, with D Marks, for the respondent

SOLICITORS: The appellants appeared on their own behalf
CW Lohe, Crown Solicitor, for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of White J. I agree with the orders proposed by her Honour and with her reasons.

[2] **JERRARD JA**: I have read the reasons for judgment of White J and the orders proposed by her Honour. I respectfully agree with those reasons and orders.

[3] **WHITE J:** The respondent to these appeals, now the Commissioner of State Revenue, in each of two proceedings, S7812 and S7813 of 2001, sought to recover the sum of $256,765.20 as a debt due and owing to the Crown, being stamp duty and penalties pursuant to the *Stamp Act* 1894. The duty was assessed in respect of two instruments, being agreements for share sales by and to the appellants. Holmes J struck out the appellants' defences as disclosing no reasonable cause of action, concluding that they had no prospect of successfully defending the claim and gave judgment for the respondent in each proceeding.

[4] The appellants were represented by Mr Kenneth Hoggett, a director of some of the companies, below and on these appeals. The grounds of appeal, in effect, are that:

- there was inadequate service of the application;
- the appellants were denied a fair hearing below on a number of bases:
  - they were denied an opportunity to produce evidence;
  - they were denied an opportunity to examine departmental files and cross-examine departmental officers;
  - they were "ambushed" on the day.
- her Honour erred in concluding that the validity of the "share sales agreement [was] not even raised as an issue in the defence" when it was raised;
- her Honour erred in applying an incorrect test for the granting of summary judgment.

[5] The appellants have sought to file an affidavit of Mr Hoggett concerning the conduct of the hearing below and matters which the appellants wish to raise by way of defence. The respondent opposed leave being given but if given wished to file an affidavit exhibiting correspondence with the appellants after the hearing.

[6] The learned primary judge had some familiarity with the background to these proceedings having heard the matter reported as *Hoggett v O'Rourke* [2000] QSC 387, 2 November 2000; [2002] 1 Qd R 490 and this was explored with Mr Hoggett. The extensive pleadings in that proceeding (S11510 of 1999) and her Honour's reasons were exhibited to the affidavits of Mr G Rowan, investigations officer with the Office of State Revenue and Mr M Moynihan, solicitor in the Crown Solicitor's

office respectively, filed in support of the application. For the purposes of understanding the appeal and something of the appellants' approach to them, it is necessary to outline some of the assertions of fact found in the pleadings in S11510, the defences to these present claims and Mr Hoggett's affidavits as well as his outlines on the appeals.

[7] A number of the appellants were desirous of establishing a cruise terminal with associated commercial features on a four hectare site owned by the State of Queensland at Hamilton on the Brisbane River. Woodsands Pty Ltd, a company in which some of the appellants were shareholders, was granted a 100 year term lease over the site in 1997. Woodsands entered into a development contract with Walter Construction Group Limited. The project subsequently encountered funding difficulties and it was hoped to raise the necessary capital through a publicly listed company. This was achieved by share sale agreements which were lodged with the respondent for assessment of stamp duty payable. The relevant instruments for these appeals were two deeds dated 22 October 1998.

[8] Assessment issued on 18 February 1999 in the sum of $159,481.20 in respect of each instrument the subject of these proceedings. No objections were raised. Mr Hoggett deposes that the appellant decided not to object because there was an understanding that there was in place an oral agreement with the State Government that stamp duty would only be payable on the completion of the project. In the meantime, events occurred to undermine the advancement of the project which, Mr Hoggett says, are the subject of action S11510 of 1999.

[9] Rental due in respect of the Hamilton site was not met and the lease was forfeited in May 2001. Walter Constructions placed Woodsands into receivership and subsequently it went into liquidation. The appellants either pleaded below or now contend that the State Government and the Office of State Revenue colluded with Walter Constructions (and others) to defeat their interests in the project.

[10] In *Hoggett v O'Rourke* Holmes J struck out paras 8 to 26 of the statement of claim in that proceeding which relied on a share sale agreement of 30 March 1999 between other entities involved in the project and the relief sought that there be a declaration for the validity of the share sale agreement. Her Honour did so because the share sale agreement had not been stamped and no undertakings had been offered. There was no information below or on appeal about the status of that proceeding.

[11] Turning to the specific grounds of appeal:

(i) Inadequate service

[12] The application for strike out and summary judgment was dated 22 March 2002 with the hearing date endorsed as being on 10 April, the day on which it was, indeed, heard. Mr Hoggett announced on that day to the court that he was there for a number of the defendant companies and that other directors from the remaining companies were present in court and could participate if necessary. He clearly was making submissions in respect of them all. Some of the companies had not been properly served as Mr Hoggett then indicated or, in the case of Pearlreach Pty Ltd (the fifth appellant), not at all but Mr Hoggett added:

> "Be that as it may, in the interests of truth we're here rather than just let the matter go through in an ex parte way so that – to sort of give

> the impression to the Court and to the people of Queensland that we don't care. We do. We are honourable people, and we intend to maintain that honour and to maintain, as far as we're able within the Court system, our rage about what has taken place." R 182.

[13] There was no application for an adjournment on the grounds of inadequate or no service. Mr Hoggett clearly expressed an intention on the part of the appellants to waive any irregularity as to service and to proceed with the substantive application that day. It may appear from his statement after her Honour gave judgment that the appellants believed, having had a discussion with Mr Moynihan on the day before, that

> "we wouldn't necessarily be arguing the matter that we ended up arguing before you this morning so to some extent we probably feel that we've been slightly ambushed to that extent…" R 195.

On appeal Mr Hoggett said that the appellants did not fully appreciate that the hearing on 10 April was a strike out application but was rather "a preliminary leading-up to actually where we would have a trial". This misconception is hard to comprehend. The application was clear as to what was to happen –

> "… each of the Defences … be struck out … as the defences disclose no reasonable defence… that, accordingly, pursuant to Rule 292 … judgment be given for the Plaintiff on the Plaintiff's claim as follows …"

The application plainly stated that it was to be heard on 10 April 2002. As is apparent from the transcript, the matters that the appellants wished to address were made in oral submissions by Mr Hoggett. There is nothing in that ground of appeal.

(ii) *Want of natural justice in the conduct of the hearing*

[14] The appellants contend that they were denied an opportunity to produce evidence to the court although they had a present and apparent ability to do so, that they had indicated to the solicitor from Crown Law that they wished to have access to the relevant departmental files and for two witnesses to be available for cross-examination. They say that they had that agreement but the files were not produced to them and no opportunity was afforded for cross-examination. The respondent says that the witnesses were available and the appellants did not seek before her Honour to cross-examine them or to have the files disclosed. The appellants contend that her Honour

> "made no effort to ensure that the appellants were afforded every opportunity to fully and thoroughly present the case for the appellants, particularly when the presiding judge was aware that no legal representation was present for the appellants but individual directors of all appellant companies were present …"

The appellants complain that they were denied an opportunity to amend their defence.

[15] The transcript reveals that her Honour engaged Mr Hoggett in an exploration of the basis upon which the appellants said that they were not obliged to pay stamp duty when it was assessed; why they did not lodge an objection to that assessment and that she had no power to grant an extension of time for lodging any objection. Mr Rowan's affidavit exhibited, *inter alia*, extensive correspondence between the

Office of State Revenue and the appellants or some of them. Further material was exhibited to the affidavit of Mr Moynihan. Mr Hoggett was given an opportunity to make submissions on (as he put it, below, "to work through") the affidavits. He made reference to access to the complete departmental file and submitted that if the existing defences did not adequately reflect the contentions of the appellants, amendment could.

[16] The procedure on the application was favourable to Mr Hoggett – Mr K Dorney QC for the respondent handed up written submissions and added little to them orally. Mr Hoggett made extensive oral submissions. Mr Dorney responded and Mr Hoggett made further submissions in reply. Her Honour indicated that she would adjourn to consider her decision and would return to give judgment which she did about 30 minutes later. As is clear from her Honour's reasons there was no utility in adjourning the matter, or making an order for disclosure, or in giving an opportunity to cross-examine, or in giving the appellants leave to deliver fresh or amended defences to reflect Mr Hoggett's submissions.

> "In sum, the defences, while they disclose certainly a good deal of dissatisfaction with the conduct of the State Government and other parties involved in the cruise port development, do not establish any defence to the Commissioner's claim.
>
> There is no reasonable defence disclosed. The defences are so clearly untenable they cannot possibly succeed and must be struck out. Nor have the defendants produced any material which would indicate that they have a reasonable prospect of success in their defence or indeed any prospect of success, and I am satisfied that there is no need for a trial of the action." R 201.

(iii) *Amending the defences*

[17] The appellants now contend that had an opportunity been afforded to them they would have made the following amendments to their defences:

> "**Inserting 9A as follows**
>
> The Defendant has been denied natural justice in that it was precluded from lodging any objection or appeal against the assessment of stamp duties because of the underlying agreement made with the Queensland State Government.
>
> **Inserting 9B as follows**
>
> The Defendant does not admit the specific allegations in the Statement of Claim.
>
> **Inserting 9C as follows**
>
> The Defendant relies on agreement with the Queensland State Government that stamp duty would not be sought until the conclusion of construction of the relevant Project at Hamilton.
>
> **Inserting 9D as follows**

> The Defendant relies on the facts of the matter and that the Crown is estopped from seeking the payment of the stamp duty or any stamp duty in respect of the various agreements surrounding the development of the Cruise Ship Terminal and associated facilities at Hamilton unless and until the parties to the relevant agreements have completed construction of those relevant facilities.
>
> **Inserting 9E as follows**
>
> The Defendant believes that the Queensland State Government cannot on the one hand claim that the various agreements the subject of stamp duty were illegally entered into on the one hand and on the other hand seek to claim stamp duty from those very agreements.
>
> **Inserting 9F as follows**
>
> The Defendant relies on the facts of the matter as indicated in this defence is clearly set out either in whole or in part in files held within the Queensland Government Departments involved and those files should be made available to ensure that an injustice is not perpetrated by the Court."

[18] When the respondent received the appellants' material including the proposed amendments, Ms Jackson, a legal officer in the Crown Solicitor's office, wrote seeking particulars of paras 9C and 9D having asserted that paras 9A, 9B, 9E and 9F were legally unintelligible. On 10 December 2002 she requested the usual particulars of the alleged agreement including the date, the parties and whether it was in writing or made orally etc; and particulars of the alleged estoppel. Although there was a lengthy reply from Mr Hoggett on behalf of all the appellants the only particulars of the agreement (and estoppel) were that it was between

> "the Managing Director of the relevant Company and the Treasurer of Queensland with those two parties present in the office of the Treasurer of Queensland".

There was no attempt to identify the date even if approximate or what was actually said, i.e. what was the precise agreement or representation. It is said that a properly pleaded defence will only be possible after an examination of various files.

[19] A perusal of the contemporaneous correspondence and notes of telephone calls between the Office of State Revenue and Mr Walker, the then solicitor for the appellants, and Mr Hoggett, shows that at no time was the alleged agreement raised. On the issue of the assessment notices representations were made on behalf of the appellants for deferment of payment of the stamp duty not because of any agreement but an immediate inability to pay.

[20] By letter dated 7 September 1999 to Mr Walker, the Office of State Revenue referred to previous correspondence and advised that there was

> "no authority to extend the payment date of an assessment or to agree that penalties for late payment will not be payable."

It was made clear that the Commissioner did have a discretion to reduce or remit penalties for late payment but that would not be exercised until after the prime duty

had been paid. The letter made it clear that if the assessment was not paid by the due date penalties would accrue and noted that the Office of State Revenue had agreed not to take recovery action until 1 October 1999.

[21] On 10 November 1999 Mr Hoggett telephoned the officer managing the file. The file note states that Mr Hoggett believed that payment of the duty would not be made until December 1999 and that "it all depends on the deal being finalised, as he sees it". On 1 December 1999 Mr Hoggett wrote as managing director for "BCB Group" to the Office of State Revenue:

> "We seek your compassionate consideration of the issues surrounding this transaction and the difficulties that have had to be overcome. …
>
> It was for these reasons coupled with the envisaged delays that might have occurred that I met with the Honourable the Treasurer earlier this year. We would hasten to add that the Treasurer did not make any commitment or promises at all. He properly asked us to submit the transaction documents in the normal course and to keep him informed. The reason for mentioning this contact here is to underscore what we perceive to be the interest of Government in the development of the cruise ship terminal and the massive economic flow–on effects generated by a successful such facility in Brisbane. …
>
> We confidently expect the ITOBS [Infrastructure Tax Offset Borrowing Scheme] application to be completed, but it is not possible for us to precisely stipulate when it will so complete. Completion of that arrangement does generate funding for the Company such that the stamp duty would then be paid. …
>
> We felt it important to place before you the background to the issue of stamp duties, which on the face of the transaction documents does not leap into view.
>
> We seek your indulgence for up to three months to seek to complete the issues that will then lead to stamp duty payment. We suggest that period of time given the time of year involved and the "speed" with which some issues may be dealt with in that period. …".

An extension was granted.

[22] Mr Hoggett telephoned again on 6 January 2000 seeking a moratorium on the payment of stamp duty for three months because of financial difficulties. By then the arrears were significant. Over the following months there were telephone communications either with Mr Walker or from Mr Hoggett or others associated with the appellants seeking time to pay the stamp duty and mentioning financial difficulties. The main purpose of the communication appears from the file notes to be to avoid the commencement of recovery action by the Office of State Revenue.

[23] On the letterhead of Chieron Holdings Limited, a company involved in the project, Mr Hoggett as managing director wrote to the Office of State Revenue on

22 March 2000 referring to the letter of 1 December 1999. After setting out the endeavours which the group was making to obtain funding he wrote:

> "The Group does not dispute that stamp duty is payable, provided that the Share Sale Agreement of 30 March 1999 between Cruison Pty Ltd (as Vendor) and Chieron Holdings Limited (As Purchaser) is ultimately upheld by the Supreme Court as a valid enforceable agreement. The Group has catered for such costs in the overall financial costing for the project."

This share sale agreement is not the subject of the present proceedings but that pleaded in S11510.

[24] Recovery action was commenced on 22 May 2001 by a letter of demand to each of the parties to the share sale deeds as assessed in the notice issued on 18 February 1999 plus penalties. Submissions were received by each of the appellants that the share sale deeds were part of a series of transactions which culminated in a sale of shares by Brisbane Cruise Ports Pty Ltd to Chieron Holdings Limited making reference to the proceedings S11510 and submitting that if that agreement was set aside the subject stamp duty assessments should also be set aside.

[25] The Crown Solicitor's office responded on 16 July 2001 pointing out that the validity of the assessment had never been challenged by objection under s 23D(1) of the *Stamp Act*, noting that the assessment was conclusive and could only be reviewed upon a case stated pursuant to s 24 and declined to defer recovery proceedings.

[26] When challenged on appeal with the letter of 1 December 1999, Mr Hoggett said that, in effect, the "Government officials" knew about the oral agreement that duty was not presently payable but to maintain "form" or, as Mr Hoggett described it "to satisfy the niceties", the Office of State Revenue was obliged to pursue the recovery of stamp duty but took no legal action to recover the debt until after the lease was forfeited. This must be regarded as an extraordinary response.

[27] The scheme of the *Stamp Act* 1894, Reprint 3 of which is appropriate to these transactions, is plain. It imposes a duty upon the Commissioner and those officers to whom power is delegated to levy and collect stamp duty upon the several instruments specified for the time being, s 4. Where the Commissioner is of the opinion that an instrument is chargeable with duty it is assessed and payable on the date specified and becomes a debt due to the Crown and if unpaid may be sued for and recovered, ss 22 and 4B. Even where an objection is lodged the objector is not relieved of the obligation to pay the duty assessed, s 23D(7).

[28] There can be no waiver of the statutory duty to charge stamp duty. The appellants allege that the Commissioner is complicit in the pursuit of the appellants for stamp duty with knowledge of the agreement made by the State Government not to do so until and unless the project was completed. This seems to be based on an impermissible identification of, or a blurring between, the Commissioner and the State Government. No particulars are given of this complicity and, it seems, the only basis for it is that the Commissioner is identified with the State Government and that the commencement of the proceedings to recover the duty did not occur until after the lease of the terminal had been forfeited. This is asserted against the tenor of the correspondence in which recovery action is clearly foreshadowed from

an early date. Neither of these allegations even if supported by credible evidence can found any defence to the claim for duty. More importantly, no representation or estoppel can operate against the imperative provisions of the *Stamp Act, Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105 at 117 per Kitto J; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 510 per Deane, Toohey and Gaudron JJ; and *Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 124 per Gleeson CJ, Gummow and Hayne JJ.

[29] It was well established, prior to the enactment of the *Judicial Review Act* 1991, that a person dissatisfied with an assessment of the Commissioner could only challenge the assessment after objection made in writing to the Commissioner within the time specified by appeal by way of the case stated procedure in s 24. That person could not raise as a defence matters which could have been the subject of objection, *Cuming Campbell Investments P/L v Collector of Imposts (Vic)* (1938) 60 CLR 741; *O'Sullivan v Commissioner of Stamp Duties* [1984] 1 Qd R 212 at 214-6 per Matthews J and 227-9 per G N Williams J; *Commissioner of Stamp Duties (Qld) v Edmunds* [1989] 1 Qd R 271; and *Commissioner of Stamp Duties v Westleigh Management Services P/L* [2001] QSC 176; SC No 9593 of 2000, 8 June 2001.

[30] After the enactment of the *Judicial Review Act* 1991 another means of challenge to the assessment of stamp duty was provided, subject to the provisions of that Act, *Westpac Banking Corporation v Commissioner of Stamp Duties* [1994] 1 Qd R 99; and *Suncoast Milk P/L v Commissioner of Stamp Duties* [1999] 2 Qd R 529. The appellants have not availed themselves of that procedure. The time limited by the *Judicial Review Act* in which to commence proceedings has long since passed.

[31] In the interests of justice, since the appellants do not have legal representation, I would give leave to the appellants (and the respondent) to read and file their further affidavit material. The proposed new grounds of defence do not provide the appellants with an arguable case against the Commissioner's claim.

[32] The learned judge below was correct in concluding that the appellants had no prospects of success in defending the Commissioner's claim either on their existing defences or on any of the further bases advanced by Mr Hoggett on their behalf.

(iv) *Application of wrong test*

[33] Her Honour did not apply an incorrect test as contended for by the appellants for entering summary judgment. The starting point is r 292(2) of the *Uniform Civil Procedure Rules* which provides that if the court is satisfied that the defendant has no real prospects of successfully defending all or part of the plaintiff's claim and there is no need for a trial of the claim or part thereof the court may give judgment. This was the test applied by her Honour. It is not the test applied to the former Rules of the Supreme Court which was generally that enunciated by Barwick CJ in *General Steel Industries Inc. v Commissioner for Railways (NSW)* (1964) 112 CLR 125. The court will apply the provisions of r 292 consistently with the philosophy expressed in r 5, see *Foodco Management P/L v Go My Travel P/L* [2001] QSC 291; SC No 3549 of 2001, 10 August 2001; *McPhee v Zarb & Ors* [2002] QSC 004; SC No 6277 of 2001, 8 January 2002, both per Wilson J; and *CSR Ltd v Casaron P/L* [2002] QSC 021 per Holmes J. But as noted by Holmes J in *Queensland University of Technology v Project Constructions (Aust) PL* [2002] QCA 224;

Appeal No 7943 of 2001, 25 June 2002; [2003] 1 Qd R 259 at 265, a judgment with which Davies JA and Mullins J agreed, quoting from *General Steel*:

> "… it remains, without doubt, the case that: 'Great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case.'"

It is an observation apt for defendants. But there is no prospect of the appellants defeating the claim by the Commissioner.

[34] There is no substance in any of the grounds of appeal raised by the appellants either formally in their notice, in their supplementary material or in the course of oral submissions. The orders which I would make are:

1. Give leave to the respondent to amend the respondent's name to the "Commissioner of State Revenue".

2. Dismiss the appeals.

3. The appellants to pay the respondent's costs of and incidental to the appeals to be assessed.