SUPREME COURT OF QUEENSLAND

CITATION:	*Resolute Mining Ltd v Commissioner of State Revenue* [2020] QSC 281
PARTIES:	**RESOLUTE MINING LIMITED** ACN 097 088 689 (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	BS No 8195 of 2019
DIVISION:	Trial Division
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2020
JUDGE:	Bradley J
ORDER:	**The Order of the Court is that:**

1. The appeal is allowed completely.

2. The respondent's decision to disallow the appellant's objection (the "Objection") to the notice of assessment dated 9 January 2019 and notice of reassessment dated 14 January 2019 is set aside.

3. The Objection is allowed completely.

4. Subject to section 39(1) of the *Taxation Administration Act* 2001 (Qld) (the "Administration Act"), the respondent refund to the appellant an amount (the "overpaid amount") being the difference between $511,744.50 paid by the appellant on 25 January 2019 and the transfer duty payable by the appellant assessed in the further reassessment the respondent is to make in accordance with the direction in paragraph 7 below.

5. Pursuant to section 61(2) of the Administration Act, the respondent pay the appellant interest on the overpaid amount, calculated in accordance with section 61(3) of the Administration Act.

The Court directs that:

6. **The matter is remitted to the respondent.**

7. **In accordance with section 19 of the Administration Act, the respondent give effect to the Court's decision by making a further reassessment of the appellant's liability to pay transfer duty under the *Duties Act 2001* (Qld) on the dutiable transaction in the written agreement entitled "Funding Agreement relating to Ravenswood State School Relocation" between the State of Queensland represented by the Department of Education and the appellant, which was executed by the State of Queensland on 19 November 2018.**

The Court will hear submissions on the question of costs.

CATCHWORDS: TAXES AND DUTIES – STAMP DUTIES – ASSESSMENT AND AMOUNT PAYABLE INCLUDING FINES – GENERALLY – QUEENSLAND – where the appellant agreed to provide a "funding amount" to the State pursuant to a contract by which the State would transfer land to the appellant – where the funding amount was expressed to be a sum of money which was liable to be increased pursuant to a clause of the contract – where another clause of the contract required the State to pay certain amounts to the appellant, one of which was calculated by reference to the funding amount, such that the total amount payable by the appellant could be more or less than the funding amount – where the respondent submits the adjustments which could be made to the funding amount are not a payment for the land or, alternatively, can be disregarded due to the "contingency principle" – where the appellant submits the consideration is the total amount payable by the appellant to the State and could not be ascertained when the contract was executed – whether the consideration under the contract was the funding amount or the total amount payable by the appellant to the State – whether the consideration could be ascertained when the contract was executed – whether transfer duty should be assessed on the consideration for the transaction or the unencumbered value of the land

Duties Act 2001 (Qld), s 11, s 502
Taxation Administration Act 2001 (Qld), s 69, s 70A, s 70C

AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation (2015) 255 CLR 439, cited
Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd (2005) 221 CLR 496, applied
Commissioner of State Revenue (Vic) v Lend Lease Development Pty Ltd (2014) 254 CLR 142, applied
Commissioner of Taxation v Morgan (1961) 106 CLR 517, distinguished
Independent Television Authority and Associated Rediffusion Ltd v Inland Revenue Commissioners [1961] AC 427, cited

	Pacific Fair Shopping Centres Pty Ltd v Commissioner of Stamp Duties [1979] Qd R 410, distinguished
COUNSEL:	H Lakis for the appellant D Marks QC, with P J Coore, for the respondent
SOLICITORS:	McCullough Robertson Lawyers for the appellant Crown Law for the respondent

[1] The appellant (**Resolute**) appeals the decision of the respondent (the **commissioner**) to disallow its objection to an assessment and a reassessment of the transfer duty payable on an agreement to transfer land. The agreement for transfer is contained within a written agreement (the **Funding Agreement**) between Resolute and the State of Queensland represented by the Department of Education (the **Department**).

[2] The outcome of the appeal turns on whether the consideration payable for the agreement could be ascertained on the date the liability to pay the duty arose. If the consideration could not be ascertained, as Resolute contends, then the duty is payable on the unencumbered value of the land. If the consideration could be ascertained, as the commissioner contends, it is payable on the amount of the consideration.

[3] The liability to pay transfer duty is imposed by the *Duties Act* 2001 (Qld) (the **Act**). The appeal is brought pursuant to s 69(2) of the *Taxation Administration Act* 2001 (Qld) (the **Administration Act**).

Background facts

[4] Carpentaria Gold Pty Ltd (**Carpentaria**) owned the Ravenswood Gold Mine. It is a wholly owned subsidiary of Resolute.[1]

[5] The Ravenswood Expansion Project is a project for the expansion of the Ravenswood Gold Mine, including the mining activities associated with the expansion of the existing Buck Reef West open pit and related infrastructure.[2] Carpentaria applied for two additional mining leases and an extension to the surface area of a third mining lease (collectively, the **new mining leases**) as part of the Ravenswood Expansion Project.[3]

[6] The existing Ravenswood State School was located on land (the **Existing Site**) within the area for the Ravenswood Expansion Project.[4] The Existing Site was owned by the State.[5] It was "restricted land" within the meaning of s 68(1)(a) of the *Mineral Energy Resources (Common Provisions) Act* 2014 (Qld), being within 200 metres laterally of the area used for the Ravenswood State School[6] and a residential duplex.[7]

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1 These matters are set out in the statement of agreed facts filed 20 May 2020 (**Agreed Facts**) at [1] and [2].
2 By clause 1.1 of the Funding Agreement, the meaning of certain words and expressions used in the Funding Agreement is defined, unless the context provides otherwise. The defined expressions include Ravenswood Expansion Project.
3 Agreed Facts at [3].
4 See recital A and clause 1.1 of the Funding Agreement.
5 Agreed Facts at [5].
6 *Mineral Energy Resources (Common Provisions) Act* 2014 (Qld) (**CPA**), s 68(1)(a)(ii)(A).
7 CPA, s 68(1)(a)(i)(A).

[7] On 14 November 2018, the Department executed a written agreement with Carpentaria (the **Compensation Agreement**).[8] It was a compensation agreement for the new mining leases for the purposes of the *Mineral Resources Act 1989* (Qld) (the **MRA**), including for determining compensation between Carpentaria and the State as the owner of the Existing Site under s 279 of the MRA. It was also written consent of the State, as the owner and occupier of the area used for the school and the residential duplex,[9] for the purposes of s 238(1) of the MRA. The compensation payable by Carpentaria to the Department was $1.

The agreement for transfer in the Funding Agreement

[8] The Funding Agreement and the Compensation Agreement are separate instruments. Their relationship was indicated, not only by their subject matter, but by the fact that the Compensation Agreement did not commence until the last party to the Funding Agreement executed that instrument. The Department was the last party to execute the Funding Agreement. It did so on 19 November 2018. It is common ground that the liability for transfer duty arose on that date.

[9] By clause 4.1 of the Funding Agreement,[10] the parties agreed:

> "The Department will transfer legal title of the Existing Site to Resolute or its nominee after all of the following have occurred to the Department's satisfaction:
>
> (a) Practical Completion has occurred;[11]
>
> (b) all students have been relocated to the New School;[12] and
>
> (c) all resources required for the operation of the New School have been relocated to the New School."

[10] As land in Queensland, the Existing Site is dutiable property, within the meaning of s 10(1)(a) of the Act. It is common ground that clause 4.1 is a dutiable transaction, within the meaning in s 9(1)(b) of the Act, because it is an agreement for the transfer of the Existing Site.

[11] It is also common ground that the dutiable value of the agreement for the transfer of the Existing Site is determined pursuant to s 11(7) of the Act, which is relevantly in these terms:

> "**11 What is the dutiable value of a dutiable transaction**
>
> (7) … the *dutiable value* of another dutiable transaction is—
>
> (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—

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8 Agreed Facts at [7].

9 MRA, ss 238(1)(a), (3); CPA, ss 69(a)-(b).

10 Each further reference to a clause is to a clause of the Funding Agreement.

11 **Practical Completion** was practical completion under the contract for the construction of the New School.

12 The **New School** was that to be constructed on the **New Site**, depicted on a map attached to the Funding Agreement.

(i) there is no consideration for the transaction; or

(ii) the consideration can not be ascertained when the liability for transfer duty arises; or

(iii) the unencumbered value is greater than the consideration for the transaction."

[12] In this instance, the dutiable value will be either the consideration for the agreement for the transfer of the Existing Site or the unencumbered value of the Existing Site. It will be the unencumbered value only if the consideration could not be ascertained on 19 November 2018.

The consideration for the agreement for the transfer of the Existing Site

[13] In *Commissioner of State Revenue (Vic) v Lend Lease Development Pty Ltd*,[13] the High Court explained that the primary question is: what was the consideration for the dutiable transaction? By reference to its earlier decision in *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd*,[14] the Court explained:

"*Consideration 'for' the transfers*

[49] As the majority in this Court's decision in [*Dick Smith Electronics*] pointed out, the statutory criterion of consideration 'for' the transaction 'looks to what was received by the Vendors so as to move the transfers to the Purchaser *as stipulated in the Agreement*'. In *Dick Smith Electronics*, the majority held that:

> 'The consideration which moved the transfer by the Vendors to the Purchaser of the Shares which they owned in the Company was *the performance by the Purchaser of the several promises recorded in the Agreement* in consequence of which the Vendors received the sum of $114,139,649. It was only in return for that *total sum* (paid by the various steps and in the various forms required by the Agreement) that the Vendors were willing to transfer to the Purchaser the bundle of rights which their shareholding in the Company represented.'

[50] In these cases, the consideration which moved the transfer by VicUrban to Lend Lease of each Stage was the performance, by Lend Lease, of the several promises recorded in the 2001 DA (or that agreement as later varied and supplemented), in consequence of which VicUrban would receive the total of the several amounts set out in the applicable agreement. It was only in return for the promised payment of that total sum, by the various steps recorded in the applicable agreement, that VicUrban was willing to transfer to Lend Lease the Land comprising the relevant Stage.

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13 (2014) 254 CLR 142 (***Lend Lease***).
14 (2005) 221 CLR 496 (***Dick Smith Electronics***).

Identifying the consideration

> [51] The conclusion just described is reached after an inquiry that begins in the agreements the parties made. The search is for 'what was received by the [vendor] so as to move the transfers to the [purchaser] *as stipulated in the Agreement*'."[15]

[14] In *Dick Smith Electronics*, the High Court had examined the meaning of consideration in the context of the *Duties Act* 1997 (NSW). In addition to the passage extracted by the High Court in *Lend Lease,* the majority had held:

> "[71] … as Dixon J pointed out in *Archibald Howie*:[16]
>
> > 'the word "consideration" should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts.'
>
> That is, as his Honour went on to say, 'the consideration is rather the money or value passing which moves the conveyance or transfer'.
>
> [72] To adapt what was said by Lord Wilberforce of other stamp duty legislation:
>
> > 'In the first place, the phrase "consideration for the transfer or conveyance" seems to me to refer clearly and naturally to that which passed to the transferor company "for" the transferred properties.'
>
> The criterion in the Act of consideration 'for' the transaction … looks to what was received by the Vendors so as to move the transfers to the Purchaser as stipulated in the Agreement."[17]

[15] The Department and Resolute recorded their agreement about the transfer in the Funding Agreement. It is there the enquiry about consideration begins. Neither party to the appeal submitted that the Court should approach the Funding Agreement as anything other than a commercial contract. The meaning of its provisions is to be determined by enquiry as to "what a reasonable business person would have understood those terms to mean" considering "the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract".[18]

[16] To the extent that the circumstances addressed by the Funding Agreement and its commercial purpose may require reference to facts known to the Department and Resolute outside the Funding Agreement itself, they are the background facts, noted at [4] to [7] above.

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15 *Lend Lease* at 159-160 (French CJ, Hayne, Kiefel, Bell and Keane JJ). Citations to *Dick Smith Electronics* at [72] and [75] have been omitted and the emphasis was added by the High Court in *Lend Lease*.

16 *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 152.

17 *Dick Smith Electronics* at 518 (Gummow, Kirby and Hayne JJ).

18 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] (French CJ, Hayne, Crennan and Kiefel JJ) and *Mount Bruce Mining v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [47] (French CJ, Nettle and Gordon JJ).

The commissioner's case on consideration

[17] The commissioner contends simply that "[t]he Funding Amount is consideration for the dutiable transaction".[19] Resolute's obligation in that respect is found in clause 2.1:

> "**2.1 Payment of Funding Amount and provision of Related Works**
>
> (a) Resolute will:
>
> (i) provide the Funding Amount to the Department; and
>
> (ii) provide, or procure the provision by or through Carpentaria of, the Related Works,
>
> in accordance with and subject to the terms of this Agreement.
>
> (b) The Department acknowledges that the Prior Payment has already been paid by Resolute.[20]
>
> (c) The:
>
> (i) Funding Amount (less the Prior Payment that has already been paid) must be paid by Resolute to the Department in full; and
>
> (ii) temporary power supply described in subparagraph (a) of the definition of 'Related Works' must be connected and power available,
>
> within 20 Business Days of the satisfaction of the conditions precedent in clause 2.2(a)."

[18] The parties defined "Funding Amount" in clause 1.1:

> "**Funding Amount** means the sum of $8,398,767.20 plus GST, as may be adjusted under clause 2.4 and which:
>
> (a) includes the Prior Payment; and
>
> (b) does not include any amount attributable to the provision or procurement by Resolute of the Related Works, which Related Works are in addition to the Funding Amount to be paid."

[19] Related Works are defined, also in clause 1.1, as:

> "the supply and maintenance of temporary power to the New Site until permanent power is available; the provision and installation of a new mains supply and site transformer at the New Site; and the supply of concrete for the New Site".

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19 Respondent's outline of submissions filed 1 July 2020 (**commissioner's outline**) at [14].

20 The **Prior Payment** was an amount of $400,000 already paid to the Department by or on behalf of Resolute in connection with the purchase of the New Site, which was deemed to be permitted Project Costs (see [32] below).

[20] The Funding Agreement includes a number of promises by Resolute for the benefit of the Department, which might have moved the Department to transfer the Existing Site. The promise to pay the Funding Amount is one, as is the promise to provide or procure the provision of the Related Works, both in clause 2.1. Other promises are found in clauses 2.4(a), 2.7, and 4.4(a), (b) and (d).

[21] In both the assessment and the reassessment, the commissioner either disregarded or attributed no value to the provision or procurement of the Related Works or the other promises. In the 9 January 2019 assessment notice, the commissioner determined the dutiable value to be $8,398,767.20, which is the figure found in the definition of Funding Amount in clause 1.1. The 14 January 2019 reassessment notice was based on the commissioner's determination that the dutiable value was $9,238,543.82. Evidently, the commissioner increased the previously determined dutiable value by 10%, being the rate at which GST was payable.[21]

[22] The commissioner contends that the parts of the Funding Agreement that provide for the Funding Amount to be increased (and for Resolute to pay the amount of the increase) and for the Department to refund or pay amounts to Resolute are akin to "settlement adjustments between vendor and purchaser" commonly contained in contacts of sale. The commissioner submits these do not "represent a payment for the land" and that the "price remains fixed" at the figure stated in the definition of Funding Amount. [22]

Resolute's case on the consideration

[23] The full title of the Funding Agreement is "Funding Agreement relating to Ravenswood State School Relocation". The transfer of the Existing Site to Resolute is not mentioned by the parties in the recitals, which are in this form:

> "A. The existing Ravenswood State School is located within the area required for the Ravenswood Expansion Project.
>
> B. Resolute and the Department have agreed that:
>
> (i) the Department will procure the design and construction of a comparable school complex for the Ravenswood State School in a new location, including the relocation and refurbishment of two existing heritage listed school buildings (**Project**); and
>
> (ii) Resolute will fund the cost of the Project and provide or procure provision of Related Works at the New Site .
>
> C. This Agreement sets out the terms on which the Funding Amount will be provided, and Related Works provided or procured, by Resolute to the Department."

[24] The transfer is to occur after the three matters mentioned in clause 4.1 "have occurred to the Department's satisfaction", including Practical Completion.

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21 *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), s 9-70.

22 Commissioner's outline at [20]. The commissioner cited *Commissioner of Taxation v Morgan* (1961) 106 CLR 517 at 521 (Dixon CJ, Kitto and Windeyer JJ) as an example of the approach to such a contract of sale.

[25] Mr Lakis, who appeared for Resolute, identified "what was bargained for" by particular reference to recital B(ii), where the parties expressed Resolute's side of the bargain as its obligation to "fund the cost of the Project", leaving aside the Related Works.

[26] In this appeal, Resolute attributes no importance to the Related Works.[23] It is not necessary to consider any of Resolute's other obligations under other clauses in the Funding Agreement, because Resolute does not pursue its appeal on the basis that any of those obligations formed part of the consideration that moved the Department to transfer the Existing Site.[24]

[27] Resolute was reluctant to identify the consideration for the transfer with any more precision, submitting:

> "There is no provision in the Funding Agreement that attributes the Funding Amount, or any other amount, as consideration 'for' the agreement to transfer the Properties [comprising the Existing Site]."[25]

[28] Resolute did identify "the monetary payments to be made" under the Funding Agreement as including "initially" the Funding Amount under clause 2.1, the additional amount of any Cost Overrun Payment (added to the Funding Amount) under clause 2.4, and any refund under clause 2.6(c) or (d).[26] Resolute appeared to characterise these payments as "the monetary consideration" and as "a subset of the total consideration".[27]

[29] Resolute's appeal turns on whether the Funding Amount or the "monetary consideration" was ascertainable on 19 November 2018. Resolute contends neither could be ascertained on that date, so that the consideration could not be ascertained.

[30] Resolute relies on clause 2.4(a), which is cross-referenced in the definition of Funding Amount (see [18] above). It is in these terms:

> **"2.4 Cost Overruns**
>
> (a) Subject to clause 2.4(b), if, at any time before Project Completion, the Project Cost* exceeds the Funding Amount (**Cost Overrun**):
>
> (i) Resolute will pay an additional amount equal to that Cost Overrun (**Cost Overrun Payment**) within 10 Business Days of the Department submitting an invoice for payment of the Cost Overrun Payment; and
>
> (ii) the Cost Overrun Payment will be deemed to be added to the Funding Amount for the purposes of this Agreement.
>
> **The Project Cost does not include amounts attributable to the Related Works.*"

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23 In its objection, Resolute contended the value of the non-monetary Related Works was also not able to be ascertained on 19 November 2018. This was not pursued in the appeal to "minimise the issues": Appellant's reply filed 10 July 2020 (**Reply**) at [7.1].

24 Resolute does rely on the promises in clauses 2.4 and 2.6, which it contends affect the consideration payable as the Funding Amount. These promises are dealt with later in these reasons.

25 Appellant's submissions filed 29 May 2020 (**Resolute's outline**) at [5.11].

26 Resolute's outline at [5.8].

27 Resolute's outline at [8.2].

[31] Project Completion was defined in clause 1.1:

> "**Project Completion** means the later of:
>
> (a) the expiry of the last defects liability period under the Construction Contract; and
>
> (b) the settlement of all payments under the Construction Contract."

[32] The Construction Contract, Construction Contractor and Project Costs[28] were also defined in clause 1.1:

> "**Construction Contract** means the contract for the construction of the New School to be entered into with the Construction Contractor on a lump sum, fixed price basis and incorporating:
>
> (a) Australian Standard General Conditions of Contract AS 2124 – 1992; and
>
> (b) Special Conditions of Contract and Annexure 1 July 2018 version and associated contract documents, as provided to Resolute by the Department and substantially in the form set out in Attachment F.
>
> **Construction Contractor** means the contractor to be appointed by the Department to undertake the construction of the Project under the Construction Contract.
>
> …
>
> **Project Costs** means the aggregate of:
>
> (a) the Contract Sum;[29]
>
> (b) any fees payable under the contract for the Design;[30]
>
> (c) any fees payable under the Superintendent Agreement;[31]
>
> (d) the Department's legal costs of negotiating, preparing and executing this Agreement; and
>
> (e) any other amounts payable by the Department in association with the Project and which are included in the Cost Plan,
>
> but does not include any amount attributable to the provision or procurement by Resolute of the Related Works."

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28 I have assumed "Project Cost" in clause 2.4(a) has the same meaning as the defined term "Project Costs" in clause 1.1. The addition of the "s" in the defined term is likely a typographical error.

29 **Contract Sum** has the meaning given to that term in the Construction Contract. Although it was to be a contract on a "lump sum, fixed price basis", the Department had not entered into the Construction Contract on 19 November 2018. The AS 2124-1992 conditions (and the special conditions in Attachment F to the Funding Agreement) provided for adjustments to the Contract Price.

30 The **Design** means the design of the New School set out in drawings attached to the Funding Agreement.

31 The **Superintendent Agreement** means the agreement between the Department and the person appointed to perform the functions of the superintendent under the Construction Contract.

[33] The Cost Plan, referred to in paragraph (e) of the Project Costs definition, is "the preliminary cost plan" attached to the Funding Agreement, "as amended or replaced from time to time" under the Funding Agreement. When so amended or replaced, the "amended or replacement version will become the Cost Plan" for the purposes of the Funding Agreement.[32]

[34] The Project Costs and the Cost Plan were the subject of other clauses of the Funding Agreement, including clauses 2.3 and 2.5(b):

> "**2.3 Funding to be used for Project only**
>
> (a) The Department agrees that:
>
> (i) it will use the Funding Amount solely for the purposes of payment of the Project Costs; and
>
> (ii) it will expend the Funding Amount in accordance with the Cost Plan.
>
> …
>
> **2.5 Changes to Design or Cost Plan**
>
> (a) …
>
> (b) Where the Department determines that a change to the composition or breakdown of costs shown in the Cost Plan is required, the Department may amend or update the Cost Plan, provided that:
>
> (i) it will ensure that, as far as practicable, the amendment or update is first included as an item for consideration and discussion by the Project Monitoring Committee;[33]
>
> (ii) it will notify Resolute about the amendment or update; and
>
> (iii) an update or amendment to the Cost Plan under this clause 2.5(b) will not increase the Funding Amount."

[35] A change to the Cost Plan would not bring an immediate change to the Funding Amount, due to clause 2.5(b)(iii). However, it would change the Project Costs, which include amounts payable by the Department included in the Cost Plan. The Project Costs are a component of the formula for a Cost Overrun in clause 2.4(a) that Resolute might be required to pay; and a Cost Overrun Payment is deemed to be added to the Funding Amount (see [30] above).

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32 Clause 1.1.

33 The **Project Monitoring Committee** was to be established within 10 business days of the execution of the Funding Agreement and comprise two representatives of Resolute, two representatives of the Department and one representative of the Superintendent.

[36] Resolute contends that clause 2.4(a), and the reference to it in the definition of Funding Amount, had the effect that the quantum of the Funding Amount could not be ascertained until Project Completion, because at any time before then the Funding Amount might be increased by the addition of a Cost Overrun Payment. On this basis, Resolute submits the consideration for the agreement to transfer the Existing Site could not be ascertained on 19 November 2018.

[37] Resolute also relies on clause 2.6, by which the parties agreed:

> "**2.6 Refunds**
>
> (a) The Department will use reasonable endeavours to procure that the Construction Contractor achieves Practical Completion by the Date for Practical Completion [as that term is defined in the Construction Contract].
>
> (b) The Department agrees that, in the event that it determines that a right for it to levy liquidated damages has arisen under the Construction Contract but decides not to exercise that right, it will, prior to communicating that decision to the Construction Contractor, first:
>
> (i) notify Resolute about the Department's decision; and
>
> (ii) allow Resolute a period of not less than 5 Business Days to make recommendations about that decision,
>
> provided that nothing in this clause limits the Department's discretion regarding the exercise, non-exercise or waiver of any rights that it has, or that may at any time arise in its favour, under the Construction Contract.
>
> (c) If the Construction Contractor:
>
> (i) refunds any payment of the Contract Sum to the Department in accordance with the Construction Contract; or
>
> (ii) pays the Department any liquidated damages under the Construction Contract,
>
> then the Department will pay any such amount received from the Construction Contractor to Resolute within 20 Business Days of receipt.
>
> (d) If, upon Project Completion, the total Project Costs paid to the Construction Contractor are less than the Funding Amount (**Excess Funding Amount**), then the Department will pay the Excess Funding Amount to Resolute within 20 Business Days of Project Completion."

[38] Under clause 2.6, the Department is liable to make three types of payment to Resolute, each depending upon whether or not a particular thing happens:

(a) The amount of any payment of the Contract Sum refunded by the Construction Contractor, under clause 2.6(c)(i).

(b) The amount of any liquidated damages paid by the Construction Contractor, under clause 2.6(c)(ii).

(c) Finally, any Excess Funding Amount, under clause 2.6(d).

[39] Resolute appears to contend that the monetary consideration for the Department's agreement to transfer the Existing Site is the net amount payable by Resolute to the Department, taking account not only of any Cost Overrun Payment but also of any refund, liquidated damages or Excess Funding Amount payable by the Department to Resolute.

The statutory approach to contingent consideration

[40] Resolute also relies on s 502 of the Act. It specifies what is to be determined as the consideration payable under a transaction where it is based on certain contingencies:

> "**502 Consideration based on contingency**
>
> (1) Subsection (2) applies for determining the consideration payable under an instrument or transaction if the consideration payable—
>
> (a) may be increased or decreased depending on a particular thing happening or not happening; or
>
> (b) may or may not actually become payable depending on a particular thing happening or not happening; or
>
> (c) is agreed to be a minimum amount, whether or not depending on a particular thing happening or not happening; or
>
> (d) is agreed to be a maximum amount, whether or not depending on a particular thing happening or not happening; or
>
> (e) is agreed to be either a minimum or maximum amount, whether or not depending on a particular thing happening or not happening.
>
> (2) Regardless of whether the thing happens or does not happen, the consideration is—
>
> (a) if subsection (1)(a) or (b) applies—the highest consideration payable under the instrument or transaction; or
>
> (b) if subsection (1)(c) applies—the minimum amount; or
>
> (c) if subsection (1)(d) or (e) applies—the maximum amount."

[41] The parties identified no particular issues with the ordinary and natural meaning of the words in s 502 such that it could be departed from in interpreting the provision. I adopt the submission of Mr Lakis that "consideration" bears the same meaning in both ss 502 and 11 of the Act, because it favours a harmonious interpretation of the Act as a whole.

[42] Resolute contends that the monetary consideration payable is within the scope of s 502(1)(a), because it may be increased, depending on whether a Cost Overrun Payment happens. This is so whether the consideration is the net amount payable or the Funding Amount alone. If the consideration payable is the net amount, as Resolute submits, then it may also be decreased, depending upon a refund of the Contract Sum, a payment of liquidated damages or there being an Excess Funding Amount. This would also be within the scope of s 502(1)(a). On this contention, s 502(2) would apply to determine the consideration payable for the agreement to transfer the Existing Site.

[43] At the end of clause 2.1(c), the parties referred to clause 2.2(a), which is in these terms:

> "**2.2 Conditions precedent**
>
> (a) Resolute's obligations under clause 2.1(c) are conditional upon:
>
> (i) Resolute notifying the Department that it is satisfied with:
>
> A. the Construction Contract terms; and
>
> B. the Design; and
>
> (ii) the Department submitting an invoice for the Funding Amount (other than the Prior Payment that has already been paid)."

[44] The conditions precedent in clause 2.2(a) mean that the Funding Amount may or may not actually become payable, depending on whether Resolute gives the notice under clause 2.2(a)(i) and the Department issues the invoice under clause 2.2(a)(ii). The conditions precedent appear to bring the consideration payable within the scope of s 502(1)(b).

[45] This is a further basis on which s 502(2) would apply to determine the consideration payable under the transaction.

[46] If the consideration payable is the Funding Amount and not the net amount, then the figure stated in the definition of the Funding Amount ($8,398,767.20 plus GST) might be an agreed minimum amount, within the meaning of s 502(1)(c), on the basis that it may increase depending upon a Cost Overrun Payment occurring. In that scenario, s 502(2)(b) would apply, in which event the consideration payable would be the figure stated. In the course of the hearing of the appeal, this possibility was raised with Mr Lakis. He relied on the decisions in *Dick Smith Electronics* and *Lend Lease* as binding authority that the consideration for the agreement to transfer could not be so confined.

[47] The commissioner did not make either assessment on the basis of s 502(2)(b) and did not advance it in written contentions or the Commissioner's outline. It seemed to be adopted by Mr Marks QC, who appeared with Ms Coore for the commissioner, without any noticeable enthusiasm. He described it as "simply a matter of law that has come up in argument". The topic was not further pursued by him or by Ms Coore.

Conclusion on the consideration for the transfer of the Existing Site

[48] Resolute's obligation to pay the Funding Amount (as adjusted by any Cost Overrun Payment) and the Department's obligation to pay refunds of the Contract Sum and the Excess Funding Amount were part of a single, consistent scheme for Resolute to fund the cost of the relocation of the school. The terms of the Funding Agreement in various ways operate so that Resolute is to pay the Department the amount the Department spends on discharging the Department's obligation, described in recital B(i) as procuring the design and construction of a school in a new location. The recitals reveal the way the parties chose to identify the relevant context of their bargain. They assist in interpretation by describing the context and purpose of the operative clauses.[34] They are consistent with them.

[49] Resolute is to approve any material change to the unsigned Construction Contract. Once Resolute is satisfied with the Construction Contract and the Design, and the Department has submitted an invoice for the balance of the Funding Amount, then Resolute is to pay it. The Department could not enter into the Construction Contract without a payment by Resolute of the Funding Amount.

[50] The figure stated as the Funding Amount corresponds to the amount in the Cost Plan. The Cost Plan is a preliminary cost plan, subject to amendment or replacement. Resolute is to pay the Department the amount of any Cost Overrun (which is deemed to be added to the Funding Amount), save for any costs due to delay caused by the Department or a material change to the Design that Resolute has not approved. If the Construction Contractor refunds part of the Contract Sum to the Department, it is to be paid to Resolute. At Project Completion, if the total Project Costs paid to the Construction Contractor are less than the Funding Amount, then the Department is to pay the Excess Funding Amount to Resolute.[35]

[51] In this way, the parties allocated the risk of the actual cost of the Project to Resolute, and Resolute assured the Department its contractual liability to the Construction Contractor would be met by Resolute. These obligations to pay for any increased cost and rights to be repaid any refund or underspend were interrelated. The subject of each is the same. They are not separate from the obligation to pay the unadjusted Funding Amount (itself a preliminary estimate of the Project Cost). They cannot be divided in the way the purchase price for land and the time-dependent adjustment for municipal and water rates were in *Commissioner of Taxation v Morgan*.[36]

Liquidated damages

[52] The relationship between the Funding Amount and the Department's obligation to pay Resolute any liquidated damages is not so apparent.

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34 *OneSteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd* (2013) 85 NSWLR 1 at 21 [65] (Allsop P), cited with approval by Meagher JA in *Schwartz v Hadid* [2013] NSWCA 89 at [81] and Bond J in *Baldwin v Icon Energy Ltd* [2018] QSC 233 at [116].

35 The connection between the Funding Amount and the Excess Funding Amount might be apparent from the language the parties chose to describe the two.

36 See [22] above. Note the observations in *AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439 at 457 [27], 470-471 [60] (French CJ, Kiefel and Bell JJ).

[53] The liquidated damages are a pre-estimate of the damage the Department might suffer due to the Contractor's delay in reaching Practical Completion. The Department and Resolute agreed that the liquidated damages received by the Department are to be paid to Resolute. This is plainly because the Department's obligation to transfer the Existing Site to Resolute or its nominee would be delayed by the delay in reaching Practical Completion. The Department's promise to use its best endeavours to satisfy the other matters required before the transfer[37] "as soon as practicable after Practical Completion has occurred" would also be delayed.

[54] The ownership and control of the land by Resolute (or its nominee) would be delayed. The Department could continue to use the Existing Site as the Ravenswood State School during any delay period. As between the parties, Resolute is treated as the person adversely affected by any delay and is to be paid the amount of any liquidated damages paid by the Construction Contractor.

[55] In my view, the Department's obligation to pay Resolute any liquidated damages is a separate promise dealing with the loss to Resolute likely to be occasioned by such a delay. While it is consistent with the allocation of risk between the parties under the Funding Agreement, it is not an element of the consideration payable by Resolute for the Department's agreement to transfer the land. It is analogous to a payment by a vendor to a purchaser (or a purchaser to a vendor) for an extension of the settlement date.

[56] Considering the language used by the parties in the Funding Agreement, the circumstances it addressed and the commercial purpose to be secured by it, a reasonable business person would have understood the terms of the Funding Agreement to mean that the consideration the Department was entitled to receive, and for which it conditionally bound itself to transfer the Existing Site to Resolute, was the promise by Resolute to pay the Department the amount of the Project Costs. The consideration was the promise to pay the total amount, whatever it may be. It included the amount by way of an Overrun Cost Payment. It was the net amount after any refund of the Contract Sum by the Construction Contractor and after the repayment by the Department of any Excess Funding Amount.

[57] The consideration, so understood, coincides with the wider meaning or operation that belongs to the term in conveyancing of "the money or value passing which moves the conveyance or transfer".[38] On the proper construction of the Funding Agreement, it was in return for Resolute's promised payment of the net cost of the Project, by the interrelated obligations in clauses 2.1, 2.2, 2.3, 2.4 and 2.6,[39] that the Department was willing to promise in clause 4.1 to transfer the Existing Site to Resolute or its nominee, after Practical Completion and relocation of students and resources to the New School.

Could the consideration payable be ascertained on 19 November 2018?

[58] The word "ascertained" in s 11(7)(b)(ii) of the Act bears its ordinary meaning in the context of the provision: meaning, determined or established with certainty. This is consistent with the meaning of "ascertain" adopted in respect of another taxing statute,[40] offered by Mr Lakis,[41] and in the *Shorter Oxford English Dictionary* (6th ed).[42]

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37 The relocation of all students and resources to the New School.

38 *Archibald Howie* at 152 (Dixon J).

39 Subject to the separate matter of liquidated damages in clause 2.6(c)(ii) discussed above.

40 See *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* (2003) 135 FCR 346 at 353 (Ryan and Finkelstein JJ).

41 "Determined", "fixed" and "known": Reply at [2.2], citing the *Compact Oxford English Dictionary* (2nd ed).

42 "Make certain; prove; demonstrate; ensure; guarantee" and "Find out or learn for a certainty; make sure of, get to know".

[59] The consideration payable under the transaction may be increased from the figure stated in the definition of Funding Amount, depending upon whether the Project Costs exceeded the Funding Amount. It could be decreased from the figure stated, depending upon whether the total Project Costs paid to the Construction Contractor were less than the Funding Amount. As noted, the consideration may or may not actually become payable depending on the conditions precedent being met.

[60] Sections 502(1)(a) and (b) of the Act apply. The consideration payable is the highest consideration payable under the transaction, by operation of s 502(2)(a).

[61] The scenarios in ss 502(2)(b) and (c) are not invoked to make the consideration a maximum or a minimum amount. Neither the figure stated in the definition of Funding Amount nor any other amount is agreed to be a minimum amount. There is no amount agreed to be a maximum.

[62] Whether or not Resolute was obliged to make any Cost Overrun Payment to the Department or the Department was obliged to pay any Excess Funding Amount, and in what amount, could not be ascertained on 19 November 2018. It would seem to follow, as Resolute contends, that the highest consideration payable under the transaction could not be ascertained on 19 November 2018.

[63] The commissioner seeks to challenge this conclusion by reference to the common law approach to the assessment of duty on a contingent consideration.

Common law approach to contingent consideration

[64] The commissioner submitted that:

> "the contingency that some amount greater than 'the sum of $8,398,676.20 plus GST' might be payable, or some reduction might occur, is disregarded in accordance with the general law 'contingency principle' … the sum of $9,238,543.82 represented the *prima facie* or basic amount of the consideration for the purposes of duty",[43]

and:

> "The Funding Amount, ascertained as $8,398,676.20 plus GST, being $9,238,543.82, was the *prima facie* or basic amount of the consideration for the dutiable transaction in terms of *Pacific Fair Shopping Centres Pty Ltd v Commissioner of Stamp Duties.*"[44]

[65] As its text suggests, this submission relies on part of the decision in *Pacific Fair.*[45] That decision concerned the *ad valorem* duty payable under the *Stamp Act 1894* (Qld) on an agreement for the transfer of land on which a shopping centre had been constructed. The purchase price was a fixed amount of $22 million plus a variable amount, to be calculated in a specified manner, but not to exceed $4.5 million. The Full Court determined that the commissioner was entitled to assess stamp duty on the basis that the consideration was

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43 Commissioner's outline at [8](c).
44 Commissioner's outline at [35].
45 [1979] Qd R 410 at 415G and 416A.

$26.5 million. In his reasons, Connolly J, with whom Wanstall CJ and Lucas J agreed, relied upon the decisions of the English Court of Appeal and High Court in the two *Underground Electric Railways* cases,[46] in each of which the revenue authorities assessed duty on the maximum amount payable under a relevant instrument, notwithstanding it included a sum only payable on a contingency.

[66] The position under the Funding Agreement is not the same as that under the instrument before the Full Court in *Pacific Fair*. In the present case, the Funding Amount may increase by an amount that could not be ascertained on the relevant date and the Department may have to pay an amount to Resolute under any one or more of three circumstances, which also could not be ascertained.

[67] In deciding whether to follow the decisions in the *Underground Electric Railways* cases, Connolly J referred to the subsequent decision of the House of Lords in *Independent Television Authority and Associated Rediffusion Ltd v Inland Revenue Commissioners*[47] and the decision of Brightman J in *Coventry City Council v Inland Revenue Commissioners*.[48] The *Coventry City Council* case concerned an annual rent payment that included a variable contingent amount with a fixed maximum.

[68] Connolly J quoted, with evident approval, the following passage from Lord Radcliffe's speech in *ITA*:

> "What is necessary is that it should be possible to ascertain from the agreement that there is some specified sum agreed upon as the subject of payment which may perhaps fairly be called the prima facie or basic payment. Even that minimum condition may have to be restated in relation to certain kinds of securities, such for example as guarantees, in which the ad valorem charge is calculated according to the maximum sum contingently payable, or, to put it another way, the amount of the guarantee."[49]

[69] The commissioner relies on the following passage from the reasons of Connolly J:

> "In the light of all of the authorities no distinction is to be drawn between an ascertained sum which is liable however to be increased or decreased depending upon contingencies and an ascertainable sum which may not however in fact become payable except upon contingencies."[50]

[70] The instrument before the Full Court in *Pacific Fair* did not involve a sum liable to be increased or decreased. The fixed component of the purchase price could not be reduced and the variable component was capped at a maximum amount. The purchase price would have to fall within the range from the minimum of the fixed component to that sum plus the maximum possible variable component. The consideration: if taken to be the fixed component, could be said to be liable to increase; or if taken to be that amount plus the maximum variable, could be said to be liable to decrease. Connolly J, and so the

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46 *Underground Electric Railway Company of London Ltd v Commissioners of Inland Revenue* [1905] 1 KB 174, affirmed by the House of Lords [1906] AC 21 and *Underground Electric Railway Company of London Ltd v Commissioners of Inland Revenue* [1914] 3 KB 210, affirmed by the Court of Appeal [1916] 1 KB 306.

47 [1961] AC 427 (***ITA***).

48 [1978] 2 WLR 857 (***Coventry City Council***).

49 *ITA* at 443.

50 *Pacific Fair* at 416A.

Full Court, adopted the maximum amount. In doing so, the Court followed the statement of principle in the earlier part of Lord Radcliffe's speech that preceded the passage extracted by Connolly J in *Pacific Fair*:

> "I take it, therefore, to be a well-settled principle that the money payable is ascertained for the purposes of charge without regard to the fact that the agreement in question may itself contain provisions which will in certain circumstances prevent it being payable at all. If that is so, there is at least no better reason for adopting a different principle when there are found clauses which merely vary the amount to be paid according to specified contingencies. Nor does it matter for this purpose whether the effect of such a clause is to make it possible for the sum to be increased or to be diminished."[51]

[71] In the commissioner's outline, this broader proposition is described as the contingency principle and expressed as follows:

> "The common law suggests that, if a maximum sum is expressed which may or may not be payable according to the happening of a contingency, *ad valorem* duty is to be assessed by reference to the maximum sum contingently payable."[52]

[72] In *G E Crane & Sons Ltd v Commissioner of Stamp Duties*,[53] Pincus JA and Williams J made the following observations about the history of the contingency principle to that time:

> "The beginning of the contingency principle appears to have been a rather modest one, in *Lord Canning v Raper* (1852) 1 E & B 164; 118 ER 400. The question decided was whether stamp duty on a security for a liability of a guarantor might be assessed on the basis of the guarantor's contingent liability; the answer given was yes. From that beginning the principle has grown so as to authorise exacting duty on a sum agreed as a 'prima facie or basic payment'. So a sum prima facie payable, even if it might be varied down, is treated as the price. What if the price is a variable sum, not to exceed a certain figure? The contingency principle has been extended so as to permit the exaction of duty on the maximum stipulated, as the consideration."[54]

Difficulties with applying the common law contingency principle

[73] There are two obvious difficulties in applying this principle to the consideration for the transfer of the Existing Site under the Funding Agreement.

[74] The first is that the sum payable to the Department to move the transfer is not a maximum sum payable subject to a contingency. Nor is it a minimum sum liable to be increased if a contingency occurs. The commissioner submits the contingency principle authorises him to assess transfer duty on a sum that is neither a maximum nor a minimum. That submission is not supported by the authorities upon which the commissioner relies.

[75] The second difficulty is that s 502 of the Act puts the determination of the consideration payable upon certain contingencies into statutory form.

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51 *ITA* at 443.

52 Footnote 30 on page 7. Among the cases cited as authority for this description are the *Underground Electric Railways* cases, *Coventry City Council* and Lord Radcliffe's speech in *ITA*.

53 [1999] 1 Qd R 480 at 493 (citations omitted).

54 These remarks were *obiter*. However, with respect, they were an accurate summary of the contingency principle.

[76] The commissioner seeks to avoid the operation of s 502 and instead apply a version of the contingency principle. The written outline puts the commissioner's case in this way:

> "… the Appellant does not show that section 502 of the *Duties Act 2001* ... is a code, nor that it displaces the general law so far as not inconsistent.
>
> …
>
> There is nothing to say that the general law rule, the contingency principle, has been overridden in Queensland. The Respondent was right to assess on the *prima facie* or basic sum, the amount ascertained numerically in the definition of 'Funding Amount'."[55]

[77] It is not necessary to determine whether s 502 of the Act is a code. If the consideration payable under the relevant transaction falls within any of the categories in ss 502(1)(a) to (e), then s 502(2) will apply and determine the consideration payable. It matters not if, as the commissioner submits, the application of the contingency principle would produce a different result.

[78] If the circumstances in *Pacific Fair*, or in any of the cases considered by Connolly J in that decision, were now to arise in this State, then s 502 would apply. The statutory provision may produce the same outcome as the common law principle in many instances. Where it does not, the different outcome is as the Parliament intended.

[79] In the present circumstances, s 502 operates to determine the consideration payable under the transaction. It is not appropriate to apply the common law contingency principle.

Other contentions by the commissioner

[80] The commissioner's written outline included some other contentions.

Frequent application and self-assessment

[81] The following submission was not the subject of address:

> "Legislation that must be applied frequently in such transactions must be construed against that commercial background so that the amount *prima facie* payable to move the transfer is the integer – as the consideration for the dutiable transaction – upon which the parties may calculate, and often self-assess, the duty."[56]

[82] I reject this submission. It would be wrong to construe the Act as if it included a provision authorising the commissioner to deem the consideration for a transaction to be "the amount *prima facie* payable to move the transfer" when it does not. The provisions enacted to deal specifically with consideration subject to a contingency do not authorise such an approach. The frequent application of the Act and the existence of a self-assessment regime do not justify the adoption of a construction that departs from the ordinary and natural meaning of s 502 in the context of the Act.

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55 Commissioner's outline at [36] and [39].

56 Commissioner's outline at [21].

Amount payable "judged" at the relevant date

[83] The commissioner also submitted that the figure stated in the definition of Funding Amount (increased by 10% for GST) was:

> "… the highest consideration payable under the Funding Agreement at execution, which is the time when these things are judged. Again, it is relevant for these purposes that no circumstance has been proved that was an occasion for adjustment at that critical moment."[57]

[84] For the reasons set out above, the relevant enquiry is whether the highest consideration can be ascertained on the relevant date. A known figure, expressly subject to increase, does not afford a positive answer to that enquiry. The fact that an additional payment may be payable on a later date, even after the transfer of the Existing Site, does not alter its character as consideration for the transfer.[58] In the Funding Agreement, the parties made clear that the stated figure is an estimate of the Project Costs that might be payable, based upon the preliminary costs in the Cost Plan.

[85] In enacting the Act, the Parliament did not adopt provisions of the kind found in s 49 of the *Duties Act* 1997 (NSW) and s 30 of the *Duties Act* 2000 (Vic).[59] Those statutes authorise the commissioner in each of those States to make an assessment by way of an estimate of the dutiable value in respect of a sale or transfer, when, in the commissioner's opinion, the full dutiable value cannot be ascertained. They also require the commissioner to make a reassessment when the full dutiable value has been ascertained.

[86] In contrast, s 11(7) of the Act requires a quite different approach by the commissioner to assessment when the consideration cannot be ascertained on the date the liability to pay transfer duty arises.

The highest consideration nominated

[87] The commissioner also submitted that the highest consideration payable under the transaction was the "highest consideration nominated under the Funding Agreement", being "the figure (plus GST) which appears in the definition of 'Funding Amount' in clause 1.1".[60] I reject this as a gloss on the language of the Act and as contrary to the scheme of s 502. I also reject the oral submission that s 502(2) authorises the commissioner to assess transfer duty on the Funding Agreement as an instrument. Such duty is imposed only on dutiable transactions: see s 8(1).

Conclusion on whether the consideration could be ascertained

[88] The Funding Amount is the consideration (or part of the consideration) payable for the agreement to transfer the Existing Site. It may be increased depending on a Cost Overrun occurring that results in a Cost Overrun Payment. It may or may not actually become

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57 Commissioner's outline at [45].

58 See e.g. *Lend Lease Development Pty Ltd v Chief Commissioner of State Revenue* (2012) 87 ATR 504 at 519 [31] (Pagone J). On 19 November 2018, no amount was payable, as the conditions precent had not yet been fulfilled.

59 Mr Lakis identified Parliament's awareness of the then recent Duties Acts in other States by reference to the Explanatory Notes for the *Duties Bill* 2001 (Qld), which advised "the provisions of the Bill have been aligned or harmonised, where possible, with recently rewritten duty legislation in other States and Territories".

60 Commissioner's outline at [44].

payable depending upon satisfaction of the conditions precedent. It follows that ss 502(1)(a) and (b) respectively apply. Pursuant to s 502(2)(a), the consideration payable is the highest consideration payable under the transaction.

[89] The figure stated in the definition of Funding Amount is not the highest consideration payable under the transaction, because the parties clearly intended that figure to increase in the event of a Cost Overrun Payment. The highest consideration payable could not be ascertained on 19 November 2018, because the amount of any increase to the Funding Amount for a Cost Overrun Payment could not be ascertained on that date.

[90] In the circumstances, the unencumbered value of the Existing Site is the dutiable value of the transaction. On 19 November 2018, that value was $635,000.[61]

[91] Mr Lakis submitted a calculation of the transfer duty payable on this basis. It shows the transfer duty to be $21,600.[62] In the reassessment notice, the commissioner assessed the transfer duty as $511,744.50. Resolute paid that sum before lodging its objection. It was substantially in excess of the transfer duty that would be payable on an assessment made in accordance with the Act.

Onus of proof

[92] For the commissioner, it was submitted that Resolute bore the onus of proof.[63] Although this is undoubtedly correct, as matter of law,[64] there were no factual issues in the appeal that might turn on the discharge of the onus. The matters in issue concerned the proper construction of the Act, in particular ss 11(7) and 502, and the Funding Agreement. The conclusions on the relevant questions and the outcome of the appeal in no way turned on whether a party had or had not discharged any onus in making out their case.

[93] Similarly, the commissioner's reliance on s 132(1)(b)(i) of the Administration Act[65] had no effect on the outcome of the appeal. Resolute demonstrated the amount and all particulars of the assessment and of the reassessment were not correct.

Final disposition

[94] Orders should be made to the effect that:

(a) The appeal is allowed completely, pursuant to s 70C of the Administration Act.

(b) The respondent's decision to disallow the appellant's objection to the respondent's notice of assessment dated 9 January 2019 and notice of reassessment dated 14 January 2019 is set aside.[66]

(c) The appellant's objection is allowed completely.

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61 Agreed Facts at [14].

62 Being $17,325 plus $4.50 for each $100, or part of $100, over $540,000.

63 Commissioner's outline at [49].

64 Administration Act, s 70A.

65 Commissioner's outline at [50].

66 The Court's power to make an order of the kind in this and succeeding subparagraphs is implicit in or necessarily incidental to the power conferred by s 70C of the Administration Act: *Pryke v Commissioner of State Revenue* (2006) 64 ATR 152 at 159 [43] (Chesterman J).

(d) Subject to s 39(1) of the Administration Act, the respondent refund to the appellant an amount (the **overpaid amount**) being the difference between the $511,744.50 paid by the appellant on 25 January 2019 and the transfer duty payable by the appellant in accordance with the further reassessment the respondent is to make in accordance with the direction below.

(e) Pursuant to s 61(2) of the Administration Act, the respondent pay the appellant interest on the overpaid amount, calculated in accordance with s 61(3) of the Administration Act.

[95] The following directions should also be made:

(a) The matter is remitted to the respondent.

(b) In accordance with s 19 of the Administration Act, the respondent give effect to the Court's decision by making a further reassessment of the appellant's liability to pay transfer duty under the Act on the dutiable transaction in the Funding Agreement.

[96] I will hear the parties on the question of costs, in accordance with their expressed wishes.