SUPREME COURT OF QUEENSLAND

CITATION:	*McDonald's Australia Holdings Ltd & Anor v Commissioner of State Revenue* [2004] QSC 357
PARTIES:	**McDONALD'S AUSTRALIA HOLDINGS LTD (FORMERLY McDONALD'S AUSTRALIA LIMITED) (ACN 000 697 763)** **(first applicant)** **and** **McDONALD'S AUSTRALIA LTD (FORMERLY McDONALD'S PROPERTIES (AUSTRALIA) LTD (ACN 008 496 928)** **(second applicant)** **v** **COMMISSION OF STATE REVENUE (FORMERLY COMMISSIONER OF STAMP DUTIES)** **(respondent)**
FILE NO:	SC No 3240 of 1996
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2004; 10 September 2004; 24 September 2004
JUDGE:	Chesterman J
ORDER:	**1. It is declared that neither of the applicants acquired or agreed to acquire a business for the purposes of s 54A *Stamp Act* 1894 (Qld) by or pursuant to the Deed of Extinguishment of Rights.** **2. It is ordered that the decision of the respondent to issue the amended assessments of duty on 12 December 1995 and the amended assessments be set aside.** **3. It is further ordered that the respondent repay to the applicants the sum of $98,386 together with simple interest at the rate of 5.5% per annum since 15 January 1996.** **4. The respondent is to pay the applicant's costs of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: TAXES AND DUTIES – STAMP DUTIES – RECOVERY OF DUTY – where the second applicant was a licensee under a restaurant licensing arrangement with the first applicant – where the second applicant subsequently terminated the licences that it held with the first applicant – where the first and second applicants then became parties to a Deed of Termination and a Deed of Extinguishment of Rights – where both deeds were lodged with the respondent for stamp duty assessment – where the applicants paid duty on these deeds of $98,368 – where the applicants subsequently object to the payment of stamp duty and sought judicial review of the respondent's decision – whether, through the effect of the deeds, a business had been acquired – whether the respondent had incorrectly obliged the applicants to pay stamp duty on the deeds

Duties Act 2001 (Qld), s 512(1)
Judicial Review Act 1991 (Qld), s 48
Stamp Act 1894 (Qld), s 24(4), s 49, s 53, s 54, s 54A

Allina Pty Ltd v Commissioner of Taxation (1991) 28 FCR 203
Commissioner of Taxation of the Commonwealth of Australia v Murray [1998] 193 CLR 605
Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297
MSP Nominees Pty Ltd v Commissioner of Stamps (South Australia) (1999) 198 CLR 494
State Bank of New South Wales Ltd v Commissioner of Stamp Duties [1994] 2 Qd R 661
Westpac Banking Corporation v Commissioner of Stamp Duties (2003) 55 ATR 50

COUNSEL: Mr R W Gotterson QC, with Mr D Marks, for the applicants
Mr K D Dorney QC, with Mr J A Logan SC, for the respondent

SOLICITORS: Minter Ellison for the applicants
Crown Solicitor for the responent

[1] McDonald's Corporation is 'a corporation duly organised and existing under the laws of the State of Delaware, USA.' It 'operates many restaurants in the United States and certain foreign countries and has developed in relation thereto certain valuable trademarks, trade names and other valuable property rights.' On 1 January 1970 McDonald's Corporation made an agreement with the first applicant, then known as McDonald's System of Australia Ltd. It has had other names which are unnecessary to mention. By the agreement McDonald's Corporation granted the first applicant, for a term of 30 years, within the Commonwealth of Australia, the right to adopt and use the McDonald's System in restaurants; to use the trademarks to identify McDonald's restaurants and McDonald's food products sold therein; to use the property to design, construct and operate McDonald's restaurants. By cl 14 the first applicant was given the right to allow others to enjoy 'the rights conferred on it by this agreement.'

[2] On 8 August 1983 the licence between the McDonald's Corporation and the first applicant was extended to 2019.

[3] 'Property' was defined to mean drawings, plans, specifications and technical data relating to the design and construction of McDonald's restaurants, and the design, manufacture, layout and installation of equipment therein as well as the technical information contained in McDonald's equipment and maintenance manuals. The 'McDonald's System' was defined to mean:

> 'a comprehensive restaurant system for the retailing of a limited menu of uniform and quality food products, emphasizing prompt and courteous service in a clean, wholesome atmosphere which is intended to be attractive to children and families. The foundation of the McDonald's System and the essence of this Licence is the adherence by the Licensee to standards and policies of Licensor providing for the uniform operation of all McDonald's Restaurants with the McDonald's System including, but not limited to, serving only designated food and beverage products; the use of only prescribed equipment and building layout and designs; strict adherence to designated food and beverage specifications and to Licensors prescribed standards of quality, service and cleanliness. Compliance by Licensee with the foregoing standards and policies in conjunction with the use of McDonald's trademarks, trade names and service marks provides the basis for the valuable good will and wide family acceptance of the McDonald's System, and constitute the essence of this Agreement.'

'Trademarks' in turn was defined to mean the trademarks and trade names used by McDonald's Corporation to identify its food products and restaurants.

[4] The parties are agreed that the McDonald's System determines, *inter alia*, what McDonald's restaurants will look like, the type and quality of food served, how the food is to be prepared and cooked, how the food is to be presented, how the kitchen is to be equipped and cleaned, how customers are to be served, how the restaurants are to be marketed, and how the administration of the restaurant is to be organised. Exhibit 1, the agreed bundle of documents, includes a number of operating, training and organisation manuals published by McDonald's Corporation. They are very lengthy and extremely detailed. No part of the conduct or operation of a McDonald's restaurant is left to individual initiative or choice. The entire enterprise is highly regulated. The manner of regulation applies to all McDonald's restaurants.

[5] The McDonald's System, as well as including proprietary rights to trademarks, trade names and service names, extends to designs and colour schemes for restaurant buildings, signs, equipment layout, the formulae and specifications for certain food products, methods of inventory and operational control, book-keeping and accounting as well as business practices and policies.

[6] The second applicant (whose name has also changed over time) owned and built – or leased and fitted out – buildings or premises for use as McDonald's restaurants.

[7] In the event that the first applicant granted a sub-licence for the use of the McDonald's System the sub-licensee was to be supervised and observed to ensure

that its operations complied with the McDonald's System 'for the intended benefit of the brand'. Employees of the first applicant would offer assistance to sub-licensees to ensure compliance with the system.

[8] The first applicant conducted its business in two ways. It operated a large number of McDonald's restaurants which were owned or leased by the second applicant. Secondly it licensed individuals to conduct McDonald's restaurants in premises which they would lease or sub-lease from the second applicant.

[9] On 5 August 1985 the first applicant made an agreement with a company, McBurger Pty Ltd ('McBurger'), which was owned and controlled by Mr Armitage. The agreement is entitled 'Licence' and recites that McBurger wished 'to be granted the right to adopt and use the McDonald's System in a restaurant at Booval shopping centre at Ipswich and that the first applicant had agreed to grant such right.' By cl 2, in consideration of the payment of $12,500, the first applicant granted McBurger 'the right licence and privilege to adopt and use the McDonald's System in the restaurant …'. The term of the licence was five years commencing on 5 August 1985. McBurger was given options to renew the licence 'for three separate further periods, the duration of each of which should be five years.'

[10] McBurger changed its name to Senor Frogs Pty Ltd but I shall continue to refer to it as McBurger.

[11] In addition to the licence fee cl 3 obliged McBurger to pay an amount equal to three per cent of the restaurant's gross sales in consideration of the provision by the first applicant of 'continuing consultation, management and training services.'

[12] In conjunction with the licence agreement, McBurger became the lessee from the second applicant of the restaurant premises at Booval for a term of five years with the right to extend the term for three further terms, each of five years. The copy of the lease in Exhibit 1 is undated, and the term of the lease is not identified by date, but no doubt the parties intended it to coincide exactly with the terms of the licence.

[13] On 17 August 1987 McGold Pty Ltd ('McGold'), another company owned and controlled by Mr Armitage, entered into a licence agreement with the first applicant for the use of the McDonald's System in the operation of a McDonald's restaurant at Shop 122, Ipswich City Square, in Ipswich. The term of the licence was 20 years commencing 17 August 1987. The licence fee was $12,500 and the service fee was four per cent of gross sales. On this occasion the premises formed part of a large shopping centre and were leased by the second applicant from the shopping centre owner. The second applicant subleased the premises to McGold for a term of 20 years.

For convenience I will refer to McBurger and McGold collectively as 'the licensees'.

[14] The two licence agreements were identical in terms. By cl 5.01 the first applicant was empowered 'from time to time as it deems appropriate advise and consult with [the] Licensee[s] in connection with the operation of the Restaurant[s] and shall upon … request do so at other reasonable times.'

[15] By cl 6.01 the licensees acknowledged 'the importance to [the first applicant] and to the operation of the Restaurant as a McDonald's restaurant, of every component of

the McDonald's System … [and] … shall comply with the entire McDonald's System and shall adopt and use every such component thereof, in the Restaurant.'

By cl 6.02 the licensees agreed to allow the first applicant and its authorised representatives to enter and inspect the restaurants at all reasonable times to ensure that the operation complied with the standards and policies of the McDonald's System.

By cl 6.03 the licensees acknowledged that McDonald's Corporation was the owner of all proprietary rights in and to all components of the McDonald's System and that all information contained in the system and manuals was confidential.

[16] After some years of operating the restaurants Mr Armitage wished to reorganise his business affairs. He conducted McDonald's restaurants in Toowoomba and wished to concentrate and expand his interests there. The first applicant believed that such a concentration of effort would be in its interests too. Accordingly the parties made agreements to bring to an end McBurger's and McGold's respective interests in the restaurants at Booval and Ipswich. The first and second applicants, the licensees and Mr Armitage all became parties to a Deed of Termination which is said to be dated 31 January 1994 (although the copy in Exhibit 1 is undated).

[17] The subject matter of the deed was the lease and the sublease both of which still had some years to run. The deed recited that all the parties to it wished to terminate the leases prior to the expiration of their terms. Clause 2 provided that 'forthwith upon the close of business of the Restaurants on the Termination Date [31 January 1994] the Leases shall be terminated without penalty' to any party. By cl 3 the second applicant agreed to pay McBurger and McGold an agreed amount for the transfer to it of the plant and equipment they had used in the restaurants and which was identified in a schedule to the deed. In consideration of the payment of the price McBurger and McGold transferred title to, and delivered to, the second applicant, free of encumbrance, the plant and equipment so identified. By cl 5 McBurger and McGold transferred to and delivered to the first applicant, free of encumbrance, all of their stock in trade at the two restaurants as at close of business on the termination date. The first applicant agreed to pay the value of the stock 'calculated at landed invoice cost.'

[18] The amount paid for the plant and equipment transferred to the second applicant was $342,700. The value of stock in trade transferred to the first applicant was $28,581.67.

[19] By cl 7 the licensees agreed to use their best endeavours to procure all their employees engaged in both restaurants to accept employment with the first applicant which was to operate the two restaurants on and from 1 February 1994. Clause 7 further provided that in respect of each employee who accepted an offer of employment with the first applicant that the licensees would terminate 'such Employees on the Termination Date and [would] pay all accrued and unpaid wages, salaries … referable to .. employment … prior to the Termination Date.'

[20] The same parties also executed a 'Deed of Extinguishment of Rights', the copy of which in evidence is undated, but which was no doubt made at the same time as the Deed of Termination. The subject matter of the Deed of Extinguishment was the two licence agreements made between the first applicant and the licensees. The deed recited that the parties to it wished 'to extinguish the said contractual rights

held by the Licensees and to release each other from their respective obligations under the Licences prior to the expiration of [their] terms …'.

[21] Clause 1 of the deed provided that, in consideration of the payment by the first applicant to the licensees of the sum of $2,632,201, on or prior to the restaurants' handover date, from the close of business on 31 January 1994 all parties should be released from their respective contractual obligations under the licences. The 'handover date' does not appear to be defined but was, no doubt, 31 January 1994.

[22] The Deeds of Termination and of Extinguishment were lodged with the respondent for assessment for stamp duty, together with a submission that no duty was payable. The respondent replied by letter of 26 April 1994 requiring the applicants to provide 'a fully completed form S(a)' so he could 'assess the duty payable.'

[23] The form is the creature of s 54A of the *Stamp Act* 1894 (Qld). It provides:

> '(1) An acquisition or an agreement to acquire a business shall, for the purposes of this section, be deemed to include all goods … and other moveable chattels, and all … licences, and the goodwill appertaining to the business, which are acquired or agreed to be acquired from the owner of the business whether the same are included in the transaction by which the business is acquired or agreed to be acquired or are the subject of another transaction or other transactions.
>
> (2) Every person who acquires or agrees to acquire a business that exists in Queensland shall, within 1 month after the person does so, deliver to the commissioner a statement in duplicate in the prescribed form … showing the prescribed information.
>
> …
>
> (5) A statement under subsection (2) … shall be charged with duty under this Act as if it were a conveyance or transfer of the property to which the statement relates for a consideration equal to the full unencumbered value of such property and the person delivering that statement shall be liable accordingly.
>
> …
>
> (7) For the purposes of this section –
>
> '**acquisition of a business**' and '**agreement to acquire a business**' include any transaction … by which, although the whole of the assets of a business are not acquired or agreed to be acquired, sufficient of those assets are acquired or agreed to be acquired to enable the person acquiring the same to carry on the business.
>
> '**business**' includes –

> (a) any business carried on by a person on his … own behalf or in partnership …'.

[24] The form S(a) is the form prescribed by regulation 4 for the purposes of s 54A(2).

[25] The applicants' solicitors replied to the respondent by a letter dated 1 July 1994. They contended that the applicants had not, pursuant to the deeds, acquired or agreed to acquire any business, and that they had no obligation to provide the form. They also contended that the deeds were not dutiable for reasons which the letter set out at some length.

[26] Eventually, after further communications between the parties, the applicants' solicitors submitted a modified form S(a) under cover of a letter dated 21 September 1994. The information contained in the form was limited to the plant and chattels, and stock in trade, and the consideration paid for that property, which totalled $371,380.67. The statement contained no reference to the payment of $2,632,201 pursuant to the Deed of Extinguishment, and did not include any reference to the acquisition of the businesses of McGold or McBurger.

[27] The respondent amended the form submitted by the applicants. One of its officers noted that the form was altered 'in accordance with s 22A(2) of the Act.' The same officer wrote on the form:

> 'That on 31 January 1994 McDonald's Australia Ltd acquired or agreed to acquire the businesses conducted by McGold Pty Ltd and McBurger Pty Ltd in Booval and Ipswich being the operation of McDonald's restaurants.'

The statement attached to the form was also amended to show that the applicants had acquired 'the whole' of the licensees' businesses and to include as an item of property acquired, 'goodwill' for a consideration of $2,632,201.

[28] The respondent then, on 23 September 1994, assessed the statement as amended by him. No duty was assessed on either of the deeds. The acquisition of plant and equipment and stock in trade was assessed to duty in the sum of $11,474.

[29] The applicants now concede that the form was properly assessed to duty in respect of the acquisition of those items of property. Unhappily, as things turned out, the applicants then took a different view and objected to the assessment on 27 October 1994. The respondent replied to the objection on 12 December 1995. He accepted that the assessment of duty for $11,474 was incorrect but disallowed the objection because:

> '1. The Deed of Termination is a conveyance or transfer within the meaning of … s49(1)(a)(i) of the Act … as it effects the "sale" of the leases, plant and equipment and stock used in the business of the Restaurants. Such assets became "vested" in [the second applicant] immediately upon the execution of the Deed …
>
> The exemptions … for property consisting "solely on goods, wares or merchandise" cannot apply to the composite transaction effected … by the … Deed.

…

2. The Deed of Extinguishment … evidences an agreement to sell the only asset of the Restaurant business, namely goodwill, for the stated consideration of $2,632,201.00 … [W]hat was granted under the agreements dated 17 August 1987 and 5 August 1985 was the right to exploit the expertise and the business and its equipment in the sense of its goodwill and as a going concern.

   The Deed also falls within the definition of a conveyance or transfer under s 49(1) … [and] is therefore chargeable with duty …

…

3. Clearly, the restaurant business at Ipswich and Booval … have been acquired for the purposes of s 54A …'.

[30] The result was that the respondent issued an amended assessment of duty. The Deed of Termination was assessed to duty in the sum of $13,584 pursuant to s 49(1)(a)(i) and s 53 of the Act. The Deed of Extinguishment was assessed to duty in the sum of $92,236 pursuant to the same sections, on the consideration of $2,632,201. The statement was assessed to duty in the sum of $109,860, on the aggregated amount of $3,003,581.67, being the sum of the considerations for the acquisition of stock in trade, plant and equipment and the surrender of the licences. A set off was allowed for the duty assessed on the deeds. Credit was given for the duty already paid of $11,474 leaving a balance of $98,386. The amount was paid by the applicants on 15 January 1996.

[31] The amount of duty assessed on the Deed of Termination on 12 December 1995 exceeded the initial assessment of duty because the amended assessment aggregated the consideration paid (as the respondent contended) on both deeds. The duty payable on part of the aggregated total exceeded the duty payable if the only consideration were that paid for the stock in trade and plant and equipment.

[32] By notices dated 27 and 29 January 1996 the second and first applicants respectively objected to the amended assessments. By letter dated 22 March 1996 the respondent disallowed the objections. By an application filed on 23 April 1996 the applicants sought review of the respondent's decisions that:

(i) On or about 21 September 1994 to require them to deliver a form S(a) for stamping.

(ii) On 23 September 1994 that the statement was chargeable with duty pursuant to s 54A of the Act in an amount of $11,434.

(iii) On 12 December 1995

   (a) To disallow their objection on 27 October 1994

(b) To assess the Deed of Termination to duty calculated on a consideration of $371,380.67.

(c) To assess the Deed of Extinguishment of Rights to duty on a consideration of $2,632.201.

(iv) On 22 March 1996 to disallow their objections against the assessments of 12 December 1995.

[33] The applicants also seek review of a number of subsidiary decisions made by the respondent which led to the decisions I have identified above and which really are subsumed by those decisions. The subsidiary decisions were really processes in the respondent's evaluation of the documents which led to his making the assessments.

[34] The application has the nature of a 'test case'. The applicants have been involved in about 40 similar transactions with other licensees of the McDonald's System. The documents in those cases have been treated similarly to the applicants' who have paid a considerable amount of duty to the respondent. It is expected that the outcome of those applications will follow the result of this one.

[35] The *Stamp Act* has been repealed by the *Duties Act* 2001 (Qld), but its sections remain relevant for the determination of the application because the transactions in questions occurred before 1 March 2002 and the *Stamp Act* continues to apply: see s 512(1) of the *Duties Act*.

[36] The application sets out a very large number of grounds for reviewing the respondent's decisions. It would be tedious, and it is unnecessary, to rehearse them. They come down to a plea that, as a matter of law, the Deeds of Termination and of Extinguishment of Rights are not assessable to duty pursuant to any of ss 49, 53, 54 or 54A of the *Stamp Act*, and that the transactions effected by and evidenced by the deeds are not of the character ascribed to them by the respondent. If the applicants make out this basic point then it is no doubt right to contend, as they do, that the respondent did not have jurisdiction to make the decisions complained of, or that they were an improper exercise of his powers, or involved an error of law.

[37] One ground, perhaps, deserves particular mention. It is that:

> 'There was no evidence … to justify the making of the decisions … including –
>
> (a) There was no evidence on which the respondent could have been satisfied that the applicants … acquired … any estate or interest in the leases.
>
> (b) There was no evidence … that the applicants … acquired the 'prepayments reimbursements' (i.e. the sum of $2,632,201).
>
> (c) There was no evidence … that the applicants … acquired … the goodwill of the restaurant businesses from (the licensees).
>
> (e) There was no evidence … that the applicants … acquired … sufficient assets of the restaurant businesses to enable (them) to carry on the businesses.'

[38] In support of, and in opposition to, these grounds the parties adduced substantial affidavit material and statements. Three witnesses, the Deputy Managing Director of the applicants and two accountants with expertise in the valuation of companies, were cross-examined at some length on their respective statements and reports. On the view I have taken of the points in dispute it is unnecessary to rehearse or analyse the evidence except quite cursorily. The application can be determined (and in my opinion should be determined) by reference to the terms of the documents in question and evidence which was uncontested. There is little scope in an application for judicial review for the court to engage in an examination or determination of the facts underlying the decision in question. The court's role is to determine whether the decision was lawfully made by reference to the bases for review set out in the *Judicial Review Act* 1991 (Qld). It is not to review the decision maker's opinion on questions of fact save where errors of fact can be seen to amount to errors of law, as where evidence is legally insufficient to support a decision.

[39] The orders sought by the applicants are:

(i) A declaration that the Termination Deed did not transfer or vest the leases in the land on which the restaurant businesses at Ipswich and Boovall were conducted in the second applicant.

(ii) A declaration that the Deed of Extinguishment of Rights was not an agreement for the sale of any goodwill of the restaurant businesses, nor a conveyance or transfer of the businesses.

(iii) A declaration that neither applicant acquired or agreed to acquire a business for the purposes of s 54A of the *Stamp Act* by or pursuant to the Termination Deed or the Deed of Extinguishment of Rights.

(iv) An order quashing each of the respondent's decisions assessing the documents to duty and the decision to disallow the applicants' objection against the amended assessment.

(v) An order directing the respondent to refund the duty paid by the applicants together with interest pursuant to s 24(4A) of the *Stamp Act*.

[40] Although the respondent sought to uphold the assessments on the several statutory bases I have mentioned the only real contest was with respect to s 54A. The respondent did not, however, abandon its written submissions with respect to s 49, s 53 and s 54 of the *Stamp Act* - which I will deal with briefly - but showed no enthusiasm in oral argument for these bases of assessment.

[41] Section 49 of the *Stamp Act* provides:

'(1) For the purposes of this Act –

"**conveyance**" and "**transfer**" include every instrument …

(a) whereby property is conveyed, transferred or assigned to or is vested in a person …'.

[42] Schedule 1 to the *Stamp Act* sets out the manner in which duty is to be assessed on various instruments. It says with respect to conveyances or transfers:

'(4) Of any property (except stock or marketable security or rights in respect of shares) –

(a) upon a sale for a consideration in money or money's worth of not less than the full unencumbered value of the property –

Duty calculated on the amount … of the consideration …'.

[43] The respondent seeks to combine the two deeds and regard the combined effect as constituting a conveyance or transfer within the terms of s 49. Section 53 of the *Stamp Act* allows the combination in some circumstances. It provides:

'(1) For the purposes of this section –

"conveying" has a meaning, as the case may require, corresponding to the dealing in property which is effected by or evidenced by an instrument of conveyance as defined …

"instrument of conveyance" includes the conveyance, transfer, assignment, settlement, deed of gift, voluntary conveyance, declaration of trust, contract or agreement or any instrument which is charged as if it were a conveyance …

…

(2) Subject to subsections (4), (5), (6), if there are two or more instruments of conveyance …

(a) that arises from a single agreement … to convey property; or

(b) that together form, or arise from, substantially one transaction …

the instruments are chargeable with *ad valorem* duty –

(c) calculated on the sum of the amounts by reference to which *ad valorem* duty on each of the instruments would, but for this section, have been calculated …'.

[44] Subsections (4), (5) and (6) are irrelevant for present purposes.

[45] There is no doubt that the Deed of Termination is an instrument whereby property was transferred from the licensees to the applicants for a stated monetary consideration. The deed conveyed the property comprising stock in trade and plant and equipment. The applicants now accept the point and no longer challenge the

respondent's initial assessment of duty in the sum of $11,474 on the transfer of that property.

[46] It is equally clear that the Deed of Extinguishment is not an instrument of conveyance or transfer. The respondent's attempt to call s 53 in aid will fail unless the two deeds are both instruments of conveyance arising from a single agreement to convey property, or together they form or arise from substantially the one transaction. It is on the facts which I will mention shortly probably right to say that the two deeds arose from a single agreement and form substantially one transaction. However, s 53(2) only applies where both instruments are ones 'of conveyance'. The Deed of Extinguishment does not, and does not purport to, transfer any property between any of the parties to it. Its sole purpose is to effect the cessation of the licensees' rights given to them by their respective licence agreements, and to oblige the applicants to pay the stated monetary consideration for the licensees giving up their rights for the balance of the terms of the agreements.

[47] The respondent's submissions are that:

> 'The Deed of Extinguishment returned to the first applicant the right to operate a business under the name McDonald's at each of the Ipswich and Booval sites … even though not expressed as a sale of business, the two deeds placed in or returned to the first applicant's name or command every resource … needed to continue to operate the existing businesses, the character of which was identical before and after the handover date … The surrender of the leases and the consensual cessation of the licences were each, in substance, a conveyance on sale or property and the deeds effecting the same are amenable to duty by virtue of s 49 and s 4(1) of the first schedule.'

[48] The obstacle to acceptance of the submission is that the Deed of Extinguishment did not convey or transfer any property. Whether or not the deeds 'placed in the first applicant's name or command every resource needed to continue to operate the businesses' the second deed is not of such a character as to fall within the ambit of s 49 or of s 53(2). The submission that the two deeds were 'in substance a conveyance on sale of property' is, I apprehend, a submission that the practical result of the two deeds was the same as though they had effected a transfer of the licensee's proprietary rights and interests in the businesses to the applicants. This may be so, but the question whether the Deed of Extinguishment is an instrument of conveyance depends upon its terms. If it does not transfer any property it is not such an instrument.

[49] Section 49 has no application.

[50] The respondent's reliance on s 54 can be even more briefly disposed of. That section provides:

> '(1) Any contract or agreement for sale of any property or any contract or agreement whereby a person becomes entitled or may … become entitled to the conveyance or transfer of any property shall be charged with the same duty as if it were an instrument of conveyance of the property.'

[51] Neither of the deeds answers the description in s 54 of a contract or agreement for the sale of any property whereby the applicants became entitled to the conveyance or transfer of any property. The deeds did not entitle the applicants to a transfer of the licensee's rights or property in the restaurant businesses. This section has no application.

[52] On 23 August 1993 the applicant wrote to Mr Armitage with respect to the restaurants to:

> '… make the following offer …
>
> In consideration of the termination of the Lease and Licence on the above Restaurants from the close of trading on 31 January, 1994, the following offer is made:-
>
> 1. McDonald's will purchase stock on hand (at cost price) ...
>
> 2. Any outstanding prepayments, necessary to the daily operation of the business will be apportioned and paid for on handover.
>
> 3. You will remain responsible for all outstanding liabilities … in relation to the operations up to the date of handover.
>
> 4. McDonald's will purchase all Restaurant Equipment … currently used in the Restaurant at your tax written down value.
>
> 5. As an inducement to the termination of the licence McDonald's will pay you $2,975,000 less any amounts paid in 4. above.
>
> 6. Refund your security deposits …
>
> 7. Rent, Service Fee, Advertising and General Account must be settled on the day of handover.
>
> 8. All employees are to be terminated and paid their entitlements on the day of handover. The employees will then be rehired by McDonald's …
>
> 9. This offer is … conditional on the Restaurant being handed over in an operationally acceptable condition consistent with McDonald's standards …
>
> 10. This offer is subject to the approval of … McDonald's Corporation.'

[53] The sum of $2,975,000 was calculated by Mr Jermyn using a formula he, or the applicants, had developed for valuing businesses conducted at McDonald's restaurants, whether by the first applicant or a licensee. The details can be ignored. The formula valued the profit generated by the restaurant. The profit could be

calculated with relative ease. The turnover was known as was the cost incurred in producing the turnover. A multiplier was applied to the net profit figure. The multiplier was chosen to reflect the balance of the term of the licence agreement, and to provide a discount for the immediate receipt of the projected future earnings. The method was described by Mr Lonergan, whose evidence I accept, as a surrogate method of determining the present value of the future cash flow of the business.

[54] The methodology used in valuing the businesses by the first applicant was the same as that which a prudent purchaser interested in buying the businesses from the licensees would have used. The value derived from the formula was that for the 'whole business', including licences, leases, equipment and stock. It valued the businesses as going concerns. The procedures followed by the applicant and the licensees in the days leading up to the handover, and on the handover itself, were precisely those which would have been followed had the licensees sold the businesses and assigned their interests under the leases and the licence agreements to the purchaser. The procedures are set out in the manuals which form part of the McDonald's System.

[55] The businesses operated without interruption prior to and following the handover date. There was what was called a 'seamless transition' of the businesses and their operation between 31 January and 1 February 1994. Prior to the handover the staff were employed by the licensees. On and from 1 February they were employed by the first applicant. The licensees paid wages and entitlements up to and including 31 January 1994. All employees were immediately re-employed by the first applicant when their employment was terminated on 31 January. There was no loss of personnel and no disruption to the ordinary flow of business.

[56] Most of the evidence explored at the trial was concerned with whether or not the licensees had any goodwill in the restaurant businesses, and the nature of that goodwill, in particular, whether it could be the subject of transfer for consideration. The relevance of the evidence to the legal issues in the application was not obvious. Diverging opinions on the points of debate were advanced by Mr Lonergan for the applicants and Mr Flynn for the respondent. If the amenability of the deeds and the form S(a) to duty depended upon the correctness of one or other of the opinions of the accountants concerning goodwill the application could not succeed. Any opinion the court might form on the question would be one of fact. The respondent could not be said to have unlawfully assessed duty if he made the assessment upon the basis of the existence or value of goodwill which was supported by reputable evidence. It is not the point that the court might form a different opinion on the question.

[57] The reason for the spirited and interesting debate over the existence and nature of goodwill in the restaurants probably has its basis in the amendments made by the respondent to the form S(a) provided by the applicants. It will be recalled that the Commissioner added to the form the notation: 'Goodwill … $2,632,201.'

[58] If the licensees had no goodwill in their restaurants, or if there was no goodwill of a kind which could be transferred to, or acquired by the applicants, the amendment and the assessment made on it could not stand.

[59] Despite this platform for the debate it misses the point. In the circumstances of this case, and cases like it, there can be no transfer or acquisition of goodwill without a

transfer of the business, or the assets of the business, which generate the goodwill. The High Court explained in *Commissioner of Taxation of the Commonwealth of Australia v Murray* [1998] 193 CLR 605 (at 615):

> 'From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business … because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom". Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business ...'.

[60] The court also noted that goodwill is inseparable from the business to which it relates and that the sale of an asset or assets of the business does not transfer goodwill unless the sale of the assets is accompanied by or carries with it the right to conduct the business. (618)

[61] It follows that the applicants cannot have become the transferee of the licensee's goodwill, or have otherwise acquired the goodwill, unless it acquired those assets which the licensees held prior to 31 January 1994 and which allowed them to carry on the business, which is said to have given rise to the goodwill. In practical terms that means the licences, or rights, to use the McDonald's System's trademarks, trade names and service names. Without these licenses the licensees would not have conducted their businesses which were McDonald's restaurants. They may have needed other things as well, but the licenses were the essential ingredient. Customers are attracted to a McDonald's restaurant because of the reputation of the McDonald's name and the fact that enforced compliance with the detail of the McDonald's System means that on the occasion of every visit and in every McDonald's restaurant the quality and choice of food and the quality of service and standard of fit-out will be the same. There is a uniformity of product, service and milieu in every McDonald's restaurant. This uniformity, which the public confidently expects to experience at a McDonald's restaurant, comes from the adherence by each restaurant proprietor to the McDonald's System including the use of the trademarks, trade names and service names. It is the right to use these items of intangible property which generates goodwill. For this reason it is not necessary to decide whether the licensees had any goodwill capable of transfer.

[62] The respondent appreciated the point and accepted that its amendment was infelicitous. The amendment should have seen the insertion of the words 'intangible property' rather than 'goodwill'. The change would not affect the dutiability of the form nor the amount of the assessment. The respondent's real point is that the applicants acquired the licensee's businesses, including all assets and any goodwill in those businesses, in the transaction which finds expression in the two deeds. The consideration for that acquisition is said to be the sum of the amounts set out in the deeds. If the contention is right the form was amenable to stamp duty in the amount assessed. Any misdescription in the respondent's amendment to the form of the property acquired would be of no consequence. If the only error the applicants could demonstrate is that the property was described as

'goodwill' instead of 'intangible property – licence to use trademarks etc.' the application should be dismissed pursuant to s 48 of the *Judicial Review Act*.

[63] The real controversy in the application is whether the deeds and/or the transaction between the applicants and the licensee, which gave rise to the deeds, was 'an acquisition or an agreement to acquire a business' i.e. the licensees' businesses. If there were such a transaction the applicants were obliged to deliver a statement identifying the property acquired. The statement becomes dutiable as if it were a conveyance or transfer of that property.

[64] There is nothing in the terms of either of the deeds or in the letter of offer which the first applicant wrote to Mr Armitage to suggest that there was, or was to be, an acquisition by the applicants of the licensees' businesses. The offer, which is reflected in the deeds, was for the licensees to relinquish their contractual rights to use the McDonald's System for the balance of the contract terms and to bring the lease and sublease to an end. Upon the extinction of the licence agreements and the leasehold interests the first applicant was free to conduct a restaurant business in each of the premises utilising the McDonald's System pursuant to its own licence agreement with McDonald's Corporation.

[65] In the face of this difficulty the respondent's argument took on a degree of elaboration.

[66] Before turning to consider the authorities on which the respondent relies it is appropriate to mention some further questions of fact to which the respondent points to support the conclusion that the applicants acquired the licensee's businesses. The first fact is that the consideration paid for the licensees' consent to terminate the licence agreements was derived by valuing the businesses as though on a sale. The similarity does not assist the respondent. There is no doubt that the licence agreements were valuable. They conferred on the licensees the right to use the McDonald's System in the two restaurants. They were a means of generating substantial income. The agreements gave them the right to generate that income until 2005 in one case and 2007 in the other. The licensee would not forego the right to use the McDonald's System to produce that income without receiving the value of that which was being given up. The fact that the value was (perhaps) equivalent to what a purchaser would have paid to acquire those rights is beside the point. The fact that the value of the rights foregone was or may have been equal to the price for which the licensees would have sold the right does not prove that they were sold.

[67] On 1 February 1994 the first applicant employed all of the staff who had, until the day before, been employed by the licensees at the two restaurants. This enabled the applicant to commence trading without difficulty or disruption on 1 February. The first applicant was saved the expense and inconvenience of finding and training new staff members. It must be pointed out that, while employees may be regarded in a commercial or accounting sense as 'assets' of a business, they are not property. Nor were their contracts of employment which the licensees assigned to the applicants.

[68] The third point made by the respondent is that the licensee's business consisted of more than the licence to use the McDonald's System, its marks and name. This is true but the very essence of the business of a McDonald's restaurant is the use of the marks and names and the sale and supply of the goods and services of which they

are distinctive. It is the implementation of the McDonald's System which attracts custom and generates income. The licensees did not have a restaurant business: they had a McDonald's restaurant business. They could sell only McDonald's products branded, packaged and delivered strictly in accordance with the McDonald's System.

[69] Section 54A is concerned with the acquisition of a business. The obligation in subsection 2 is to deliver a statement which identified the assets of the business acquired. This is apparent from the expression used in s 54A(1), (2) and (7). What attracts the operation of the section is the acquisition of an existing business. The acquisition must be of that same business, or sufficient of its assets to allow the same business to be conducted, as was being conducted by the person from whom the assets were acquired. This was the view of White J in *Westpac Banking Corporation v Commissioner of Stamp Duties* (2003) 55 ATR 50 at paragraph 17 and I respectfully agree with it. For s 54A to justify the respondent's assessments the applicants must have acquired the licensees' restaurant businesses.

[70] The applicants can only have acquired the businesses if they acquired the licensees' rights to use the McDonald's system. That was the essence and basis of the businesses. If the applicants did not acquire those rights they did not acquire sufficient assets of the business to carry on those businesses. If they did, those rights, however described, should have been listed in the statement required by s 54A(2), and subsection (5) would have operated to make the statement a transfer of those rights and exigible to duty as such.

[71] This analysis produces an immediate problem for the respondent. The deeds did not by their terms effect a transfer of the rights conferred on the licensees by the licence agreements. The transaction which is described in, and by the terms of, the deeds is not one of acquisition but of relinquishment, or extinction, of rights. It must be borne in mind that the first applicant did not need the licensees' rights to use the McDonald's System. It had its own rights which it had pursuant to the agreement it had with McDonalds' Corporation. Pursuant to that agreement the first applicant could operate McDonald's restaurants where and when it chose throughout Australia. While the licence agreements with the licensees, and the lease and sublease, subsisted the applicants could not conduct a McDonald's restaurant business at the licensees' premises in Ipswich or Booval. The licence agreements with the licensees operated as a restriction on the full exercise of the first applicant's rights conferred on it by the licence agreement with McDonald's Corporation. Once the restriction came to an end with the Deed of Extinguishment the first applicant was free, and entitled, to conduct McDonald's restaurant businesses in each of the premises formerly occupied by the licensees. It could do so utilising its own rights to the McDonald's system. It did not need the lessees' rights to the system.

[72] The plain effect of the Deed of Extinguishment was the destruction of the licensees' rights under the licence agreement. They came to an end and vanished. They were not, it seems to me, acquired by the applicants.

[73] The respondent points to authorities which establish that the word 'acquire' has a wide meaning and includes means of acquisition other than by transfer. The point may be good in the abstract but it must be kept in mind that s 54A is concerned with the acquisition of an existing business, and the assets of that business. No matter

what shades of meaning 'acquire' may have the section is concerned with a particular type of acquisition: of an existing business owned by someone other than the acquirer. It is difficult to see how such a business can be acquired except by some means of transfer.

[74] An authority relied upon by the respondent is *State Bank of New South Wales Ltd v Commissioner of Stamp Duties* [1994] 2 Qd R 661. The State Bank was a corporation created by an Act of the parliament of New South Wales. There was, prior to the enactment of that legislation, a State Bank of New South Wales constituted under its own Act. Section 9 of the later Act made detailed provisions for the transfer of assets, rights and liabilities from the State Bank to the newly created corporation. The section allowed the relevant Minister to give an order in writing directing that the business undertaking of the State Bank 'be transferred to the corporation'. A ministerial order was duly made that:

> '(a) The business undertaking of the State Bank, namely all assets, rights and liabilities thereof, be transferred to the corporation, being the universal successor of the State Bank, upon the commencement of this Order'.

[75] The State Bank in time objected to an assessment of duty on the form S(a) it had provided to the Commissioner pursuant to s 54A(5). The argument was that the corporation had not negotiated for the transfer and had played no active part in it. It was merely the passive recipient of the former State Bank's assets.

[76] Williams J (as his Honour then was) held (at 671) that what s 54A:

> '… required is that an entity obtains or gets something (… a "business") and it is not to the point to consider whether or not that entity played an active or passive role in getting the property.'

[77] This is, with respect, obviously correct. It is equally obvious that there was, in that case, a transfer of assets from one legal entity to another. The fact that the transfer occurred pursuant to a ministerial direction authorised by an Act of Parliament was irrelevant. There was an acquisition of assets by transfer.

[78] Williams J referred at some length to a decision of the full Federal Court, *Allina Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 203, which was concerned with the issue of rights to a shareholder by a subsidiary company created by the holding company in which the shareholder held shares. The question was whether the rights issued by the subsidiary to the shareholder had been 'acquired from another person'. The court pointed out that the ordinary meaning of 'acquire' was to 'obtain, gain or get something', or to receive it. The Full Court said (the passages are quoted at [1994] 2 Qd R 671):

> '… the word is apt to encompass the case where one person creates an asset which at the same time comes into the possession of or is obtained by another person. … Where an owner of property grants an option to a person to purchase it the owner does not own the option before he creates it, it is created by the owner and at the very same time it is acquired by the grantee. Yet, … it is clear that the option was acquired by the grantee from the owner of the property …

> [P]roperty can be acquired by one person without there being any disposition of that property by another person. The allotment of shares is an act of the company, the capital of which is the source of the allotment. The allottee … acquires the shares from the company … [A]s was observed by Cohen L.J. …
>
> 'as used by lawyers the word "acquired" has long covered transactions of a purely passive nature and means little more than receiving. …''.

[79] These observations may be accepted as valid but they are of no assistance in the present case which, if s 54A is to apply, means that the respondent must point to the applicant receiving assets which were in existence prior to the acquisition and were owned by someone other than the acquirer so that they had to be disposed of by that other. Observations taken from a different context may mislead more than help.

[80] The respondent relies also on *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297. The case involved a challenge to the constitutional validity of a section of the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth) which provided that an action for damages did not lie against a Commonwealth authority in respect of an injury sustained by an employee in the course of employment. Section 51 of the Commonwealth Constitution provides that the Parliament has power to make laws with respect to:

> '(xxxi) The acquisition of property on just terms from any … person for any purpose in respect to which the Parliament has power to make laws.'

[81] The High Court, by a bare majority, held that the section was invalid because it effected an acquisition of property, being the employee's right to bring an action for damages, without recompense so that the acquisition was not on just terms. The majority of the court accepted the plaintiff's argument (at 299) that:

> 'The complete extinguishment of the plaintiff's right of action and the corresponding direct enhancement of the Commonwealth's estate demonstrate that an acquisition in substance occurred … It is not a case of mere extinguishment. The Commonwealth obtained an advantage that exactly mirrored what was taken from the plaintiff.'

[82] In their joint judgment Mason CJ, Deane and Gaudron JJ said (at 305):

> 'It is often said in relation to constitutional guarantees and prohibitions that "you cannot do indirectly what you are forbidden to do directly" ... That maxim is, in fact, an important guide to construction, indicating that guarantees and prohibitions are concerned with substance not form. Within that context, it is relevant to consider, by way of example, a vested cause of action against the Commonwealth for goods sold and delivered. If legislation extinguished that cause of action, it would, in substance, effect its acquisition, for the Commonwealth, having obtained the goods in exchange for its promise to pay, would be freed from its

> liability on that promise. Accordingly, "acquisition" in s 51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain … and the cause of action is one that arises under the general law.'

[83] This decision, that in some circumstances the extinguishment of rights may amount to an acquisition of property, has no application beyond the sphere of interpretation of the Commonwealth Constitution. Neither the concept nor the remarks are applicable to the determination of the question whether there has been an acquisition of a business for the purposes of s 54A of the *Stamp Act*. Even if the remarks were somehow applicable, before an extinguishment of rights could amount to an acquisition of property *Georgiadis* is only authority for the proposition that the acquisition exists only where the extinguishment is the unilateral act of one party who obtains a direct financial gain from the act. This is not what happened between the applicants and the licensees.

[84] The respondent's main argument relies on an analogy with the surrender and release of proprietary interests in old system land. The submission is:

> '… The same rules apply to subleases as applied to leases, with the consequence that upon the granting of a sublease the sublessor carves out of his estate a lesser estate in respect of which he owns the immediate reversion … and with the further consequence that where, as here, a surrender occurs, the sublessor "acquires" the sublease …;
>
> As for the master licence held by the first applicant, there had been carved out of it the sublicence granted to each franchisee, with the consequence that the first applicant was effectively restrained from exercising business rights under the master licence with respect to the Booval and Ipswich restaurants until such time as it was able to "acquire" what had been carved out from the master licence and this occurred through the Deed of Extinguishment …'

[85] The case principally relied upon for this submission is *MSP Nominees Pty Ltd v Commissioner of Stamps (South Australia)* (1999) 198 CLR 494 where these concepts are explained. The court said (at 508-9):

> 'Reference was made in argument to the use of the terms "surrender" and "release" as terms of grant in old system conveyancing. "Release" was the proper term to employ to convey a remainder or reversion to the person in possession, or for a conveyance between joint tenants … The releasee being already in possession, no livery of seisin was required ... The "practical effect" of a release by the reversioner or remainderman to the life tenant in possession was "to enlarge the estate of the tenant for life" ... On the other hand, the term "surrender" was appropriate where an estate for life or a term of years was assured to the holder of the reversion to the intent that it merge or "drown" in the latter…
>
> … It also may be that, with respect to dealings in equitable interests, the distinction drawn between a surrender and a release is not

> necessarily observed and that "surrender" may be used to identify what technically is a "release".
>
> However, there remains the essential characteristic of the enlargement of one interest by absorption or "drowning" of the other.'

[86] The essential characteristic, as explained by the High Court, for the release or surrender of one estate so that another could be enlarged was that there be a transfer or conveyance, or assurance, of the one estate to the owner of the other. A release occurred where the remainder or reversion was conveyed to the tenant. A surrender was the assurance of an estate for life or a term of years to the reversioner. The absorption or drowning occurred in a particular way, as a consequence of the particular transfers. In the present case there is no assurance or conveyance of the licensees' interests to the applicants.

[87] In my opinion it is not right that the Deed of Extinguishment enlarged the first applicant's interests which it enjoyed from the licence agreement with McDonald's Corporation. It certainly did not do so by means of a conveyance or assurance of any property. The analogy with these concepts from the realm of real property law are inapt and are likely to give rise to confusion. It can lead to the presupposition of that which must be established if the respondent's assessments of duty are to be upheld. The question, I repeat, is whether the applicants acquired the licensees' restaurant businesses or the requisite assets of those businesses.

[88] In my opinion the transaction was not one of acquisition by the applicants of the licensees' businesses. The principal assets of those businesses, the rights given by the licence agreements, were brought to an end by the deeds. They were extinguished and vanished. Their extinction left the first applicant free to engage its own right to the McDonald's System in the restaurants. In one sense a restriction on the first applicant's right to use the McDonald's System in those restaurants was removed but this cannot be accurately described as an enlargement or increase in the first applicant's rights to the McDonald's System. In any event the restriction was removed not by the acquisition of the licensees' rights, but by their destruction.

[89] For these reasons s 54A of the *Stamp Act* has no application to the transactions between the applicants and licensees. This section did not impose on them an obligation to provide the statement in form S(a). The assessment of duty in respect of the consideration for the extinguishment of the licensees' rights has no basis in s 54A. It was unlawful. The Deed of Termination was dutiable with respect to the consideration for the transfer of plant and equipment and stock in trade.

[90] Accordingly I declare that neither of the applicants acquired or agreed to acquire a business for the purposes of s 54A of the *Stamp Act* by or pursuant to the Deed of Termination or the Deed of Extinguishment of Rights. I order that the decision of the respondent to issue the amended assessments of duty on 12 December 1995 and the amended assessments be set aside.

[91] I further order the respondent to repay to the applicants the sum of $98,386 together with interest pursuant to s 24(4A) of the *Stamp Act* since 15 January 1996.